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Guaranteed Access to Safe and Legal Abortions: The True Revolution of Mexico City's Legal Reforms Regarding Abortion

Part I: Introduction

On April 24, 2007, the Legislative Assembly of the Federal District¹ of Mexico or ALDF (Asamblea Legislativa de Distrito Federal) reformed Articles 145 through 148 of the Criminal Code and Article Fourteen of the Health Code, all dealing with abortion.² The reforms were signed into law the next day by Mexico City's Mayor, Marcelo Ebrard, a champion of socially liberal causes.³ These reforms dramatically altered the previous laws by legalizing abortion – in all circumstances – up until twelve weeks of pregnancy. Before this point, abortion was only legal in four situations: where the pregnancy was the result of rape, where the pregnancy would put the woman's life at risk, where the fetus would be seriously deformed or where the woman suffered forced artificial insemination.⁴

The technical right to receive a safe and legal abortion, however, was very different from having actual *access* to a safe and legal abortion. Responding to the problem of access, the ALDF reformed not only the Criminal Code, but also the Health

¹ The Federal District of Mexico is also known as Mexico City.

² Most of the translations from Spanish in this work are my own, with the invaluable help of Edgar Villanueva, L.L.M. Candidate, The George Washington University Law School. At times, I also used translations where provided by the source.

³ See Hector Tobar, *In México, Abortion is Out from the Shadows: The Stigma Attached to it has Begun to Fade as Large Numbers of Procedures Have Been Done in the Capital*. Los Angeles Times, Nov. 3, 2007, at A1.

⁴ See Código Penal de Distrito Federal [Criminal Code of the Federal District], *as amended*, Gaceta Oficial del Distrito Federal, 4 Mayo (May) 2007 (Mex.).

Law to continue to expand on changes made in 2000⁵ that attempted to assure that women who pursued safe abortions would not be thwarted by state actors, who opposed abortion, or by doctors and hospitals, who consciously objected to abortion.⁶ Both prongs of the 2007 legislation were nothing short of revolutionary in Latin America. Never before has Latin American seen such wide-spread decriminalization of abortion, nor have there ever been such effective and meaningful mechanisms in place to guarantee access to legal forms of abortions.

Part II of this paper discusses the evolution of abortion laws in Mexico, from the codification of the Mexican Criminal Code to the creation of the revolutionary Robles Law in 2000. This section will also lay out how the 2007 reforms substantively altered both Mexico City's Criminal Code and its Health Law. Part II additionally discusses modern international action and jurisprudence on the abortion issue. Part III is divided into six separate sections, which each look at the changes to the abortion law through a different lens. Section A of this Part focuses on how international action on abortion has influenced Mexico City's abortion laws. Section B focuses on the major and revolutionary changes to the Health Law. Part C and D discuss the impact of religion and class on the abortion debate in Mexico City. Part E focuses on the recent constitutional challenge to the 2007 reforms before the Mexican Supreme Court and the outcome of that case. Finally part F looks towards the future and how the changes in Mexico City's abortion laws may impact the rest of Mexico and Latin America.

⁵ The 2000 changes regarding access first appeared in the Criminal Code. It was not until 2007 that the Health Code was reformed to include abortion reforms. Before this point, all abortion reform was solely within the realm of the Criminal Code.

⁶ See Grupo de Información en Reproducción Elegida, *Paulina: Five Years Later*, 2005, at 43.

Part II: Discussion

Although Mexico City is the second largest Catholic city in the world,⁷ the reforms to the abortion laws passed by an overwhelming majority of the Legislative Assembly.⁸ It was a historic signal that Mexico City was finally confronting the grim and pervasive reality that in Latin America, and in Mexico in particular, women are seeking dangerous, clandestine abortions in record numbers, despite total to near-total bans on abortion throughout the region. According to the United Nations, more than 500,000 Mexican women seek illegal abortions every year, with more than 2,000 dying from botched or unsafe procedures.⁹ Mexico City is following an international movement which also recognizes that the banning of abortion in poverty-stricken areas where access to sexual education and contraception is limited can have devastating consequences for women in the country.¹⁰ The United Nations addressed Mexico's need to deal with the serious problem of unsafe abortions in the most recent periodic report on the country during the Thirty-sixth session of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW).¹¹ The recent changes in Mexico City's law, then, are nothing short of historic in the way that they incorporate this international recognition of a woman's right to a safe abortion and, more importantly, in that they provide a legal mechanism to ensure that women have *actual* access to safe abortions. These reforms are even more significant because of the social and political changes that had to occur for these gains to be realized.

⁷ *Secretaria de Salud Mexicana definio normas realizaci3n de practicas abortivas*, UPI LatAm, April 4, 200 (noting that ninety percent of the residents of Mexico City profess to be Catholic).

⁸ See James C. McKinley, Jr., *Mexico City Legalizes Abortion Early in Term*, N.Y. Times, April 25, 2007.

⁹ *Catholics to Appeal Mexico City's Abortion Law*. The Telegraph (London), April 27, 2007.

¹⁰ See Jack Chang, *Latin America's Abortion Bans Don't Deter Women: WHO Reports that Nations There Have the Highest Rate in the World*, The Houston Chronicle, Oct. 28, 2007.

¹¹ Concluding Comments of the Committee on the Elimination of Discrimination Against Women (CEDAW): Mexico, U.N. GAOR., 36th Sess., U.N. Doc C/Mex/Co/6 (Aug. 25, 2006).

A. Language and Influences:

A few notes are necessary at this point about the significance of language and cultural influences on the abortion debate. The reader should be familiar with the distinction between “liberalization” of abortion (which is to make the laws less restrictive) and the “decriminalizing” of abortion (which is to make the practice legal).¹² Latin America has a long and slow tradition of liberalization, which is distinct from a tradition of decriminalizing abortion, a much more familiar trend in the United States and Europe.¹³ In addition, in much of the literature and official governmental and legal documents, abortion in Mexico is referred to as the “interruption of pregnancy.” Indeed, the 2000 reform that meant to increase women’s access to legal abortions in the case of rape was entitled the program for the “Legal Interruption of Pregnancy.”¹⁴ In this way, “abortion,” which is seen as illegal and immoral, is distinguished from the “interruption of pregnancy,” which is legal and acceptable.¹⁵ These differences of language are critical in Latin America, where the politics of “naming” has been an important component in the political and social acceptance of certain types of abortions.¹⁶

Furthermore, for the reader in the United States, it is important to recognize both the similarities and differences between the debate about abortion in Mexico and the United States. The democratic history and jurisprudence of the United States has couched

¹² Mala Htun, *Sex and the State: Abortion, and the Family Under Latin American Dictatorships and Democracies* 144 (Cambridge University Press 2003).

¹³ See The Center for Reproductive Rights, *Roe v. Wade and the Right to Privacy*, Third Edition, 2003, at 51 -58.

¹⁴ See generally Shalini Ananthanarayanan, *Access to Abortion for Victims of Rape in Mexico City: A Case Study of Policy Implementation* (March 2005) (unpublished B.A. thesis, Harvard University) (on file with Pusey Library, Harvard University), 67, (providing a fascinating discussion on the significance of wording in the abortion laws of Mexico and other Latin American countries).

¹⁵ See *id.* at 67 -73.

¹⁶ See *id.*

our abortion debate in terms of a woman's right to choice and privacy.¹⁷ Mexico, on the other hand, has strongly based any liberalization of abortion laws on a woman's right to health.¹⁸ Though feminist movements in both the United States and Mexico have been largely led by the educated elites, the very open focus of the abortion laws in Mexico has been the protection of poor women who are most at risk of having unsafe abortions.¹⁹ Whether this focus on the poor translates into a real effect on the lives of low-income women will be a topic of discussion later in this paper. It is important to note, though, how this focus in Mexico has driven the legal rationale for liberalized abortion laws towards the right to health and less towards a general right to privacy or choice, which is a "right" bestowed on the elites much more than on the poor. Although many abortion activists on both sides of the issue have begun to adopt the language of "choice" and "life," such as the leading Mexican anti-abortion group, For Life (Pro Vida), and the abortion activist group, The Caravan of Women for the Right to Choose (la Caravana de la Mujeres por el Derecho a Decidir),²⁰ the historic focus has been on health.²¹

Finally, it is critical to note that the anti-abortion movement in Mexico has been spear-headed by the Catholic Church.²² Though the United States' Pro-Life Movement also has very close ties to the religious right, it is useful to both differentiate and emphasize the historical and immense power of the Catholic Church when discussing abortion in Latin America. Although the Catholic Church in Mexico, as in the United States, has recently been hit with a series of sex-abuse scandals involving priests, the

¹⁷ See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁸ See Htun, *supra* note 12, at 43.

¹⁹ See Gaceta Oficial de Distrito Federal, 4 May 2007, at 2.

²⁰ See *Festegan su derecho a decidir*, Reforma (México), Sep. 24, 2007.

²¹ See Htun, *supra* note 12, at 43.

²² See *id.*, at 12 -13, 23 -25.

Church remains enormously influential in Mexico and any discussion of abortion must also discuss the reactions and policies of the Church.²³ It is also the Church's influence that has guided the debate more towards a health rationale than a choice rationale.²⁴ Indeed, the political and social underpinnings of a country have an enormous impact on how the country frames and justifies abortion. In Cuba, for instance, the strong socialist influences have paved the way for full access to abortion in the first trimester on pragmatic grounds, having nothing to do with a women's right to choose or her right to health.²⁵ It is critical, therefore, to understand the major socio-political influences in a country when attempting to understand the logic of abortion liberalization.

B. The Historical Picture in Latin America and Mexico

Latin America has some of the most restrictive abortion laws in the world.²⁶ Paradoxically, it also has the highest rates of abortion of anywhere in the world.²⁷ Thirty-one out of every 1,000 women in Latin America will have an abortion at some point in her life.²⁸ Approximately 5,000 women die each year in Latin America as a result of unsafe, clandestine abortions; another 800,000 are treated at hospitals.²⁹ And yet Latin America has been slow to change. Indeed, only Cuba and Puerto Rico allow legal abortions on demand.³⁰ All other countries either ban it in all circumstances or allow it in limited circumstances (for example, to save a woman's life, to preserve a woman's

²³ See *Breaking Taboo: Abortion Rights in Mexico*. The Economist, April 28, 2007; See also McKinley, Jr., *supra* note 8.

²⁴ See Htun, *supra* note 12, at 23, 144 -145.

²⁵ *Id.*, at 45, (noting that "in most of these [socialist] countries . . . the state permitted abortion to keep families small and women in the labor force, not because it recognized a women's right to choose.").

²⁶ See Chang, *supra* note 9.

²⁷ See *id.*

²⁸ *Id.*

²⁹ *A Question of Life and Death: Abortion*, The Economist, May 19, 2007.

³⁰ The Center for Reproductive Rights, *The World's Abortion Laws: Fact Sheet*, May 2007.

physical or mental health or in cases of rape).³¹ Every Mexican state allows some sort of exception for abortion, most commonly in cases of rape or where the procedure is necessary to save the woman's life.³² As Mala Htun noted in her work, *Sex and the State: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies*, "criminal laws and social mores share an intimate relationship, which has tied the Criminal Code in Latin American countries inextricably to the morality of the country."³³ As she notes, "in [the] civil law countries of Latin America, laws on abortion, divorce and family relations are embedded in the criminal codes. They are not short term policies introduced and withdrawn by each incoming government but weighty tomes passed from one generation to the next . . . the civil and criminal laws of Latin America thus have a strong ethical component, making ideas an important part of debates about legal change."³⁴

One of the most common exceptions to the immensely restrictive abortion laws of Latin America allows for an abortion in the case of rape. These so-called "compassionate abortions" were first legalized in Argentina and Brazil in the early 1920s.³⁵ Other states quickly followed, including Mexico, which legalized "compassionate abortions" in the 1930s.³⁶ Initially the Catholic Church did not energetically resist these early reforms as general sentiment in Latin America was so strongly opposed to abortion that clerical concerns about the advancing cause of abortion were very limited.³⁷ And although

³¹ See *The World's Abortion Laws*, *supra* note 30; See also *Nicaragua: firman ley contra aborto*, BBC Mundo, Nov. 18, 2006.

³² Grupo de Información en Reproducción Elegida (GIRE), *El aborto en los códigos penales de la entidades federativas*, June 2007.

³³ Htun, *supra* note 12, at 2.

³⁴ See *id.*, at 2-3.

³⁵ See *id.*, at 16, 143.

³⁶ See *id.*, at 143.

³⁷ See *id.*, at 145.

abortions have been allowed in the case of rape in Mexico since the Criminal Code was codified in 1931, a woman's access to an abortion in those cases has been limited, at best.³⁸ Indeed, a study between 1991 and 2001 at the Hospital Gea González, the only public hospital to perform abortions at the time, showed that out of 197 women who had become pregnant as the result of rape, only forty-four received authorized abortions.³⁹

C. State of the Law in Mexico

i. The Law: Pre-2000

Much of Mexico's legal system mirrors that of the United States. Mexico is made up of thirty-one states and the Federal District (Distrito Federal), also known as Mexico City.⁴⁰ The national Constitution, which was written in 1917 after The Mexican Revolution, guides the states, but each state is responsible for promulgating their own laws.⁴¹ Although Mexico's legal system is within the civil law tradition, there are some strong common law influences, including *stare decisis*.⁴² The federal judiciary consists of sixty-eight district courts (including the courts of the Federal District), twenty-one circuit courts and an appointed Supreme Court.⁴³ Though Article Seventeen of the Mexican Constitution provides that justice must be both prompt and impartial, the legal system has been plagued in recent history with a reputation for corruption, inefficiency and endless delays.⁴⁴

³⁸ See Ananthanarayanan, *supra* note 14, at 44.

³⁹ See *id.*

⁴⁰ Foreign Law Guide: Mexico, <http://www.foreignlawguide.com/ip/fl/Mexico%20Introduction.htm>, (last visited Feb. 24, 2009), 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. Law 715 (2004).

The country's political history has, in recent memory, been in a state of flux that has had a profound impact on the legal system. During most of Mexico's modern history, the country was controlled by the Revolutionary Institutional Party or PRI (Partido Revolucionario Institucional).⁴⁵ Since 1968, PRI's power had been fading in the country and especially in Mexico City.⁴⁶ In 1997, PRI lost the Mexico City mayoral election to the Democratic Revolutionary Party or PRD (Partido de la Revolución Democrática), indicating a seismic shift in power in Mexican politics.⁴⁷ In 2000, the greatest change came when the PRI lost the presidency to Vicente Fox of the National Action Party or PAN (Partido Acción Nacional).⁴⁸ This period of time came to be known as "the change" ("el cambio") within Mexico.⁴⁹ "The change" also transformed the Mexican legal system by revitalizing the National Supreme Court of Justice or SCJN (Suprema Corte de Justicia),⁵⁰ which had once ruled almost exclusively in favor of the executive.⁵¹ Indeed, with this change has also come a move to a "functional version of the tri-partite division of powers,"⁵² as well as a renewed openness to federalism and state power.⁵³

Within this context of transformation, there was a revitalized hope for change among the population. Before the 2000 mayoral election in Mexico City, a coalition of non-governmental organizations (NGOs) mobilized to create the 1998-1999 Mexico City Campaign for Access to Justice for Women, which included suggestions for the

⁴⁵ Ananthanarayanan, *supra* note 14, at 26.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See generally id.*; *See also* Kossick, *supra* note 44, at 715-728 (providing a brief political history of Mexico).

⁵⁰ *See* Kossick, *supra* note 44, at 727.

⁵¹ *See id.*, at 750.

⁵² *Id.*, at 753.

⁵³ Telephone Interview with Professor Jorge Domínguez, Antonio Madero Professor of Mexican and Latin American Politics and Economics, Harvard University (Oct. 17, 2007).

liberalization of abortion laws in Mexico City.⁵⁴ Most Mexican states still model their abortion laws on those appearing in the original 1931 Criminal Code.⁵⁵ Movements to liberalize abortion laws began in the 1970s, led by groups like Women in Solidary Action (Mujeres en Acción Solidaria) or the National Movement for Women (Movimiento Nacional de Mujeres).⁵⁶ In 1976, the Coalition of Feminist Women (Coalición de Mujeres Feministas) brought the first (unsuccessful) proposal to legalize abortion before Congress.⁵⁷ And in 1992, the Information Group on Reproductive Choice or GIRE (Grupo de Información en Reproducción Elegida) was founded.⁵⁸ GIRE would soon emerge as the strongest advocate for reproductive choice in Mexico and it still leads the movement today.⁵⁹

The struggle for these groups has not always been easy. For instance, the 1998-1999 Campaign had particular hope that they would succeed in liberalizing abortion laws after being given specific assurances by the PRD candidate for mayor, Cuauhtémoc Cárdenas, that he would push for liberalization upon entering office.⁶⁰ Once in office, though, Cárdenas came to realize what so many other Mexican politicians had realized before him – supporting abortion in a Catholic country can be a costly political move supported by few and promoted by fewer.⁶¹

⁵⁴ See Ananthanarayanan, *supra* note 14, at 24.

⁵⁵ See *id.*

⁵⁶ See Olga Bustos, *La despenalización no promueve el aborto*, La Jornada Ciencias, <http://ciencias.jornada.com.mx/foros/despenalizacion-del-aborto/opinion/segunda-sesion/la-despenalizacion-no-promueve-el-aborto>, (last visited Feb. 24, 2009).

⁵⁷ See *id.*

⁵⁸ See GIRE website, *What Is GIRE?(English version)*, <http://www.gire.org.mx/contenido.php?informacion=197>, (last visited Feb. 24, 2009).

⁵⁹ See Bustos, *supra* note 56.

⁶⁰ See Ananthanarayanan, *supra* note 14, at 25.

⁶¹ See *id.*

ii. Changes in 2000: The Robles Law

In 2000 the issue of *access* to legal abortions finally came to the forefront of the debate about abortion in Mexico after the press got hold of the story of a thirteen-year-old rape victim in the state of Baja California who had been denied access to a legal abortion by the state Attorney General and the local public hospital.⁶² Included among the accusations against the State were stories about the Attorney General, Salazar Pimental, strongly trying to dissuade the girl, who was known only as “Paulina,” from having an abortion by bringing her to see a Catholic priest.⁶³ In April 2000, Paulina’s son was born and her case was taken up by a number of Mexican feminists groups, who brought a suit against Mexico in the Inter-American Court on Human Rights and generated a massive amount of press coverage.⁶⁴ What became clear from the *Paulina case*, as it was dubbed in Mexico, was the significant gap between the *de jure* access to abortion in the case of a rape that was on the books and the *de facto* access to abortion in women’s lives.⁶⁵ What was even more apparent after *Paulina* is that most Mexicans, who showed general outrage at the young girl’s treatment, were not nearly as opposed to abortion as had long been suspected.⁶⁶ In her work, “Access to Abortion for Victims of Rape in Mexico City: A Case Study of Policy Implementation,” Shalini Ananthanarayanan compiled a number of surveys taken about national and local public opinion on abortion in Mexico from the late 1990s until 2000 and found that in 2000, sixty-nine percent of Mexicans on the national level agreed that abortion should be permitted in certain circumstances and

⁶² *Paulina: Five Years Later*, *supra* note 6, at 5.

⁶³ *Id.*, at 17.

⁶⁴ See *Paulina: Five Years Later*, *supra* note 6, at 16; See also Dr. Santiago Cantón, *Petition to the Inter-American Court of Human Rights: El Centro Legal Para Derechos Reproductivos y Politicas Publicas v. Los Estados Unidos Mexicanos*, no date provided, www.reproductiverights.org/pdf/crt_PeticionPaulinaFINAL.pdf, (last visited April 8, 2008).

⁶⁵ See Ananthanarayanan, *supra* note 14, at 44.

⁶⁶ See *id.*, at 32.

eighty percent of Mexico City youth surveyed agreed that abortions should be provided in the case of rape.⁶⁷

Those in power in Mexico City were not blind to this public outrage over the *Paulina* case. While abortions in cases of rape had long been legal, a study in 2001 found that judicial decisions (or lack thereof) had made it virtually impossible for victims of rape to actually access them.⁶⁸ The PDR, having lost the presidential election, was in a unique position to distinguish itself in this area without risking a major election.

It was in this environment that significant changes – especially in the area of access – were made within Mexico City’s abortion laws. On August 18, 2000, a series of reforms were passed, entitled the Robles Law after Rosario Robles, the first female mayor of Mexico City,⁶⁹ that would profoundly change the legal landscape of abortion law in Mexico City.⁷⁰ The Robles law consisted of two prongs – the first reformed Article 334 of the Criminal Code to extend the exceptions for legal abortion to three additional circumstances: where the mother’s life was at risk, where there was artificial insemination without consent and where the fetus suffered from a severe genetic defect.⁷¹ The second part of the Robles Law directly addressed the issue of access for the first time

⁶⁷ *See id.*

⁶⁸ Margarita Martinez, *Women’s Rights Ignored by Latin American Courts*, Women’s ENews, Nov. 30, 2001, <http://www.womensenews.org/article.cfm?aid=738> (last visited Feb. 24, 2009).

⁶⁹ Julia Preston, *Mexico City Journal: Tough, Cheerful Mayor Wins Hearts*, N.Y. Times, Feb. 28, 2000.

⁷⁰ The Robles Law can be found in Decreto por el que se reforman y adicionan diversas disposiciones del Código Penal para el Distrito Federal y del Código de Procedimientos Penales para el Distrito Federal, [Decree for the Reform and Addition of Diverse Dispositions of the Penal Code for the Federal District and the Code for Penal Procedures for the Federal District], Asamblea Legislativa del Distrito Federal (ALDF), *as amended*, Gaceta Oficial del Distrito Federal, 24 Agosto (August) 2000 (Mex), 2-3; *See also* Ananthanarayanan, *supra* note 14, at 137, translating The Robles Law.

⁷¹ *See* Ananthanarayanan, *supra* note 14, at 14.

in Mexican legal history by laying out a procedure for the authorization and administration of abortion in the case of rape.⁷²

Under the Robles Law, Article 131 of the Criminal Code provided that if a victim of rape requested an abortion, she could present evidence of the rape to the Public Ministry and then apply for authorization for an abortion at a public hospital.⁷³ It further provided that hospitals were obligated to perform abortions and that in all cases where a woman sought an abortion, she would be provided with “impartial, objective, true and sufficient information about procedures, risk, consequences and effects.”⁷⁴ Possibly to appease the conservative faction in the country, the law also required that the public health institution “offer the orientation and support [after the abortion] necessary to facilitate [the woman’s] personal . . . rehabilitation in order to avoid subsequent abortions.”⁷⁵

In April 2002, The Ministry of Health for Mexico City also published guidelines to accompany the law, entitled “General Guidelines for the Organization and Operation of Health Services Related to the Interruption of Pregnancy in the Federal District.”⁷⁶ These guidelines helped strike a balance between the rights of the rape victim and the rights of the conscientiously objecting doctor by providing that in instances where a doctor chose not to perform an abortion, he had to find a doctor who did not object to

⁷² *See id.*

⁷³ *See id.*, at 42 -43.

⁷⁴ *See id.*, at 14 – 15; *See also*, Gaceta Oficial del Distrito Federal, 24 August 2000, at 2.

⁷⁵ Gaceta Oficial del Distrito Federal, 24 August 2000, at 2.

⁷⁶ Lineamientos generales de organización y operación de los servicios de salud relacionados con la interrupción del embarazo en el Distrito Federal [General Guidelines on Organization and Operation of Health Services related to Legal Interruption of Pregnancy in Mexico City], Secretaría de Salud del Distrito Federal (SSDF), Circular/GDF-SSDF/02/02, Gaceta Oficial del Distrito Federal, 23 Abril (April) 2002 (Mex), 22 - 25.

performing the procedure.⁷⁷ Where the procedure was urgent, however, even a conscientious objector was obliged to perform the abortion⁷⁸ This essentially provided that each public hospital have some non-objecting doctors on staff.⁷⁹ Though there were still barriers to implementation after the Robles Law passed, the fact that access had become such a considerable part of the reform would pave the way for even greater change in the future.

iii. 2007 Reforms⁸⁰

In April 2007, the ALDF radicalized abortion laws in a way never experienced in Latin America before. In a vote of forty-nine to nineteen (with one abstention), the Assembly passed a comprehensive set of reforms that legalized abortion up until twelve weeks of pregnancy for any reason and also greatly expanded a woman's access to

⁷⁷ See *Paulina: 5 Years Later*, *supra* note 6, at 46, (quoting the Mexico City Health Law December 2003, Paragraph 7, Article 16: "In the cases permitted by the new Penal Code of Mexico City, health care providers whose religious beliefs or personal convictions conflict with their obligation to perform legal abortions and, thus render them conscientious objectors, must refer the woman to a doctor who does not object to performing an abortion. When the termination of a pregnancy is of such urgency as to safeguard the woman's health or life, health care providers cannot invoke their right to conscientious objection. Public health institutions shall be obligated to guarantee the timely provision of abortion services and permanent availability of staff that are not conscientious objectors on the issue.").

⁷⁸ *Id.*

⁷⁹ *Gaceta Oficial del Distrito Federal*, 23 April 2002, at 22 – 25.

⁸⁰ A note on sources is necessary at this point. For this section, I have strongly relied on the Dictamen: Iniciativa De Reforma De Los Artículos 145, 146 Y Deroga El 147 Y 148 Del Código Penal Para el Distrito Federal; Reforma el Artículo 14 Fracción II, Y se Anexa La Fracción X Del Artículo 2 y los Artículos 14 Bis 1, 14 Bis 2, 14 Bis 3, 14 Bis 4, 14 Bis 5, 14 Bis 6 y se Derogan los Artículos 16 Bis 6 y 16 Bis 7 de la Ley de Salud del Distrito Federal [Resolution: Initiative to Reform Articles 145, 146 and Repeal 147 and 148 of the Criminal Code for the Federal District; Reform of Article 14, Fraction II and the Addition of Fraction X of Article 2 and Article 14 Bis 1, 14 Bis 2, 14 Bis 3, 14 Bis 4, 14 Bis 5, 14 Bis 6 and the Repeal of Articles 16 Bis 6 and 16 Bis 7 of the Health Law of the Federal District], *as amended*, Asamblea Legislativa del Distrito Federal (ALDF), 19 Abril (April) 2007 (Mex), (presenting the official Resolution written by Diputado (Congressman) Armando Tonatiuh González Case and accepted by the ALDF during their April 24, 2007 vote. The Resolution explains the proposed changes to both the Criminal Code and the Health Law and their rationale). (Hereinafter "Dictamen").

abortion, not just in cases of rape this time, but at any point during the first twelve weeks of her pregnancy.⁸¹

Articles 144, 145, 146 and 147 of the Criminal Code for the Federal District (Código Penal del Distrito Federal) were reformed. Significantly, Article 144 was changed from its original reading of “abortion is the death of the product of conception at any moment of pregnancy”⁸² to read, “abortion is the interruption of pregnancy after the twelfth week of gestation.”⁸³ Article 147 previously laid out the punishment for abortion by requiring that “one to three years in prison will be imposed on a woman who voluntarily practices an abortion or consents to have another do the abortion.”⁸⁴ In the reformed Code, Article 145 became the code for punishment and now states, “Three to six months in prison will be imposed or 100 to 300 days of community service for a woman who voluntarily practices an abortion or allows another to do the abortion, after twelve weeks of pregnancy.”⁸⁵ Article 148, which stated exceptions that “will be considered excluded from penal criminal responsibility for the crime of abortion” remained the same as before.⁸⁶

In addition to these changes in the Criminal Code, there were also profound changes to the Health Law (Ley de Salud del Distrito Federal). Specifically, the addition of Paragraph X to Article Two of the Law set up the Clinical Commission of Evaluation (Comisión Clínica Valoración) to “register the number of people seeking an interruption

⁸¹ See Código Penal Para el Distrito Federal [Penal Code for the Federal District], *as amended*, Gaceta Oficial del Distrito Federal, 26 Abril (April) 2007 (Mex), 2; See also Gaceta Oficial del Distrito Federal, 4 May 2007.

⁸² Código Penal Para el Distrito Federal [Penal Code for the Federal District], *as amended*, La Gaceta Oficial del Distrito Federal, 2 Febrero (February) 2007 (Mex), 46.

⁸³ Gaceta Oficial del Distrito Federal, 26 April 2007, at 2.

⁸⁴ Gaceta Oficial del Distrito Federal, 2 Feb. 2007, at 47.

⁸⁵ Gaceta Oficial del Distrito Federal, 26 April 2007, at 3.

⁸⁶ Gaceta Oficial del Distrito Federal, 2 Feb. 2007, at 47.

of pregnancy.”⁸⁷ In addition, there were a number of additions to Article Fourteen of the Health Law in bis one through six.⁸⁸ These changes dramatically expanded the scope of services provided to women seeking legal abortions. Article Fourteen bis one established the right of the woman to seek an abortion within the first twelve weeks of pregnancy and the following articles provided protections for that right.⁸⁹ For instance, Article Fourteen bis three acts to guarantee that doctors perform abortions on demand by requiring hospitals to report all requests for abortions to the Clinical Commission of Evaluation. Article Fourteen bis five assures that all public hospitals will provide free abortions to women seeking them.⁹⁰ Bis six of the same article recognizes that Mexico is a society with a “plurality of beliefs,” but insists that doctors who are conscientious objectors must contact a non-objecting doctor to perform a requested abortion.⁹¹

In addition, as part of the “secondary law”⁹² of the health code, a seven-step guide was published for health care professionals to follow in performing legal abortions.⁹³ Among other requirements, a doctor has to ensure that the woman seeking the abortion is indeed within the twelve week period and he must obtain her informed consent, which also requires giving the woman fair and accurate information about her options.⁹⁴

The ALDF also established a “criteria of reasonableness” (“un criterio de razonabilidad”) for deciding on the twelve-week mark for legal abortions. This

⁸⁷ Dictamen, *supra* note 80, at 34.

⁸⁸ In Spanish, these additions are noted as “artículos 14 bis 1, 14 bis 2, 14 bis 3, 14 bis 4, 14 bis 5 y 14 bis 6. The term “bis” is used in Mexican law as an addition, not a subsection. Because it difficult to capture the meaning of “bis” in English, I will use the Spanish term in this paper.

⁸⁹ Dictamen, *supra* note 80, at 35.

⁹⁰ *Id.*, at 36.

⁹¹ *Id.*, at 37.

⁹² The “secondary law” in Mexico consists of agreements within specific Ministries – for instance, the Ministry of Health – on how the laws will be carried out. These agreements then become law.

⁹³ Gaceta Oficial del Distrito Federal, 4 May 2007, at 2-3.

⁹⁴ *Id.*, at 3.

reasonableness standard was based on a desire to avoid an “arbitrary result” and create a fair balance between the rights of both the fetus and the mother.⁹⁵ For the purposes of this discussion, the ALDF distinguished between the definition of fertilization and implantation, noting that fertilization was the moment the sperm penetrated the egg, whereas implantation occurs when the zygote is implanted in the endometrios and pregnancy begins.⁹⁶ Though the Resolution did not note the legal distinction between these two phases, it did ultimately give seven reasons for picking twelve weeks as the mark between legal and illegal abortions. The reasons given were 1.) maternal mortality is lowest for abortions performed before the first trimester, 2.) the medical procedure for abortions performed under twelve weeks is the best established in Mexico City and is in line with international standards laid out by the World Health Organization, 3.) during the first trimester the fetus’s nervous system has not yet fully developed and cannot perceive certain complex sensations – namely, pain. 4.) up until twelve weeks, the embryo weighs only twenty grams and measures eight centimeters, 5.) the fetus is not viable during the first twelve weeks of pregnancy, 6.) of every 100 pregnancies, between thirteen and fifteen percent end in miscarriages. Of those, nine out of ten occur within the first twelve weeks of pregnancy, and finally 7.) gestational differences appear between the twelfth and thirteenth week, when the embryo becomes a fetus.”⁹⁷ In defining this standard, the ALDF took its cue from the World Health Organization and the International Federation of Gynecology and Obstetrics, among others – just one way in which the ALDF would rely on the international community for guidance in the abortion debate.⁹⁸

⁹⁵ Dictamen, *supra* note 80, at 27.

⁹⁶ *Id.*, at 30.

⁹⁷ *Id.*, at 28 -29.

⁹⁸ *Id.*, at 30.

D. International Action on Abortion

Much of the debate and change in Mexico surrounding abortion law reflects a greater global movement toward reform of abortion laws.⁹⁹ The United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (which was ratified by most Latin American countries in the 1980s and 1990s)¹⁰⁰ – has been critical in guiding and shaping reproductive health policy in Mexico.¹⁰¹ The CEDAW created certain norms of gender equality that, in theory, became law in the ratifying countries.¹⁰² Furthermore, the CEDAW regularly publishes reports on specific countries, including Mexico, noting where improvement is still needed on issues of gender equality.¹⁰³

In addition, the United Nations conferences in Cairo (1994) and Beijing (1995) both addressed unsafe abortions.¹⁰⁴ The Cairo program recognized unsafe abortion as a major health issue, while the Beijing Platform for Action went further by proposing both that abortion be decriminalized and that countries take steps to address the causes and consequences of illegal abortion.¹⁰⁵ All these proposals were reinforced at the five-year review of the Beijing Platform.¹⁰⁶ The review, however, noted that “while some measures have been taken in some countries, the actions set out in . . . the Platform for Action regarding the health impact of unsafe abortion and the need to reduce the recourse to

⁹⁹ See *Roe v. Wade and Right to Privacy*, *supra* note 13, at 51.

¹⁰⁰ See Htun, *supra* note 12, at 16.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *Sixth Periodic Report on Mexico*, 36th Sess., U.N. DocC/SR.752(B) (Sep. 13, 2006), 7.

¹⁰⁴ See *Roe v Wade and Right to Privacy*, *supra* note 13, at 52.

¹⁰⁵ See *id.*, at 52- 53.

¹⁰⁶ See *id.*, at 53.

abortion have not been fully implemented” – voicing yet another call by the United Nations to reduce unsafe abortions globally.¹⁰⁷

In addition, a 2006 report by the United Nations’ Economic and Social Council, entitled “Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health” called for the extensive use of indicators to determine the robustness of the right to health in a particular country.¹⁰⁸ Almost every indicator on the list addressed the individual’s access to reproductive health.¹⁰⁹ Among the questions that the report laid out and demanded that countries ask of themselves are the following: “Does the State have a national sexual and reproductive health strategy or plan of action?;” “Does the strategy/plan of action establish a procedure for the State to regularly disseminate information on sexual and reproductive health policies?;” “Does State law criminalize abortion?;” and “Does the State have a strategy and plan of action to prevent unsafe abortions or to provide post-abortion care?”¹¹⁰ The report also stressed that eliminating unsafe abortion should become a part of any meaningful health program.¹¹¹

Additionally, changes in the United States and in other countries have had an international impact.¹¹² According to a 2003 report by the Center for Reproductive Rights, which reviewed abortion policy around the globe, the years following the *Roe v. Wade* decision have seen “an emerging global trend toward recognizing women’s right to

¹⁰⁷ *Further actions and initiatives to implement the Beijing Declaration and the Platform for Action*, U.N. GAOR, 23rd Special Sess., U.N. Doc. A/Res/s-23 (2000), (June 5-9, 2000), 6.

¹⁰⁸ Commission on Human Rights, *Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Paul Hunt, 62nd Sess, U.N. Doc E/CN.4/2006/48 (March 3, 2006), 23 (listing indicators in 18 major areas of government).

¹⁰⁹ *Report of the Special Rapporteur*, *supra* note 108, at 23 – 33.

¹¹⁰ *Id.*, at 23- 34.

¹¹¹ *Id.*, at 31 -32.

¹¹² *Roe v. Wade and Right to Privacy*, *supra* note 13, at 51.

reproductive autonomy.¹¹³ For instance, Sweden, Denmark and France are among some of the countries that also reformed their abortion policy during the *Roe*-era. This trend toward global recognition has continued, with countries like Turkey, Romania and South Africa more recently expanding the scope of their abortion laws.¹¹⁴ In addition, just this April, Amnesty International, a historically Catholic organization, which has avoided the abortion debate, adopted a resolution that supports abortion in the case of rape, incest, violence or where the women's health or life was in danger, as part of a comprehensive plan to keep women free from violence and sexual coercion.¹¹⁵

Within the first month of the enactment of the 2007 reforms in Mexico City, there were 700 requests for information about abortion from local hospitals and 300 abortions performed at public facilities.¹¹⁶ Indeed, within 126 days, the number of abortions performed shot up to 2,000.¹¹⁷ Recent reports claim the number is now up to 12,500.¹¹⁸ In a country where abortion has so long been shrouded in degradation and shame, it is no small thing that so many have sought out the opportunity to end their pregnancies in a public hospital. Mexico City's former Secretary of Health, Manuel Mondragón y Kalb, was vigilant in monitoring that hospitals conform to the law.¹¹⁹ In the weeks after the law was passed, Mondragón was clear to note that Mexico City did not become a "paradise of

¹¹³ *Id.*

¹¹⁴ *Id.*, at 56-59.

¹¹⁵ See Theresa Braine, *Amnesty Abortion Stance Bolsters Mexico Activists*, Women's ENews, Aug. 17, 2007, <http://www.womensenews.org/article.cfm/dyn/aid/3280/context/archive> (last visited Feb. 24, 2009); See also Amnesty International *Votes to Support Abortion Rights*, Conscience, Sep. 22, 2007.

¹¹⁶ Manuel Durán, *Acumulan hospitales peticiones de aborto: Afirma Mondragón que han interrumpido "decenas" de embarazos, hay 300 solicitudes más*, Reforma (Mexico), May 15, 2007.

¹¹⁷ Silvia Arellano, *Abortions Pass the 2,000 Mark: Mexico City Minister of Health*, Milenio (Mexico), Aug. 31, 2007, translated from the Spanish and republished at <http://www.gire.org.mx/contenido.php?informacion=149> (last visited on Feb. 24, 2009).

¹¹⁸ Elisabeth Malkin, *Mexico Court is Set to Uphold Legalized Abortion in Capital*, N.Y. Times, Aug. 28, 2008.

¹¹⁹ Arellano, *supra* note 113.

abortion,” as many conservative politicians and clergy members predicted it would if Mexico City became the only Mexican state with legal abortions.¹²⁰ Instead, Mexico City became a haven for women, who choose to end their pregnancies in a safe and legal way. The historic nature of this legal and socio-political change is explored in the Analysis section below.

Part III: Analysis

Full treatment of this topic requires looking to a number of areas, including the legal and socio-political influences that predominate the abortion debate at this time. By tracing through the international legal influences, the religious challenges and compromises that surround the debate, the societal benefits of abortion, as well as the subsequent support of the law by the Supreme Court, this paper attempts to create a framework with which to view not only the law in Mexico City, but perhaps future reforms across both Mexico and Latin America.

A. International Influence and Legal Reform on Abortion

At the base of this movement toward more liberalized abortion laws has been a paradigm shift from the fetus’s “right to the life” towards a woman’s “right to health.” Although neither right has been abandoned for the other, in passing the 2007 reforms the ALDF engaged in a serious debate about balancing these rights, taking care to assure that a woman’s right to health was also respected.¹²¹ Much as the jurisprudence in the United

¹²⁰ Mirtha Hernández, *Suma ya la SSa 215 abortos: Diario se practican en promedio, 7 interrupciones de embarazo. Entrega secretario informe actualizado, destaca que ninguna mujer ha muerto*, Reforma (Mexico), May 25, 2007.

¹²¹ Dictamen, *supra* note 80, at 20.

States has tried to strike a balance between these two competing interests,¹²² so too did the ALDF struggle to find a defining line that protected both a baby's life and a woman's health.¹²³ At the end, the legislature adopted the reasonableness standard explained above.¹²⁴

Indeed, Mexico has looked to the international community for much more than just the defining terms of the abortion debate. International organizations and treaties – like the CEDAW – have been critical guideposts in Mexico's attempts at reform.¹²⁵ CEDAW, in fact, has made its own specific attempts to influence Mexico; a 2006 CEDAW report on Mexico made specific mention of the confusion regarding Mexico's abortion policy.¹²⁶ The CEDAW has also commented on the abortion policies of other Latin American countries and emphasized that the creation of a meaningful abortion policy is directly related to providing citizens access to safe reproductive health options.¹²⁷

Much of the language emerging from the international community has focused on the health consequences of unsafe abortions. This international influence on the Mexican abortion debate can be seen directly in the 2007 Resolution that came before the ALDF, which cited decisions by the Inter-American Court of Human Rights, as well as the

¹²² See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), (recognizing the “principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child).

¹²³ Dictamen, *supra* 80, at 27 (recognizing that “life in gestation . . . [should] continue receiving the protection of the penal law, [while] at the same time guaranteeing the exercise of the fundamental rights of women.”).

¹²⁴ *Id.*, 27.

¹²⁵ See Htun, *supra* 12, at 16.

¹²⁶ See CEDAW, Report on Mexico, *supra* note 103, at 7.

¹²⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *Responses to the list of issues and questions with regard to the consideration of the combined fifth and sixth periodic reports: Colombia*, 37th Sess., U.N. Doc. CEDAW/C/COL/Q/6/Add.1, (Jan. 6, 2006).

language of international organizations and NGOs.¹²⁸ What has emerged from this international pressure is a move away from the absolute protection of the rights of the unborn baby and towards the protection of the woman's right to health in a modern society that values the "principles of diversity, tolerance and autonomy."¹²⁹ Under Article Four of the Mexican Constitution, individuals are guaranteed equality and liberty.¹³⁰ Within the Resolution, however, the ALDF interpreted Article Four to extend to the protection of a woman's right to reproductive autonomy and health.¹³¹ Indeed, the Resolution noted that the debate on reproduction implicates the rights to life, to health, to equality, to non-discrimination, to liberty, to personal integrity, to freedom from violence, to work and to be educated.¹³² Furthermore, the focus on health may have strong policy purposes in a conservative, Catholic country. As Mala Htun notes in her work on abortion in Latin America, "framing abortion as a question of health is less polarizing and expands the potential constituency supporting change . . . legal abortion may cease to be seen as a threat to traditional family values and more as a necessary measure to avert a public health crisis."¹³³ The legislature of Mexico City, following this international trend, has strongly adopted the language of health to justify the dramatic changes in its abortion law.

Significantly, the Resolution also strongly focused on a new concept of the right of women to engage in some form of family planning. The Resolution notes throughout that women *have the right not to become mothers*; that they have the right to decide in a

¹²⁸ Dictamen, *supra* note 80, at 24, 30.

¹²⁹ *Id.*, at 9.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*, at 21.

¹³³ Htun, *supra* note 12, at 43.

free, responsible and informed way the number and spacing of their children.¹³⁴ In a historically Catholic city, it is nothing short of historic that a woman's *right* to family planning has become so critical to the debate on gender equality. Indeed, much of this language and the extension of the scope of rights have come from the international debate on abortion. The Resolution directly noted that the ALDF is looking to move away from an antiquated concept of gender that reduces women to "simple instruments of reproduction of the human species."¹³⁵ The ALDF has tapped directly into the suggestions and language of the indicators presented by the UN's Economic and Social Council for creating a robust health care system, noting the obligations of the State in providing resources for a woman to make a choice based on her reproductive needs.¹³⁶ Additionally, by reforming the punishment component of the Criminal Code to call for 100 to 300 days of community service instead of one to three years in prison, it seems the ALDF also acknowledged that the moral stigma attached to abortion is fading and that making criminals of women who seek abortions goes against both international consensus on the issue and public opinion in Mexico.¹³⁷

The changes to the Health Law were no less influenced by the international community than those made to the Criminal Code. The ALDF noted in their Resolution that the government is obligated to "promote the expansion and improvement of programs focusing on sexual and reproductive health, as a suitable instrument to avoid unwanted and unplanned pregnancies . . . so that women make informed and responsible

¹³⁴ Dictamen, *supra* note 80, at 9.

¹³⁵ *Id.*, at 23.

¹³⁶ *Id.*, at 10.

¹³⁷ *Id.*, at 6; *See also* Ananthanarayanan, *supra* note 14, at 32.

decisions about interrupting their pregnancy.”¹³⁸ This language is strongly related to that found in the suggestions of the UN’s Economic and Social Council.¹³⁹ In creating a plan for providing safe abortions, the ALDF followed the World Health Organization’s publication “Abortion without Risks: A Technical and Policy Guide to Health Systems.”¹⁴⁰ By grounding the rationalization for abortion in the universal language of health, adopted by so many other countries and international organizations, the ALDF created a law that would be much harder for the Supreme Court to strike down when the reforms were inevitably challenged before the highest court.

It should be noted, however, that the anti-abortion activists have also used the international debate to bolster their position. For instance, the United Nations’ conferences in Cairo, Beijing and New York (2000) provided a network for Latin American anti-abortion activists to come together and build connections.¹⁴¹ Groups opposing abortion in the United States have consistently reached out globally to support the cause in other locations.¹⁴² In 1998, quoting the Universal Declaration of Human Rights, the Convention on Children’s Rights and the Cairo and Beijing conferences, then-President of Argentina, Carlos Menem, declared March 25 the “Day of the Unborn Child” to applause from a global network of anti-abortion activists.¹⁴³

The impact of international human rights groups and treaties cannot be underestimated on either side of the debate. That influence led to a strong justification for the change in the Criminal Code and the Health Law based on a woman’s right to health

¹³⁸ Dictamen, *supra* note 80, at 33.

¹³⁹ Report of the Special Rapporteur, *supra* note 108.

¹⁴⁰ Dictamen, *supra* note 80, at 34 (referencing “Aborto sin riesgos. Guía Técnica y de políticas para Sistemas de Salud,” Organización Mundial de la Salud, Ginebra 2003).

¹⁴¹ See Htun, *supra* note 12, at 16.

¹⁴² See *id.*

¹⁴³ See *id.*, at 162.

and family planning, while for anti-abortion activists the human rights language of these agreements only further supported their protestations to protect “the unborn.”

B. Focus on Health Law

The changes within the Health Law have been most significant in the ways they expand real access to abortion and family planning resources in Mexico. As noted above, the Robles Law was the first movement toward providing access to legal and safe abortions, but only in four limited cases.¹⁴⁴ The second prong of the Robles Law—requiring doctors in public hospitals to perform abortions – was first promoted by Mexico’s then-Secretary of Health, José Antonio González Fernández, who stated in August 2000 that in cases where abortion was legal, doctors in the public health system must perform abortions.¹⁴⁵ He additionally called for the prosecution of doctors who refused to comply with the law.¹⁴⁶ This demand on public hospitals was eventually worked into a section of the secondary Health Law, but only in the limited case of abortions requested after a rape.¹⁴⁷ The changes and additions to the Health Law in 2007, however, greatly expanded the scope of the doctors’ obligations in cases of abortion and also provided for a comprehensive strategy for family planning that would avoid unwanted pregnancies in the future.¹⁴⁸

¹⁴⁴ See Ananthanarayanan, *supra* note 14, at 14, 42 (the four limited cases include: where the mother’s life was at risk, where there was forced artificial insemination, where the fetus suffered from a severe genetic defect and where the pregnancy was the result of rape).

¹⁴⁵ See *Paulina: 5 Years*, *supra* note 6, at 24.

¹⁴⁶ *Id.*

¹⁴⁷ Gaceta Oficial del Distrito Federal, 4 May 2007, at 4; see also Ananthanarayanan, *supra* 14, at 42

¹⁴⁸ Gaceta Oficial del Distrito Federal, 4 May 2007, at 2-3.

It was this new emphasis on the governments' obligation to provide *access* to what was promised in the law that made these changes so significant. As the language of the Resolution makes clear:

the Legislative Assembly of the Federal District in its exercise of its legal duties, must not only adopt rules to provide security and legal certainty for citizens, but also must establish additional mechanisms that allow the administrative organs of public health to, in this particular case, attend to this grave public health problem, with full respect for the dignity and the fundamental rights of women.¹⁴⁹

C. Religion and Abortion

The changes to the Health Law also required the ALDF to attempt a balancing act between the needs of the pregnant woman and the interests of the doctor who conscientiously objects to performing abortions because of her religious beliefs.¹⁵⁰ Freedom of religion in Mexico is protected under Articles Six and Twenty-Four of the Mexican Constitution.¹⁵¹ Indeed, many doctors and nurses, especially during the first few weeks after the law passed, felt compelled to reject their duty in favor of their faith.¹⁵²

Religious objection to abortion was no small matter in the debate over requiring doctors to perform abortions. The Catholic clergy in Mexico and world-wide had come out in the days before the vote on the abortion laws to call for the ex-communication of politicians who voted in favor of the law.¹⁵³ The Archbishops of Mexico City threatened ex-communication for anyone who participated in an abortion.¹⁵⁴ Additionally, the

¹⁴⁹ Dictamen, *supra* note 80, at 8.

¹⁵⁰ *Id.*, at 37-38.

¹⁵¹ *Id.*, at 38.

¹⁵² See Tobar, *supra* note 2; Elisabeth Malkin and Nacha Cattán, *Mexico City Struggles with Law on Abortion*, N.Y. Times, Aug. 25, 2008.

¹⁵³ See *Advierte Iglesia a legisladores: Excomulgarán 'por normatividad' a quienes voten a favor de despenalizar el aborto*, Mural (Mexico), April 24, 2007; See also Malkin and Cattán, *supra* note 152, (noting that the church did not ultimately expel any members of the legislature for his or her vote).

¹⁵⁴ See *Papa-Brasil: Apoyo excomuni3n pol3ticos pro aborto*, ANSA Noticiero en espa3ol, May 9, 2007.

Vatican issued a statement before the vote that abortion, along with gay marriage and euthanasia, was “terrorism with a human face.”¹⁵⁵

The ALDF sought to deal with the Church’s influence on public hospitals and their employees by reinforcing the reforms made in the Robles law and requiring, in Article Fourteen, bis six of the Health Law, that once again hospitals must have non-objecting doctors on call for abortions.¹⁵⁶ The language of the Resolution makes clear that the right to object on religious grounds is not absolute and that the woman’s right to receive the abortion trumps the doctor’s right to object where no non-objecting doctor can be located.¹⁵⁷ To ensure that doctors were performing abortions, Article Fourteen, bis three establishes the Clinical Commission for Evaluation, so that every time a woman requests information about an abortion, it is recorded by an independent, centralized body of the government.¹⁵⁸ Significantly, then-Secretary of Health, Manuel Mondragón y Kalb, under the current Mayor of Mexico City, Marcelo Ebrard, worked to make sure that abortions were readily available to women who sought them before the twelfth week of pregnancy.¹⁵⁹

There have, of course, been instances of resistance and dissatisfaction with this balancing act among health care professionals in Mexico City. A recent report noted that eighty-five percent of gynecologists in the city’s public hospitals have identified themselves as conscientious objectors.¹⁶⁰ One woman interviewed by the Mexican newspaper, *Reforma*, recounted that when she sought an abortion in the days after the law

¹⁵⁵ *Advierte Iglesia a legisladores*, *supra* note 153.

¹⁵⁶ *Dictamen*, *supra* note 80, at 37 – 38.

¹⁵⁷ *Id.*, at 38.

¹⁵⁸ *Id.*, at 35.

¹⁵⁹ *See* Tobar, *supra* note 2; *See also* Malkin and Cattán, *supra* note 152 (noting that the current Secretary of Health, Dr. Armando Ahued, continues the efforts of his predecessor).

¹⁶⁰ *See* Malkin and Cattán, *supra* note 152.

passed the doctors and nurses who performed her abortion, treated her like a leper, with one nurse bemoaning before the abortion, “Mija,¹⁶¹ this is not the best option, I am a mother of a family and I have children, I don’t know how you can do it.”¹⁶² Other accounts, however, reflect a more positive experience. Another woman who had come to Mexico City from Guadalajara for an abortion claimed that, “all the people in Mexico City gave me a lot of support. The person who did my tests, the nurses, the social workers, the psychologist...”¹⁶³ Indeed, the Secretary of Health noted that “the doctors don’t want to involve themselves in legal questions. Here the majority [of doctors] are against abortion, but we have to abide with the law.”¹⁶⁴ Even the anti-abortion activists realize they are losing the cause in the public hospitals. According to Jorge Serrano Limon, the leader of the National Pro-Life Committee in Mexico, “the pro-abortion current is growing tremendously. At the beginning, there was resistance in the medical community. Now there isn’t any.”¹⁶⁵ Interestingly, eighty-one percent of the women who requested abortions in the first month that the procedure was available professed to be Catholic.¹⁶⁶ Both the quickly fading resistance from the medical community, as well as the high number of self-identified Catholics seeking abortions lends weight to the proposition that the reforms in Mexico City could be recreated successfully in other parts of Mexico and across Latin America.

¹⁶¹ Spanish term of affection; “Mija” combines the words “mi hija,” which means “my daughter.”

¹⁶² Sergio Fimbres, *Camina segura la ruta del aborto: Cumple joven los trámites de nueva ley. Recurre ciudadana a las recientes reformas para interrumpir su embarazo*, Reforma (Mexico), May 3, 2007.

¹⁶³ Tobar, *supra* note 2.

¹⁶⁴ Fimbres, *supra* note 162.

¹⁶⁵ Tobar, *supra* note 2.

¹⁶⁶ Iván Sosa, *Ofrecen cifras de atenciones: Atiende Salud local durante un mes a mil 377 mujeres interesadas en aborto*, Reforma (Mexico), May 29, 2007.

D. The Issue of Class

One of the key reasons the ALDF focused so extensively on the issue of access was because of the historical pattern of how abortions have been accessed in Mexico – with the wealthy possessing the only *de facto* access to abortion.¹⁶⁷ While all women had theoretical legal access to abortion (in the case of rape) since the codification of the Criminal Code in 1931, only women of the middle and upper classes, who could manage to pay up for the procedure by a private physician, had real access to abortion (in all circumstances).¹⁶⁸ For those who could not afford the hefty price-tag of a private clinic, the other option was a “back-alley” abortion, also an expensive option for many Mexican women, but also a surprisingly common choice given the attendant dangers of the procedure.¹⁶⁹ Therefore, the protections provided in the Health Law were really meant to avoid discrimination against poor women, who have had historically limited access to quality health services, especially in the realm of abortion.¹⁷⁰ Indeed, in negotiating Article Fifteen, bis five, the Resolution discussed at length the need for abortion services to be provided free of charge.¹⁷¹ In creating these reforms, the ALDF aimed to close the gap between what services were offered by private physicians and public clinics.¹⁷²

This concern for lower class women also informed the emphasis on family planning found in Article Fourteen, bis two and article Sixteen, bis eight of the Health Law, which both propose that as part of the larger expansion of abortion rights, there would also be a new emphasis on access to information about contraceptives and family

¹⁶⁷ Tobar, *supra* note 2.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Dictamen, *supra* note 80, at 39.

¹⁷¹ *Id.*, at 36.

¹⁷² *Id.*, at 39.

planning.¹⁷³ Article Sixteen, bis eight specifically states that in expanding family services, the law hoped to reduce instances of abortions.¹⁷⁴ Among the free services offered under the law are access to and education about “anti-contraceptive methods whose efficiency and security have been scientifically proven,” as well as medical help and information about family planning to women who are seeking an “interruption of pregnancy.”¹⁷⁵ The statement by the Secretary of Health, published in the May 4 *Gaceta*,¹⁷⁶ also lays out a plan for providing family services with the goal of “reducing the number of broken families and [reducing] social injustice, that affects, most of all, women from the least-protected social classes.”¹⁷⁷ The law therefore provides specifically that the target of this legislation is protecting the women most at risk of having illegal and unsafe abortions.

Whether the law – and its focus on access – is truly protecting poor women remains to be seen. According to the Secretary of Health, by late May 2007, of the women who had sought abortions in Mexico City, fifty-four percent had graduated from high school or technical school, seventeen percent had a bachelor’s degree and less than one percent claimed to be illiterate.¹⁷⁸ A study by the Organization for Economic Cooperation and Development rated Mexico’s high school graduation rates at the very bottom of the twenty-nine richest countries.¹⁷⁹ Therefore, the fact that more than seventy percent of the women seeking abortions had a high school degree or higher indicates that the newly free and legal abortions are likely being accessed by the same class of women

¹⁷³ *Id.*, at 35; *See also* *Gaceta Oficial del Distrito Federal*, 26 April 2007, at 3.

¹⁷⁴ *Gaceta Oficial del Distrito Federal*, 26 April 2007, at 3.

¹⁷⁵ *Id.*

¹⁷⁶ The *Gaceta Oficial del Distrito Federal* is akin to the Official Reporter for a state court.

¹⁷⁷ *Gaceta Oficial del Distrito Federal*, 4 May 2007, at 2.

¹⁷⁸ *Sosa*, *supra* note 166.

¹⁷⁹ Ethan Bronner, *Long a Leader, U.S. Now Lags in High School Graduate Rate*, *NY Times*, Nov. 24, 1998.

who had historically had access to abortions. As additional proof of this fact, forty percent of the women seeking abortions were homemakers, twenty-three percent were students and only thirty-five percent claimed to be employed.¹⁸⁰ Whether poorer women will begin taking advantage of the newly available access to abortion will be a topic for future study and a critical indicator for other states and countries looking to follow Mexico City's lead. If wealthy women continue to be over-represented in the pool of women seeking abortions, it will be interesting to note whether that will have an undermining effect on the class rationale for the reformation of the abortion law. Given that the law was strongly based on giving low-income women access to safe abortions, which they could not usually obtain on the illegal market, it may indeed be a future challenge to the law that so few women of that target group are using the provided abortion services.

E. Constitutional Consequences

The abortion laws promulgated by the ALDF have recently passed their most significant hurdle, when the Supreme Court of Mexico upheld the laws by an eight-to-three vote on August 28, 2008.¹⁸¹

The case stemmed from an action by Mexico's Attorney General or PGR (Procuraduría General de la República) and the National Commission for Human Rights or CNDH (Comisión Nacional de Derechos Humanos), a governmental body, who challenged the constitutionality of the reforms one month after the new laws passed.¹⁸² The CNDH objected to the reforms on the grounds that they violated the right to life of

¹⁸⁰ Sosa, *supra* note 166.

¹⁸¹ Elisabeth Malkin, *Mexico: City's Abortion Law is Upheld*, N.Y. Times, Aug. 29, 2008.

¹⁸² See Ella Grajeda, "Abortará" Corte ley de salud, *anticipan*, El Universal (Mexico), Jan. 30, 2008.

the unborn, which the CNDH argued was established in Mexico's constitution.¹⁸³ In addition, the CNDH, which is the Mexican body for the protection of human rights, contested the changes to the Health Law, which obligated hospitals to perform abortions.¹⁸⁴ Both parties claimed that the ALDF violated the separation of powers in Mexico's constitution with regard to the health law reforms, claiming that Mexico City was attempting to regulate an area of the law that was restricted to the federal government's control.¹⁸⁵

Recent trends in the Court's jurisprudence, however, set the stage for the Court to uphold the laws. The SCJN, which until major reformation in 1994 was long considered a handmaiden of the executive branch, has slowly begun to gain its independence over the last two decades.¹⁸⁶ Civil law countries have classically been wary of judicial activism, but the increasing independence of the SCJN has allowed it to vote against the Executive with greater regularity.¹⁸⁷ Furthermore, the decentralization of the Mexican political landscape – from seven decades of one-party rule to competition among parties – has engendered a new respect for federalism within the SCJN.¹⁸⁸ Indeed, as part of a set of judicial reforms in 1994, standing to bring a constitutional controversy, which was once reserved only for the federation and state governments, was opened up to both the Federal District and local municipalities in order to strengthen federalism in Mexico.¹⁸⁹ In addition, this “upswing has been accompanied by the newfound willingness of the

¹⁸³ See Tobar, *supra* note 2; see also Víctor Fuentes, *Pelean aborto al DF: Impugnan ley la PGR y CNDH. Pon en manos de la Suprema Corte constitucionalidad de la despenalización*, El Norte (Mexico), May 26, 2007.

¹⁸⁴ Victor Fuentes, *Abre Corte audiencias sobre aborto*, Reforma (Mexico), April 1, 2008.

¹⁸⁵ Grajeda, *supra* note 182.

¹⁸⁶ See Kossick, *supra* note 44, at 750.

¹⁸⁷ *Id.*, at 54, 764.

¹⁸⁸ Domínguez, *supra* note 53.

¹⁸⁹ See Kossick, *supra* note 44, at 766.

SCJN to proactively provide – in the interest of safeguarding the well-being of the people (*el “bienestar de la persona humana”*) – meaningful guidance with respect to a seemingly unlimited range of contemporary political, commercial, and social issues.”¹⁹⁰ This means that the Court has not only tackled abortion issues in the past (in the *Robles Law* case to be discussed below), but also a number of human rights cases that had once been off-limits.¹⁹¹

Most tellingly, the SCJN had previously confronted the abortion issue in 2000 when the Robles laws passed. In that case, the PAN and the Green Party or PVEM (Partido Verde Ecologista de México) challenged the addition of the fetal impairment exception to the list of circumstances in which abortion would be legal.¹⁹² They also challenged the procedure for authorizing abortions in cases of rape.¹⁹³ Both challenges were based on the ground that abortion violated Mexico’s right to the preservation of life, which protects life starting at conception.¹⁹⁴ In January 2002, the court handed down two decisions addressing the challenges.¹⁹⁵ The Court upheld the fetal impairment exception by a vote of seven to four, but found, even in upholding the law, that abortion was a crime against human life.¹⁹⁶ The Court additionally failed to gain the eight votes

¹⁹⁰ *Id.*, at 768.

¹⁹¹ *Id.*, at 768-770.

¹⁹² Ananthanarayanan, *supra* note 14, at 33-34 (referencing the *Acción de inconstitucionalidad en contra del Código Penal y del Código de Procedimientos Penales para el Distrito Federal* [Action of Inconstitutionality against the Penal Code and the Code of Penal Procedures for the Federal District], Asamblea Legislativa de Distrito Federal (ALDF), *Gaceta Oficial del Distrito Federal*, 25 Septiembre 2000, at 4).

¹⁹³ *Id.*

¹⁹⁴ *Id.*, at 34.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; *See also* “México, “Sesión pública del Pleno de la Corte,” January 30, 2002, 37 – 41.

necessary to strike down the provision that granted the Public Ministry authority to authorize abortions in cases of rape and therefore that too was upheld.¹⁹⁷

Still, it was not entirely clear how the Court would vote on this most recent challenge until the decision was released in late August.¹⁹⁸ Currently, the Bench seems equally split between judges who are characterized as more “traditional” and those who fall into the “liberal wing,” with two judges, Maragarita Luna Ramos and Olga Sánchez Cordero, generally coming out as “centrist” swing votes.¹⁹⁹ Throughout the process, the ALDF and many Mexican feminist groups remained confident that the Court would find in their favor.²⁰⁰ Although the Court had never actively come out in support of abortion, their pattern of past behavior lent itself to the suggestion that it would continue to uphold abortion.

Indeed that is just what the court did on August 28, 2008 when it held that the creation of laws and punishments was outside the scope of the Court’s role and declared that Mexico City was constitutionally permitted to promulgate its own abortion laws.²⁰¹ As María Luisa Sánchez, the Director of GIRE noted before the decision was released, it would be very difficult for the Court to resist a law that protects both women and their health.²⁰²

¹⁹⁷ *Id.*

¹⁹⁸ See Miguel Carbonell, *El año de la Corte*, El Universal (Mexico), Jan. 11, 2008.

¹⁹⁹ *Id.*

²⁰⁰ See Mónica Archundia and Ella Grajeda, *GDF ve seguro ganar juicio sobre aborto*, El Universal (Mexico), Jan. 31, 2008; see also Claudia Balaños, *Confían en que Corte no frene la despenalización del aborto*, El Universal (Mexico), Feb. 5, 2008.

²⁰¹ Suprema Corte de Justicia de la Nación, *Constitucional, Norma De ALDF Que Despenaliza el Aborto en DF hasta la Semana 12 de Gestación*, No. 205/2008, Aug. 28, 2008, http://informa.scjn.gob.mx/constitucional_norma_de_aldf_que_despenaliza_el_a.html (last visited Feb. 24, 2009).

²⁰² See Balaños, *supra* note 200.

F. The Future for Mexico and Other Latin American Countries

The impact of the abortion revolution in Mexico City on the rest of the country and Latin America continues to evolve. The Supreme Court's ruling and newfound respect for State's rights opens the door to other Mexican states passing similar abortion laws as those passed in Mexico City. The head of Pro-Vida in Mexico already fears that the leftist states of Guerrero and Tabasco may follow the capital's lead and also decriminalize abortion.²⁰³ It is less likely, at this point, that changes in Mexico will generally affect other Latin American countries, which tend to have much more centralized legal and political systems.²⁰⁴ Some countries have recently begun to allow some liberalization of abortion laws. Colombia, for instance, which had once banned abortion entirely, loosened their laws slightly in 2006.²⁰⁵ Uruguay came very close to decriminalizing all abortions before the twelfth week of pregnancy when both houses of Congress passed the Sexual Health and Reproduction Law.²⁰⁶ The President, however, vetoed the bill at the last moment, saying that pregnant women needed support, not abortions.²⁰⁷ Still, recently polls indicate that fifty-seven percent of Uruguayans are in favor of legalizing abortion.²⁰⁸ Other countries, however, have been headed in the opposite direction. In 2007 Nicaragua incorporated a ban on the last remaining exception to the general prohibition on abortion, which allowed abortions where a woman's life was

²⁰³ See Tobar, *supra* note 2.

²⁰⁴ Domínguez, *supra* note 53.

²⁰⁵ See *Breaking a Taboo*, *supra* note 23.

²⁰⁶ Jeremy McDermott, *Uruguayan Leader Quits Party Over Abortion Law*, *The Daily Telegraph* (London), Dec. 6, 2008.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

at risk.²⁰⁹ In short order, Nicaragua, which had permitted these so-called “therapeutic abortions” since 1893, witnessed the deaths of ninety women who were denied abortions after it became clear that their pregnancies had put their lives at risk.²¹⁰ Indeed, where the procedure was once common, with 800 to 1,000 abortions performed each year, doctors are now terrified to perform them as the penalties are stiff – a one to three year prison term and loss of their medical license for two to five years.²¹¹ A woman who has a self-induced abortion risks facing one to two years in prison²¹²

Surprisingly, the widespread criminalization of abortion does little, if anything, to prevent actual abortions. According to a study by the World Health Organization and the Alan Guttmacher Institute research group, Latin America has the highest abortion rate in the world.²¹³ The vast majority of these abortions are done in dangerous and unsafe ways that lead to the deaths of tens of thousands of Latin American women each year.²¹⁴ As Mexico City’s model continues to save women’s lives (while the Nicaragua model leads to more unnecessary deaths), perhaps what the Mexico City experiment will provide is a meaningful framework for crafting an abortion law that takes into account a number of different perspectives. By relying heavily on international organizations and treaties to justify a law that focuses on women’s health, especially the health of women who have been historically at risk for unsafe abortions, and, additionally, by making access to abortion a *de facto* reality and not a *de jure* note in the law books, Mexico City has

²⁰⁹ See Jocelyn Getgen, *Reproductive Injustice: An Analysis of Nicaragua’s Complete Abortion Ban*, 41 Cornell Int’l L. J. 143, 151 (2008); See also Jose Silva, *Nicaragua: Due to Abortion Ban, Doctors Stand by as Women Die*, Inter Press Service, October 31, 2007.

²¹⁰ Silva, *supra* note 208.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Chang, *supra* note 9.

²¹⁴ *Id.*

created a system that goes far to stemming the tide of deadly, illegal abortions that plague Latin America.