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# Miscarriage of Justice: The Impact of El Salvador's Total Abortion Ban

In April 2016, the Center for Reproductive Rights, *Agrupación Ciudadana por la Despenalización del Aborto*, and Debevoise & Plimpton LLP, provided supplementary information on El Salvador for consideration by the Committee for the Elimination of Discrimination against Women (the "Committee") for the 66<sup>th</sup> Session. The report highlights El Salvador's serious failure to comply with its obligations under the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"). In particular, El Salvador has failed to take all appropriate measures to eliminate discrimination against women in the field of healthcare (including family planning), reproductive rights and other human rights and fundamental freedoms by:

1. **Prohibiting abortion under any circumstances**, even in cases of rape or incest, where it endangers the mother's life, or where the fetus is unviable;
2. By effectively **obliging health professionals to report patients to the police** who they merely suspect *could possibly* have had an abortion, in total disregard of patient confidentiality; and
3. **Investigating and prosecuting 17 innocent women ("Las 17") who suffered miscarriages and were sentenced to up to 40 years in prison**, most on charges of aggravated homicide.

## THE LEGISLATION

In 1998, El Salvador criminalized abortion *under all circumstances*,<sup>1</sup> and in 1999 passed a constitutional amendment recognizing an embryo as a human being from "*the moment of conception*".<sup>2</sup> Thus a person who performs or self-induces an abortion, even before the fetal stage, is liable to be prosecuted for homicide. This carries a penalty of up to 50 years' imprisonment.<sup>3</sup> Further, it is a blanket offence in El Salvador for public employees or officials of any public authority (including hospitals and clinics) to fail to report crimes.<sup>4</sup> This includes failing to report abortion, which causes medical workers to limit risks to themselves by over-reporting. The result is that many women who suffer serious unprovoked complications in pregnancy (such as a miscarriage), opt not to seek healthcare assistance due to a fear that they will be wrongly suspected of an offence and prosecuted and imprisoned. In the event that women do seek medical attention, they face the real risk of being unjustly reported and prosecuted without adequate legal advice and

representation.<sup>5</sup> There remains a stigma in El Salvador associated with speaking about abortion law reform and reproductive rights.<sup>6</sup> Those who do speak out are often subject to abuse, aggression, and political violence and harassment.<sup>7</sup>

## THE CONSEQUENCES OF EL SALVADOR'S TOTAL CRIMINALIZATION OF ABORTION

El Salvador's severe anti-abortion legislation effectively restricts women's access to healthcare and has led to the preventable deaths of many Salvadoran women. Between 2000 and 2011, 57.4% of formal complaints to the authorities regarding potential breaches of anti-abortion legislation came from staff in public hospitals and from the Salvadoran Social Security Institute.<sup>8</sup> Women with obstetric complications have died or suffered long-term health damage from lack of medical treatment because they have been afraid to attend public hospitals.<sup>9</sup> Women have also committed suicide or otherwise died, or suffered long-term damage to health following backstreet abortions or self-inducement, whether by inserting an object or by ingesting potentially lethal medication or substances.<sup>10</sup>

## THE CASE OF GUADALUPE, ONE OF "LAS 17"

El Salvador's laws lead to the prosecution and imprisonment of vulnerable women. Between 2000 and 2011, 129 women in El Salvador were prosecuted for abortion or homicide when the fetal deaths occurred in the last months of pregnancy.<sup>11</sup> Of these 129 women, 26 were convicted of homicide<sup>12</sup> and 23 were convicted of abortion.<sup>13</sup> Most of these women were young, poor, with limited education, and from remote communities.<sup>14</sup> Indeed, 68.2% of the incarcerated women were between 18 and 25 years old and with limited education. Almost three-quarters were single.<sup>15</sup>

"Las 17" are a group of 17 Salvadoran women who, between 1999 and 2011, were each sentenced to up to 40 years in jail following reported miscarriages, mostly on charges of aggravated homicide.<sup>16</sup> One of these women, Guadalupe, suffered a miscarriage at 18 after being raped and was sentenced to 30 years' imprisonment in February 2008. After spending 7 years in prison she was pardoned in January 2015,<sup>17</sup> a decision welcomed by a group of eminent UN experts.<sup>18</sup> However, nine of these women remain in prison and new cases have been reported. A petition submitted by the Center on their behalf asserting that El Salvador's conduct breaches international human rights law is currently being considered by the Inter-American Commission on Human Rights.

## EL SALVADOR'S CONGRESS IS CURRENTLY CONSIDERING A BILL TO LOOSEN THE CRIMINALIZATION OF ABORTION

Nonetheless, some Members of Congress seek to change this reality and protect women's rights. In October 2016 was introduced a Bill to decriminalize abortion where the life of the mother is at risk, where the pregnancy is a result of rape, human trafficking or statutory rape, or where the fetus is unviable. President of the Salvadoran Congress, Lorena Peña, introduced the proposed amendment to the country's penal code to the Legislative Assembly, with the support of 12 other congresswomen. The amendment has already received broad support from the Alliance for the Health and Life of Women (la Alianza por la Salud y la Vida de Las Mujeres) — a coalition of more than 30 human rights organizations and international human rights activists.

# RECOMMENDATIONS

Now more than ever, an explicit recommendation to decriminalize abortion in El Salvador, at least in certain circumstances, is crucial to upholding women's right to health without discrimination. We respectfully request the CEDAW Committee to make the following recommendations to El Salvador during the 66<sup>th</sup> Session:

- To *urgently* repeal El Salvador's highly restrictive anti-abortion legislation and *urgently* pass the Abortion Bill to permit exceptions for pregnancy resulting from sexual violence, rape or incest, where there is a threat to the mother's life or health, or where the fetus is unviable.
- To *urgently* amend El Salvador's anti-abortion legislation to remove the obligation of health professionals and public officials to report women to the police based merely on a suspicion of abortion; and to formulate and actively implement policies to provide for the widespread dissemination of contraceptive products (particularly emergency contraception) and accurate family planning information to allow women (particularly adolescents in rural areas) to exercise their reproductive rights.
- To *urgently* liberate the women that remain in prison following reported miscarriages.

<sup>1</sup> Performing an abortion on another carries a penalty of imprisonment of up to twelve years, and self-inducing an abortion carries a penalty of imprisonment of up to eight years, see Decreto N° 1030, Código Penal (1998) (hereinafter '1998 Criminal Code'), Articles 133-137. See also Código de Ética y Deontología Médica (2015) (hereinafter '2015 El Salvador Doctors' Code of Ethics and Deontology'), Article 87, which provides that "performing abortion constitutes serious misconduct according to the Criminal Code".

<sup>2</sup> Decreto N°38, Constitución, Article 1.

<sup>3</sup> 1998 Criminal Code, Articles 128-132.

<sup>4</sup> 1998 Criminal Code, Article 312.

<sup>5</sup> Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned – The Effects of El Salvador's Total Criminalisation of Abortion*, 2014, p. 14 (hereinafter "CRR, *Marginalized, Persecuted, and Imprisoned*").

<sup>6</sup> The Center for Reproductive Law and Policy, *Persecuted – Political Process and Abortion Legislation in El Salvador: A Human Rights Analysis*, 2001, p. 40 (hereinafter "The Center for Reproductive Law and Policy, *Persecuted – Political Process and Abortion Legislation*").

<sup>7</sup> US State Department Country Reports on Human Rights Practices, *El Salvador 2014 Human Rights Report*, available at <http://www.state.gov/documents/organization/236900.pdf> (last accessed March 23, 2016) (hereinafter 'US State Department Country Reports on Human Rights Practices, *El Salvador*'); See also Women's Global Network for Reproductive Rights, *WGNRR Demands the Protection of Sexual and Reproductive Rights Defenders in El Salvador* (August 28, 2015), available at <http://wgnrr.org/wgnrr-demands-the-protection-of-sexual-and-reproductive-rights-defenders-in-el-salvador/> (last accessed February 12, 2016).

<sup>8</sup> Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico, *Del hospital a la cárcel: consecuencias para las mujeres por la penalización sin excepciones, de la interrupción del embarazo en El Salvador*, 2013 ("Citizen's Coalition for the Decriminalisation of Abortion on Grounds of Health, Ethics and Fetal Anomaly, *From Hospital to Jail: the Impact on Women of El Salvador's Total Criminalisation of Abortion*", *Reproductive Health Matters*, Vol. 22 (44) (November 2014)", p. 54 (hereinafter "*From Hospital to Jail Report*").

<sup>9</sup> *From Hospital to Jail Report*, pp. 53-55 (it is impossible to state the number of deaths: as long as abortion remains illegal, statistics cannot be expected to reflect the true position).

<sup>10</sup> *From Hospital to Jail Report*, p. 53, citing research from the Guttmacher Institute and the International Family Planning Federation Western Hemisphere Region, which estimates that the rate of unsafe abortions in El Salvador is about 25 per 1,000 women of childbearing age, such that over 35,000 unsafe abortions take place in El Salvador every year. Additionally, according to the Maternal Death Surveillance System of the Ministry of Health of El Salvador, the suicide rate among pregnant women was the third largest cause of maternal deaths in 2011, after hypertensive disorders and obstetric hemorrhage.

<sup>11</sup> *From Hospital to Jail Report*, pp. 53-55.

<sup>12</sup> Of these 26 convictions, 19 were for aggravated homicide, 4 were for attempted homicide and 3 were for manslaughter.

<sup>13</sup> Of the 80 remaining cases, 67 were dismissed or acquitted, and nine were subject to default judgment. No information is available about four cases. *From Hospital to Jail Report*, p. 55.

<sup>14</sup> Of the accused women, 43.4% were aged 21–25 years, 24.8% were aged 18–20 and 16.3% were aged 26–30. Thus, some 85% were women younger than 30. These women had very low levels of education: 46.3% were illiterate or had at most finished two years of primary school. Only 25.6% had attended secondary school, a technical school or university. *From Hospital to Jail Report*, pp. 53-54.

<sup>15</sup> CRR, *Marginalized, Persecuted, and Imprisoned*, p. 13.

<sup>16</sup> See *Las 17, No Dejemos que sus vidas se marchiten*, available at <http://www.las17.org/> (last accessed March 30, 2016). See also E. Guevara-Rosas, *El Salvador and Las 17*, NEW YORK TIMES (March 2, 2015), available at [http://www.nytimes.com/2015/03/03/opinion/el-salvador-and-las-17.html?\\_r=0](http://www.nytimes.com/2015/03/03/opinion/el-salvador-and-las-17.html?_r=0) (last accessed March 30, 2016).

<sup>17</sup> This was a prolonged process in which El Salvador's Congress approved Guadalupe's pardon by 43 votes, following the recommendations of the Human Rights Congressional Committee and the Supreme Court Committee. See Center for Reproductive Rights, *El Salvador Releases One Woman Wrongfully Imprisoned, But Refuses to Pardon 15 Others* (February 19, 2015), available at <http://www.reproductiverights.org/press-room/el-salvador-releases-one-woman-wrongfully-imprisoned-but-refuses-to-pardon-15-others> (last accessed March 30, 2016); OHCHR, *Guadalupe's pardon: UN experts urge El Salvador to pardon all women jailed for pregnancy complications and repeal restrictive abortion law* (January 28, 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15520&LangID=E> (last accessed March 30, 2016) (hereinafter 'OHCHR, *Guadalupe's pardon*').

<sup>18</sup> OHCHR, *Guadalupe's pardon* (The experts were **Emna Aouij** (Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice), **Mads Andenas** (Chair-Rapporteur on the Working Group on arbitrary detention), **Dainius Pūras** (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), **Juan Ernesto Mendez** (Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment), **Rashida Manjoo** (Special Rapporteur on violence against women, its causes and consequences), and **Gabriela Knaut** (Special Rapporteur on the independence of judges and lawyers).