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The Constitutionalization of the Right to Abortion from Different Understandings of Autonomy

A Review of the Jurisprudence of the Mexican Supreme Court of Justice

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ABSTRACT

This article explores the constitutionalization of abortion in Mexico within the broader framework of Latin American constitutionalism. It highlights the pivotal institutional reforms of 1994 and 2011 that redefined the role of the Mexican Supreme Court and elevated international human rights instruments to constitutional status. These reforms opened new legal avenues for feminist advocacy, enabling the recognition of reproductive rights. The article conceptualizes three jurisprudential approaches to abortion: (1) unjustified paternalism, often manifest under causal regulatory frameworks; (2) a negative liberal theory of autonomy, characteristic of decriminalization arguments; and (3) relational autonomy, which emphasizes contextual and substantive equality considerations. By examining key Supreme Court cases, the author identifies a progressive shift toward recognizing abortion as a fundamental right, which allows for the construction of reasons in favour of a narrative based on the relational conception of autonomy and substantive equality. The article aims to contribute to feminist legal strategies by clarifying the argumentative frameworks surrounding reproductive autonomy in constitutional adjudication.

Keywords: constitutionalization of abortion, Mexican Supreme Court of Justice, relational autonomy, substantive equality, feminist legal theory

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1. The Constitutionalization of Abortion

Ruth Rubio Marín (2023, 114) points to the U.S. Supreme Court case *Roe v. Wade* (1973)[1] as the first decision to *constitutionalize* abortion in world history. Similarly, Reva Siegel (2016) recognizes the first rulings that constitutionalized abortion in the 1970s, beginning with *Roe*. Isabel Cristina Jaramillo (2018, 17), for her part, explains how from the 1990s, Latin American feminists turned their attention to the framing of abortion by the courts and what consequences this had on the campaigns for its decriminalization. With regards to Latin America, Paola Bergallo and Agustina Ramón Michel (2016, 229) point out that it was in 2006 that the courts joined the liberalizing trend that recognized constitutional limits to the criminalization of abortion. In Mexico, this trend began earlier, with the first ruling that dates back to 2002.[2]

By "constitutionalization" of abortion I mean the approach to the issue through constitutional arguments that are ultimately reflected in judgments of the Supreme Court of Justice under the recognition that, regardless of the position adopted, it involves conflicting constitutional values.[3] Constitutionalization implies a shift from considering abortion as a matter of public policy, mainly foreseen as criminal conduct in the penal codes, to accepting it as one that involves multiple rights in dispute and, therefore, requires some constitutional balancing for its resolution (see Bergallo and Ramón Michel, 2018; Beltrán y Puga 2018, 59). Perhaps this is the main characteristic of the "change of framing" in the abortion debate, i.e.,

[1] US Supreme Court, *Jane Roe et al vs Henry Wade*, 410 U.S. 113, 22 January 1973.
[2] Mexican Supreme Court of Justice, Plenary, Action of Unconstitutionality AI 10/2000, January 29 and 30, 2002.
[3] Reva Siegel (2016, 32 and 47) criticizes equating the constitutionalization of abortion with its adjudication or judicialization, locating the dynamics of constitutionalization (and consequent polarization) in politics. I agree with this position. For her, it was feminists who "changed the way abortion was debated." (34).

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addressing the conflict in its complexity as one that involves tension between different human rights.[4]

The fact that abortion is treated as a constitutional issue inevitably influences the political and social field. The recognition that the debate on abortion is not limited to the aspiration for the life of the *nasciturus* as the only legally relevant good that ought to be protected but that the rights of women and people with gestational capacity are at stake,[5] legitimizes feminist struggles in the public sphere, which, from being "murderers" or "crime apologists," come to be perceived as human rights activists. At the same time, it serves to delegitimize certain once-dominant positions, such as religious ones, in the public argumentation sphere.

As human rights defenders, the arguments presented by feminists, the information revealed about the true consequences of the criminalization of abortion for the most vulnerable women, and the visibility on the inconsistencies sustained by the legal systems in terms of dignity, citizenship, autonomy and equality for women, generate a public impact that was once inconceivable. Thus, the reception of the arguments related to their rights by the courts helps to change the status of feminist political action, which generates empathy and more adhesion on the part of citizens and groups in power, as well as advancing gender equality from a substantive standpoint.

Likewise, due to their institutional position as the ultimate guardians of the constitutional system, when supreme courts speak, they not only place issues on the agenda but can also shape the parameters of public discourse. This impacts decision-makers, who can outright accept the judicial interpretation – depending on the case, reaffirming their own previous decision, softening or eliminating criminal provisions, making protocols for access to non-punishable abortions, or even legislating it as a right – or can respond

[4] On an approach based on the principle of proportionality see Verónica Undurraga (2016).
[5] As established by the Supreme Court of Justice as of 2021, the inclusion of persons with gestational capacity for access to abortion is intended to "include, recognize and make visible those persons of gender diversity who do not identify themselves as women, but who can gestate. For example, transgender men, non-binary people, queer, among others." See AR 267/2023 (2023 para. 27), also AI 148/2017 (2021, para. 52).

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reactionarily – trying to shield their interpretations through constitutional reforms,[6] placing supererogatory requirements on access to non-punishable abortions, regulating the forms of access until it becomes null and void – for example, through the broad recognition of conscientious objection – or even simply defying judicial rulings.

It should be noted that these dynamics function as double-edged weapons since the courts are not always sympathetic to feminist pretensions. Thus, while we can recognize the importance of constitutionalization, we should not rush to celebrate it because the power of the discourse emanating from the highest judicial body also has its radiating and penetrating effects when it is contrary to feminist claims – as we have recently seen in the United States.[7]

What constitutionalization generates, therefore, is a new terrain for political struggle in which the same opposing forces will dispute the interpretation of the rights involved in abortion, using the language of human rights as a weapon. And given that sexual and reproductive rights are largely absent in the constitutional charters,[8] the struggle will address the interpretation and content of the rights that are positive in nature, and especially that of autonomy.[9]

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[6] As practically half of the Mexican states did after the 2008 ruling, see *infra*.

[7] US Supreme Court, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), 24 June 2022.

[8] This is debatable since in most Latin American constitutions, the International Human Rights Treaties are already constitutionalized, among them the CEDAW, which, together with the general observations and recommendations made by its committee, have enshrined Sexual and Reproductive Rights as enforceable. See Article 16, which guarantees women equal rights to decide "freely and responsibly the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights," as well as General Recommendation 24 of the CEDAW Committee (1999) which requests States to give priority to the "prevention of unwanted pregnancies through family planning and sex education." In the "case of the Political Constitution of the United Mexican States, the provision is expressed in its 4th article: "[...] Everyone has the right to decide freely, responsibly and in an informed manner on the number and spacing of their children. [...]."

[9] Constitutionalizing the debate in these terms may present democratic objections when the judicial interpretation clashes with that of the representative bodies. In addition, it has other limitations. As Isabel Cristina Jaramillo and Tatiana Alfonso Sierra (2008) point out, translating political struggles against structural or distributional problems into the language of individual rights tends to compartmentalize conflicts into closed areas of norms that fail to entirely encompass the phenomenon. In the same vein, Jeremy Waldron (2012) uses the case of the decriminalization of abortion to compare the quality of the deliberation that took

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2. The Constitutionalization of Abortion in Mexico

The constitutionalization of abortion was possible in Mexico after some far-reaching institutional changes that were characterized as a new era of constitutionalism (see Zamora and Cossío, 2006, 411-412). I want to highlight two of them. On the one hand, the 1994 constitutional reform completely modified the Mexican Supreme Court of Justice (hereinafter SCJ), granting it the functions of a Constitutional Court (see Magaloni, 2008, 199). This enabled social movements' struggle for human rights to find an increasingly fertile avenue in litigation.

On the other hand, the 2011 constitutional reform on human rights set "a new stage" (Pou Giménez and Triviño Fernández, 2024, 174). While it is true that Mexico had been a pioneer in the consecration of social rights with the 1917 Constitution (still in force), successive amendments expanded the catalogue of rights and gave them a newfound binding force.[10] The 2011 reform culminated this process of constitutionalization with the incorporation of the International Human Rights Instruments, which were inserted into the constitutional hierarchy (see Guastini, 2009, 49; Alterio, 2021, 57). Since then, the jurisprudence of the Supreme Court has consistently recognized and developed such rights, especially those of women, in concert with international developments (see Espejo Yaksic and Ibarra Olguín, 2019; Espejo Yaksic and Lovera Parmo, 2023).

This constitutional paradigm shift, as it has also been called, is not an exception confined to the country. Starting in the 1990s, Latin American countries opted for constitutional changes, partly in response to the bloody dictatorships that ravaged the region during the twentieth century (see

place in the United States (with *Roe*) with that which took place in the United Kingdom in order to show the superiority of the latter. The reason for this, according to the author, is that in the legislative sphere, there is freedom to debate the problem of abortion in its integral dimension, and it should not be forced to be included in the interpretation of written rights that are alien to it, such as due process. For a view that privileges the democratic path in abortion developments (see Erdman and Bergallo, 2024).

[10] For a characterization of the recognition of social rights since the 1917 Constitution, I recommend Alterio and Niembro Ortega (2024).

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Gargarella, 2013). Among the institutional innovations introduced were constitutions superior to ordinary legislation, with strong judicial review powers and the generous recognition of fundamental rights (especially economic, social, cultural, and environmental rights – DESCA) guaranteed by international protection mechanisms, which were incorporated into domestic legal systems. This combination enabled much of academia to speak of a new Latin American constitutionalism which, immersed in "aspirational" constitutions with strong jurisdictional guarantees, enabled practices of "transformative constitutionalism" (see von Bogdandy et al, 2017).

However, not everything is progressive, much less homogeneous. The diverse and long constitutional trajectories, somehow accumulated and often in tension, generated tension in interpreting the rights, making their adjudication more complex (Jaramillo Sierra, 2022).[11] This is especially relevant when claiming *unwritten* rights – such as sexual and reproductive rights – that affect in a differentiated way one of the groups that has historically been excluded from constitutional designs, such as women.[12]

My objective in this article is to review the path of the constitutionalization of abortion up to its argumentative consecration as a fundamental right in Mexico while critically analyzing the possible manifestations of this constitutionalization and its consequences from a feminist perspective. For this task, I will theorize three ways this can occur, using the understanding of individual autonomy as a point of analysis.

I will call the first one "*unjustified paternalism*" and it usually – although not necessarily – coincides with the permission for abortion under a causal

[11] The author identifies three regional constitutionalism models to analyze an incipient argument on sexual equality: the liberal, the social, and the postcolonial.

[12] As Rubio Marín (2023, 111) explains, "the absence of any mention of reproductive rights is probably the most paradigmatic example of the limits of an inclusive constitutionalism built around the male experience". It should be noted that when the 1917 Mexican Constitution was drafted, women did not have political rights and, therefore, did not participate in its drafting. Although this changed in the middle of the last century, the original constitutional matrix did not, so women have had to strategically adapt their constitutional arguments to the always backward normative consecration. On a similar phenomenon see Siegel (2005).

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scheme. Although liberal regimes exceptionally admit specific paternalistic measures, for them to be *justified,* the person whose will is (coercively) substituted must be in a situation of basic incompetence to decide, and the measure must be objectively oriented to avoid harm to her (Garzón Valdés, 1988). When these conditions are not met, the measure is unjustified and, therefore, violates the right to autonomy.

The second is based on a *negative* "*liberal theory of autonomy*" and is primarily present in the arguments for decriminalization. According to Nino (1989, 204-205), the principle of autonomy

> prescribes that the free individual choice of life plans and the adoption of ideals of human excellence being valuable, the State (and other individuals) should not interfere in that choice or adoption, limiting itself to designing institutions that facilitate the individual pursuit of those life plans and the satisfaction of the ideals of virtue that each one upholds and preventing mutual interference in the course of such pursuit.

Finally, a third way of grounding abortion can be identified with an idea of "*relational autonomy*" (which is reinforced by an understanding of equality in substantive terms). These arguments are possible under legalization schemes, although they are advanced strategically in other contexts. This conception conceives autonomy as individuals' *gradual* and multidimensional capacity, which develops as a function of the contexts of relationships with other subjects and the options they have to choose (Mackenzie, 2014). The interaction with the arguments on equality is determined by the attention given to the natural vulnerability of individuals (both as individuals and as a group) and the consequent duty of the State to act *positively* to counteract it, thereby enhancing autonomy (Álvarez Medina, 2022, 15-19; Fineman, 2010, 255-256). In the words of Álvarez (2022, 17), "the model that focuses on vulnerability acquires a more significant commitment to autonomy to the extent that it admits that its realization must

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be achieved by attending to diversity and, therefore, to the achievement of equality".[13]

The article will be developed as follows. In section 3, I will begin by reviewing the cases that reached the SCJ under the causal system (3.1 and 3.2), which applies a *paternalistic theory* that greatly restricts women's autonomy. In section 3.3, I will dwell on AR 1388/2015 on health grounds, given the importance of the arguments used by the Court, which align more with an understanding of *relational autonomy*. In section 4, I will analyze the first case in which the Court upheld the decriminalization of abortion by declaring the Federal District (DF) legislation constitutional and distinguish the arguments used in that case from those typically used in a *negative liberal* approach. In section 5, I will study the "Coahuila case" as the inaugural case of a path towards legalization, following the recognition of reproductive autonomy as a fundamental right within its entity. These sections will allow me to construct reasons in favor of a narrative based on the relational conception of autonomy and substantive equality. Finally, in section 6, I will give a brief conclusion. The overall idea is to contribute to rationalizing the scope and limits of each type of argument in the constitutionalization of the right to abortion and its remedies in order to collaborate with the legal strategies of feminism in this area.

3. Constitutional Arguments for the Non-punishability of Abortion According to Causal Grounds

3.1. The Cause for "Malformations" of the Product

The first time the SCJ intervened in the abortion debate was in response to the legislative decision of the then-DF to establish an absolute excuse in the case of genetic or congenital alterations of the product of conception that endangered its life or that of the pregnant woman. The constitutional

[13] On the interplay between relational theories of autonomy and equality, see Mackenzie (2022).

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principles that were interpreted in the Action of Unconstitutionality AI10/2000 (2002) were the protection of life from conception, equality, and legal certainty, all invoked by the parliamentary minority opposing the criminal code reform (Suprema Corte de Justicia de la Nación, 2022, 11-12). The Court recognized the constitutionality of the reform because, as it established, the norm "does not authorize the deprivation of the life of the product of conception, but only contemplates the possibility that, if the criminal act occurs and the requirements are met, it is concluded that no sanction should be applied" (Suprema Corte de Justicia de la Nación 2022,13; AI, 2002, 112). Regarding the pregnant woman, the Court admitted that the situation foreseen places her before a difficult decision: "the heroic of accepting to continue with the pregnancy and that of accepting the interruption of the pregnancy with the consequence that it is a crime" (AI, 2002, 111).

Although in the case we can see a narrative focused on the protection of prenatal life, without any allusion to women's rights, the justification of the rule that the Court highlights is important: "to address the urgent public health problem of deaths of pregnant women due to illegal abortions" (Suprema Corte de Justicia de la Nación, 2022,12). I highlight this first ruling for two reasons. First, to point out that the progress came from the Legislative Assembly and that the role of the Court was to support it constitutionally. Second, to point out that from the beginning, the Court took a non-absolutist position on rights, and even when the focus was on the protection of prenatal life, the consequences of illegal abortions for the lives of pregnant women were recognized as a concern worthy of constitutional attention.

This issue also allows us to reflect on the formulation of the cause and the type of justification given to it, which in some cases will be acceptable from a human rights paradigm and in others not. The Court has not made this justification explicit (neither in this nor in other cases) other than by alluding to the suffering of the pregnant woman, and this has given rise to a dispute over the argumentation in the sphere of academia and social movements.

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On the one hand, when the causal grounds provide for a product of conception that is anencephalic and/or not viable for independent life, the argument is the cruel and inhuman treatment that would be given to a pregnant woman who is forced to continue with a pregnancy in order to give birth to someone condemned to die immediately. The termination of pregnancy here is not only aimed at safeguarding the psychic and physical health of the woman, but it also avoids the torture that would imply having to give birth to a being who will not survive. It is a matter of accepting the impossibility of demanding heroic acts from pregnant women. This approach is based on abortion as a "necessary evil", a suffering that is preferred to another that is presented as more serious and that turns the woman into a double victim (Triviño Caballero, 2019, 212).

On the other hand, when the causal grounds enable abortion of products with "malformations" not incompatible with extrauterine life,[14] eugenic justifications have been tested, the political and social messages of which have been resisted by groups in defense of the rights of persons with disabilities[15] and exploited by anti-rights groups.[16] In that assumption, it would seem that the State's lack of interest in punishing abortion is related to the lack of value that would be given to a fetus that will present, once born, some kind of severe disability. The message there seems to be that certain fetuses have more value than others and, therefore, that certain people may be expendable for society and therefore "abortable".[17] This type of argumentation generates symbolic violence and is discriminatory, as well as

[14] In these cases, the "accreditation of the cause" further complicates access to abortion because it leaves the determination to medical committees that must establish the "severity" of the fetal condition to allow it or not. This was seen in AR 1388/2015, to be analyzed below, where the fetus suffered from Klinefelter syndrome, and the medical Committee, without considering the risk to the health of the pregnant woman, decided not to perform the abortion because said syndrome was compatible with extrauterine life. See para. 8 of the judgment.
[15] It is important to note that the term "malformations" is opposed by disability rights groups, who prefer to call the fetus "with functional diversity" (see Iglesias and Palacios, 2019).
[16] On the so-called *crip-washing* or use of the rights of persons with disabilities to undermine women's sexual and reproductive rights, see Triviño Caballero (2019, 214 et seq); Moscoso and Platero (2017).
[17] A similar claim has been made by feminism when selective abortion has been based on gender, allowing the abortion of female fetuses.

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inadmissible from a human rights perspective (Moscoso, 2014). In addition, it has the perverse effect of confronting groups in vulnerable situations with a very precarious recognition of their rights, reinforcing stereotypes.

A less explored alternative line of argument is of interest here. It not only focuses on the autonomy or agency of the pregnant woman from a feminist perspective but also from a disability perspective that, in an intersectional manner, should inform our understanding of reproductive rights. The argument is based on the social-relational environment that enables (or hinders) the autonomous decision of the person.[18] Thus, the understanding that the birth of a person, with or without functional diversity, requires resources and special care that will fall mainly on the mother and her family, makes it necessary to establish social provisions to ensure that these burdens are shared with the State and can be undertaken at a personal and familial level. In order for a woman to make an autonomous (and private)[19] decision on whether or not to continue with a pregnancy, she must have certain guarantees that she will have the necessary conditions not only to have an abortion but also to have/raise a child.[20] These conditions, among others, can be translated into "supports",[21] which are key to a conception of feminist relational autonomy and an express demand for the social model of disability. Let me explain this convergence.

The disability perspective is based on recognizing the autonomy of persons with disabilities. It requires accommodations and support for the exercise to

[18] What Catriona Mackenzie (2014) characterizes as the "self-determination" dimension of relational autonomy.
[19] This moves us from abortion on grounds of absolution to free abortion.
[20] These conditions must include the moments prior to pregnancy so that pregnancy can also be a possible decision for everyone. As Teresa Villaverde (2019) expresses "While middle-class white women in the "global North" ask to be able to decide on motherhood, working-class women in other parts of the world demand, before a clandestine abortion tool, living conditions that allow them to decide".
[21] I put support in quotation marks because I am using the word in all its possible senses, both in terms of assistance in making a decision and in terms of structural conditions that allow both the termination of a pregnancy without obstacles and the raising of a child without high costs and resignations. Developments on the right to care point precisely to this type of "support" regarding public services, infrastructures, and social protection policies that generate co-responsibility between the family, the State, and society (Pautassi, 2018).

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its fullest degree of their autonomy, to the point that they are essential elements of the right.[22] Providing them is an obligation of the state, and not doing so constitutes discrimination.[23] This understanding of autonomy as a *gradual* capacity that requires conditions for its exercise, should be applied to all persons, especially to those who are in situations of vulnerability, whether or not they have a disability or are pregnant with a product with or without functional diversity (Álvarez Medina, 2018, 43 ff.). The idea is that any pregnant person should have the support to be able to make an autonomous decision on whether or not to continue with the pregnancy in her internal forum and without having to give explanations, avoiding conditioning both maternity and access to pregnancy termination to heteronomous reasons based on the functional diversity of the fetus (Iglesias and Palacios, 2019, 218).

3.2. The "Rape" Cause of Action

The following pronouncements on causal grounds for abortion were made by *Amparo* trials, almost 10 years after the recognition of the constitutionality of the decriminalization of abortion in DF in August 2008, which I will discuss in section 4. This is not minor because in resolving the *Amparo* cases, the Court had some political support, which was also accompanied by a growing mobilization of women who used litigation to advance their causes. Although resistance to abortion continued in most of the country,[24] the composition of the Court had become more sensitive to receiving progressive human rights claims (Niembro Ortega, 2021).

[22] This is the meaning given to Article 12.3 of the Convention on the Rights of Persons with Disabilities.

[23] An express recognition by the Court in AR 1368/2015. On accommodations as a requirement in addition to the right to substantive equality of persons, see Fredman (2012, 30).

[24] An example of this was the constitutional amendments that took place in 17 Mexican states to protect life from conception, which were judicialized through AR 633/2010, IA 11/2009, CC89/2009, CC 104/2009, and IA 106/2018 (see Suprema Corte de Justicia de la Nación, 2022, 51-69). On the backlash that these reforms to local constitutions produced and the Court's response, see Pou Giménez and Triviño Fernández, 2024,189)

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Amparos AR 601/2017 and AR 1170/2017, both decided in April 2018, addressed the refusal by health authorities to terminate pregnancies resulting from rape. In both Morelos and Oaxaca, the grounds for exemption due to rape and fetal malformations were expressly provided for in the penal codes. However, the reality was one of inaccessibility to abortion. The argumentation of the Court gave great relevance to the plaintiffs' quality as *"victims"*[25] when criticizing the authorities for extending the suffering, and the physical and psychological damage they already suffered as a result of the rape by denying them the permitted interruption. In this narrative, the woman – not the *nasciturus* – is foregrounded. Although the criminal nature of abortion is not questioned, there is a new impulse to exceptions focusing on the counter-values that are considered of special relevance. This is a step forward because the pregnant woman appears as a bearer of human rights – even if it is as a victim and even if these are negative rights such as not suffering cruel, inhuman, and degrading treatment – and it begins to slightly undermine, albeit minimally, the mandate of motherhood.

In addition, the fact that the Court ordered comprehensive reparations for the denial of access to abortions shed new light on the constitutional debate.[26] The Court established an obligation of public health institutions to provide

[25] They were even incorporated into the victim assistance program for comprehensive reparations. This was a novelty in matters of *Amparo*, since the Court has generally been timid in establishing reparations for human rights violations, limiting itself to *restitution* (see Quintana Osuna, 2016). This issue was aggravated in relation to abortion since, due to the inherent time-periods with pregnancy, for a long time, its termination served as an excuse for not accepting cases for "lack of subject matter" since, at the time of the consideration of the *Amparo*, either the abortion had already been performed or the birth had already taken place. I will return to this point in the following section.

[26] The Court explained that integral reparation includes: "Restitution, which seeks to return the victim to the situation prior to the commission of the crime or the violation of his or her human rights; Rehabilitation, which seeks to help the victim deal with the effects suffered as a result of the punishable act or human rights violations; Compensation, which is granted to the victim in an appropriate manner and proportion to the gravity of the punishable act committed or the human rights violation suffered and taking into account the circumstances of each case. This will be granted for all damages, suffering, and economically assessable losses resulting from the crime or human rights violation. Satisfaction seeks to recognize and restore the dignity of the victims. Measures of non-repetition, it is sought that the punishable act or violation of rights suffered by the victim does not happen again". (AR 601/2017, 26; AR 1170/2017, 27).

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medical care in the event of an emergency. It compelled them not to implement mechanisms that prevent the rights of women victims of rape from being realized (AR 601/2017,19). It thus ordered measures of non-repetition "to avoid the occurrence of serious human rights violations [... and to attend to] effectively, immediately and without objection, requests for termination of pregnancy resulting from rape, *giving priority to the rights of all women who have been victims of cruel and inhuman acts* [...]". These obligations – according to the SCJ – are an "*inexcusable observance of the* constitutional *mandate* (AR 601/2017,32).

One of the contributions of these decisions is found in the remedies. These are sought to compensate for the harm suffered by the woman and make an effort towards correcting the authorities' actions in the future.[27] Despite this, the fact of anchoring them to the recognition of women as victims prevents us from speaking of transformative remedies since the narrative reinforces the gender stereotypes that place women under the need for protection and care, denying them their autonomous personhood and the power to decide on their reproductive life.[28]

In constitutional terms, the approach to abortion in all these precedents is *paternalistic* and looks to the past. It is admitted as a corrective mechanism for situations of severe violation of women's human rights (sexual violence suffered by the pregnant woman or, in its case, the suffering of carrying a pregnancy whose product cannot survive or endangers her health or her own life) that are mitigated by the performance of the abortion. Abortion is, therefore, not a subjective right of every pregnant person but a *remedy* to a greater evil.

In short, whatever arguments are used to terminate a pregnancy *on causal grounds*, will highlight the pitfalls and limitations that such a system presents

[27] Always bearing in mind the implied limitation by circumscribing such orders to the specific case.
[28] I use the classification of remedies as *compensatory, corrective and transformative* as the CEDAW Committee does in General Recommendation No. 25 (2004). For a more robust characterization of these remedies, I refer to Alfonso Sierra and Alterio (2021, 1079-1081).

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for the recognition of abortion. The fact of having to justify on a case-by-case basis (and on an *individual basis*) the will to terminate a pregnancy generates consequences that violate rights. First, it allows the reproduction of stigmas, stereotypes, and violence in two ways. On the one hand, it reinforces the message of a victimized woman, without agency, who resorts to abortion because she "has no choice", a woman who will be "traumatized" by the practice and who is allowed to do so as an alternative of last resort to avoid re-victimization, because if she had a choice she would be a "bad woman", selfish, frivolous and a murderer (Triviño Caballero, 2019, 213). On the other hand, in the case of products with "malformations" that are not incompatible with life, the idea is reproduced that some lives are not worthy of being lived, exercising symbolic violence (Iglesias and Palacios, 2019).

Second, it removes the power of decision-making from the pregnant woman, transferring it to the third party with authority to determine that the grounds are met and that the justification is adequate (generally a medical or hospital group, or a judicial agent). In no case is there any recognition of the woman or pregnant person as a moral and autonomous agent, only an attempt not to aggravate an already harmful situation. Thus, the woman is objectified and subjected to invasive procedures to verify the alleged situation, as well as to re-education regarding the consequences of the interruption (meditating the imposition of waiting periods, mandatory counseling, dissuasion techniques, and so on), which represents an unjustified exercise of paternalism (Triviño Caballero, 2019, 208).[29] These procedures not only place her in a situation of dependence and vulnerability but are also sexually discriminatory.[30]

[29] As the author points out, "In the case of minors or women with disabilities, the consent or opinion of third parties (sometimes both parents or guardians) has become the stronghold of control in advanced legislations" (210).

[30] As established in General Recommendation 24 of the CEDAW Committee and affirmed by the SCJ, AR1388/2015 (2019, para 107) "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 their access, constitute acts of discrimination and a violation of the right to equality before the law". Similarly, para. 137-8.

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Lastly, it generates legal insecurity since, until the exculpatory excuse is reliably established by whoever has the authority to do so, both the pregnant woman and any person who may assist her in the termination of the pregnancy are committing a crime and may be subject to sanctions. This is a powerful inhibiting reason that can bend the will of the pregnant person, in addition to generating a strong incentive to abstain from assisting her, which ultimately results in the systematic denial of abortions, even when the situations foreseen by the law are present (see Pou Giménez, 2019).[31]

3.3. The "Health" Causal Ground as a Springboard Towards a Conception of Relational Autonomy

Although AR 1388/2015 decided on health-related grounds (ruled in 2019) remains within the logic of exculpatory defenses, and, therefore, within the paradigm of abortion as a criminal offence, and consequently within a framework that individualizes both access to abortion and reparations for violations of such access; the forcefulness of the arguments made by the Court warrant its analysis in a separate section.

The case deals with a woman with serious health conditions and a high-risk pregnancy in which the fetus presented Klinefelter syndrome and whose request for termination of pregnancy was denied by the hospital. After unfavorable rulings in the lower instances, the case reached the Supreme Court. There, for the first time, the human rights of women appear in the foreground, with a development that, at times, makes it difficult to conceive of a circumstance in which abortion would still be considered punishable.

The Court in AR 1388/2015 (para 84) uses a definition of the right to health in terms of international standards as "the right of every person to the enjoyment of the highest attainable standard of physical and mental health", which implies considering, among others, the socioeconomic factors that

[31] It is also the central argument used by the Inter-American Court of Human Rights to condemn the State in the case *Beatriz y ots vs. El Salvador*, Merits, Reparations and Costs (2024).

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make it possible to enjoy a healthy life, including the fundamental determinants of health and access to health protection services (para.108).[32] From there, the SCJ affirms that the harm (which enables it to request the termination of pregnancy) can only be measured according to *individual* standards, which "must be defined by the women" (para.118), and which will be given "not only in those cases in which [pregnancy] causes them physical harm but also in those cases in which their *well-being* is harmed, including whatever each woman understands as constituting *being* well" (para. 119).

In order for women to be able to make this autonomous decision, according to the Court, the State (including all public and private agents that make up the health system) must not only refrain from hindering – and guarantee that third parties do not hinder – the exercise of this right, it must also create the necessary conditions including infrastructure, regulation, human and economic resources, as well as supplies and sanitary conditions to ensure women's access to abortion for health-related reasons (para. 126, 127, 136).

In addition to these developments, the highest Court analyzes the procedural conditions for access to justice and the available remedies through *Amparo*, applying a gender perspective. First, the Court dismisses the grounds of inadmissibility based on the alleged lack of purpose of the *Amparo* action, raised on the basis that the woman had already undergone the interruption of her pregnancy at the time the case came before the courts. In this sense, the Court established that applying the "neutral" rule of inadmissibility implies an act of discrimination against women. Pregnancy is a biological process that is only experienced by people with a female reproductive system and has a fatal termination period. The strict application of the rule of inadmissibility would make *Amparo*, and the restitution of rights that it facilitates, inaccessible to women when they suffer violations of their right to health.

[32] This is important because it highlights the positive aspect of the right to health, which, as a person's well-being, is only possible in a social context and not in the abstract, which gives a relational perspective to the enjoyment of the right. Hence, the link it presents with the right to liberty, autonomy, and free development of the personality is evident in the "right to make decisions about one's own health and body".

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Furthermore, it clarifies that the authorization to interrupt the pregnancy is not the only effect that can be granted through the *Amparo*, since what is alleged is a health-related harm that is not extinguished with such interruption. The effect of the *Amparo* can be to order the restitution of the right to health through the provision of medical care services to combat the sequelae and complications resulting from the refusal to perform the abortion when it was requested (paras. 58-75).

As I was saying, this *Amparo*, unlike the previous ones, enables, for the first time, the woman to recover her autonomy by empowering her to determine whether the continuation of the pregnancy affects her health. In addition, it provides that certain conditions must be met for the decision to be effectively executed. However, precisely because it is within the framework of the causal ground's regime, the extent of this autonomy is minimal, and the strength of the arguments towards the demands of substantive equality is also limited. This is due to the fact that the reasoning insufficiently presents abortion as a *positive* right linked to the need for the State to create an environment conducive to human procreation (Rubio Marín, 2023, 117).

The reflections expressed in this *Amparo* were taken up again in AR 438/2020 (2021) to constitutionally protect a young 18-year-old woman with severe disabilities, who had been raped, but who had been denied an abortion because the pregnancy had reached 23.4 weeks. The particularity of this case lies in the time of gestation as a possible limit to the exercise of the woman's rights to autonomy and health. An issue that returns to the techniques of constitutional balancing in the face of a conflict of values in the legal system. The criterion established by the Court is

> The term of 90 days from conception for accessing a non-punishable abortion ignores the effects that women suffer as a result of rape and re-victimizes them. Forcing a woman to endure a pregnancy resulting from rape implies structural discrimination that responds to a stereotype that assumes that the primary function of women is procreation. It is intended to force her to bear and continue with a

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> pregnancy that was the product of a crime only because she did not act with the "opportunity" indicated by the legislator. […] Consequently, this protection given to the conceived over the mother constitutes a form of violence against women and violates the right to free development of personality and human dignity. This condition is unconstitutional because it violates the rights of persons with disabilities and minors (Suprema Corte de Justicia de la Nación, 2022, 89; AR 438/2020, para. 137-140).

As can be seen, the Court is forceful in prioritizing women's human rights over the *nasciturus*. Here, not only does it apply the gender perspective to analyze the norms at stake, but also the perspective of disability and the best interests of the child to declare the unconstitutionality of the 90-day time limit. It argues that people belonging to these groups present significantly more conditions of vulnerability that may prevent them from even knowing that they are pregnant as a result of rape. Thus, they cannot seek support from health services within the time limit established by the law, which *establishes a single, generic time limit that unifies all women*, while also ignoring the situation of poverty and extreme marginalization of the claimant (Suprema Corte de Justicia de la Nación, 2022, 94-95).

The latter strengthens the rationale by incorporating an intersectional vulnerability analysis for assessing the law and its differentiated application, emphasizing the contexts in which rights are exercised. This approach is typical of conceptions of substantive equality that attempt to accommodate differences to avoid discrimination through uniform norms (Fredman, 2012). Especially concerning the right to autonomy, the argument forces us to remove it from the abstraction that is typical of the liberal constitutional construction, to place it on the plane of interdependence generated by social relations and the opportunities that may or may not arise for its exercise, as suggested by an understanding of relational autonomy.

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4. Constitutional Arguments for Decriminalization

As I mentioned before, the Legislative Assembly of DF (today the Congress of Mexico City) was a pioneer in the region in decriminalizing abortion for the first 12 weeks of gestation in April 2007. This law was challenged by national government officials belonging to the National Action Party (PAN) – the country's conservative party.

The Court had to resolve the constitutionality of the law in AI 146/2007 and its accumulated cases (2008) which, in chronological terms, was the second time it had to rule on abortion after AI 10/2000, already mentioned in 3.1. This context is noteworthy because, unlike in other countries, these matters came before the Court after a majority-led political decision had already been made in favor of liberalization. In this sense, the Court did not have to construct arguments for decriminalization but only evaluate whether those used by the democratic instance were constitutionally admissible. The Court said yes.

In a judgement that was preceded, for the first time, by the use of public hearings, the Court was deferential to the reasoning of the Legislative Assembly and established the following relevant criteria.

(i) The right to life is not absolute (AI 146/2007, 161).

(ii) Article 4 of the American Convention on Human Rights establishes that life ought to be respected, "in general", from the moment of conception, thus allowing States to provide abortions. In addition, Mexico made a reservation to the said article and, therefore, has no obligation to protect life from conception (AI 146/2007, 171).

(iii) There is no constitutional obligation to criminalize abortion. The Legislative Assembly carried out a balancing, the result of which was the duty to decriminalize abortion in the face of the State's obligations regarding health, information, and responsibility in women's decision-making (AI 146/2007, 180):

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> The general justification of the measure [...] was to put an end to a public health problem derived from the practice of clandestine abortions, [...] to guarantee equal treatment to women, specifically to those with lower incomes, as well as to recognize their freedom to determine their sexual and reproductive life; to recognize that there should be no forced maternity and that women should be allowed to develop their life project in the terms they deem convenient. (AI 146/2007, 181).

And

(iv) The continuation of the unwanted pregnancy has distinctively permanent and profound consequences for the woman (...), and it is this asymmetrical effect on the woman's life plan that establishes the basis for the different treatment that the legislator considered in granting her the final decision as to whether the pregnancy should or should not be terminated, which does not make it unreasonable to deny the male participant the capacity to make this decision. (AI 146/2007, 188).

Thus, the Court considered that the law is suitable to safeguard the rights of freedom and non-discrimination of women, the opposite of which would equate to criminalization (AI 146/2007, 183-184).

I want to highlight the understanding of equality embodied in this seminal judgment. By recognizing the specific contexts in which the practice occurs and its consequences, as well as the fact that men and women are in an asymmetrical situation in the face of pregnancy – and that it is constitutional for the law to treat them differently – the Court moved away from formal interpretations of equality and thus from assimilationist approaches (Rubio Marín, 2023, 93-101). With these considerations, the Court laid the foundations for approaching reproductive autonomy as an intelligible right in contexts tending to guarantee substantive equality, which would only be consolidated jurisprudentially 13 years later.

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This argumentative construction, however, has not been found in other decriminalization processes. Although I am not interested in making a comparative study here, I would like to mark a counterpoint with rulings that followed the line of the emblematic *Roe v. Wade* case previously cited, which was based on a woman's right to privacy (or the right to be left alone), requiring non-interference by the State. That type of constitutional underpinning, which I have described as *liberal and negative,* has been met with strong criticism within feminism insofar as it omits equality considerations (Siegel, 1995) and encourages a narrative where autonomy is equated with the right of ownership over one's own body (Phillips, 2011, 2013). I cannot here expand on all the implications this has concerning abortion, but I would like to point out some issues to consider the contrasts.

The first is contextual: the U.S. Constitution does not include social rights or gender equality rights as most Latin American constitutions do (or the international treaties to which they adhere) (Fineman, 2010, 254-255). In fact, at the time of the *Roe* decision, the U.S. Court had not even begun to develop its jurisprudence on sex discrimination (Siegel, 1995, 60). This historical particularity has served as an excuse for the recent backlash against the austere interpretation of a woman's right to terminate a pregnancy.

The second has to do with the anchoring of abortion in reasons of sexual rather than gender differences. As Reva Siegel (1995, 54) explains, by omitting considerations of equality, the physiological process of pregnancy is abstracted from the social context in which women live as if it were an issue related to their bodies and not to their roles. This, which seems to have been overcome, becomes relevant today in the face of "gender-critical" feminist theories that are favoring the re-anchoring of the legal protection of women (*cis* only) to their biology, with all the negative consequences that this entails (see Butler, 2024; Alterio, 2024).

The third and final point concerns the implications of a "proprietary" narrative of autonomy (see Nedelsky, 1990). Not only because this understanding refers to individualistic and negative conceptions of rights

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(which are at the antipodes of the recognition of abortion as a social right), but also because of how this metaphor is projected to other important debates for feminism. I refer to how the language of "ownership over one's own body" can invoke, as Anne Phillips points out, its availability in the marketplace and its price in it, obscuring the power relations that are intrinsic to such a context (Phillips, 2011). This is concerning if you consider autonomy in other planes of reproduction or sexuality, such as surrogacy or sex work (see Nussbaum, 2022, Phillips, 2009).

A liberal approach to autonomy, which ignores the structural inequality in which many women make decisions – that is, which does not take into account situations of vulnerability, the network of social relations in which they are immersed, the availability (or not) of options that are available to them, and which only concentrates on the decision – privatizes the burdens that these entail and places women in the situation of being responsible for all their consequences (Jaramillo Sierra, 2018, 19). This approach is the opposite of a relational articulation of autonomy and is an advantage that the Mexican Court has not used.

5. The Path Towards the Legalization and Consecration of Abortion as a Fundamental Right

The next decriminalization case occurred in a different context (GIRE, 2024, 65). Abortion was already legal in 4 states of the Republic,[33] and the Court had openly adopted women's rights as its banner. Among the issues it had to resolve, it ruled on the constitutional possibility of criminalizing abortion. This time, the Court was no longer deferential to the Legislature. While in 2007, it had said that the Legislature *could* decriminalize, it had not said that those states that continued to opt for criminalization were contravening the Constitution. This was reversed on September 7, 2021, when AI 148/2017

[33] In addition to Mexico City (2007), Oaxaca decriminalized up to the 12th week of gestation in 2019, Hidalgo in June 2021, and Veracruz in July 2021.

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declared unconstitutional the articles of the criminal code of Coahuila that criminalized the practice.

In a new balancing exercise, the SCJ established that the punitive route does not harmonize the right to decide of women and people with the capacity to gestate, with the constitutional purpose of protecting the life of the conceived, but rather annuls the former entirely (AI 148/2017, para. 266). Furthermore, making abortion a crime implies discriminating against people with gestational capacity since it assumes that their destiny is to be mothers (GIRE, 2024, 62, 70-71). Hence, the Court opted to *redefine the practice* of abortion in a destigmatizing direction, establishing that it is "necessary to eliminate the treatment that this expression receives and that is equated, by the design of the legal system, with a *crime*, since this [...] perpetuates a stereotype of gender concerning the role of women in society" (AI 148/2017, para. 264). In this sense, the Court opted for a transformative narrative, which *focuses on the future*, on the life project of women and people with the capacity to gestate, which it hopes can be free of stigmas and stereotypes, overthrowing the motherhood mandate.

Although anchored in an idea of substantive equality, this attempt at re-signification is based on a conception of agents capable of "self-authorizing" themselves for specific actions (Johnston, 2022,127). As Mackenzie (2014, 35) states, part of self-authorization – one of the dimensions of autonomy – is given by the social recognition condition: "that others regard the person as having the social standing of an autonomous agent". Dismantling prejudices and social stereotypes enables social recognition and self-authorization, thus increasing autonomy.

At the same time, the Court recognized without restrictions the "exclusive" right of women and people with gestational capacity to self-determination in matters of maternity (naming it reproductive autonomy),[34] which is enshrined

[34] It is important to note that this concept comes from the Inter-American Court of Human Rights, which recognized it in the case *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 257 (2012).

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in Articles 1 and 4 of the Constitution (AI 148/2017, para. 154-155, 195). Furthermore, it anchored the fundamental right to decide in the "reproductive justice" notion, which includes the right to self-determination, bodily autonomy, and physical and psychological integrity (AI 148/2017, para.129). In an argument that explicitly departs from any paternalism,[35] the Court affirmed that "reproductive freedom [...] implies that *it is not up to the State to know or evaluate the reasons for continuing or interrupting a pregnancy, since they belong to the woman's private sphere*, and can be of the most diverse nature" (AI 148/2017, para. 130). With this, the Court abandons the rationale of justification based on causal grounds and returns the decision to the pregnant person in all cases.

Although a firm liberal anchorage could be found in this foundation of the law, *the* fact is that the Court bases the law on a robust conception of equality that, in its words, "seeks to eliminate factual or legal assumptions based on a social hierarchy of supposed biological order", that is, it seeks to incorporate a vision of non-subordination or non-domination between genders (AI 148/2017, para. 89, AR 267/2023, para. 62). From there, it dedicates a good part of the decision to clarifying the conditions of inequality, marginalization, and precariousness in which many women in the country find themselves, pointing out how they influence their decisions (AI 148/2017, para. 132-135). Consequently, it recognizes that "it is necessary to establish the scope of the right to decide as a requirement for the State to implement specific measures useful for its materialization" (AI 148/2017, para. 138). Among the *positive* measures mentioned are sex education, access to information, recognition of the woman as the holder of the right to decide, and the guarantee that she can interrupt her pregnancy in public health institutions in an accessible, free,

[35] "A paternalistic position that supports the idea that women need to be 'protected' from making certain decisions about their life plan, sexual and reproductive health, has no place in the annulment of the right to decide since this approach entails a disregard for women as rational, individual and autonomous beings, fully aware of the decisions that – following their life plan – are the ones they consider most convenient". (AI 148/2017, para. 73).

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confidential, safe, expeditious and non-discriminatory manner within a period close to the beginning of the gestation (AI 148/2017, para.140-164).[36]

One last consideration about the case, which enables me to recover a mentioned point, is that the Court insists on making distinctions according to the context. On this occasion, when analyzing the timeframe that the legislation set for non-punishable abortions (which it declares unconstitutional), the Court establishes that the legislation that allows access to abortion must differentiate cases according to the situation of the woman or the pregnant person. Thus, if the antecedent is an unlawful conduct that forced the sexual and reproductive rights of the woman, special provisions must be provided to address the particularities of such a scenario. With all this, the Court consolidates its departure from the postulates of universality and abstraction that are typical of the liberal paradigm and applies considerations of intersectionality to the conditions for reproductive autonomy.

After this ruling that decriminalized abortion in Coahuila, and perhaps because of the radical nature of its argument, decriminalization followed in many other states. In 2021, it was legalized in Baja California and Colima; in 2022, in Sinaloa, Guerrero, Baja California Sur, and Quintana Roo. In 2023, Aguascalientes had to decriminalize after a conviction, and in 2024 Jalisco, Zacatecas, Nayarit, San Luis Potosí, Chiapas and Yucatán had to do the same. Finally, it was decriminalized in the States of Puebla, Michoacán, and in the State of Mexico in 2024, in Campeche in February 2025, and through the courts in Chihuahua in January 2025, making a total of 21 States (out of 32) where abortion is not punishable.

In AR 267/2023 of September 2023, the criminalization in the Federal Criminal Code was also declared unconstitutional. This *Amparo* reiterates the argumentation of AI 148/2017. However, its effects are remarkable as it

[36] Note that the establishment (without specifying) of this "short period close to conception" to exercise the right to decide is the formula used by the Court to "balance the coexisting elements and provide a scope of protection to both the conceived and the reproductive autonomy" (AI 148/2017, para. 198).

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declares the norms inapplicable for all people in the legal sphere of the complaining association, not only in the present and in the future, but also retroactively to those already prosecuted or sentenced for the crime (see AR 267/2023, para. 218-223). This is the closest to general effects that an *Amparo* trial for abortion has ever had. Another point to note is that the *Amparo* was promoted by GIRE, a civil association dedicated to the defense of reproductive rights. That its legal standing was accepted is exceptional in Mexico and has the consequence of opening up judicial representation and participation, as well as extending its effects far beyond when the complainant is an individual woman (or several women). This is an issue that I cannot deal with here, but which can reinforce the Court's commitment to the participatory dimension of substantive equality.

6. Conclusions

Throughout this article, I have sought to highlight different constitutional arguments that have been developed with regards to access to abortion until its consecration as a fundamental right, and how these arguments reflect different conceptions of autonomy. I have insisted on the consequences of each, even when the justifications are not explicit, and I have linked them to the conceptions of equality that have accompanied them.

Along the way, on the one hand, I have rejected paternalistic arguments for access to abortion in the causal systems, both because of their problematic reinforcement of gender stereotypes and symbolic violence and because they are not particularly transformative since they focus on the past. On the other hand, I have welcomed constitutional approaches based on the right to substantive equality, allowing us to understand autonomy in relational terms. Regarding the arguments of a negative liberal conception of autonomy, I suggest that although they have been present in Mexico in a subsidiary way, they have not been the basis for women's rights, enabling them to benefit from greater scope and a transformative vocation. The whole construction

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that emerged from *Roe* and inaugurated the constitutionalization of abortion at the international level is alien to Mexican constitutionalism and, I suggest, also to Latin American constitutionalism, which is rather founded on a robust understanding of social rights and substantive equality. It is time for the normative force of these arguments to become a reality in the daily lives of all women.

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