



Suprema Corte
de Justicia de la Nación



DERECHOS
HUMANOS

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RIGHT TO THE LEGAL TERMINATION OF PREGNANCY
(DERECHO A LA INTERRUPCIÓN LEGAL DEL EMBARAZO)

CASE: *Amparo en Revisión* 1388/2015

REPORTING JUDGE: Alfredo Gutiérrez Ortiz Mena

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE: May 15, 2019

KEY WORDS: right to health, right to equality and non-discrimination, right to life, right to termination of pregnancy, life plan, full reparation of the harm caused, effects of the *amparo*, discriminatory practices, women.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión* 1388/2015, First Chamber, Alfredo Gutiérrez Ortiz Mena, J., decision of May 15, 2019, México.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AR%201388-2015.pdf>

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SUMMARY OF THE *AMPARO EN REVISIÓN* 1388/2015

BACKGROUND: Marisa (beneficiary of the ISSSTE) who requested the termination of her pregnancy because it was considered high risk, filed for the *amparo* and protection of the federal justice system. In the claim she challenged the constitutionality of articles 333 and 334 of the Federal Criminal Code [Código Penal Federal] (CPF) and the official notice through which the health staff denied her request for the termination of her pregnancy, arguing that the refusal to terminate the pregnancy violated her right to health. A district judge in Mexico City heard the matter who determined she did not have subject matter jurisdiction, and therefore a district judge of that same city heard it and decided that the claim was inadmissible. Given this decision, Marisa filed a *recurso de revisión* which at her request was heard by the First Chamber of Mexico's Supreme Court of Justice (this Court) through its authority to assert jurisdiction.

ISSUE PRESENTED TO THE COURT: Whether the dismissal decision declared by the judge in the appealed decision was correct and, secondly, to determine if the authorities indicated as responsible violated their constitutional obligations to protect health when they refused to terminate Marisa's pregnancy for health reasons.

HOLDING: It was determined to grant the *amparo*, essentially, for the following reason: The responsible authorities breached the obligations the constitutional parameter of the right to health imposed on them by denying Marisa access to the termination of her pregnancy in spite of the fact that this action could be counterproductive to her physical and emotional wellbeing. Therefore, it was ordered that Marisa be reestablished in the enjoyment of her right to health and that the responsible authority take charge of providing her the medical and psychological care necessary to restore the harm caused to her in that sphere by the refusal to provide her a service she was entitled to.

VOTE: The First Chamber decided this matter unanimously with five votes of the judges Norma Lucía Piña Hernández (reserved the right to draft a concurring opinion), Luis María Aguilar

Morales (reserved the right to draft a concurring opinion), Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá (reserved the right to draft a concurring opinion).

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=190811>

EXTRACT OF THE *AMPARO EN REVISIÓN* 1388/2015

- p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 15, 2019, issues the following decision.

BACKGROUND

- p.1-2 On September 24, 2013, Marisa was informed that she was pregnant by personnel of the National Medical Center 20th of November [Centro Médico Nacional 20 de Noviembre] (CMN20). In turn, the doctors that attended her informed her that her pregnancy was considered high risk since she had had gastric bypass surgery a few months before; she was 41 years old and was overweight.

- p.2 Subsequently, at 15.5 weeks of gestation, Marisa submitted to a genetic amniocentesis test in order to know if the fetus showed any hereditary problem, running the risk of injuring the sac in which the fetus is found since the procedure implied the introduction of a needle to obtain amniotic liquid.

On October 30, 2013, Marisa received the results of the genetic amniocentesis, which showed that the male fetus had Klinefelter syndrome. This would mean that the fetus would not develop his genitals in puberty, but it would not prevent him from being a self-sufficient person.

Given all these complications that cause a risk to her physical and emotional health, Marisa verbally requested the doctors of the hospital to terminate the pregnancy a couple of times.

- p.2-3 Given the repeated denials, on November 6, 2013, Marisa requested the termination of her pregnancy in writing, in exercise of her right to health and based on the high risk characteristics of her pregnancy, which put at risk her health and life. In this respect Marisa annexed the technical opinion of a doctor specialized in gynecology and obstetrics. In that

opinion, the doctor specified that Marisa was experiencing a high risk pregnancy due to grade III obesity, which caused a greater risk of maternal diabetes, thromboembolism and preeclampsia. In turn, due to the gastric bypass surgery, he specified that Marisa faced the risk of suffering malnutrition and the obstruction of the small intestine by an internal hernia. The issuer of the medical opinion recommended the termination of the pregnancy.

- p.3 As a result of the care given by the hospital that terminated her pregnancy, on November 19, 2013 she was hospitalized in an emergency medical unit Dr. Fernando Quiroz Gutiérrez with middle post abortion puerperium. She was released on November 21, 2013.
- p.3-4 Finally, Marisa received the response of the responsible authorities by mail. In it her petition was denied since the fetus could be self-sufficient even though it had Klinefelter syndrome. It was also indicated that the Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado (ISSSTE) is a federal health institution, which is governed by the General Health Law [Ley General de Salud] (LGS), which does not contemplate the legal termination of pregnancy. Marisa filed the *amparo* and protection of the federal justice system against that denial.
- p.5 The matter was assigned to a district judge of Mexico City who, in a ruling of December 13, 2013, registered the *juicio de amparo indirecto* with the number 1358/2013. After requesting the complainant to state more clearly the challenged act attributed to the responsible authorities, on December 20, 2013 she issued a ruling deciding she lacked competency to hear the matter because she considered it to be criminal in nature.
- p.6 On December 30, 2013, a district judge of Mexico City, who heard the matter, dismissed the constitutional claim, considering that the cause for invalidity established in section XXIII of article 61 of the Amparo Law [Ley de Amparo] (LA), in relation to article 107, section II, first paragraph of the constitution applied. Marisa filed a *recurso de queja* against that decision.

p.6-7 The district judge hearing the matter issued a decision dismissing the proceeding with respect to the challenged acts consisting of the unconstitutionality of articles 333 and 334 of the Federal Criminal Code [Código Penal Federal] (CPF), considering the cause for invalidity contained in section XII, of article 61 of the LA to be applicable, and for the act consisting of the official notice 96.201.1.2.2.2/208/2013 (the official notice), from which the illegal denial of performing an abortion on Marisa arose, considering the cause of invalidity established in section XXII, of article 61 of the LA to apply. Marisa then filed a *recurso de revisión* and requested this Court to exercise its authority to assert jurisdiction to hear the *recurso de revisión*.

STUDY OF THE MERITS

I. Evaluation of the determination of dismissal declared by the district judge

p.23-24 The Court identifies the following as challenged acts and responsible authorities in this matter: a) The official notice through which the responsible authority denies the request for termination of pregnancy for reasons of health, attributed to the Gynecology-Obstetrics coordinator and the head of the Fetal Maternal Medicine services, both of CMN20 of the ISSSTE and; b) Articles 333 and 334 of the CPF which tacitly prohibit the termination of pregnancy for reasons of health, attributed to the President of the United Mexican States.

p.24 Having specified the acts and responsible authorities, this Court proceeds to evaluate the determination of dismissal declared in the appealed decision.

a) Invalidity of the challenged act relative to articles 333 and 334 of the CPF

p.26 This Court considers that it was correct for the district judge to consider the cause for dismissal established in section XII of article 61 of the LA to be present since in this case there is no specific act of application of articles 333 and 334 of the CPF that affects her legal sphere, nor is the challenged act a consequence of the inhibitory effects of the criminal provision. In any case, as is seen from the mere reading of the denial notice, it constitutes an act of application of the LGS, from the understanding of the responsible

authorities that this law prevents them from providing Marisa abortion services for reasons of health.

p.28 Thus, since the attitude of the authority is not expressly based on the federal criminal prohibition nor can be understood as caused by its inhibitory effect, the argument of the unconstitutionality of articles 333 and 334 of the CPF referred to by Marisa is discarded, since there is no act of application of that law.

b) Invalidity of the challenged act relative to the refusal to terminate the pregnancy of the complainant for reasons of health, set forth in the official notice

p.29 In the appealed decision, the district judge considered the cause of invalidity contained in section XXII of article 61 of the LA to be present, considering that it would be legally impossible for the eventual granting of the *amparo* to have any effect, in view of the fact that the object or material of such act ceased to exist, since Marisa expressly stated in her *amparo* claim that on November 11, 2013 her pregnancy was terminated in a private hospital.

p.31 This Court considers that the grievances of Marisa are essentially well-founded and sufficient to assert that the district judge should not have declared the *amparo* invalid with respect to the challenged act consisting of the refusal to terminate the pregnancy for reasons of health, expressed in the official notice.

p.31-32 First of all, Marisa is right when she argues the constitutional judge should determine whether the challenged administrative act issued by the competent authority affected substantive rights and if it involved a direct violation of the obligations that the constitutional right to health imposes on such authority. The constitutionality of the reasons given for denying the service requested must also be established and whether they satisfy the constitutional requirement of being duly grounded in law and fact, and respond, in its terms, to the request made.

- p.32-33 Marisa is also partially right when she asserts that the authorization for the termination of pregnancy that was requested is not the only effect that can be granted to the *amparo*, especially when what is alleged is not only the denial, but also the impact on Marisa's right to health caused by that denial. In this respect, it must be said that health is a process that presumes a series of behaviors to ensure it is adequately preserved, and that implies that health problems that are not adequately and timely addressed provoke consequences that, in turn, harm the right to health. In addition, this Court has held that the presumed initial impossibility of assigning effects to the constitutional decision does not mean in itself that the *juicio de amparo* is invalid nor does it deprive the constitutional proceeding to protect and restore human rights that have been violated of efficacy.
- p.33-34 The essential purpose of an abortion for health reasons is to restore and protect the health of the pregnant person. That health is being affected not only by the pregnancy, but also by the physical or mental illness that appears or worsens with its continuation, which may also complicate the development of the pregnancy. Thus the termination of pregnancy caused by a health complication is the initiation of a process of recovery of health and not its culmination, which makes any denial or deliberate delay in the services of medical care for resolving those issues critical and presumably in violation of human rights. Thus if what is attributed to the responsible authorities is a refusal to provide a health service it can be verified if this attitude involved a violation of Marisa's right to health and its protection, and a relevant form of restitution may be indicated. The necessary protection of health does not cease because the abortion has been performed in a private hospital; rather her state of health should be monitored, especially because her history shows the complications Marisa suffered as a result of the denial.
- p.34 Marisa is also right when she argues that the rigid concept of the procedural rules complicates access to justice of women in the case of a termination of pregnancy. In fact, this Court has already determined repeatedly that the inquiry and decision processes in different matters - civil, family and criminal - must incorporate the gender perspective in order to prevent historic disadvantages based on sex-gender reasons from adversely

affecting the legitimate claims for justice, especially of women and persons of sexual diversity.

p.35-36 In this respect it is important to recall that this Court has already determined that the parameter of constitutional regularity of the right to equality and nondiscrimination recognizes that the latter occurs not only when the rules, policies, practices and programs explicitly invoke a prohibited factor of discrimination, but also when they are apparently neutral but the result of their content or application generates a disproportionate impact on persons or groups in a situation of historic disadvantage, without there being an objective and reasonable justification for this.

p.36 This means that the interpretations of the rules may be discriminatory when they do not reasonably respond to the differences, whether inherent to the persons or created by the social order; in particular when those differences are associated with social, political or economic marginalization, as occurs with the differences of sex-gender identity that tend to place women and persons of sexual diversity at a disadvantage.

Thus, as Marisa argues, if the cause of cessation of effects or cessation of existence of the object or material of the challenged act was strictly applied in all the cases where this appeal is used to challenge violations of human rights committed by the authorities in questions related to pregnancy, the result would be that the institution of the *amparo*, and the restitution of rights it facilitates, would be inaccessible to women when the authorities obstruct or deny them access to a health service that only they need.

p.37 With these actions of the responsible authority, presumptively arbitrary and in violation of human rights, respecting, protecting and guaranteeing those rights would most likely remain outside of constitutional scrutiny, by virtue of an uncontrollable event that, in addition, significantly increases a person's vulnerability, and this in spite of the fact that the rights at play in these cases can obviously be restored, above all if it is taken into account that health is a process and that the termination of pregnancy for health reasons

is only part of the process by which a women initiates the road to recover her health given a complication that appears or is exacerbated with the pregnancy.

Marisa is also right when she argues that in the cases of denial of abortion services, these matters would soon become moot, whether because the pregnancy completes its natural course, or because the woman decides not to submit herself heroically to the risk or the physical and mental suffering of a pregnancy with congenital deformities for the sole purpose of preserving the subject matter of the proceeding. This means that the *amparo* and the restoration of rights pursued in it would be inaccessible for women by reason of a biological difference, unless they choose heroic behavior, which does not even guarantee that the subject matter of the proceeding is preserved, since the pregnancy will terminate anyway and this will occur before a decision on the merits.

p.37-38 In this case, if the judge is considered correct with respect to the dismissal declared in the terms already described, the institution of the *amparo* and the remedies it proposes would be inevitably unavailable to the women who attempt to overcome arbitrary actions of the health authorities consisting of the denial of medical care services to terminate risky pregnancies, unless they agree to submit heroically to the risk of the continuation of the pregnancy.

p.38 Thus, a presumed violation of the constitutional and conventional right to health and its protection would remain outside the scrutiny of the constitutional proceeding, when the authorities responsible for guaranteeing that constitutional right refuse to provide pregnancy termination services for health reasons, even though there is an affiliation that grants a preference for its guarantee and effective fulfillment.

Therefore, this Court considers in this case that a possible violation of constitutional rights by the responsible authorities should not be discarded with the argument that the sole restorative effect of the *amparo* would be to order the termination of the pregnancy. The *amparo* can have effects other than that sole possibility, without altering its restorative purpose.

p.39 First of all, it is incorrect to determine that the refusal of the responsible authorities to carry out the abortion medically indicated for health reasons that was requested of them only constitutes a violation of an possible right of Marisa to terminate a pregnancy when it means a risk to her health, and that authorizing that the procedure be carried out is the only effect that can be imposed as restitution for the violation consisting of the denial.

If the indicated authorities were found responsible for a violation of the right to health of Marisa, the effect of the *amparo* could consist of ordering the restoration of that right and the providing of medical care services to combat the repercussions of the denial on the health of Marisa, to the extent she was obligated to postpone the termination of a pregnancy that risked her health and that required, for that fact, a prompt resolution. Although the pregnancy has been terminated, it cannot be ignored that the denial had dilatory effects that increased the health risk suffered by Marisa, and that provoked various repercussions and complications in that regard.

II. Study of constitutional validity of the challenged act

a) The right to health and its protection

p.42-43 In different precedents this Court has considered that the right to health must be interpreted in light of article 4 of the Constitution and various international instruments, to allow for a normative unity. In those precedents, this Court has determined that the right to health is the right every person has to enjoy the highest level possible of physical and mental health and is justifiable in different dimensions of activity.

p.46 Article 1 of the Constitution establishes that all the authorities have the obligation to respect, guarantee and protect human rights. Specifically, this Court has concluded that the State has three types of obligations arising from the right to health: respect, protection and compliance (guarantee). Those obligations guarantee benefits in terms of availability, accessibility, nondiscrimination, acceptability and quality of the health services. Additionally, by virtue of article 1 of the Constitution, it should be recalled that the State

has the obligation to promote, prevent, investigate violations, sanction and repair the violations of human rights.

p.47 Furthermore, this Court has established that health is a public good whose protection is the responsibility of the State. From this affirmation, this Court has established that this imposes, on the one hand, complex duties on all the public powers inside the State, from the lawmaker and the administration, public hospitals and your personal doctor, to the courts and, on the other hand, imposes duties on private parties, such as doctors, private hospitals, employers and administrators of pension and retirement funds.

b) The right to health and the termination of pregnancy for health reasons

p.50 As stated above, every person has the right to health, understood as the enjoyment of the highest level possible of physical, mental and social wellbeing. The highest level possible of health refers to i) a level of health that permits a person to live with dignity; ii) the socioeconomic factors that make it possible to live a healthy life, including the basic determinants of health, meaning that it is not limited to health care, and iii) access to health services and health protection.

p.51-52 Thus, it can be argued that every woman has the right to benefit from as many measures as permit her to enjoy the best state of health she can reach, among them universal access to the broadest services possible of sexual and reproductive health, including those associated with pregnancy in all its stages and all its vicissitudes, without any type of coercion or discrimination. This covers the obligation of the State to reasonably prevent the risks associated with pregnancy and with unsafe abortion, which in turn covers both an adequate, timely and exhaustive evaluation of the risks that the pregnancy represents for the restoration and protection of the health of each person, and the prompt access to abortion services that may be necessary to preserve the health of the pregnant woman.

p.52 Therefore, and given that health is a right that protects both physical and emotional, and even social, aspects, its adequate guarantee implies the adoption of measures so that the

termination of pregnancy is possible, available, safe and accessible when the continuation of the pregnancy puts the health of women in its broadest sense at risk. This implies that the public health institutions must provide and facilitate these services, and refrain from impeding or obstructing timely access to them.

The exercise of the right to health presumes the elimination of all forms of discrimination and the recognition that the enjoyment of that right implies the emotional, social and physical wellbeing of people during their entire life cycle and, in the specific case of women, the right to sexual and reproductive health.

p.53 Thus, to eliminate discrimination against women it is important that the State applies policies intended to provide women with access to a complete range of high quality health care within their reach, including sexual and reproductive services, which includes the services of medical care that the State provides and has the purpose of promoting, restoring and protecting the health of pregnant persons and the risks associated with pregnancies, particularly those that compromise the preservation or achievement of the physical, mental or social health of women.

p.53-54 Therefore, the access of women to the health services they need must be guaranteed, especially for those located in vulnerable groups. Nondiscrimination in health services requires that the health services guarantee the conditions that ensure women can effectively attend their health needs and that the services that are only required by women, such as the termination of a pregnancy for risks associated with it, will be provided in safe conditions.

p.54 This Court considers, then, that when women request specific services that only they require, such as the termination of pregnancy for health reasons, the denial of such services and the barriers that restrict or limit access to them, constitute acts of discrimination and a violation to the right of equality before the law.

p.55 With respect to sexual and reproductive rights, based on the principle of dignity of persons and their rights to autonomy and intimacy, one of their essential components is the right of women to reproductive self-determination, protected essentially by article 4 of our Constitution. The decision whether or not to be a mother has to be made in an informed manner, cannot be imposed externally, and cannot provoke a disproportionate burden.

p.56 According to the parameter of constitutional regularity of the right to health and its protection, it is not enough to have the freedom to adopt, autonomously, the decisions regarding your own health; it is fundamental to be able to execute them adequately. In other words, the decision regarding one's own health, such as terminating a pregnancy, cannot be interfered with arbitrarily and, in addition, all the infrastructure should exist to be able to carry it out: safe, available, accessible, acceptable, affordable, respectful and quality medical services.

From the interpretations of the right to life, States have positive obligations to preserve life and generate conditions of a dignified life. This notion exceeds the biological sense of life and includes elements of wellbeing and subjective elements related to the determination of an individual life plan.

p.57-58 The concept of life plan demonstrates the importance of the expectations each person has for his or her life according to their conditions and their context, and its basis is the self-determination of how each one wants to live their life. The life plan can be affected with the continuation of a pregnancy that represents a health risk by actually harming health or life or simply by resulting incompatible with that plan. Therefore, denying access to the termination of a pregnancy when there is a risk to health for a woman, not only may cause different types of harm, but also may disrupt her expectations for her future wellbeing. In addition, the distortions of the individual life plan may have an impact on the health of women.

p.59-60 Based on the above considerations, this Court concludes that abortion motivated by health risks, and its adequate and timely provision, fall under the normative scope of the right to

health and its protection, since it involves an action whose primary objective is to promote, preserve or restore the health of the pregnant person, including the achievement of a state of physical, mental and social wellbeing, and that also involves the fulfillment and effective guarantee of the rights to live free from discrimination, enjoy a life of dignity and freedom and be free of arbitrary interferences in private life. Rights that in their interrelationship with the right to health and to its protection imply that women must have access, without arbitrary distinctions, to health services that only they need, with respect and guaranteeing their decisions with regard to their own health, life plan and individual understanding of wellbeing.

c) The act challenged and the obligations of the responsible authorities toward the right to health and its protection in the scope of abortion motivated by health causes

p.69 In the criterion of this Court, to obligate women to adopt, against their will, decisions on their reproductive health, which happens when, among other things, women are impeded from accessing certain medical services or when the necessary conditions do not exist for those decisions to be effective, violates human dignity. In the health system, primarily responsible for providing medical care, women are placed in a situation of dependency and vulnerability, which means that their health objectives can only be achieved if this system facilitates those services to them. Therefore, the providers of health services have the final decision on the personal integrity of women; especially in the case of therapeutic abortion where forcing her to continue a pregnancy generates in itself harm to the health of the woman, independently from the moment it is terminated.

p.72-73 In the specific case of the termination of pregnancy for health reasons, the State has the obligation to provide health services and appropriate medical treatment to ensure that women who continue a risky pregnancy do not have health effects. This access should be guaranteed as medical care to which women are entitled in cases when the termination of the pregnancy is necessary to resolve a health problem. Access to a termination of pregnancy because of a health risk, as a medical care service, includes both access to an

appropriate evaluation of the risks associated with the pregnancy as well as the adequate procedures for terminating risky pregnancies if the woman requests it.

- p.73 According to this Court, the provisions of the LGS can be interpreted to guarantee access to services of pregnancy termination for health reasons, given that they can clearly be understood as priority medical care services and as therapeutic actions adequate for preserving, restoring and protecting the health of women in all its dimensions.
- p.74-75 The refusal of the responsible authorities to grant the termination of the pregnancy of Marisa meant that they would deprive her of a medical care service that forms part of the normative scope of the right to health protection. The responsible authorities ignored the fact that abortion for health reasons has the essential purpose of restoring and protecting the health of the pregnant person. Health that is being affected not only by the pregnancy, but by the physical or mental illness that appears or worsens with its continuation.

DECISION

- p.76 For the above explanations, it is decided, on the one hand, to revoke the determination of ineffectiveness declared by the district judge. Therefore, to resume jurisdiction to analyze the merits of the matter, finally, to declare the grievance of Marisa well-founded taking into account the parameter of constitutional regularity relative to the right to health, developed throughout the extract and therefore, to grant the *amparo* for the effect of reestablishing the enjoyment of her right to health and that the responsible authority take charge of providing her the medical and psychological care necessary to restore the harm that the refusal to provide her a service she was entitled to caused her in that sphere.