STEP BY STEP: EMBLEMATIC DECISIONS ON REPRODUCTIVE HEALTH

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Contents

LIST OF ABBREVIATIONS AND ACRONYMS

OHCHR
Office of the United Nations High Commissioner for Human Rights

Cofepris
Mexico's Federal Commission for Protection against Health Risks

CNDH
Mexico's National Human Rights Commission

Committees
International Committees of the United Nations

CEDAW Committee
Committee on the Elimination of Discrimination against Women

CESCR Committee
Committee on Economic, Social, and Cultural Rights

CMN
National Medical Center

American Convention
American Convention on Human Rights

Belém do Pará Convention
Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women

CEDAW
Convention on the Elimination of All Forms of Discrimination against Women

IACHR, Inter-American Court
Inter-American Court of Human Rights

DOF
Mexico's Official Journal of the Federation

IUD
intrauterine device

ENDIREH
Mexico's National Survey on the Dynamics of Household Relationships

IVF
in vitro fertilization

GIRE
Information Group on Reproductive Choice

INE
Mexico's National Electoral Institute

INEGI
Mexico's National Statistics and Geography Institute

ISSSTE
Mexico's Institute for Social Security and Services for State Workers

LGS
Mexico's General Law on Health

NOM
Official Mexican Regulations

BTO
Bilateral tubal occlusion

MDGs
Millennium Development Goals

WHO
World Health Organization

UN
United Nations

PGR
Mexico's Attorney General's Office

MMR
Maternal mortality ratio

SCJN, Supreme Court, the Court
Mexico's Supreme Court of the Nation

SNS
Mexico's National Health System

INTRODUCTION

Mexico's Supreme Court of Justice (Supreme Court, Court, or SCJN) and the international human rights bodies, such as the Inter-American Court of Human Rights (IACHR or Inter-American Court), have played a fundamental role in the defense of reproductive rights. In the past decade, in particular, noteworthy progress has been made on guaranteeing the protection of reproductive health as well as on the autonomy of women and people with the capacity for pregnancy. The decisions made by these bodies have been based on international obligations related to human rights and on the responses that expert agencies have provided to questions posed both by civil society organizations and representatives of States and other authorities.

Thus, each of the decisions analyzed in this publication represents an emblematic moment in the defense of reproductive rights. Despite their importance and historic nature, the rulings, both by national courts and other international bodies, cannot always be accessed by the general public or by all those interested in the issue. This is because the technical language of the legal sphere—particular to legal proceedings and the structure of each of their stages' processes—can be an obstacle that keeps different sectors of society from understanding the main arguments of these rulings. Therefore, this also makes it difficult for them to be reflected in improvements in the lives of the women and people with the capacity for pregnancy whom they aim to protect.

With this in mind, and using simple language, the first part of this document presents an analysis of eight emblematic decisions on matters of obstetric violence, including maternal death. Meanwhile, the second part focuses on eight rulings related to assisted human reproduction. Some of these rulings were pronounced by the Supreme Court, while others are decisions made by the Inter-American Court and the expert committees of the United Nations (committees).

The rulings of the Inter-American Court and the committees studied in this publication were the first to address the problem of reproductive health violations from a human rights perspective. While the analyzed cases do not have a mandatory nature for the Mexican State, as it was not the country held responsible, they do constitute minimum standards of protection in our country. Because they provide criteria that guide the study, analysis, and rulings of these types of cases, they offer a fundamental guide for the legal interpretation carried out by judges on matters of reproductive health.

Both sections include a brief analysis of the set of laws, rules, and other instruments that should regulate matters of obstetric violence and assisted human reproduction. They also present the legal instruments taken into account in each examined decision in order to highlight their impact and relevance. Each case, in its own way, has cleared the way for the legal recognition of the reproductive autonomy of women and people with the capacity for pregnancy, and each has demonstrated the importance of offering them accessible, acceptable, available, and quality health services that are free of discrimination.

Despite this valuable progress, there are still significant barriers to matters of reproductive health in Mexico, such as the fact that obstetric violence is not understood as a kind of gender-based and institutional violence and that there are no standardized regulations that provide guarantees on assisted reproduction in Mexico. Among the most significant obstacles, there is also the lack of access to non-discriminative health services. However, the progress should not be overlooked, and it should be stressed that the rulings are part of the strategies aimed at improving laws and providing information to those who decide to exercise their reproductive rights.

At the Group on Reproductive Choice (GIRE, for its Spanish initials), we have developed this text aiming to raise awareness of the importance of guaranteeing that these decisions are accessible for all people, with the intention that women and pregnant people learn more about what numerous bodies have interpreted as part of the protection

of reproductive rights. This is the second text of our series Step by Step, whose first edition focused on the Court's rulings on matters of abortion.[1] Our intention is for these materials to serve as a tool to support the outreach, advocacy, and guidance efforts carried out by activists, academics, legislators, and anyone interested in women and people with the capacity for pregnancy being able to fully exercise their rights in Mexico.

1 You can read the text *Step by Step: Mexico's Supreme Court Rulings on Abortion* here: https://gire.org.mx/wp-content/uploads/2022/11/Step-by-step-.pdf

GIRE is an organization that recognizes sex/gender diversity and that the spectrum of people who can get pregnant includes those who recognize themselves as having non-normative gender identities. Therefore, we refer to both women and people with the capacity for pregnancy or pregnant people in the sphere of reproductive health, as it is fundamental that all those who need these services are included in their protection and guarantee. In addition to pregnant women, the term *pregnant people* refers to those who do not identify as women and whose bodies have the capacity for pregnancy; namely, trans men, non-binary people, and all those belonging to the gender dissidents included in this category.

Therefore, throughout this book, we will employ between parenthesis the terms *people with the capacity for pregnancy or pregnant people*—on a case-by-case basis—each time the official document we are referring to only mentions women. This is because, even though they are not explicitly mentioned in these decisions, the rights they recognize also concern them. The intention is to strengthen recognition of the reproductive rights of people with the capacity for pregnancy; regardless of their gender identity, they should be guaranteed, protected, and respected. Thus, the decisions analyzed in the following chapters, as well as the resulting interpretation and protection of reproductive rights, are essential elements for women and people with the capacity for pregnancy to be able to exercise their reproductive autonomy in a way that is free and informed.

WHAT SHOULD BE KNOWN TO UNDERSTAND NATIONAL, REGIONAL, AND INTERNATIONAL RULINGS

How many times have we heard or read "the Supreme Court granted protection to...," "the Inter-American Court stated that...," or "the International Committee made a decision regarding..."? How many of those times have we clearly understood what they are trying to communicate? In this first section, we will explain the following: the Supreme Court rulings, the IACHR Court rulings, and the opinions of the United Nations Committees of Experts.

NATIONAL SYSTEM

The Mexican Government is divided into three branches: executive, legislative, and judicial.[2] All its responsibilities to those who reside in or travel through the country are distributed between them. Each of these branches and its offices have different roles and are represented on federal and state (or local) levels. In this section, we will focus on the work performed by the judicial branch.

2 To learn more about what the executive and legislative branches do, see: GIRE, *Step by Step: Mexico's Supreme Court Rulings on Abortion* (2022) https://gire.org.mx/wp-content/uploads/2022/11/Step-by-step-.pdf

Who are its members?[3] Judges, magistrates, and ministers. Their title depends on the office where they work. At the local level, the most prominent office of the judicial branch is usually called the Supreme Tribunal of Justice or the Supreme Tribunal, and its members are magistrates. At the federal level, the office with the greatest authority is the Mexico's Supreme Court of Justice, whose members are eleven ministers who, when they work together, are called the Full Court Chamber. One of these people is the president of the Supreme Court, whose term lasts four years. The other ten ministers are divided into two five-member groups, which are known as the First Chamber and the Second Chamber. While it would seem that there is a hierarchy, the work they do is equally important. The rulings of the chambers and the Full Court Chamber are not subject to review by any other judge in the country, as they have the highest ranking within the judicial branch.

What do they do? Their job is to deliver justice, especially by enforcing regulations to settle conflicts. Their final decisions are recorded in writing in documents called rulings. The judge who is in charge of studying and settling the conflict is selected based on the nature of the case. For example, for the Supreme Court, the First Chamber predominately settles matters related to civil, family, and criminal matters; while the Second Chamber mainly settles cases related to labor and administrative affairs. Regarding the Full Court Chamber, its key role is to guarantee that the actions of the executive and legislative branches, as well as other state bodies, do not violate the rights established in the federal Constitution, in addition to intervening in settling disputes that may arise between these branches.

3 At the federal level, there are other especially important authorities within the judicial branch that are not described in detail here because we will not refer to their work in this publication; among them are, for example, the Federal Judiciary Council and the Electoral Tribunal of the Judicial Branch of the Federation. The former is responsible for organizing the entire judicial branch at the federal level while the latter settles conflicts related to elections.

Unconstitutional actions are among the matters the Supreme Court can settle. They are trials that serve to make demands related to human rights. However, they only involve authorities; that is, they cannot be requested by anyone. These actions are promoted when it is considered that the modifications made to a law or regulation go against what is established in the Constitution.[4] The Full Court Chamber is responsible for settling these actions, and it can do so in two ways: by confirming that what a regulation says agrees with the Constitution or by declaring that it contradicts it.[5] In order for the Supreme Court to decide that a regulation contradicts the Constitution, at least eight of the eleven ministers must vote for said option.[6]

The Supreme Court can also settle *amparo* lawsuits[7] that are under review. These are legal proceedings that one or more people (called complainants) can resort to when they do not agree with the decision a judge made in an *amparo* lawsuit. In essence, it is the review of an original decision to guarantee it was made correctly and in accordance with the

4 The authorities that may present inter-constitutional actions are defined in the federal Constitution and, depending on the type of regulation that is being challenged, they can include the following: if a general or federal law is modified, it is the equivalent of 33 percent of the deputies of the Chamber of Deputies or of the Senate; when dealing with federal or local regulations, it is the Executive Federal Branch through the Legal Counsel; when regulations were changed in a state, it is the equivalent of 33 percent of the deputies of the local congress; when dealing with a reform of an electoral law, it is the political parties registered in the National Electoral Institute (INE, for its Spanish initials); when dealing with a federal or local regulation that violates human rights, it is the National Human Rights Commission (CNDH, for its Spanish initials) or the local human rights commissions when dealing with any regulation from their state that violates human rights; when it is a regulation that violates the right to access public information or the right to the protection of personal data, it is the bodies that work for the right to information, at a federal or local level (depending on the type of regulation that is being denounced); and if dealing with regulations related to criminal matters, it is the Attorney General of the Republic or the local attorney generals (depending on whether it is a federal or local regulation).

5 The Full Court Chamber can also intervene to settle conflicts between the different powers related to compliance with laws or the limitation of each one's authority; this is called *constitutional controversy*.

6 In the second part of this book, where the rulings about assisted reproduction are addressed, examples of these types of trials are mentioned.

7 What is the an *amparo* lawsuit? See the definition in the glossary at the end of this publication.

applicable constitutional and international norms. The *amparo* lawsuits that are under review always involve significant and critical issues regarding the interpretation and application of the articles contained in the Constitution and the international treaties that the Mexican State is part of (that is, the ones it has signed).[8]

So, **why are the Supreme Court's decisions so important?** In addition to what has already been mentioned, the Supreme Court can also determine if the way the authority has acted or the content of a regulation go against the human rights included in the federal Constitution or in the international treaties that our country subscribes to. In Mexico, there is not an authority that can modify its decisions; for that matter, when the majority of the ministers[9] voted in favor to decide whether an issue contradicts the Constitution, all the authorities affected by this decision must comply with it to keep from affecting the human rights that were considered. In these cases, both the local and federal judges who have to settle similar situations will have to do so in the same way as the Supreme Court. In some cases, the congresses will have to change the laws that oppose what has been established by the Supreme Court, and authorities of the executive branch must even stop enforcing certain regulations when the Supreme Court has determined that they are unconstitutional.

8 In the two parts of this book, when dealing with rulings related to obstetric violence and maternal death, as well as rulings on assisted reproduction, several examples of these types of trials are mentioned.

9 In the case of the Full Court Chamber, the qualified majority (as it is called) is met when eight of the eleven ministers vote one way. Meanwhile, in the chambers, four votes of the five ministers are required.

INTERNATIONAL HUMAN RIGHTS SYSTEM

The International Human Rights System is composed of a set of agreements and treaties that require States to protect people's rights and freedoms. Given the importance of addressing the particularities of the different regions and cultures, it is formed by an international system as well as by various regional systems. The **international system** includes treaties and instruments signed within the framework of the United Nations (UN), such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[10] Additionally, the **regional systems** (Inter-American, African, and European) are centered on specific geographic regions and have their own treaties and bodies responsible for supervising their compliance. In the case of Mexico, its corresponding regional system is the Inter-American system,[11] which has various mandatory instruments, such as the American Convention on Human Rights (American Convention) and other protocols and conventions on specialized issues. Both systems work together to promote and protect human rights worldwide.

What are the international treaties on human rights matters? They are documents in which several countries from around the world form written agreements on the same human rights in all their territories and commit to guaranteeing them. In Mexico, in 2011, the first constitutional article was reformed to establish that all people in the national territory should enjoy the human rights recognized by the constitution and by the international treaties signed by the Mexican State. Based on this reform, when the authorities apply human rights regulations, they should select the regulation or interpretation that is the most favorable for all people, and, to the contrary, when these rights must be limited,

10 If you want to learn more about the international system, you can visit the following website: https://guides.ll.georgetown.edu/c.php?g=273364&p=1824722

11 You can learn more about the Inter-American system here: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp

they should give preference to the interpretation that limits them the least. This is known as the *pro personae* principle.[12] With this, not only was the human rights catalogue broadened, but the reach of that established by international and regional bodies also grew.

What importance do international treaties have for the Mexican system? In the case of Mexico, there are numerous reasons why the universal and Inter-American human rights systems are important. Firstly, these systems establish international standards that the State has committed to following; by doing this, they aim to strengthen the promotion, protection, and guarantee of people's rights and freedoms as well as respect for them. Likewise, it fosters transparency and accountability on the part of the Mexican government, which also helps prevent abuse and guarantees that laws and policies are just and equitable.

Moreover, the treaties and instruments that Mexico is part of are incorporated into national legislation, which means that Mexican laws must coincide with international human rights standards. This not only guarantees that a minimum of rights and needs are covered to allow people to live with dignity, but, in the case that they are not respected, it also guarantees people the possibility to defend their rights and seek justice at both national and international levels. Thus, when people believe their rights have been violated and the national authorities have not properly addressed their needs, they can turn to international mechanisms.

Similarly, international and regional agreements and covenants create mechanisms—international or regional human rights bodies—that make it possible to ensure that the countries who have signed them are upholding their commitments. For example, in the case of the international system, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international instrument that aims to establish standards to guarantee gender equality and protect the rights of women (and other people with the capacity for pregnancy). Based on

12 To learn more about the *pro personae* principle, you can read the following article: Hayde Rodarte Berbera, The Pro Personae Principle and Its Application by Mexican Courts, https://www.qmul.ac.uk/law/humanrights/media/humanrights/news/hrlr/2018/Hayde-Rodarte-Berbera.pdf


INTER-AMERICAN COURT
OF HUMAN RIGHTS

this convention, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) is the body in charge of supervising the compliance of States, such as Mexico. This committee has 23 members who are experts on human rights matters. They have different nationalities and act in their personal capacity, which is why they do not represent their respective countries. This committee receives and analyzes complaints from people or groups that consider themselves to be victims of a violation of the rights established by CEDAW, and it issues reports with recommendations addressing the responsible States.

Regarding the Inter-American System, its history dates back to 1978 when several Latin American countries committed to respecting and guaranteeing a series of human rights that they set forth in the American Convention. In this same convention, both the Inter-American Human Rights Commission and the Inter-American Court were put in place with the aim of ensuring that the signatory States would comply with the established commitments. Mexico joined this convention in 1981.

As an autonomous regional tribunal, the Inter-American Court is formed by seven judges of different nationalities who have three primary roles. The first is litigious, that is, to settle cases in which a State has allegedly violated one of the rights protected by the American Convention and/or other human rights treaties belonging to the Inter-American System at an international level. The second is the consultative role, which means that it provides legal opinions and orientation to human rights matters. Its third and last role is to pass provisional measures; this means that it orders urgent measures to protect human rights while the matter is being fully settled.

Even when they do not involve Mexico, the decisions of the Inter-American Court and the committees are important for our country because they establish legal precedents and standards in human rights that all the signatory States must respect. Likewise, they guide the Mexican courts and authorities toward making decisions related to human rights that coincide with these decisions. In addition to promoting access to justice, this offers examples of good practices so that all the States might make efforts to reinforce the protection of these rights.

Part I.

OBSTETRIC VIOLENCE AND MATERNAL DEATH

A little over 40 years ago, women's childbirth experience began to be documented when this procedure was transferred to institutions and care was provided by health care personnel. While this involved significant progress in reproductive health care, the transition to institutions also meant there was a loss in the prominence of women and other pregnant people in this process. This did not only result in an unequal and hierarchical relationship between health care personnel and pregnant people, but it also affected their reproductive autonomy.[13] In this sense, obstetric violence is a specific type of gender-based and institutional violence that appears in the actions and omissions of National Health System (SNS, for its Spanish initials) personnel, in both public and private institutions, which cause physical and/or psychological harm during pregnancy, childbirth, and puerperium.

In the sphere of obstetric violence, institutional violence refers to actions that, even though they are carried out by an individual, have a structural nature resulting from the way the SNS operates. An example of this type of violence is when health care personnel scold or mistreat patients, which could be related to the precarious working conditions in these institutions as well as to staffing shortages, limited budgets, and a lack of the materials needed to provide due care. In the case of gender-based violence, this appears in an unequal power relationship between health care personnel and pregnant people, which hinders care and, on some occasions, keeps these people from making decisions about their reproductive health in a free and informed way.

Obstetric violence can appear in multiple forms; from scolding, mocking, threats, and irony to conditioning or postponement of medical care, unjustified caesarean sections, non-consensual sterilizations, and maternal deaths.

13 To learn more about this topic, see the following study in Spanish: Roberto Castro and Joaquina Erviti, "25 años de investigación sobre violencia obstétrica en México" [25 Years of Research on Obstetric Violence in Mexico], *Conamed* 19, no. 1, (2014): 37–42, p. 39, https://dialnet.unirioja.es/servlet/articulo?codigo=4730781

Did you know that the most common form of obstetric violence in Mexico consists of yelling and scolding? This is followed by pressure to accept some type of contraceptive or to be sterilized, and by ignoring the pregnant person when they ask about their birthing process or the baby they gave birth to.[14]

The fact that yelling and scolding are the most common forms of obstetric violence may be due to the fact that this is what the system's users perceive most clearly. These verbal expressions are alarming because they reflect a deep-seated and strongly rooted problem. When they occur during childbirth and obstetric care, they lay bare the presence of a structural and gender-based problem in the health care system. In this sense, it is not merely about individual attitudes, but about a phenomenon rooted in gender stereotypes, unequal power relationships, and discriminatory practices that affect the rights of women and other pregnant people.S

14 To learn more about the 2021 National Survey on the Dynamics of Household Relationships (ENDIREH, for its Spanish initials), you can see the results in Spanish here: https://www.inegi.org.mx/contenidos/programas/endireh/2021/doc/endireh2021_presentacion_ejecutiva.pdf

There are various social determinants that influence how women and pregnant people access health services. The distribution of money, power, and resources affects the circumstances in which people are born, grow up, live, and grow old. This also explains the inequalities existing in each person's health situation and in the care they receive from the health system.

In Mexico, the National Survey on the Dynamics of Household Relationships (ENDIREH, for its Spanish initials) provides information on the experiences of various types of violence faced by girls and women ages 15 and older in different contexts. In 2016, this survey included the measurement of violence in obstetric care, and, in its fifth edition (2021), it also added the experience that women and adolescents with a disability had the last time they gave birth.

In 2021, the ENDIREH reported that 30.9 percent of women and people with the capacity for pregnancy of reproductive age (ages 15 to 49) who reported that they had given birth at least once in the past five years experienced at least one form of obstetric violence. That is, one of every three women suffered some type of obstetric violence the last time they gave birth.

Because there are groups that are more vulnerable to suffering obstetric violence, it is important to consider the characteristics of the women and people with the capacity for pregnancy who have experienced it. Moreover, there are numerous stereotypes and forms of discrimination that have affected and influenced this population's reproductive health care throughout history. An example of this are adolescents, who suffer obstetric violence more frequently. According to the 2021 ENDIREH, 36 percent of adolescents between ages 15 and 19 reported having experienced at least one of the expressions of this type of violence.

This is also the case of women and pregnant people with a disability,[15] as 55.6 percent of women with a disability between ages 15 and 49 reported having suffered at least one form of obstetric violence

15 The National Statistics and Geography Institute (INEGI, for its Spanish initials) defines people with a disability as those who have great difficulty doing or cannot do at least one of the following daily life activities: seeing, hearing, walking, getting dressed.

the last time they gave birth. In this sense, young women are the most likely to experience this type of violence, with one of every two women with a disability under age 20 reporting having suffered at least one type of obstetric violence the last time they gave birth.

In Mexico, the high rates in the maternal mortality ratio (MMR)[16] are another problem. This is a human rights violation that is the State's responsibility, as it is a structural matter that can be prevented. In 2000, in the context of the Millennium Development Goals (MDG),[17] the Mexican State committed to reducing the national MMR to 22.3 by the year 2015. Unfortunately, this did not happen. While this figure reduced between 2010 and 2015 to reach 35.04, in the years of the COVID-19 pandemic, there was a significant increase. In 2020, the MMR rose to 60.96 while, in 2021, it was estimated at 66.54, the worst year registered since 1992, when the information started to be published.[18] This increase equals a setback of nearly a decade in matters of maternal death.

16 What is the MMR? See the definition in the glossary at the end of this publication.

17 The Millennium Development Goals are eight international development goals that the United Nations member countries as well as a number of international organizations agreed to reach by 2015.

18 To learn more about obstetric violence and maternal death figures, see: GIRE, *¿Qué dicen los datos públicos? Radiografía de la violencia obstétrica y la muerte materna* (2023) [What Does the Public Data Say? X-Ray of Obstetric Violence and Maternal Death], https://violenciaobstetrica.gire.org.mx/ (Currently only available in Spanish.)

INTERNATIONAL HUMAN RIGHTS LAW: INTERNATIONAL SYSTEM AND REGIONAL SYSTEM

INTERNATIONAL HUMAN RIGHTS SYSTEM

Obstetric violence and maternal death are a violation of the human right to life, which is recognized in article 6 of the International Covenant on Civil and Political Rights, as well as **the right to health**, which is found in article 12 of the International Covenant on Economic, Social, and Cultural Rights. This last article establishes the right of all people to the highest attainable standard of physical and mental health. In its General Comment No. 14, the Committee on Economic, Social and Cultural Rights (CESCR Committee) recognizes that the right to health also includes freedoms; for example, the freedom to control one's body, sexual and reproductive freedom (to decide when to reproduce); and the right to make these decisions in a free and informed way.[19] In order to fight against obstetric violence, respect for these freedoms is fundamental, as women and other pregnant people are the ones who should decide about any matter related to their own body and reproduction.

19 *See General Comment No. 14 (2000): The right to the highest attainable standard of health*, here. https://digitallibrary.un.org/record/425041

Obstetric Violence and Maternal Death

The General Comment No. 14 also mentions the essential elements of the right to health: availability, accessibility, acceptability, and quality. Acceptability means that the State must guarantee that the personnel of health care establishments respect the culture of system users and are sensitive to gender requirements. This means reproductive health care should be free of discrimination with respect to the way that women (and other pregnant people)[20] decide to pursue their pregnancy and give birth, as well as their decisions related to the use of contraceptive methods.

For its part, in article 7, the International Covenant on Civil and Political Rights recognizes **the right to not be subjected to torture or cruel, inhuman, or degrading treatment or punishment**. Even though this right was originally conceived for other kinds of situations, such as detention, the international community has recognized that it can also take place in other contexts.[21] In 2019, the United Nations Special Rapporteur on Violence against Women stressed that one of the main expressions of violence against women (and other pregnant people) is exercised in the health sector: obstetric violence. She explained that it is a widespread and deep-seated practice in health systems resulting from "coercive and non-consensual medical procedures, the lack of confidentiality, the issue of not obtaining fully informed consent, and the refusal to administer pain medication."[22] In addition to being discriminatory and violating the right to health of women and pregnant people, all of these conducts are also an example of cruel, inhuman, and degrading treatment.

20 Throughout this chapter, we will use the term *pregnant people* between parenthesis each time the official document we are referring to only mentions the term women. You can find our explanation for doing this in the introduction.

21 See the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (2014), here: https://digitallibrary.un.org/record/793910?ln=en

22 United Nations, *Report of the Special Rapporteur on violence against women, its causes, and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services, with a focus on childbirth and obstetric violence* (2019), par. 5, http://undocs.org/en/A/74/137.

Another crucial right in situations of obstetric violence and maternal death is **the right to information**. In its tenth article, the CEDAW[23] points out that the State should adopt all measures to eliminate discrimination against women. This has special relevance in the case of informed consent, provided that non-consensual sterilization is another expression of obstetric violence. In this sense, access to information should be guaranteed so that women and other pregnant people can make decisions about their reproductive life in a conscious and free way; they should be advised on matters of family planning, including explanations of the risks and benefits of different contraceptive methods as well as all the medical interventions that are intended to be carried out.

INTER-AMERICAN HUMAN RIGHTS SYSTEM

The American Convention also protects **the right to life** (art. 4) and **physical integrity** (art. 5), and it includes the prohibition on torture and cruel, inhuman, or degrading treatment. Likewise, in its 26th article, it refers to economic, social, and cultural rights, among which is **the right to health**. This article points out the obligation States have to take the necessary actions in order to ensure that these rights are fulfilled and guaranteed, and it establishes that its sphere of protection cannot be reduced or altered but that it can only be broadened.[24]

Obstetric violence and maternal death are also a violation of **the right to live a life free of violence**, which is regulated in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention). This convention defines gender-based violence (art. 1) as "any act or conduct, based on gender, which causes death or physical, sexual, or psychosocial harm

23 CEDAW was ratified by Mexico in 1981.

24 This is called the criterion of progressivity and non-regression of rights.

or suffering to women (or people with the capacity for pregnancy), whether in the public or the private sphere,"[25] which can also take place in health care establishments and be committed by the State, its agents, or any other person (art. 2). In article 9, it specifically establishes that, when they are pregnant, women (and other pregnant people) are especially vulnerable to this type of violence.

On this point, international human rights law has established a series of guidelines so that States take action to guarantee that women and other pregnant people have access to quality health services that are not affected by stereotypes. Likewise, it has established various standards for providing people with information about the gestation process that is true, objective, and clear in order to eliminate all forms of discrimination and violence in obstetric care.

MEXICAN REGULATORY FRAMEWORK

In the Mexican context, there are different laws and regulations that protect the **right to access health services and live a life free of violence**. Accordingly, the General Law on Health (LGS, for its Spanish initials) is responsible for regulating the human right to health, established in article 4 of the Constitution, whose fifth chapter recognizes the priority character of comprehensive care for mother-and-child health. Thus, the federal Secretariat of Health is required to promote acts that identify and eradicate risk factors for pregnant people as well as to improve access to quality care during pregnancy, childbirth, and puerperium.[26]

25 See the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women here: https://www.oas.org/juridico/english/treaties/a-61.html

26 To learn more about the operating capacity of Mexico's National Health System and the LGS reforms, see the report by GIRE, *El camino hacia la justicia reproductiva: una década de avances y pendientes*, 2010-2021 [The Path to Reproductive Justice: a Decade of Progress and Pending Matters, 2010–2021] (2021), here: https://gire.org.mx/wp-content/uploads/2021/11/GIRE_INFORME_2021.pdf (Currently only available in Spanish.)

NOM-007-SSA-2016. On care for women during pregnancy, childbirth, and puerperium, and care for the recently born person (NOM 007)[27] establishes the minimum standards for quality care. The aim is to avoid practices that put maternal and neonatal care at risk or that do not meet the highest standards of quality care. *NOM-004-SSA3-2012. On the clinical record* (NOM 004), states that health care personnel are required to offer verbal information to health service users and establishes the guidelines for incorporating the clinical record, which must remain confidential. These records are especially important as they ensure the correct filing of medical records, which makes it possible to know what kind of care women and pregnant people receive in terms of reproductive health.

27 What are NOMs? See the definition in the glossary at the end of this publication.

In addition, at federal and local levels, there are laws on accessing a life free of violence that aim to prevent, sanction, and eradicate violence against women as well as to guarantee their access to a life free of violence that supports their development and wellbeing. To date, 29 local laws have incorporated definitions of obstetric violence. In states where this definition has yet to be taken into account (Jalisco, Michoacán, and Tabasco) as well as in the General Law on Women's Access to a Life Free of Violence, other concepts are used (such as psychological, physical, and institutional violence) to protect people who have experienced obstetric violence. Finally, some local legislation has reformed criminal codes to classify this violence, and now it includes prison rulings or fines for health care personnel who employ these practices.

DOES CLASSIFYING OBSTETRIC VIOLENCE SOLVE THE PROBLEM?[28]

Recognizing and naming obstetric violence has contributed to seeing it as a specific form of institutional and gender-based violence that violates human rights. However, when it is classified as a crime, this problem, which is social and structural, becomes a conflict between the survivors of this type of violence and health care personnel.

Moreover, when providing support to cases, GIRE has observed that the imposed criminal sanctions do not meet the expectations of survivors of obstetric violence. These people believe it is more important for the State to recognize their experiences and assume responsibility for their actions (for example, through public apologies) and to guarantee that this kind of violence does not happen again.

28 To learn more about this issue, see: GIRE, *Justicia Olvidada. Violencia e impunidad en la salud reproductiva* (2022) [Forgotten Justice. Violence and Impunity in Reproductive Health], https://justiciaolvidada.gire.org.mx/ (currently only available in Spanish) and the text by Isabel Fulda Graue and Verónica Esparza Pérez, also in Spanish, "La violencia obstétrica" [Obstetric Violence], in *Efectos inesperados: feminismos y apuestas penales en México*, coordinated by Ana Sofía Rodríguez Everaert (Intersecta, Equis, GIRE, Balance, ILSB, and Fondo Semillas, 2023), 14–19, https://gire.org.mx/wp-content/uploads/2023/09/Efectos-Inesperados.pdf

EMBLEMATIC CASES OF OBSTETRIC VIOLENCE AND MATERNAL DEATH

INTERNATIONAL CASES

a) The Case of Alyne da Silva Pimentel Teixeira vs. Brazil

On November 11, 2002, Alyne da Silva Pimentel—an Afro-descendant woman from Rio de Janeiro, Brazil—went to a health care center with nausea and abdominal pains; she was six months pregnant. There, they prescribed her medication and sent her home; however, over the course of six days, her situation grew considerably worse. Consequently, she returned to the health care center, where she had to wait hours before receiving assistance. After examining her, the doctor on duty informed her that there was no fetal heartbeat, and so they would need to induce labor (to stimulate uterine contractions for a vaginal birth) and perform a curettage[29] (to remove parts of the placenta and other possible remains). Her condition grew worse and needed specialized emergency medical care; however, when the personnel from the health care center could not find her prenatal records and did not have transportation to transfer her to a public hospital, they made her wait. When they finally transferred her, she needed resuscitation and was placed in a provisional area in a hallway of the hospital. Alyne died three days after her labor induction.[30]

The Brazilian court that handled the case ordered a pension and an indemnity for moral damage to Alyne's daughter; however, it did not establish that the State was responsible for Alyne's death. Therefore, Alyne's mother, with support from the Reproductive Rights Center and Advocacia Cidadã pelos Direitos Humanos, took the case to the CEDAW Committee, alleging that the Brazilian State had violated the rights to life and health that are protected by this convention.

29 Curettage is a method used in abortion procedures that the World Health Organization (WHO) currently lists as obsolete, provided that it is not only associated with higher costs for the health system, but it also has a higher risk of health complications for the patient.

30 Would you like to see the CEDAW report for yourself? You can access it here: https://www2.ohchr.org/english/law/docs/cedaw-c-49-d-17-2008.pdf

On September 27, 2011, the CEDAW Committee published its ruling on the case, stating that the Brazilian State was responsible and recognizing Alyne's death as a case of maternal death. It also emphasized the State's obligation to monitor and regulate the provision of health services, including private services; to guarantee timely access to maternal health services that are free of discrimination; and to provide effective mechanisms for accessing justice and integral reparation. The committee stated that the lack of access to maternal health services which meet the needs of women (and other pregnant people) not only violates the right to access reproductive health services, but it also involves gender discrimination and violates the right to life.

The following are among the recommendations that the committee made to the Brazilian State:

- Repair the damage done to Alyne's daughter.
- Guarantee the right to a risk-free maternity as well as affordable and adequate access to emergency obstetric care.
- Reduce preventable maternal deaths.
- Implement guarantees of non-repetition in the country's hospitals and health care centers.
- Offer professional training to health care personnel, especially on matters of reproductive rights.

The CEDAW Committee had already established that States should give priority to reducing maternal mortality rates by guaranteeing safe maternity and prenatal care services.[31] However, Alyne's case was the first in which an international human rights body addressed maternal death as a matter of human rights and determined that, because it was a preventable death, it was the State's responsibility. This case was also fundamental for recognizing the reproductive rights of women and other pregnant people, as it stressed that all States have the obligation to provide quality maternal health services that are free of discrimination.

31 See the General Recommendation No. 24 on article 12 of CEDAW at: https://www.refworld.org/legal/general/cedaw/1999/en/11953

b) The Case of S. F. M. vs. Spain

In December 2008, Ms. S. F. M. became pregnant. Her pregnancy went by without complications until, in September 2009, she was experiencing discomfort before going into labor, and she went to a public hospital in Spain. There, without her consent and without receiving adequate information, they subjected her to a series of invasive procedures, which included ten vaginal exams within a 48-hour period, the administration of oxytocin,[32] an episiotomy,[33] the forced extraction of her baby with instruments, and the manual extraction of the placenta before the recommended time. For seven days, Ms. S. F. M. was separated from her daughter, with limited time together and without the possibility to breastfeed directly. Because of this, Ms. S. F. M. argued to the CEDAW Committee that the consequences of these events, both physical and psychological, were serious and included post-traumatic stress disorder and physical problems that required long-term treatment.[34]

On February 28, 2020, the CEDAW Committee published its decision on the case and, in view of the fact that several of the rights considered by the CEDAW were violated, it found the Government of Spain responsible for obstetric violence. First, it pointed out the violation of article 2, in which the convention requires States to adopt active policies to eliminate gender discrimination. In this case, the Spanish State did not take the necessary means to eliminate discriminatory practices related to reproductive care, including obstetric violence. It also violated article 3, which refers to taking measures to guarantee the effective enjoyment of human rights; as well as article 5, which demands the deconstruction of sociocultural patterns that perpetuate gender stereotypes; and

32 Oxytocin is a hormone that acts by stimulating the smooth muscle of the uterus toward the end of the pregnancy, during labor, and after childbirth.

33 An episiotomy is a procedure during which a controlled incision is made in the perineum area during vaginal birth. The WHO does not recommend its routine use. For more information, you can see the text *WHO Recommendations. Intrapartum Care for a Positive Childbirth Experience* (2019), here: https://iris.who.int/bitstream/handle/10665/272447/WHO-RHR-18.12-eng.pdf?sequence=1

34 See the report here: https://undocs.org/en/cedaw/C/75/D/138/2018

article 12, which refers to due medical care and the health of women (and pregnant people) during pregnancy, childbirth, and puerperium.

In other words, according to the CEDAW Committee's ruling, the Spanish State did not guarantee the provision of adequate services during pregnancy and childbirth and, because obstetric violence specifically targets women (and other pregnant people), it described it as "gender-based violence." The committee stressed not only the importance of guaranteeing dignified and respectful treatment during pregnancy and obstetric care but also the need to receive full, free, and informed consent from the pregnant person. Finally, it pointed out and emphasized the right of women (and pregnant people) to be accompanied during childbirth.

As a result of the human rights violations committed by the Spanish State against Ms. S. M. F., the committee made recommendations to repair the damage suffered, including the following:

- To grant financial compensation to Ms. S. M. F. for physical and psychological impacts.
- To adapt obstetric care to international standards that emphasize autonomy, information, and free, prior, and informed consent in all invasive treatments that take place during childbirth.
- To provide necessary information in an appropriate way during each stage of childbirth.
- To carry out studies on obstetric violence to raise awareness about the situation and aim public policies at avoiding it.
- To train health care professionals on the right to reproductive health.

c) The Case of N. A. E. vs. Spain

In July 2012, Ms. N. A. E. and her partner submitted a birth plan to a public hospital in Donostia, Spain, stating their wishes to avoid using medication to accelerate labor, to make consensual decisions, and to not bottle-feed the baby. However, when they arrived at the hospital at 38 weeks or pregnancy, the personnel who assisted them prematurely induced labor without their consent despite the existence of a hospital protocol recommending to wait 24 hours. During the process, Ms. N. A. E. did not only experience multiple vaginal examinations, but she was also not allowed to eat, and they performed a non-consensual cesarean section, during which process they tied down her harms and did not allow her husband to be present. When her son was born, they did not allow her to have skin-to-skin contact with him and, as a consequence of the way the birth took place, Ms. N. A. E. was diagnosed with postpartum post-traumatic stress disorder.[35]

35 See the report here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2f82%2fD%2f149%2f2019&Lang=en

Obstetric Violence and Maternal Death

Ms. N. A. E. presented her case to the CEDAW Committee under the argument that the events that had occurred were due to the gender stereotypes related to the birth as well as structural discrimination. On July 13, 2022, the committee published its decision on the case, concluding that Ms. N. A. E. had suffered obstetric violence, as it was a form of violence against women (and other pregnant people) during childbirth in a setting of medical care.

On this point, the committee stated that States have the obligation to change or eliminate, not only discriminatory laws and rules, but also practices and customs (art. 2 f and 5 of the CEDAW). It stressed that gender-related stereotypes violate the right to live free from this type of violence, including obstetric violence. Finally, the committee determined that the decisions made by the health care personnel had been based on gender stereotypes, as they had assumed they could perform a cesarean section without taking Ms. N. A. E.'s opinion and consent into account and argued that the psychosocial aftereffects of the birth were an unfounded perception.

Consequently, the CEDAW Committee made a series of recommendations to the Spanish State, including the following:

- To grant a financial indemnity to Ms. N. A. E. considering the damage to her physical and psychosocial health.
- To guarantee safe obstetric care, offer complete information, and gain informed consent from patients during childbirth.
- To offer professional training to health care personnel on matters of reproductive rights.
- To ensure access to effective legal resources for cases involving the violation of reproductive health rights.

Both the case of Ms. S. M. F. and the case of Ms. N. A. E. are emblematic because they were the first times that a body that monitors human rights, like the CEDAW Committee, classified obstetric violence as gender-based violence. Likewise, they reflect a systematic pattern of discriminatory practices and violations of the reproductive rights of health

care system users who are receiving obstetric care, which the committee had already identified.[36]

Even though the Mexican State was not directly involved in the case, these decisions also have a significant impact on it. This is because the CEDAW Committee's rulings contribute to the interpretation of the rights protected by the convention and are precedents that direct how its provisions are applied. Thus, in the Mexican context, these decisions guide judges when they are settling cases related to violations of the rights of women and other pregnant people. They can also be relevant criteria for implementing public policies and legislative reforms. In the case of Sandra, which was settled by Mexico's Supreme Court (which we will analyze later in this publication) arguments provided by the CEDAW Committee in cases such as S. F. M. vs. Spain were used.

REGIONAL CASES

a) The Case of the Indigenous Community Xákmok Kásek vs. Paraguay

Xákmok Kásek is an indigenous community from Chaco, Paraguay that was expelled from its land due to a process of privatization. As a result, for more than 17 years, people from the community could not access their land, which left them severely vulnerable in terms of food, health, and medical care. Many people from the community died due to problems that could have been prevented if they had had adequate medical care. Despite efforts to have their land returned to them by the State, the local administrative process was inefficient.[37]

36 United Nations, Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Report of the Czech Republic* (2016), pars. 36 and 37 https://www.ohchr.org/en/documents/concluding-observations/cedawcczeco6-concluding-observations-sixth-periodic-report-czech and United Nations, Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Seventh Periodic Report of Costa Rica* (2017), pars. 31, https://www.ohchr.org/en/documents/concluding-observations/cedawccricо7-concluding-observations-seventh-periodic-report

37 You can access the ruling here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf

The case was taken to the IACHR Court in July 2009 and, with support from the organization Tierraviva a los Pueblos Indígenas del Chaco, it was settled on August 24, 2010. Remigia Ruiz died in 2005 at age 38 as a consequence of having been expelled from her land. Remigia was pregnant and, despite having complications during labor, she did not receive medical care. In its ruling, the IACHR Court established that her death had characteristics linked to maternal death. Among them, we can mention the lack of access to health care services, carrying out a pregnancy without adequate medical care, the lack of documentation about the cause of her death, and, finally, a situation of extreme poverty.[38]

In addition, this regional court stressed the State's responsibility to create health policies that offer adequate medical care, with personnel trained to tend to childbirth, as well as maternal mortality prevention programs that include monitoring beforehand and after the fact. It also pointed out that States should register maternal mortality cases and establish legal frameworks on health issues.

While this case is not directly linked to maternal death, its relevance to reproductive health is tied to the IACHR Court's statement in relation to the Paraguayan State's responsibility for deaths that occur during pregnancy because there was a failure to adopt measures to avoid them.

38 Case of the Indigenous Community Xákmok Kásek vs. Paraguay, par. 232.

b) The Case of I. V. vs. Bolivia

Ms. I. V. started receiving prenatal care at Hospital de la Mujer in La Paz, Bolivia in February 2000. In July of that same year, she was admitted to this same hospital due to the rupture of membranes and complications related to a previous pregnancy. A cesarean section was performed and, during the procedure, her fallopian tubes[39] were tied without having previously gained her consent. Ms. I. V. stated that she was not consulted, did not receive an explanation in the operating room, and that she found out that her tubes had been tied during a doctor's visit two days after the surgery.[40]

This case reached the IACHR Court in April 2015, and it was settled on November 30, 2016. The organization that represented Ms. I. V. before the regional court during the entire legal procedure was Derechos en Acción. They focused on analyzing whether the fallopian tubal ligation was carried out with the informed consent of Ms. I. V. To do so, the importance of informed consent in medical practice was emphasized, as it is based on respect for the autonomy of health care system users and on their freedom to make decisions about their health. Moreover, the power imbalance existing in the relationship between health care personnel and health care system users was stressed; because the personnel have specialized knowledge and control over the information, they can exercise significant power over the pregnant person. Gender stereotypes of pregnant women (and other pregnant people) can exacerbate these power inequalities, often subjecting them to pressure and discrimination in the field of health.

39 What is fallopian tubal ligation? See the definition in the glossary at the end of this publication.

40 You can see the ruling here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf

The IACHR Court determined that consent should be prior, free, full, and informed. That is, it should be granted before carrying out any medical procedure without any type of pressure and without using it as a condition to carry out other procedures; it should be free of coercion, threats, and misinformation. The person who will be subjected to the procedure is the only one who can grant consent; therefore, third parties, such as a partner, should not be asked to give authorization. Regarding the information that is provided, it should be clear, impartial, and comprehensible, and include details related to the diagnosis, the proposed treatment and its benefits, as well as risks and available alternatives. The IACHR Court also stressed that, in cases such as that of Ms. I. V., ensuring consent must be a more rigorous process due to the nature and permanency of fallopian tubal ligation.

In this sense, the IACHR Court pointed out that **"consent cannot be considered free if a woman is asked to provide it when she is not in a condition to make a fully informed decision because she is in a situation of stress and vulnerability."**[41] Therefore, a reasonable period of reflection should be guaranteed, which may vary depending on each case and each person's circumstances. By the same token, this court pointed out that even if a future pregnancy could put the pregnant person's life at risk, this would not happen immediately, and therefore, the decision about a means for preventing such a risk could be made subsequently. Thus, sterilization procedures—such as fallopian tubal ligation—are not considered medical emergencies.

Finally, the IACHR Court ruled that the Bolivian State was responsible for violating a number of Ms. I. V.'s rights, among them, the right to personal integrity, to personal liberty, to dignity, to privacy and family life, to access information, to raise a family, and to juridical guarantees and judicial protection, protected by the American Convention and the Belém do Pará Convention.

41 The Case of I. V. vs. Bolivia, par. 183.

As means of reparation, the IACHR Court ordered the Bolivian State to do the following:

- To offer free medical and psychological treatment to Ms. I. V.
- To publicly recognize their responsibility at the international level.
- To create a clear and accessible booklet on reproductive rights that includes informed consent.
- To provide training to medical students and health care personnel on topics of consent, gender discrimination, and gender-based violence.
- To grant a financial indemnity to Ms. I. V. considering the material and immaterial damage she suffered.[42]

Being the first case in which the IACHR Court addressed the issue of non-consensual sterilization, I. V. vs. Bolivia represented significant progress in matters of reproductive health in the Inter-American Human Rights System.

c) Case Brítez Arce and Others vs. Argentina

During her pregnancy, Cristina Brítez Arce—a 38-year-old woman who was the mother of a boy and a girl—had numerous medical check-ups, in which she mentioned having a history of arterial hypertension. In June 1992, at over 40 weeks pregnant, Cristina went to Hospital Maternidad Sardá, in Buenos Aires, Argentina, with lower back pain, a fever, and vaginal fluid loss. An ultrasound was performed, revealing the fetus had died, which is why she was admitted in order to induce labor. During the procedure, she was in labor for over three hours; for two of them, she was sitting in a chair. Finally, at 6:00 p.m., Cristina died "as a result of non-traumatic cardiopulmonary arrest."[43]

42 Material damage refers to damage that can be financially quantified, while immaterial damage includes the suffering, distress, and psychological and emotional impacts that a person who is a victim of human rights violations experiences.

43 You can see the ruling here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_474_ing.pdf

This case reached the IACHR Court in February 2021, and it was settled on November 16, 2022. In its ruling, the court established that to guarantee the pregnant person's right to health and prevent maternal mortality and morbidity, States have the obligation to provide adequate specialized health services that accommodate for pregnancy, childbirth, and a reasonable period following childbirth.[44] Likewise, it provided a reminder that States should also guarantee the right to life, which does not only entail ensuring that no individual is arbitrarily deprived of life (negative obligation); it is also vital for them to adopt specific measures to protect and preserve this right (positive obligation). Accordingly, it stated that, because the right to life is directly linked to the right to health, it can be violated by the absence of due medical care.

The IACHR Court also recognized that, when adequate medical care is offered, maternal deaths are preventable. This does not only mean providing precise and timely information on matters of reproductive and maternal health, so people can make free and informed decisions, but it also involves the obligation of States to avoid abusive or negligent practices during pregnancy, childbirth, and postpartum. In this sense, it emphasizes the right of women (and other pregnant people) to live a life free of obstetric violence—which is protected by the Belém do Pará Convention—as well as the obligation of States to take measures to prevent it, considering that, during this stage, pregnant people are in a particularly vulnerable situation.

For the first time, the IACHR Court defined obstetric violence as a form of gender-based violence, prohibited by the inter-American human rights treaties and "exercised by those in charge of health care for pregnant persons accessing services during pregnancy, childbirth and postpartum."[45] It underscored that, additionally, this form of violence is present not only in dehumanized, disrespectful, abusive, and negligent behavior on the part of health care personnel but also in the lack of complete information and in the performance of forced medical interventions, among other acts.

44 Brítez Arce and Others vs. Argentina, par. 68.

45 Brítez Arce and Others vs. Argentina, par. 81.

In the specific case of Cristina, the IACHR Court established that she did not receive adequate and timely medical treatment, and she was not provided the necessary information about her health. The fact that it was a high-risk pregnancy placed an additional responsibility on the health care personnel, who were required to provide especially careful and reinforced medical care, as the probabilities of developing preeclampsia meant a considerable risk of maternal death. All of these factors, combined with the stress and anguish that Cristina experienced due to her vulnerable situation, resulted in dehumanized treatment. The outcome was a case of obstetric violence that, due to the lack of adequate medical care, led to her death.

The IACHR Court concluded that the Argentine State was responsible for violating Cristina Brítez Arce's right to health and life as well as for transgressing her right to personal integrity, all of which are protected by the American Convention. As a measure of reparation, it ordered the Argentine State to do the following:

- Offer training to public and private hospital staff on the care standards for obstetric services, especially during pregnancy, childbirth, and postpartum.
- Implement measures aimed at reducing maternal death in order to avoid cases like Cristina's.
- Design an outreach campaign on rights related to pregnancy, childbirth, and postpartum as well as situations that may constitute obstetric violence.
- Provide a financial indemnity to Cristina's children to cover expenses for psychosocial and/or psychiatric treatment.

This case was very important for the Inter-American Human Rights System because it was the first time the IACHR Court held a State responsible for acts constituting obstetric violence that resulted in maternal death.

d) Case Rodríguez Pacheco and Other vs. Venezuela

In 1998, Ms. Balbina Rodríguez Pacheco, who was 39 weeks pregnant, went to a private clinic for a prenatal check-up. Because there were problems with the placenta and she had undergone previous surgeries, the doctor told her it was a high-risk pregnancy, which is why they decided to do a cesarean section the next day. At the same check-up, the doctor noticed that the placenta was adhered to the inner layers of the uterine wall, and thus decided to perform a manual curettage to detach it, which resulted in a hemorrhage.

When they were informed about what had happened, both Ms. Rodríguez Pacheco and her husband asked for a hysterectomy (a surgery to remove the uterus) to be preformed; however, the doctor refused. After the operation, because the bleeding had increased, a partial hysterectomy was performed and, later, she was subjected to various surgical procedures, which caused her serious health problems. Upon evaluating Ms. Rodríguez Pacheco's return to her normal work activities, the Incapacity Evaluation Commission concluded that she had permanent partial incapacity (of 50%).

Given that, after multiple processes, the courts of Venezuela did not issue a single ruling that analyzed what had happened to Ms. Rodríguez Pacheco, on May 6, 2002, her mother presented the case to the Inter-American Commission and, on September 1, 2023, the IACHR Court pronounced the corresponding ruling.

In its ruling, the IACHR Court determined that sexual and reproductive health is part of the right to health, which is also related to reproductive autonomy and freedom. Consequently, people should have the right to make autonomous decisions about their life plans, their bodies, and their reproductive health; moreover, these decisions should be made in conditions that are free of violence, coercion, or discrimination. It also provided a reminder that the implications of reproductive health services, at both public and private institutions, are of particular relevance for women (and other pregnant people), as they may include situations of disrespectful, abusive, and negligent treatment or the refusal

to be treated during the stage leading up to pregnancy, pregnancy, childbirth, and puerperium. The IACHR Court also stressed that States have the obligation to offer adequate health policies that guarantee that obstetric care is carried out by trained health care personnel in order to reduce maternal mortality.

In the case of Ms. Rodríguez Pacheco, in contrast to the previous cases, the IACHR Court stated that even when obstetric violence is exercised by non-state actors, States have the obligation to establish timely, adequate, and effective mechanisms to recognize it as a form of gender-based violence and promote reparation for damage as well as just and effective means of compensation. States also have the obligation to prevent acts of obstetric violence from being committed in both public and private medical care.

The IACHR Court's conclusion was that Ms. Rodríguez Pacheco had, indeed, been the victim of obstetric violence. It also underscored that, because the procedure carried out in Venezuela had not been done within a reasonable time frame, the national courts had not acted with due diligence (that is, as expected), and they did not have an adequate national mechanism for reporting the events that occurred or for accessing reparation for damage.

As means of reparation, the regional court ordered the following:

- Investigate irregularities in the national process of the case of Ms. Rodríguez Pacheco.
- Grant her a financial indemnity for rehabilitation.
- That the judicial branch implement training programs on researching cases of obstetric violence.
- Develop ongoing training and educational programs on the right to reproductive health and gender-based violence and stereotypes geared at people who are studying medicine and health care personnel at both public and private health care centers.[46]

46 You can see the ruling here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_504_esp.pdf (Only available in Spanish.)

In this case, in addition to stressing international standards related to reproductive health care, the IACHR Court emphasized the obligation of States to prevent and investigate any case of obstetric violence that takes place in a health care center within their territory, regardless of whether it is public or private.

While the Mexican State was not directly affected by these cases in which the Inter-American Court issued a ruling—provided that they took place in other countries that are also part of the American Convention—their impact also had a significant impact on our country. This is because this regional court's rulings contribute to both the interpretation and protection of the rights considered in the American Convention and other regional instruments of the inter-American system, such as the Belém do Pará Convention. In the case of Sandra—which was settled by Mexico's Supreme Court and which we will analyze later in this publication—the Case of I. V. vs. Bolivia was used to underscore the reinforced obligation of the Mexican State to guarantee the protection of her rights.

MEXICAN LEGAL SYSTEM. THE CASE OF SANDRA (1064/2019 *AMPARO* UNDER REVIEW)

In 2021, using a basis of both national and international standards, the First Chamber of Mexico's Supreme Court settled the case of Sandra,[47] a 31-year-old woman who was monitoring her pregnancy at a Family Medical Unit in Jalisco. GIRE[48] provided support services for the case. In January 2017, at 38 weeks pregnant and with labor pains and high blood pressure, Sandra went to the Family Medical Unit, where she was then transferred to the area's general hospital in Ciudad Guzmán, Jalisco. There, they admitted her to the emergency room, where she remained all night. The next day, they informed her that her pregnancy was going well, but that she was not yet at full term.

Two days later, the doctor working the morning shift noticed that Sandra did not have amniotic fluid, but it was not until the evening shift that they admitted her to the operating room. At this point, the doctor informed her that they would perform a cesarean section and asked her if she had already spoken to her husband about "not having more children." When she replied that they had still not spoken about it, the doctor told her she was "irresponsible" and said: "I am going to speak to your husband. I just hope he's not one of those macho men who don't understand. If not, you'll carry on like this. We'll see how long it takes for you to get better."[49] When her family members called, the doctor told them that, for health reasons, it was not advisable for Sandra to have another pregnancy, and she assured them that she was in agreement and had signed the consent form for a bilateral tubal occlusion (BTO).[50] Consequently, her husband signed an authorization document, which

47 In GIRE's previous reports, Sandra's name was changed to Sonia to respect her privacy. We started using her real name once she had granted us her consent.

48 Would you like to see the ruling? You can access it in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=266379

49 The Case of Sandra, pp. 28.13

50 What is a BTO? See the definition in the glossary at the end of this publication.

Sandra could not read in detail, because after more than two days of being in labor, she was very tired.

With support from GIRE, Sandra filed an *amparo* lawsuit. In the lawsuit, she argued that the care she received during the prenatal stage, childbirth, and puerperium constituted obstetric violence and that, in addition, the BTO that was carried out was a non-consensual sterilization[51] involving an act of torture. The first judge who analyzed the case put an end to the proceedings without examining whether her rights had been violated; this is known as dismissing an *amparo*. This judge did this based on the fact that Sandra had signed a document agreeing to the cesarean section and the BTO they performed on her, which implied her consent, and that signs of coercion that may have influenced her decision could not be identified.

As a consequence of what was decided in the first stage, a review of the ruling was requested, and the Supreme Court was asked to settle the case. To determine whether Sandra had been the victim of a non-consensual sterilization and other cruel, inhuman, and degrading treatments during childbirth and puerperium, the First Chamber considered that first there should be an analysis of whether there had been any illegalities at the time the informed consent was obtained. If this had been the case, there would be consideration for whether the lack of consent regarding a permanent contraceptive method was equivalent to a non-consensual sterilization and, therefore, whether it was a form of gender-based violence, obstetric violence, and torture or cruel and inhuman treatment. Finally, the Court analyzed if the way health care personnel treated Sandra during childbirth and puerperium could also be classified as obstetric violence.

51 The Supreme Court stated that, in international practice, various terms have been used to refer to sterilization without consent, including non-consensual, involuntary, obligatory, forced, compulsory, and coercive sterilization. Therefore, to standardize them, the Court used *non-consensual sterilization* in cases in which a sterilization is practiced without prior, full, free, and informed consent.

Considering what was stated by the IACHR Court in the Case of I. V. vs. Bolivia and by the CEDAW Committee in the Case of S. F. M. vs. Spain, among others, the First Chamber established that, to be valid in situations of permanent contraceptives, consent must be:[52]

- **Prior:** It should be granted before carrying out any type of procedure and the health care system user should receive one or several advising sessions.
- **Free:** Only the person who would be undergoing the procedure may give consent; third parties may not. It should be granted in adequate conditions that allow for making the decision without coercion and without being in stressful or vulnerable situations (like being in labor or giving birth or immediately after a natural birth or cesarean section).
- **Full and informed:** When a method is permanent, there is a more rigorous duty to provide specific information on its risks or potential side effects as well as less intrusive alternatives. The information provided should be complete and accessible in order to be understood in its totality.

52 The Case of Sandra, pp. 54-65.

Like in the Case of I. V. vs. Bolivia, the Court argued that, even if a pregnancy put the life of the woman (or pregnant person) at risk, this would not happen immediately, which is why the BTO cannot be considered an emergency medical procedure.[53] Based on the above, the First Chamber stated that informed consent is not merely an act of acceptance, but that it involves a process of related stages, which must meet the requirement of being prior, free, full, and informed. In Sandra's case, even though she had signed a document authorizing the BTO, it was determined that it had not met the requirements and, therefore, could not be considered informed consent. [54]

Consequently, the Court concluded that the BTO that was performed on Sandra was a non-consensual sterilization, which constituted an act of obstetric violence.[55] In addition, it determined that having been humiliated, scolded, intimidated, and verbally attacked by the personnel who assisted her during childbirth is also considered obstetric violence. Due to all of this, Sandra's rights to health, personal integrity, freedom, and reproductive autonomy were violated.

Based on all these arguments, the Supreme Court ordered the hospital that was responsible to provide Sandra with surgical medical care, at no cost and with her informed consent, to perform the procedure needed to reverse the sterilization, provided that it were medically viable. If not, the hospital would have to offer her the possibility of accessing an assisted reproduction procedure. Likewise, it instructed the hospital to provide specialized psychosocial or psychiatric treatment specialized in sexual and reproductive health to compensate for the psycho-emotional impacts.

This is an emblematic ruling, because, for the first time, the Supreme Court addressed a case of obstetric violence related to a non-consensual sterilization and recognized it as a form of institutional and gender-based violence. This ruling has historic significance and is a

53 The Case of Sandra, pp. 57.

54 The Case of Sandra, pp. 119.

55 The Case of Sandra, pp. 127.

valuable tool for women and pregnant people[56] because it establishes a precedent for recognizing and addressing obstetric violence. By recognizing it as a specific form of gender-based violence in the sphere of reproductive health, the Court provided a legal framework that can be used to promote reproductive justice in similar cases in the future. Moreover, by revisiting precedents from both the international and regional human rights systems, this ruling strengthens the coherence and consistency of reproductive rights protection, and therefore it also contributes to the fight against obstetric violence.

56 Based on the ruling of Marisa, in 2019, the Supreme Court began to use the term *pregnant people* in its rulings. To learn more about the Case of Marisa, see the book by GIRE, *Step by Step: Mexico's Supreme Court Rulings on Abortion* (2022), here: https://gire.org.mx/wp-content/uploads/2022/11/Step-by-step-.pdf

IN CLOSING

Based on the decisions made in international, regional, and national human rights spheres, significant progress has been made in comprehending and recognizing obstetric violence and maternal death as forms of gender-based violence and as human rights violations. This progress contributed to our legal system recognizing the importance of guaranteeing respect for the reproductive rights of women and pregnant people during pregnancy, childbirth, and puerperium and to its consideration of the decisions made by other international courts and bodies.

The rulings presented in this chapter have contributed to defining and delimiting what constitutes obstetric violence, thus identifying behaviors such as dehumanized treatment, lack of information, forced and non-consensual medical interventions, and maternal death as components of this violence. In addition, they have established important precedents to protect the exercise of the reproductive rights of women and pregnant people.

In summary, this progress is essential for all women and pregnant people to be able to access quality, comprehensive, and respectful health services during pregnancy, childbirth, and puerperium. Through these rulings, the obligation States have to prevent and eradicate obstetric violence and maternal death has been reasserted. Additionally, the importance of informing women and pregnant people about reproductive rights and of respecting their capacity to make decisions on the matter has been established.

Part II.

REPRODUCTIVE RIGHTS AND ASSISTED REPRODUCTION

On July 25, 1978, after an *in vitro* fertilization (IVF),[57] Louise Brown was born in the United Kingdom. Since then, every year, thousands of children are born around the world thanks to assisted reproduction techniques.

Assisted reproduction clinics have existed in Mexico, in both private and public hospitals, since the late 1980s. The establishments that practice these types of procedures should have a health care license (a kind of authorization to carry out these procedures) that is issued by the Federal Commission for Protection against Health Risks (Cofepris, for its Spanish acronym).[58] In the past decade, the number of clinics and establishments with this kind of license has increased from 52, in 2013, to 130, in 2020.

This increase, as well as the high number of children born with the help of these procedures—even though there are no official or precise figures—reveals that more and more people are resorting to assisted reproduction techniques every day. However, there is still not a normative framework that regulates access to these procedures or to related technical aspects.

Did you know that the first legislative initiative on assisted reproduction was presented to Mexico's legislative branch in 1999? Since then, several initiatives have been presented that aim to regulate it; however, to date, none have been passed.[59]

57 What is *in vitro* fertilization? See the definition in the glossary at the end of this publication.

58 Cofepris is a department of the Secretariat of Health. It has the responsibility of establishing and implementing policies, programs, and projects that are on par with the best international practices to prevent and address health risks, thus contributing to the population's health. To learn more about Cofepris, you can visit this website (only available in Spanish): https://www.gob.mx/cofepris

59 To learn more about initiatives on matters of assisted reproduction that have been presented to the Congress of the Union, see: GIRE, *El camino hacia la justicia reproductiva: una década de avances y pendientes 2010-2021* (2021) [The Path to Reproductive Justice: A Decade of Progress and Pending Matters], pp. 286-293, https://gire.org.mx/wp-content/uploads/2021/11/GIRE_INFORME_2021.pdf (Currently only available in Spanish.)

Access to assisted reproduction techniques involves exercising a number of human rights; among them are the rights to form a family, to a private life (reproductive autonomy), to health, and to benefiting from scientific and technological progress. Guaranteeing these rights includes regulating these reproductive procedures and guaranteeing that those who decide to resort to them can access them without discrimination. However, the State has not created adequate and comprehensive policies that are not influenced by stereotypes and that allow all people to access them under equal conditions. Consequently, there are prejudices, assumptions, and/or beliefs in terms of age, sexuality, marital status, and other aspects of people's identities that pose significant obstacles for making decisions about their reproductive life.

It is also important to address the issue of surrogacy,[60] as most of these kinds of agreements require assisted reproduction techniques. This is another reason why it is essential to have a normative framework that regulates access to these procedures and their practice in a general manner.

60 Would you like to learn more about surrogacy? See the definition in the glossary at the end of this publication.

WHY DO WE USE THE TERMS *GESTATIONAL SURROGACY* OR *GESTATION BY SUBSTITUTION* AT GIRE?

There are various terms to refer to these kinds of agreements, such as, for example, surrogate motherhood, substitute maternity, substitute gestation, gestation by substitution, surrogate gestation, or simply surrogacy. In Spanish, the most common term is *maternidad subrogada* or "surrogate maternity or motherhood," but giving it this name assumes that there is a direct relationship between gestation and maternity. At GIRE, we believe this contributes to perpetuating gender stereotypes, because maternity involves many more acts than only gestating, such as the intention to assume responsibilities.

At GIRE, we use the terms *gestation by substitution* or *gestational surrogacy* for two reasons. First, it is because they focus attention on the primary activity or purpose the parties who enter into these types of agreements are pursuing, which is gestation. The other reason is because these are the most adequate terms from a human rights perspective.

INTERNATIONAL HUMAN RIGHTS LAW ON MATTERS OF ASSISTED REPRODUCTION

The right to decide to reproduce or not, when, and how often is based on a number of rights, including those that refer to equality and non-discrimination, reproductive autonomy, health, and forming a family. All these rights are protected by our Constitution and by the international instruments that the Mexican State takes part in.

Some of these instruments are the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the American Convention. The Committee on Economic, Social, and Cultural Rights, for example, in its General Comment No. 25, on science, establishes that States must guarantee the fulfillment of the **right to enjoy the benefits of scientific progress based on a gender-sensitive approach** in such a way that ensures access to assisted reproductive technologies based on equality and non-discrimination.[61]

In addition to what is stated in these international instruments regarding the defense of assisted reproduction techniques—specifically IVF—regional courts, such as the Inter-American Court, have established noteworthy precedents on the matter. In particular, in cases settled by this court, it has reached the conclusion that **"sharing life and the possibility to procreate are part of the right to form a family,"** and that when the State creates barriers that keep people from accessing these techniques, it is an unjustified intervention in their private life. The Case of Artavia Murillo et al. (*in vitro* fertilization) vs. Costa Rica,[62] which we will analyze later in this publication, is an example of this.

61 To learn more about international treaties and their relevance for Mexico, see the introduction of this publication, which addresses what should be known to understand national, regional, and international rulings.

62 You can see the case here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf Another case related to this subject is the Case of Gómez Murillo et al. vs. Costa Rica, which you can see here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_326_esp.pdf (Only available in Spanish.)

For their part, the WHO and the Office of the United Nations High Commissioner for Human Rights have indicated that providing services focused on fertility care is a fundamental part of reproductive health.[63] Thus, all these international instruments have contributed to setting human rights standards that are based on equality, non-discrimination, and the right of all people to access assisted reproduction techniques.

REGULATION OF ASSISTED REPRODUCTION IN MEXICO

In Mexico, **the fourth constitutional article establishes that all people have the right to decide the number and spacing of their children**. To make this right a reality, it is necessary to have access to adequate health care services that allow people to exercise their reproductive autonomy. In the specific case of our country, health is a concurrent power; this means that both the federal government and state governments have the capacity to legislate and regulate the issue. However, the Constitution establishes that certain aspects of the issue of health can only be regulated at the federal level; an example of this is assisted reproduction.

In its 73rd article, the Constitution indicates the matters that must be regulated at the federal level—only those that are not considered in this article can be regulated or developed by state congresses. Thus, it establishes that the power to pass laws on general health is the responsibility of the Congress of the Union.

In turn, the General Law on Health (LGS, for its Spanish initials) establishes that the control of organs, tissues, and cells as well as family planning—which includes everything related to contraceptives

63 WHO, *Infertility* (Fact Sheet, April 3, 2023), https://www.who.int/en/news-room/fact-sheets/detail/infertility You can also check the recent report from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on human rights and infertility: Human Rights and Infertility (October 2023), pp. 29 and 30, https://www.ohchr.org/sites/default/files/documents/issues/women/Research-Paper-HRs-Infertility.pdf

and infertility—are part of general health. Therefore, the Secretariat of Health is in charge of guaranteeing that services related to family planning allow people to decide the number and spacing of their children in a free, responsible, and informed manner. Provided that assisted reproduction techniques are part of general health, access to them and their functioning can only be regulated at the federal level.

For their part, in their civil or family codes, state congresses are only allowed to regulate the consequences that assisted reproduction techniques have on people and families, such as the recognition of paternity or maternity, aspects related to filiation,[64] and birth records, among others. Nevertheless, because the country still does not have a federal regulation on access and technical matters related to assisted reproduction procedures, some local congresses have included aspects associated with these procedures in their civil or family codes with the intention of remedying this omission. Yet often these local codes regulate matters that are not their responsibility, such as requirements for the clinics and establishments where assisted reproduction procedures are performed or the health conditions required by people who wish to access them. These aspects are related to the organization, control, and supervision of the provision of health services and health facilities, and therefore their regulation is exclusively a federal responsibility.

64 What is filiation? See the definition in the glossary at the end of this publication.

DID YOU KNOW THAT, FOR 26 YEARS NOW, IT HAS BEEN POSSIBLE TO ENTER INTO A SURROGACY CONTRACT IN TABASCO?

In 1997, its civil code was reformed, and an article was added to define this legal concept and establish the possibility of registering children born as a result of these agreements. This is as long as the parties present the birth certificate to the civil registry and prove that the gestation contract had been signed before a notary public.[65]

While it has been possible to enter into a surrogacy contract since 1997, as of 2012, the number of people and couples from other countries who traveled to the state to carry out this type of contract increased considerably. This is due to the fact that India—which had previously been the world's primary destination for surrogacy—modified its legislation to impose restrictions on foreigners and same-sex couples. Because of these changes in the international sphere, though to a lesser extent, Tabasco became a national and international destination for surrogacy, which drew attention to problems with its regulations.

In January 2016, it reformed its state civil code again to include a regulation that was broader than the one that had been in effect up until that point. However, because it did not treat all people equally—thus making it discriminatory—it was problematic. While some articles went beyond what the local congress could do and regulate, others were so confusing that there was no clarity on how to enforce them, resulting in legal uncertainty that had an impact on people. [65]

65 A notary public is a public official who is in charge of guaranteeing that a contract is legal.

Up until this point, surrogacy has been regulated in the Civil Code of Tabasco and in the Family Code of Sinaloa. In contrast, the civil and family codes of Querétaro and San Luis Potosí, respectively, have included that they do not recognize surrogacy agreements. That is, they establish that the mother is always the person who gestates and that any agreement stating the contrary is not valid. In the rest of the country, the practice of surrogacy has not been regulated.

The constant, fast paced progress in the sphere of assisted reproduction, along with the absence of comprehensive regulations in Mexico, has meant that the conflicts are settled by judicial authorities. Some of these cases have even reached the Supreme Court, which has had to settle matters related to access to assisted reproduction procedures and their practice in order to determine the filiation of people who were born through reproduction techniques and also with gestation by substitution.[67]

In addition, the absence of a general regulation that establishes the basis for access to reproduction techniques has allowed both private and public institutions to implement their own rules without following any type of general guidelines. Some institutions have criteria or protocols that do not consider human rights in a comprehensive manner, and often they include requirements that discriminate against health system users and put them in vulnerable situations or leave them with little legal clarity.[68] This means that many of the people who need to access assisted reproduction procedures at public health institutions are rejected on the basis of discriminatory criteria that violate the human rights recognized in the Constitution and in the international instruments that Mexico takes part in.

66 Would you like to learn more about this topic? You can read the report by GIRE, *Surrogacy in Mexico: The Consequences of Poor Regulation* (2017), https://gire.org.mx/wp-content/uploads/2020/02/Surrogacy-in-Mexico.-The-Consequences-of-Poor-Regulation.pdf

67 Mexico's Supreme Court has dictated other rulings on issues related to assisted reproduction techniques. However, the ones selected for this publication are those that, up until August 2023, had been highlighted for the relevance of their arguments.

68 To learn more about the requirements for accessing assisted reproduction techniques at public health institutions in Mexico, see: GIRE, *El camino hacia la justicia reproductiva: una década de avances y pendientes 2010-2021* (2021) [The Path to Reproductive Justice: A Decade of Progress and Pending Matters]: https://gire.org.mx/wp-content/uploads/2021/11/GIRE_INFORME_2021.pdf (Currently only available in Spanish.)


NOT YOU,
NOT YOU,
YOU, YES YOU

EMBLEMATIC CASES ON REPRODUCTIVE RIGHTS AND ASSISTED REPRODUCTION

IACHR COURT. THE CASE OF GÓMEZ MURILLO ET AL. VS. COSTA RICA

In Costa Rica, between 1995 and 2000, a decree authorizing the practice of IVF was in effect. However, in 2000, this decree was annulled based on the argument that it violated the right to life of embryos. This left many couples without the possibility of procreating and interrupted the treatments of others.

Those affected by the annulment of this decree filed a complaint with the Inter-American Human Rights Commission, which was settled on November 28, 2012. The State had justified the annulment of the decree with the explanation that the American Convention required it to protect the life of embryos. After analyzing whether it was viable to provide absolute protection to the life of embryos, the IACHR Court established that, due to the characteristics of IVF, the embryo could not be understood as being separate from the body of the woman (or pregnant person)[69] provided that it could not survive on its own and could only survive once implanted in the body of the pregnant person.[70] On this point, the American Convention did not uphold the argument that the embryo could be considered a person nor did it justify the annulment of other rights, such as the right to procreate.

This regional court considered that the case covered several aspects of the right to a private life, which is related to both reproductive rights and with the right to form a family as well as to physical and mental integrity. It established that the right to protection for one's family involves,

69 The term *pregnant people* is used between parenthesis each time the official document we are referring to only mentions the term *women*. You can find the explanation for why we have done this in the introduction.

70 You can see the ruling here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf

in the broadest sense possible, developing and strengthening the family unit, which includes the right to form a family and procreate.

The IACHR Court explained that the right to a private life is related to reproductive autonomy and to access to reproductive health care services, which include the right to access the technology that is necessary for reproduction. It also stated that the right to personal integrity is affected when people have difficulties accessing certain medical procedures, provided that this causes distress and anxiety. Finally, it reiterated that reproductive health entails the right to freely choose safe, effective, easy-to-access, and acceptable fertility treatment methods.

In this sense, there is a relationship between the right to a private life and to reproductive freedom and the right to access the medical technology that is necessary to exercise it effectively. The right to benefit from scientific progress is considered an extension of others, such as the right to a private life, to reproductive autonomy, and to forming a family. This results in the right to access the best health care services in assisted reproduction techniques and, therefore, the obligation to prohibit restrictions that keep people from making decisions on reproductive matters.

For these reasons, the IACHR Court determined that annulling the decree had affected couples in the following areas:

- In their intimacy, provided they would need to travel abroad to undergo IVF treatments and expose aspects of their private life.
- In their personal autonomy and life plans, as IVF was their last resource for overcoming reproductive difficulties.
- In their psychological integrity, by denying them the possibility to access the procedure that would grant them reproductive freedom, which significantly interfered with their decisions regarding options for trying to procreate.

In turn, the court warned that there are different kinds of discrimination. On the one hand, there is gender discrimination, as stereotypes and social prejudices disproportionately affect women (and other

pregnant people). On the other hand, there is discrimination based on financial conditions, as the impossibility to access such treatments had a disproportionate impact on those who did not have the necessary financial resources to provide continuity to their fertilization treatments abroad.

Therefore, the IACHR Court ordered the following:

- Adopt measures to rescind the annulment of the decree and allow people to access IVF without hindrances to the exercise of their rights.
- Promptly regulate aspects that are necessary for implementing IVF and to establish inspection and quality control systems for the institutions or professionals who develop this assisted reproduction technique.
- Include IVF in health care programs and treatments for fertility without discrimination.
- Offer victims free and immediate psychological care for up to four years through specialized state health institutions.
- Implement ongoing educational and training programs and courses in human rights, reproductive rights, and non-discrimination for judicial officials.
- Pay a financial indemnity for the material and immaterial damage that has been suffered.

This IACHR Court ruling is especially important for understanding the link between the right to procreate and people's most intimate rights, such as those of personal integrity and liberty, and even the right to a private life, which is part of the right to form a family. The ruling also makes it clear that there is a right to access the medical technology that is necessary to exercise reproductive freedom as well as to benefit from scientific progress. Both elements are part of the right to access the best health care services for assisted reproduction techniques.

This ruling is highly relevant, as in addition to contributing a new perspective on assisted human reproduction techniques, it also makes them accessible to people who need them for medical reasons or who wish to use them to fulfill their desire to procreate.

NATIONAL COURTS

a) The Case of María Teresa (*Amparo* under Review 619/2017)

For a number of years, María Teresa[71] and her partner tried to get pregnant without success. Since paying an assisted reproduction treatment at a private clinic was not within their reach and because María Teresa was entitled to use the services of the Institute for Social Security and Services for State Workers (ISSSTE, for its Spanish initials), in July 2014, she went to this institution. After several consultations, the primary care doctor sent her to a specialist. At the General Hospital of Toluca, after carrying out different lab work, they directed her to the assisted reproduction program at ISSSTE's 20 de Noviembre National Medical Center (CMN, for its Spanish initials). There, she was informed that the age limit to participate in the assisted reproduction program was 35 (at the time, she was 36), and that they could not provide her the care she was requesting.

In 2016, with support from GIRE, María Teresa presented an *amparo* lawsuit for violations of her rights to equality and non-discrimination, to a private life, and to enjoying the benefits of scientific and technological progress. In this lawsuit, the first judge who analyzed the case ruled that the age limit established by 20 de Noviembre CMN was discriminatory and violated human rights. The ruling pointed out that "the success of such techniques is not only associated with the age of patients but also with the reproductive capacity of both the man and the woman, which depends on various factors," which is why the age limit established by the medical center was an arbitrary requirement. However, the judge who settled the matter did not analyze whether the program's admission criteria were justified or if they respected the rights protected by the Constitution. Therefore, in June 2017, the case reached the Supreme Court so that the Second Chamber would rule on whether or not the admission criteria were constitutional.[72]

71 María Teresa authorized GIRE to use her name in this document.

72 Would you like to see the ruling? You can access it in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=218586

After studying the case, the Court recognized that imposing an age limit on access to assisted reproduction treatments violates the right to health and goes against the principles of equality and non-discrimination. In addition, it determined that hospitals should perform lab work on health system users to consider other factors related to the reproductive health of involved parties that contribute to the success of assisted reproduction techniques, such as the number of eggs (or ova) a woman (or pregnant person) has and their quality in addition to the capacity of the uterus to carry a pregnancy to full term. In November 2017, the Second Chamber unanimously voted to grant María Teresa the *amparo*. It ordered that the discriminatory, age-based criteria—specified in the institution's manual—should not be applied to her and that a decision would be made regarding whether she could be part of the assisted reproduction program based on a medical assessment.

Moreover, in its ruling, the Court pointed out the unconstitutionality of the following criteria:

- the age limit of 35;
- the requirement for beneficiaries to be in a legally recognized union (marriage or common-law marriage); and
- the absence of genetic illnesses that could be passed on to one's children.

Why did the Court determine that these criteria went against the Constitution? For the following reasons:

- *Exclusion based on marital status*
  Regarding the requirement that only couples that have been legally constituted by marriage or common-law marriage can participate in the program, the Court reiterated that the fourth article of the Constitution recognizes the right to form a family. This article establishes that the organization and development of the family should be protected and that all people have the freedom to decide the number and spacing of their children in a responsible and informed manner.

In this ruling, the Second Chamber reintroduced what it had already established in previous cases regarding the concept of family by reasserting that this does not refer to an "ideal family model" that must be formed through a marriage or by a heterosexual couple whose purpose is to procreate.[73] The Constitution protects the family in all its forms and expressions: nuclear families, formed by parents and their children; single-parent families, formed by one parent and their children; extended family, covering several generations, both older and younger, as well as collateral relatives, such as brothers and sisters; and homo-parent families, formed by same-sex parents who have or do not have children.

Exclusion based on health reasons

Regarding the requirement stipulating that only women (and people with the capacity for pregnancy) without inheritable genetic illnesses can benefit from assisted reproduction procedures, the Court pointed out that this measure also limits both people's rights and the protection of the right to health. By not carrying out prior lab work and not allowing them to make their own decisions, the authority restricts their right to use this kind of reproduction services in an unjustified way. The Second Chamber added that carrying out previous lab work on health care service users would be a less restrictive measure. Once the tests results are analyzed, it will be possible to inform them, as the case may be, about the possible genetic conditions that the woman (or person with the capacity for pregnancy) or their partner may have. That way, those who are interested in the procedure can decide whether or not to carry through with it.

73 The Supreme Court made this statement when settling the 2/2010 Action of Unconstitutionality. You can see it in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=115026


WE WANT TO
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THE TREATMENT

The case of María Teresa stands out for being the first in which the Supreme Court analyzed the constitutionality of the requirements for accessing an assisted reproduction program at a public institution. Furthermore, it is a precedent that has been used as a guideline for courts throughout the country when settling similar cases with the same arguments. This is the case of Diana,[74] who was also denied access to assisted reproduction services at the ISSSTE clinic because she was older than 35. With support from GIRE, she presented an *amparo* lawsuit. The judge who settled the matter used the Supreme Court's ruling on the Case of María Teresa as an example and ordered the 20 de Noviembre CMN to provide its assisted reproduction services to Diana.[75]

74 Her name has been changed to respect her privacy.

75 To learn more about Diana's case, you can read the following text by GIRE: *El camino hacia la justicia reproductiva: una década de avances y pendientes 2010-2021* (2021) [The Path to Reproductive Justice: A Decade of Progress and Pending Matters], p. 321, https://gire.org.mx/wp-content/uploads/2021/11/GIRE_INFORME_2021.pdf (Currently only available in Spanish.)

UPDATES TO THE GENERAL MANUAL ON PROCEDURES OF ISSSTE'S 20 DE NOVIEMBRE NATIONAL MEDICAL CENTER

On August 4, 2021, the modifications that ISSSTE made to the General Manual on Procedures of its 20 de Noviembre National Medical Center were published in the Official Journal of the Federation (DOF, for its Spanish initials).[76] (This document includes all the requirements for accessing the institution's assisted reproduction services.) Despite it being an opportunity for the authorities to base their regulations on the criteria issued by the Supreme Court in the Case of María Teresa, this updated version once again established unjustified admission restrictions, such as age, marital status, sexual orientation, and weight.

On September 20, 2021, as a civil organization dedicated to promoting and defending reproductive rights, GIRE presented an *amparo* lawsuit against these discriminatory provisions, aiming to keep the institution from once again applying these requirements to people who request admission to the assisted reproduction program at the 20 de Noviembre CMN. Regarding the age limit of 42, GIRE argued that lab work should be carried out in each individual case, because it is not a matter that is dependent on the age of the health care system users. Furthermore, it pointed out that the requirement restricting access to the program to only couples violated the right to form a family of single people who, for whatever reason, would like to start an assisted reproduction process. On this occasion, the judge on duty did not rule in favor of this petition. Therefore, GIRE requested that a superior authority—a collegiate tribunal—review the first judge's ruling.

76 The Journal of the Federation is Mexico's government body that publishes laws, regulations, agreements, notices, orders, and other acts issued in national territory by the federal branches in order for them to be implemented.

On March 9, 2022, after reviewing the rulings, the collegiate tribunal pointed out that, just as GIRE had set forth, establishing an age limit is discriminatory, as it is not the only factor that should be considered for assisted reproduction techniques to be successful. Additionally, it pointed out that, by establishing a requirement of having a partner and failing to consider reproduction techniques that also serve the LGBT+ community, the 20 de Noviembre CMN manual excludes single people and all families that are not formed by a heterosexual couple.

In this case, the collegiate tribunal ordered the following:

- Stop imposing an age requirement.
- Stop limiting access to only married, heterosexual couples.
- Require the use of inclusive language that considers all people.
- Progressively implement assisted reproduction techniques that consider all people.

b) The right to identity of children born through artificial insemination with a donor's gamete (Direct *Amparo* under Review 2766/2015)

This was one of the first cases settled by the First Chamber of the Supreme Court resulting from a conflict involving assisted reproduction procedures.[77] In this ruling, the Court recognized that the decision to have children by using assisted reproduction techniques is part of the most intimate sphere of a person's private and family life, and that the process of making this decision is part of their reproductive autonomy.

In this case, due to reasons of male infertility, a married couple turned to an anonymous donor to perform an artificial insemination procedure through a mutual agreement. As a result of this treatment, in October 2008, their child was born in Mexico City. Four years after the birth, the couple divorced, and the mother requested for the legal recognition of her ex-husband's paternity to be revoked, provided that he had not contributed genetic material to the procedure.

77 You can see the ruling in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=181865

The woman argued that, in a heterologous artificial insemination process (that is, with a donor sperm), only the mother has genetic ties to the child, and thus she requested to be recognized as the only parent. In her opinion, filiation or the quality of being a descendant, cannot be obtained through a voluntary agreement or from a simple recognition of paternity. From her point of view, children who are born through artificial insemination with sperm from an anonymous donor are denied the right to know their true identity and biological origin.

In this case, in July 2017, the First Chamber ruled that when a couple grants their free consent to use assisted reproduction techniques, one of the fundamental factors for determining the filiation of children born through these techniques will be the parents' will, also called procreational will—that is, their intention to exercise parenting responsibilities. Thus, the couple's consent to undergo heterologous artificial insemination is a decision, made by mutual agreement, to exercise the right to decide in a free, responsible, and informed manner on the number and spacing of their children, despite the fact that, in this case, there are no genetic ties between the man and the child.

Based on this issue, the Court began to develop the concept of procreational will, which is defined as the wish to accept a child as one's own even when there are not biological ties. Therefore, in this case, the Court ruled that filiation was not determined by genetic ties but rather by the procreational will expressed by both spouses to undergo the insemination procedure using a donor's male gametes.

c) The first case related to a gestation by substitution agreement (*Amparo* under Review 553/2018)

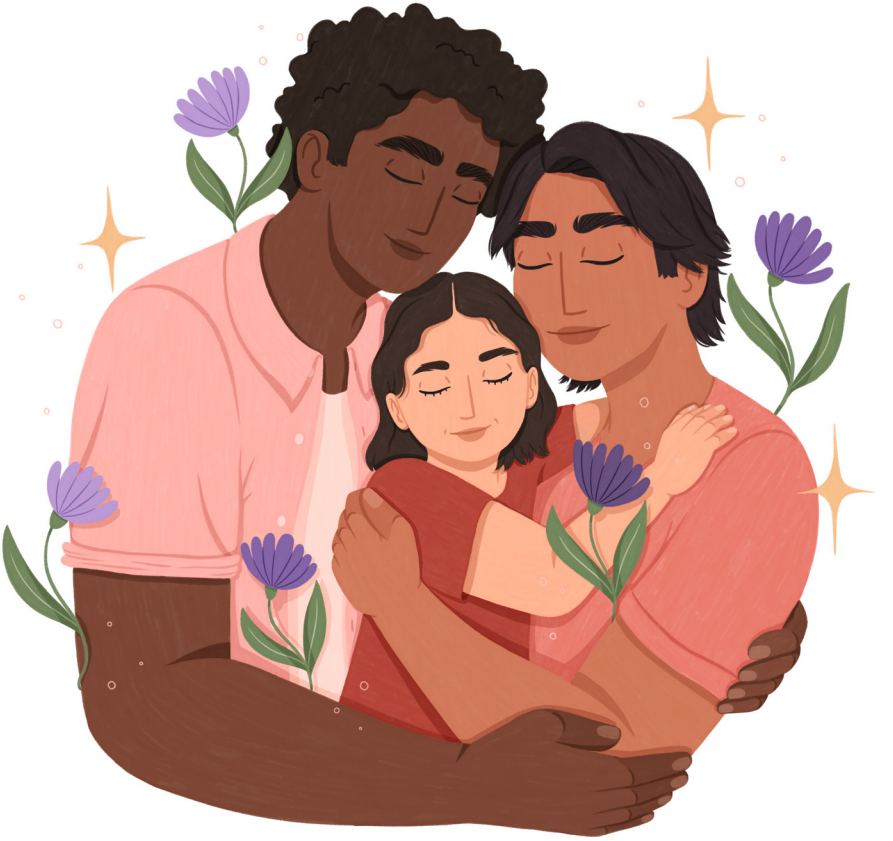
In 2018, for the first time, the Court's First Chamber unanimously ruled on a matter directly related to a gestation by substitution agreement.[78] This was because, in March 2016, an official of the civil registry of the

78 You can see the ruling in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=238503

state of Yucatán refused to recognize the relationship of filiation between a same-sex couple and a child who had been born as the result of this kind of agreement. In this state, the practice of gestation by substitution is not regulated, and therefore, in such cases, there are no rules on claiming filiation or on the requirements and proceedings of the civil registry when a person is born as a result of this kind of agreement.

In this matter, the Court uses the term *maternidad subrogada* (or surrogate motherhood) to refer to these agreements, although it recognizes that they are also called *gestational surrogacy* or *gestation by substitution*.

Part II.



In this case,[79] the First Chamber ruled that, in order to recognize the existence of a relationship of filiation, it would be necessary to evaluate the procreational will and, once they had stated their will, the intended parents would assume all responsibilities of the filial relationship.

The court ruled:

- the child's right to be listed in the civil registry as the son of the intended parents;
- the intended parents' right to have their decision to procreate through assisted reproduction techniques respected; and
- the surrogate's right to a private life and to freely develop her personality.

It added that, in a gestation by substitution agreement, the pregnant person must freely express their will to participate in the procedure and state that they know its consequences, and therefore it should be considered that the woman (or pregnant person) who freely participates in this kind of agreement does so while exercising their right to freely develop their personality in accordance with who they want to be, what they want to do, and the way they want to develop themselves. It is relevant that, in this case, the Court stressed that the fundamental element for recognizing the parenting relationship is the intended parents' procreational will as well as what is in the best interest of the child and not the genetic or biological ties between them.

d) Regulation of gestation by substitution in Tabasco (Action of Unconstitutionality 16/2016)

In January 2016, the Congress of the State of Tabasco reformed its local civil code to include its chapter VI b on Assisted and Surrogate Gestation. As previously mentioned, this new regulation was broader than the one that had been in effect up until that point. Nevertheless, it was problematic

79 The case was litigated by the organizations UNASSE, A. C. and Indignación, A. C.

because it did not treat all people equally and was, therefore, discriminatory. While some articles went beyond what the local congress could do and regulate, others were so confusing that it did not know how to enforce them, resulting in legal uncertainty for those involved.

Consequently, on February 15, 2016, the Office of the Attorney General of Mexico (PGR, for its Spanish initials) presented an action of unconstitutionality[80] against several articles of this civil code. Among other things, the PGR argued the following: a) requiring a spouse to authorize a woman's participation in a process of surrogacy went against the right to equality between men and women that is protected by the Constitution, and b) that the regulation did not include the issue of payment in surrogacy processes that, according to the PGR, should be altruistic, that is, free of cost.[81]

While the Supreme Court recognized the use of different names for these kinds of agreements (for example, surrogate womb, surrogate motherhood, motherhood by surrogacy, surrogacy of the womb or surrogacy of the uterus, gestational surrogacy, gestation by substitution, and surrogate pregnancy, among others), it clarified that, for purposes of the case, it would use the term *gestación por sustitución*, in English *gestation by substitution*.

To settle the matter, the Court incorporated and considered information that Colegio de Bioética and GIRE contributed to the case in two *amicus curiae* briefs.[82] GIRE's *amicus curiae* brief highlighted that prohibiting this practice will not make it go away; instead, it will encourage an underground practice, which will not allow the State to protect parties, oversee conditions of consent in contracts, or guarantee that clinics and agencies act in accordance with the law and human rights.

80 What is an action of unconstitutionality? See the definition in the glossary at the end of this publication.

81 To see the arguments included in the 16/2016 Action of Unconstitutionality, see GIRE, *Surrogacy in Mexico: The Consequences of Poor Regulation* (2017), p. 26, here: https://gire.org.mx/wp-content/uploads/2020/02/Surrogacy-in-Mexico.-The-Consequences-of-Poor-Regulation.pdf

82 What is an *amicus curiae*? See the definition in the glossary at the end of this publication.

Accordingly, the absence of a regulation on gestation by substitution affects the conditions in which these types of contracts are carried out.

In June 2021, the Supreme Court made the following ruling:[83]

- It determined that it was not up to the local congresses to regulate the technical aspects of assisted reproduction procedures—used in gestation by substitution—or the medical and health conditions of people who may agree to undergo these reproductive procedures and enter into gestation by substitution agreements. However, they are entitled to create laws aimed at regulating the consequences these procedures and agreements may have on people, for example, the recognition of paternity and maternity, filiation, and registry information, among others.

  It invalidated the fifth paragraph of article 380 (b) 3 due to the fact that it went against what is established and protected in the federal Constitution. This article set forth that neither the surrogate nor their spouse could claim maternity or paternity of a child born as the result of this agreement unless the intended parents who signed the contract were either incapacitated or dead. The court established that decisions made regarding children's rights must be based on what is in a child's best interests,[84] and that these interests cannot be decided in a general manner, but rather that they should be based on the circumstances of each situation; that is, the decision must be made on a case-by-case basis. Likewise, it pointed out that procreational will is one of the most essential elements to consider when determining the ties between parents and their children.

  It also invalidated the paragraphs in the gestation by substitution contracts that made the participation of women (or people with the capacity for pregnancy) conditional on the approval of their spouse or common-law partner. By requiring authorization from a partner,

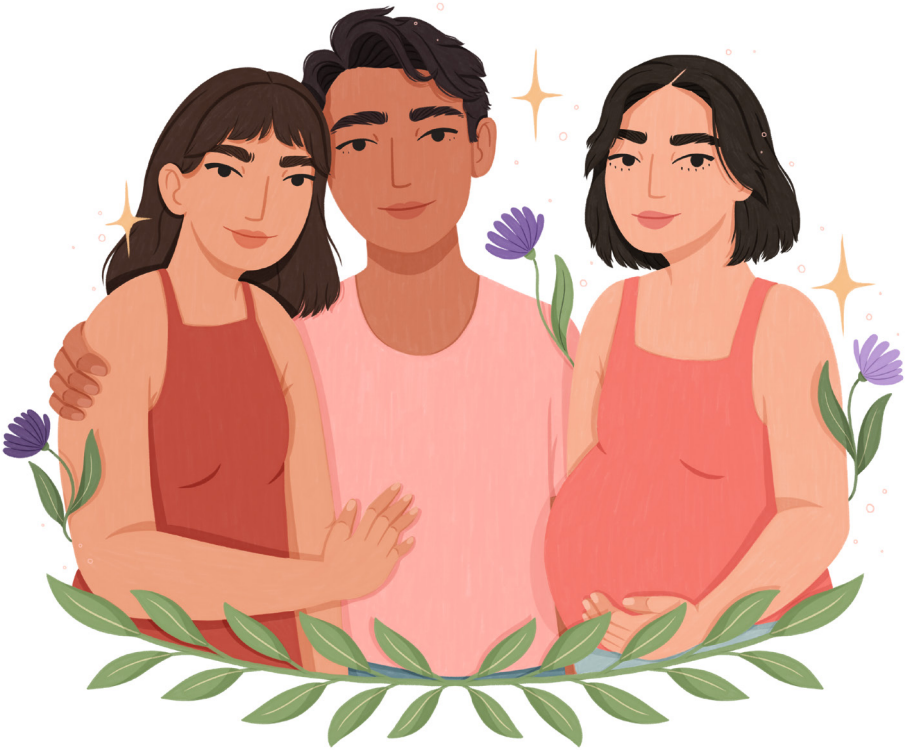
83 You can see the ruling in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=194229

84 What is meant by something being in a child's best interest? See the definition in the glossary at the end of this publication..

these provisions uphold the stereotype that women (or people with the capacity for pregnancy) cannot autonomously exercise their reproductive capacity. Therefore, the Full Court Chamber recognized that the decision to participate in a surrogacy contract is to be made by the woman (or person with the capacity for pregnancy).

- Furthermore, it invalidated the article requiring the contracting party to sign the gestation contract as the mother and father, as this excluded same-sex couples and any single person from participating in a surrogacy contract, which was discriminatory in terms of sexual orientation and marital status.
- It recognized the validity of the article that the PGR said should be revised (for not specifying if the contract should be free of cost or allow for a financial compensation), as it respects the principles and rights protected by the federal Constitution. On this point, the Full Court Chamber indicated that regulating the decision to establish commercial or altruist systems in gestation by substitution contracts was up to local legislatures and that they are not required to specify it. This is because all those involved in this kind of contract are protected in a broader sense through a comprehensive regulation that allows both onerous contracts—that is, those that involve financial payment—and free or altruistic ones. Prohibiting financial compensation can lead to surrogacy being carried out in secrecy, which would affect women (or pregnant people) in situations of greater vulnerability. The Court recognized the need to respect the principle of autonomous will, which means that the surrogate is the one who should decide on the compensation or payment, as she (or they) is the one who will undergo the procedure.
- Finally, facing the urgent need to regulate all the aspects of assisted reproduction procedures and, specifically, gestation by substitution, the Court made an invitation to carry out the necessary reforms promptly and as a priority, both at a federal level (on health matters) and in local congresses (in their civil codes), in order to have adequate and effective regulations.

Reproductive Rights and Assisted Reproduction



Even though the Supreme Court's Full Court Chamber reached a consensus to recognize and guarantee the rights of those who participate in these kinds of agreements, a little over three years have gone by now, and the medical and technical aspects of assisted reproduction procedures have yet to be regulated at the federal level. At the local level, aspects related to the consequences of assisted reproduction techniques or gestation by substitution have still not been regulated either. In Tabasco, subsequent rulings once again questioned the constitutionality of the regulation on gestation by substitution in the state's civil code.

e) *Amparo* lawsuit filed by a private clinic (*Amparo* under Review 129/2019)

Shortly after the resolution of the previous ruling, the Full Court Chamber of the Supreme Court[85] challenged an *amparo* lawsuit filed against the Civil Code of Tabasco by a private company that offers assisted reproduction services in this state. The company questioned the constitutionality of several articles of this state's civil code that were related to gestation by substitution, as it considered that, among other aspects, the regulation violated the right to freedom of work and commerce based on an unjustified distinction on the basis of nationality.

In June 2021, the Court's Full Court Chamber ruled[86] that it is unconstitutional to establish that all the parties must be Mexican citizens as a requirement to enter into a gestation contract, as this violates the principles of equality and non-discrimination as well as the right to freedom of commerce,[87] which are recognized in the first and fifth articles of the Constitution.

85 At first, the First Chamber was responsible for examining this case, but since the matter was similar to the one discussed in the Action of Unconstitutionality 16/2016, the First Chamber decided it should be examined and settled by the Full Court Chamber.

86 You can see the ruling in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=250856

87 Freedom of commerce refers to the capacity of people and companies to buy, sell, and trade goods and services freely without excessive restrictions imposed by the government or other entities.

GIRE has pointed out that establishing a requirement with respect to the nationality of those who can participate in a surrogacy process is a form of discrimination. This is because, among others, it may affect foreigners who are permanent or temporary residents of the country, including those who are common-law partners of or married to Mexican citizens.[88]

While the aim is to prevent abuse related to surrogacy in the international context, based on experience, in addition to being discriminatory, these restrictions do not solve the problems that arise in practice. In fact, they can have unwanted effects, such as the stigmatization and persecution of foreigners or delays or rejection when registering the children once they are born. In any case, a possible solution to mitigate the risks and impacts of transnational surrogacy—that is, which spans over several nations—would be to establish a requirement that makes it necessary to verify one's habitual residence or present a specific visa to be able to access these agreements. By doing this, the imposition of unjustified restrictions and discrimination could be avoided.

Furthermore, the company also argued that requesting that a notary public participate in gestation contracts—which is one of the requirements included in the civil code—was not justified either. In this case, the Full Court Chamber did not consider that this requirement was excessive or unjustified. On the contrary, it recognized that it is up to local congresses to consider additional protections for people who participate in these contracts, and that subjecting them to dual supervision—before the notary public and before the judicial authority—increases protection for all the involved parties. This dual supervision can contribute to verifying if the will of the parties is free and informed, especially in the case of the will of the surrogate.

88 GIRE, *Surrogacy in Mexico: The Consequences of Poor Regulation* (2017), p. 22, https://gire.org.mx/wp-content/uploads/2020/02/Surrogacy-in-Mexico.-The-Consequences-of-Poor-Regulation.pdf

f) *Amparo* Lawsuit for the Heteronormative Regulation of Tabasco (*Amparo* under Review 516/2018)

In December 2021, the First Chamber of the Supreme Court settled an *amparo* lawsuit in which it indicated that the entire chapter of the Civil Code of Tabasco that regulates gestation by substitution is based on a *heteronormative conception*[89] of marriage and of family, which unjustifiably excludes same-sex couples as well as single people who wish to form a family.[90]

The plaintiffs questioned the content of the articles that regulated matters related to both the health conditions and the age of the woman who would assume maternity (the contracting mother) and to the rules that regulated the health conditions and age of the surrogate. Likewise, they considered that it was inadequate for an article to establish that the baby born as a result of the gestation by substitution contract to be registered under the statue of adoption.[91]

In the *amparo* lawsuit, they also challenged aspects related to the health and age requirements imposed on the contracting parties, such as the physical impossibility of getting pregnant or having a medical contraindication to carrying out gestation to full term in one's uterus, as well as being within the age range of 25 to 40. On this point, the First Chamber considered what it had already upheld in other cases; namely, that because it is dealing with aspects related to family planning—which fall under general health—local congresses cannot regulate the health conditions of those involved in gestation by substitution agreements. Therefore, it is not up to local legislative bodies to decide who can have access to assisted reproduction techniques, provided that, as established in the LGS, all aspects related to the health conditions of people who intervene in assisted reproduction techniques are exclusively under the jurisdiction of the federation.

89 What does heteronormative mean? See the definition in the glossary at the end of this publication.

90 You can see the ruling in Spanish here: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=238027

91 This is provided that, upon settling the Action of Unconstitutionality 16/2016 (subsection e of the section on cases of national courts) the Court had already invalidated some of the regulations of the Civil Code of Tabasco that this *amparo* lawsuit was challenging.

Furthermore, the Court pointed out that there is not a valid reason to impose an age range that limits the right of women or people with the capacity for pregnancy who wish to procreate by opting for gestation by substitution. In this specific case, the First Chamber did refer to both women and people with the capacity for pregnancy throughout the entire ruling.

Next, the First Chamber analyzed the regulations on the surrogate's health conditions and age range—between 25 and 35—based on an argument of not putting the surrogate's wellbeing or the healthy development of the fetus at risk during the gestational period.

Regarding the age range, the Court considered that is was valid to establish this requirement, provided that its aim was to protect the surrogate's health by lowering the risk assumed by the pregnancy based on age. It also concluded that the fact of verifying that the pregnant person does not have any kind of condition that would put their wellbeing and the healthy development of the fetus at risk during the pregnancy was valid as long as it is understood as the need to prove that the person is in the optimal health conditions to carry out the pregnancy and avoid putting their integral wellbeing at risk and, consequently, to protect the wellbeing and healthy development of the fetus. This measure increases the possibilities of a successful assisted reproduction procedure.

Related to this issue, given the serious context of gender inequality existing in society, the Court considered that it was crucial to include measures related both to the consent expressed by surrogates as well as the possible consequences if one of the involved parties does not fulfill what they agree to in the gestation by substitution contract. To this end, it specified some minimum guidelines addressed to authorities in charge of supervising the validity of these contracts that aim to protect the surrogate, among them:

- Verify that the contract proportionately distributes the implications of non-compliance between the parties and offers greater protection to the participant who is at a disadvantage for financial reasons.

- Supervise that no clauses are agreed upon that deny the gestator the possibility to live in accordance with their life plans or that puts their health at risk.
- In the case that a financial payment is agreed upon, oversee the way it is made and the consequences there will be if it is not carried out according to the agreement in order to guarantee the surrogate's wellbeing.


GESTATIONAL
SURROGACY
CONTRACT

Provided that the *amparo* lawsuit was unanimously settled with four votes in the Court's First Chamber, all judges are required to rule on similar cases in the same way. Therefore, after this lawsuit, the Court has ruled on others in which it has used the same legal and human rights arguments.[92]

g) General Declaration of Unconstitutionality 2/2022

Upon settling the *amparo* lawsuit for Tabasco's heteronormative regulation (*Amparo* under Review 516/2018, subsection g of this section on cases of national courts) the Court's First Chamber determined that several articles of its civil code contained aspects that contravened what was provided by in the Constitution; that is, they were unconstitutional. For example, to access assisted gestation, the intended mother must have a physical impossibility, have a medical contraindication to carry gestation to full term in her uterus, or be within a specific age range. The First Chamber considered that these articles referred to aspects that should be regulated at the federal level, as they are part of the essential or technical regulation that should be administered throughout the entire country when dealing with assisted reproduction procedures.

Since the lawsuit was unanimously settled, it is obligatory for all judges to settle similar cases in the same way as the Court did. Additionally, when the Full Court Chamber or the Chambers determine the unconstitutionality of a general regulation—in this case, the Civil Code of Tabasco—the authority that passed the examined law—in this case, the Congress of Tabasco—is notified that it has a period of 90 days to reform and solve the problem of unconstitutionality. Once this period has passed, if the congress has not modified the articles that were declared unconstitutional, the Court notifies the local congress that it has been annulled; that is, it stops being part of the law in question. (This is called

92 We are referring to the following *amparo* lawsuits that are under review: 780/2017, 516/2018, 820/2018, and 572/2019.

a general declaration of unconstitutionality.)[93] This was what happened in this case; on August 15, 2023, the Court annulled those articles.

Both the resolution of the Action of Unconstitutionality 16/2016 and the General Declaration of Unconstitutionality 2/2022 contributed to adding a gender and human rights perspective to the regulatory framework in Tabasco, and it also furthered the distribution of competencies between the federation and states.[94]

93 What is a general declaration of unconstitutionality? See the definition in the glossary at the end of this publication. You can read more about this specific declaration in Spanish, here: https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7465 What is a general declaration of unconstitutionality? See the definition in the glossary at the end of this publication. You can read more about this specific declaration in Spanish, here: https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7465

94 Here, you can see the current text of Chapter VI b on assisted gestation and gestational surrogacy of the Civil Code of Tabasco in Spanish: https://congresotabasco.gob.mx/wp/wp-content/uploads/2023/05/Codigo-Civil-para-el-Estado-de-Tabasco.pdf Here, you can see the current text of Chapter VI b on assisted gestation and gestational surrogacy of the Civil Code of Tabasco in Spanish: https://congresotabasco.gob.mx/wp/wp-content/uploads/2023/05/Codigo-Civil-para-el-Estado-de-Tabasco.pdf

IN CLOSING

The rulings issued by the Supreme Court on matters of surrogacy reveal the need for federal authorities to regulate assisted reproduction techniques with criteria that adhere to human rights and medical science. This is to ensure that the provision of assisted reproduction services in public and private settings align with constitutional and international standards.

Once this is achieved and there is a general regulation at the national level, local legislative bodies will be able to develop the aspects that they are allowed to regulate in their civil codes. In addition to having a set of norms that provide certainty regarding assisted reproduction practices in the country, this legal framework will also allow people to benefit from this kind of service in a safe way and without discrimination.

While there is still a long road ahead of us before these practices become a social reality that is accessible for all people, with the arguments it has given in each of the cases presented in this section, Mexico's Supreme Court of Justice has developed many of the guidelines and principles that are necessary to achieve it.

GENERAL CONCLUSIONS

Addressing matters such as obstetric violence, maternal death, and assisted reproduction from a human rights perspective, in which people make their own decisions in all aspects related to their reproduction, is fundamental. This involves the possibility to choose freely and to have access to all the information that is necessary to benefit from the greatest available scientific progress. In this sense, respecting reproductive autonomy is key for guaranteeing that all people can decide whether they want to reproduce and that they will no longer have to face health services that aim to impose discriminatory decisions and restrictions on their life plans.

There have been significant advancements related to the defense of reproductive rights, which have had backing from national judicial bodies as well as international ones, such as the Inter-American Court. Through their emblematic rulings, step by step, they have paved the way for judges and the instruments that protect human rights to guarantee reproductive health and respect for the autonomy of women and pregnant people as well as to eliminate discrimination in the access to reproductive health services.

Despite the progress that has been made, there are still significant challenges, such as the lack of understanding of obstetric violence as a type of gender-based and institutional violence and the lack of standardized regulations that provide guarantees on matters of assisted reproduction in Mexico. Even so, beyond being legal milestones, these rulings are keystones for promoting the development of a reproductive health system that is inclusive and just. The rulings analyzed in this publication are a testimony of the road traveled, and they have been fundamental for demanding access to respectful health services that are free of stigmas and discrimination.

This publication aims to be a tool to foster outreach, advocacy, and support for this cause. By sharing these decisions, we want to collaborate with the work of activists, academics, legislators, and everyone who is interested in defending the reproductive rights of women and pregnant people in Mexico. These judicial decisions, along with the regulatory advancements in matters of reproductive health, make it possible

to demand that the Mexican State fulfill its obligation to guarantee that women and people with the capacity for pregnancy may fully exercise their reproductive rights within a framework of equality and justice.

GLOSSARY

Action of unconstitutionality. In Mexico, this type of lawsuit is also used to file claims related to human rights. However, in contrast to an *amparo* lawsuit, which can be requested by an individual, acts of unconstitutionality can only be presented by certain authorities against modifications that are made to laws or regulations. The Full Court Chamber of the Supreme Court is always responsible for settling these acts, and it can do so in two ways: by confirming that what a regulation says agrees with the Constitution or by declaring that it contradicts it. In order for the Supreme Court to determine the latter, it requires that eight of the eleven ministers that form the Full Court Chamber vote for this decision.

Amicus curiae. Translated from the Latin, this means *friends of the court*. These are technical opinions that can be presented by people who have an interest in the ruling of a case even if they are not participating in the trial; they contribute elements that can be relevant to the judge's ruling on the case. For example, a civil association can send the Supreme Court an *amicus curiae* brief on a matter that is being settled that is related to one of the subjects it does work on.

***Amparo* lawsuit.** This is a type of lawsuit in Mexico that allows any person or group of people to file a claim when one or more authorities violate their human rights; for example, when someone imposes a contraceptive method on them without their consent. There are cases which can be taken to the Supreme Court to be settled due to the importance of their consequences.

***Amparo* lawsuit under review.** This is a legal procedure that a person (a complainant) or group of people can turn to when they do not agree with the decision made by the first judge who examined the case. In such cases, the decision that was pronounced can be reviewed by a higher body, such as the Supreme Court. In essence, it is the review of an original decision to guarantee it was made correctly and in accordance with the applicable constitutional and international regulations.

Artificial insemination. This consists of placing the semen of a partner or a donor inside the uterus. This is a low complexity assisted reproduction treatment in which, in contrast to *in vitro* fertilization, the fertilization process takes place inside the uterus.

Assisted human reproduction techniques. These are all the interventions that include *in vitro* manipulation—outside of the body—of human ova, spermatozoa, or embryos in order to achieve reproduction.

Best interest of the child. This means that, in all the decisions and acts involving children and adolescents, priority should be given to protecting them and guaranteeing their wellbeing and rights.

Criminal law. This is the branch of law (such as family law or civil law, which regulate matters of marriage or properties, respectively) that establishes the rules indicating which conducts are crimes; that is, those that a government can persecute, investigate, and punish. Most crimes are described in criminal codes; in Mexico, there are 33, a federal code and a code for each state.

Fallopian tubal ligation or bilateral tubal occlusion. This is a permanent contraceptive method that consists of cutting and tying the fallopian tubes to keep ova from passing through them to join with the spermatozoon. To choose this contraceptive method, previous advising sessions must be attended, and the informed consent of the health system user must be obtained.

Filiation. This is the name given to the ties between parents and their children. Legally, it is a civil status that involves both rights and obligations.

Gamete. This is a reproductive cell, that is, the spermatozoa and ova. These cells are combined during fertilization to form a new organism.

General declaration of unconstitutionality. This occurs when one of the chambers or the Full Court Chamber of the Supreme Court, in an *amparo* lawsuit under review, rules that a general regulation goes against what is established in the Constitution. The Court requests that the authority that passed the regulation modify or revoke it; that is, they ask for it to be annulled or invalidated. If this authority has not done so after 90 days, the Supreme Court issues a general declaration of unconstitutionality, and from that point onward, the regulation in question cannot be applied to anyone again.

Surrogacy. An agreement by which a person accepts to carry out a pregnancy for another person (or other people) who has (have) the intention of acting as the parent(s) of the child who is born as a result of that pregnancy.

Heterologous artificial insemination. This is the type of artificial insemination that is carried out using a donor's sperm.

Heteronormativity. This is the idea that the only valid form of social behavior is the heterosexual one. This concept is the basis of discriminatory and prejudiced arguments against the LGBT+ community, especially when it comes to diverse families.

Homologous artificial insemination. This is the type of artificial insemination that is carried out using the partner's sperm.

Human rights and reproductive rights. These are the rights that all people have simply for being human. Human rights are written in the Constitution and in international treaties, but the authorities are the ones who must guarantee that they are respected. In turn, reproductive rights are human rights that involve a specific set of freedoms and rights related to reproduction. Women and people with the capacity for pregnancy have the freedom to choose about any matter related to their body and

reproductive health, without anyone requiring them to do so and without anyone pressuring them. Moreover, they should have the same possibilities as any other person. Furthermore, they have the right to access establishments, goods, materials, services, and information related to health and to choose whether they want to get pregnant, and if so, when. In this case, they have the right to receive timely, quality service during pregnancy, childbirth, and puerperium.

Informed consent. This is consent that is granted previously, freely, and voluntarily once the health system user has received understandable and accessible information about the procedure that will be carried out as well as about the risks, benefits, and available alternatives. This is in order for the person to be able to decide whether or not they wish to subject themselves to the procedure without being subject to any kind of threat or pressure and to also ensure their decision is respected.

Initiative. This is the name of the document that includes a proposal to create, eliminate, or modify a law. Generally, initiatives are presented by a legislator or by a member of the executive branch; in some cases, they can also be presented by a group of citizens.

Integral reparation. This is a human right of all people who are victims or survivors of a human rights violation; it means that all the impacts caused by the violation of the right should be restored. It covers the following five types of measures whose observance should be guaranteed by authorities, always with the victims' consent:

- **Restitution.** This is the creation of conditions so that people will be in a state that is as similar as possible to the one they were in before their human rights were violated. For example, if a contraceptive method, such as an intrauterine device (IUD) is inserted in someone without their consent, they have the right to have it removed.

- **Rehabilitation.** These are measures to address any physical or psychological damage that a person has suffered resulting from a violation of their human rights. For example, giving this person access to adequate psychosocial therapy.

- **Compensation.** This is the payment for the material and immaterial impacts that a person suffered as a result of human rights violations.[95] For example, the total payment of the salaries they did not receive upon losing their job when their human rights were violated or the total amount of money they spent when seeking justice.

- **Satisfaction.** These are measures that aim to compensate for pain by reconstructing the truth, sharing historical memory, and dignifying victims.[96] For example, changing the name of a street or making a monument as a tribute, or organizing an event to offer a public apology.

- **Non-repetition.** These are measures that aim to guarantee that the human rights violations in question do not happen again, neither to the victim nor to other people. For example, changing a regulation when it is unjust or establishing a public policy that makes it possible to prevent similar situations in the future.

Intended parent(s). The person or people who wish to assume the parenting responsibilities of a child who is born of a pregnancy despite not having gestated this child.

95 Material damage refers to damage that can be financially quantified or calculated in financial terms, while immaterial damage includes the suffering, distress, and psychological and emotional impacts that a person who has been a victim of human rights violations experiences.

96 This is how it was defined by the Unit for Victims of the Government of Colombia. You can read it here in Spanish: https://www.unidadvictimas.gov.co/es/medidas-de-satisfaccion/

International human rights bodies. These are the institutions, from both the international system and the regional systems (such as the Inter-American Court of Human Rights) that work together to protect and guarantee human rights and justice on a regional or global scale. To achieve this, they settle disputes, establish standards, and supervise the enforcement of treaties and agreements related to human rights issues, such as reproductive health.

International human rights treaties. These are documents in which several countries of the world form written agreements stating that the same human rights shall be respected within their territories, and they commit to making this a reality.

***In vitro* fertilization.** A procedure in which ova and spermatozoa are combined outside of the body to form embryos.

Judging with a gender perspective. This is the obligation of judges to consider the way a law and its interpretation may affect people differently based on their gender. To uphold this perspective, it is necessary to recognize that there is asymmetry of power between men and women, but also between diverse gender identities. That is, there are inequalities among genders, and this means that the problems people experience, as well as institutional regulations and practices, impact them in different ways.[97]

Maternal death. Death that occurs during pregnancy, childbirth, or puerperium for any cause that is related to or worsened by these conditions or their handling except for accidental causes.

97 To learn more about this obligation, you can read the *Protocolo para juzgar con perspectiva de género* [Protocol on Judging with a Gender Perspective], published in 2020 by the Mexico's General Directorate of Human Rights of the Supreme Court of Justice (pp. 119-133). It is available in Spanish here: https://is.gd/Tw075w

Maternal mortality ratio. This is the measure that evaluates the existence and seriousness of restrictions around access to reproductive health services at national and international levels. This measure expresses the number of pregnant people who die during pregnancy, childbirth, and puerperium for every 100,000 live births per year.

Mexico's National Health System (SNS). This includes all the institutions and bodies from the public, social, and private sector that provide health services to the population located within the Mexican territory.

Obstetric violence. This is a specific form of violence against women and other people with the capacity for pregnancy resulting from the structural defects of the National Health System in the care provided for pregnancy, childbirth, and puerperium, and it constitutes a human rights violation.

Official Mexican Regulations (NOMs, for the Spanish initials). These are technical regulations that aim to establish the characteristics that certain processes or services must meet. The NOMs related to health issues are obligatory for all the health units of the public, social, and private sectors that are part of the National Health System.

Procreational will. This is a person's conscious and free decision that assumes that another person, who is born through an assisted reproduction procedure, is their child even when there are no biological ties between them.

Puerperium. The period that begins immediately after childbirth and that lasts for six weeks (42 days) after the end of the pregnancy.[98]

98 See the executive summary of the *WHO recommendations on maternal and newborn care for a positive postnatal experience* (2022), here:

Reproductive autonomy. This refers to the capacity of all people to make their own decisions about any matter related to their own reproduction, such as planning if they wish to have children as well as when and how to have them.

Reproductive health. This is the right every person has to make informed, free, and responsible decisions regarding their reproduction. In this sense, it is related to the right to receive information and have access to materials, goods, safe contraceptive methods, establishments, and appropriate health services that allow them to make these decisions in such a way that their reproductive processes are carried out in safe and healthy conditions.[99]

Rulings. These are also known as veredicts. These are documents in which a judge drafts the decision that puts an end to a conflict. Depending on the judicial process, some rulings may be appealed; this means that another judge, from a higher level, is asked to review whether or not the first ruling was adequate. In this sense, provided that the Supreme Court is the highest authority in the Judicial Branch of the Federation, its rulings cannot be appealed. Moreover, a ruling should always explain what effects it will have; that is, it should specify to the involved parties what will change, in legal terms, based on its ruling. For example, if, upon settling an action of unconstitutionality, eight of the Court's eleven ministers decide that a regulation goes against what is established in the Constitution, the effect of its ruling will be to invalidate the analyzed regulation, which means that said regulation will no longer legally exist and, therefore, its enforcement will not be valid.[100]

99 This is how it was defined by the IACHR Court in matters such as the Case of Caso I. V. vs. Bolivia. You can read it here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf

100 This happened in the Action of Unconstitutionality 148/2017 in which Mexico's Supreme Court declared that it was unconstitutional to ban abortion completely and, therefore, invalidated the articles of the Criminal Code of Coahuila that impeded and penalized the right to choose. To learn more about this issue, read: GIRE, *Step by Step: Mexico's Supreme Court Rulings on Abortion* (2022), here: https://gire.org.mx/wp-content/uploads/2022/11/Step-by-step-.pdf

Surrogate. A person who carries out the pregnancy according to the people who have the intention to assume the parenting responsibilities of the child who is born as a result of said pregnancy. The gametes can be from the intended parents and/or from third parties.

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