

## FEATURE: The law, trials and imprisonment for abortion in Argentina

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*This report summarises the law and policy on abortion in Argentina and cases of trials and imprisonment for abortion between 2011 and 2016.*

Abortion in Argentina has been legal in certain circumstances since the adoption of the Penal Code in 1922. According to Article 86 of the Penal Code, abortion is illegal except to "save the life of the mother or where the pregnancy results from a rape or indecent assault committed on a female idiot or insane". In the past, courts have interpreted the rape/assault provision to require that the rape victim suffer from a mental disability for the abortion to be legal.<sup>1</sup> In cases where abortion is illegal, the law stipulates prison sentences ranging from 3 to 10 years and as high as 15 years for those who carry out abortions. Women who consent to or cause their own abortion can be imprisoned for up to 4 years.<sup>2</sup> However, this can be greatly increased if the courts decide to convict the woman of homicide, such as occurred in the case of "Belén" in 2016, which will be described later in this report.

Between 2011-13, according to the national Ministry of Health, there were approximately 700,000 live births in Argentina annually, and between 370,000 and 460,000 abortions. Approximately one-third of maternal deaths in the previous decade had been due to the consequences of unsafe abortion.<sup>3</sup> According to Institute for Health Metrics and Evaluation data, in 2013 the total maternal mortality ratio was 54.7 per 100,000 live births (range 45.3-64.6).<sup>4</sup> For 2015, WHO found a similar MMR of 52 per 100,000 live births (range 44-63).<sup>5</sup>

<sup>1</sup> Penal Code of the Nation of Argentina, Law 11, 179 of 1984, Second Book, Title I, Chapter I, Articles 85-88. <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm>

<sup>2</sup> Ibid. Penal Code

<sup>3</sup> Argentina Ministry of Health data, noted in: Belén Provenzano-Castro, Silvia Oizerovich, Babill Stray-Pedersen. Healthcare students' knowledge and opinions about the Argentinean abortion law. *Sexual & Reproductive Healthcare* 2016;7:21-26. [http://www.srhjournal.org/article/S1877-5756\(15\)00063-4/pdf](http://www.srhjournal.org/article/S1877-5756(15)00063-4/pdf)

<sup>4</sup> Kassebaum NJ, Bertozzi-Villa A, Coggeshall MS, Shackelford KA, Steiner C, Heuton KR, et al. Global, regional, and national levels and causes of maternal mortality during 1990–2013: a systematic analysis for the Global Burden of Disease Study 2013. *Lancet* 2014;384(9947):980–1004.

[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)60696-6/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)60696-6/abstract)

Compared to estimates from previous years, the MMR has not fallen much since 1990. The legal barriers that both women and health care providers face, especially in poorer and rural provinces, act to force women into unsafe, illegal “backstreet” abortions that risk their health and sometimes their lives, as well as possible imprisonment.

Data and cases reviewed by the Centro de Estudios de Estado y Sociedad (CEDES) and the Asociación por los Derechos Civiles (ADC), published by Ipas in 2014,<sup>6</sup> identified 417 cases recorded for the crime of abortion during the period from 1990 to 2008. The judicial records did not indicate whether these people were imprisoned, paid a fine or were granted conditional freedom, but they were all declared guilty of a crime.

The greatest percentage of sentences for the crime of abortion were against unskilled individuals who provided abortions. Based on national level data between 2002 and 2008, these sentences represented 80% of the total and were four times greater than sentences recorded against women who had an abortion. Between 1996 and 2008, a total of 234 sentences for this crime were confirmed nationwide. The jurisdictions with the most convictions were also the most populous provinces – Buenos Aires, Santa Fe, Córdoba – and the city of Buenos Aires.<sup>7</sup>

The 1966 legal case *Natividad Frias* had established that a criminal complaint presented by a health care provider against a woman for an illegal abortion violated her confidentiality rights and her right against self-incrimination. In 2010, the National Supreme Court of Justice reaffirmed this principle, which may explain the low number of cases of women who have been investigated or found guilty of illegal abortion in comparison with the number of cases against health care service providers who have been investigated, prosecuted and sentenced.<sup>8</sup>

In 2011, there was an exceptional case involving a woman physician who spent more than a year waiting to face a charge of criminal action for prescribing misoprostol for a 12-year-old girl in a marginalized neighbourhood for the termination of a pregnancy, in order to protect the girl's health, as the girl was adamant she would abort the pregnancy. The girl bought the medication and aborted on her own. It was the girl's parents who reported the doctor when they found out. The case was not heard for a year until the doctor could find a competent lawyer to represent her, when the case was finally closed. At the time, the doctor stated that providing this kind of counsel was standard at the clinic where she worked, and that she would do it again.<sup>9</sup>

It is important to note the correlation between the number of cases brought by the police or to the courts, the number of sentences that ended in imprisonment, the extent of limited access to health care and the maternal mortality ratio (MMR).

Legislative progress in support of sexual and reproductive health and rights (SRHR) has occurred a number of times in Argentina. In 2002, the *National Programme for Sexual Health and Responsible Procreation* aimed to lower maternal mortality. In 2004, the national government defined reproductive health as one of the key areas of national health policy for the next three years.<sup>10</sup> In 2006, Law 26.150 introduced comprehensive sexuality education. In 2012, the Supreme Court supported a lower court ruling that had allowed an abortion for a 15-year-old girl who had been raped by her stepfather. The Supreme Court determined that

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<sup>5</sup> Trends in maternal mortality 1990 to 2015: Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division. Geneva: WHO, 2015.

[http://apps.who.int/iris/bitstream/10665/194254/1/9789241565141\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/194254/1/9789241565141_eng.pdf?ua=1)

<sup>6</sup> Gillian Kane, Beatriz Galli, Patty Skuster, 2014. Argentina. When Abortion is a Crime: The threat to vulnerable women in Latin America. Ipas.

<http://www.ipas.org/en/Resources/Ipas%20Publications/When-Abortion-is-a-Crime-The-threat-to-vulnerable-women-in-Latin-America.aspx>

<sup>7</sup> Ibid Kane, Galli and Skuster

<sup>8</sup> Ibid Kane, Galli and Skuster

<sup>9</sup> Ibid Kane, Galli and Skuster

<sup>10</sup> Mónica Petracci, Silvina Ramos, Dalia Szulik, 2005. A strategic assessment of the Reproductive and Responsible Parenthood Programme of Buenos Aires, Argentina. *Reproductive Health Matters* 2005;13(25). [http://www.rhm-elsevier.com/article/S0968-8080\(05\)25174-1/pdf](http://www.rhm-elsevier.com/article/S0968-8080(05)25174-1/pdf)

the entire article in the law on rape and assault supported the interpretation that all rape victims may legally seek abortions. The Court also said that future rape victims would not be required to seek judicial approval for an abortion.<sup>11</sup>

All these victories were achieved under pressure from feminist, human rights and other advocacy groups supporting sexual and reproductive health and rights, throughout a period of government when the then President Néstor Kirchner's relationship with the Vatican had broken down.<sup>12</sup>

### The violence of institutions

A case that was widely publicised and recently celebrated is that of "Belén".<sup>13</sup> Belén was originally charged with aggravated murder on 3 May 2016. She had been held in jail for two years, since 2014. Belén was 25 years old when she went to a state hospital in San Miguel de Tucumán state, complaining of severe abdominal pains and heavy vaginal bleeding. The doctor she saw told her that she was 22 weeks pregnant and that she was experiencing a miscarriage. Other medical staff, who found a 32-week-old fetus in a hospital bathroom, claimed that it was hers. They then reported Belén to the police, claiming that she must have induced a very late abortion. She was charged with homicide, held in pre-trial detention for two years and then sentenced to 8 years and imprisoned in March 2014, all without legal representation. Yet, there was no DNA testing to connect Belén to the fetus, and the discrepancy between the diagnosis of miscarriage of a 22-week pregnancy and a 32-week-old fetus in a bathroom was never examined.<sup>14</sup>

After her case became known, thanks to the lawyer who agreed to represent her, there was growing criticism of the miscarriage of justice by dozens of feminist, human rights, political and social organizations and the UN Human Rights Committee. Amnesty International collected 120,000 signatures a petition calling for her release. Following demonstrations on 12 August 2016 in cities across the country, centred in the capital of Tucumán, the Supreme Court of Justice of Tucumán ordered that she should be released from prison pending an appeal of her sentence, which is still pending at this writing.<sup>15</sup>

In countries with restrictive abortion laws and legal requirements to report any breaking of the law they encounter, health care providers face a moral conflict as to whether to uphold a patient's right to confidentiality, including when it is a woman in need of post-abortion care for complications of unsafe abortion. In Argentina, the abortion law states, "each member of a woman's health team should ensure confidentiality and privacy when providing abortion care in circumstance allowed by law". Post-abortion is allowed by law.<sup>16</sup> However, a combination of lack of legal awareness, pressure from conservative and religious groups, and the fear that they themselves may be arrested for providing an abortion often means that health professionals do report women in these circumstances to the police.<sup>17</sup>

This conflict has disastrous results for women and girls seeking legal abortion care. The denial of abortion to a 12-year-old indigenous girl in the Salta province, who was raped in

<sup>11</sup> Rebecca DiLeonardo. Argentina Supreme Court legalizes abortion for rape victims". The Jurist. 14 March 2012. <http://www.jurist.org/paperchase/2012/03/argentina-supreme-court-legalizes-abortion-for-rape-victims.php> quoting <https://www.scribd.com/fullscreen/85219759> and ref 1.

<sup>12</sup> Ibid, DiLeonardo, p.87.

<sup>13</sup> International Campaign for Women's Right to Safe Abortion Newsletter. Demonstrations in Buenos Aires and Tucumán to release woman sentenced to prison for miscarriage. 5 May 2016. <http://www.safeabortionwomensright.org/demonstrations-in-buenos-aires-and-tucuman-to-release-woman-sentenced-to-prison-for-apparent-miscarriage/>

<sup>14</sup> International Campaign for Women's Right to Safe Abortion Newsletter. STOP PRESS: Belén released from prison. 19 August 2016. <http://www.safeabortionwomensright.org/stop-press-belen-released-from-prison/>

<sup>15</sup> Ibid. International Campaign

<sup>16</sup> Jina Dhillon. Protecting Women's Access to Safe Abortion Care-A Guide to Understanding the Human Rights to Privacy and Confidentiality: Helping Advocates Navigate 'Duty to Report' Requirements. Ipas, 2014. <http://www.ipas.org/en/Resources/Ipas%20Publications/Protecting-Womens-Access-to-Safe-Abortion-CareA-Guide-to-Understanding-the-Human-Rights-to.aspx>

<sup>17</sup> Betraying women: provider duty to report. Ipas, 2016.

<http://www.ipas.org/en/Resources/Ipas%20Publications/Betraying-women-Provider-duty-to-report.aspx>

November 2015, is an example of this. The girl, known as “Juana”, should have been permitted a legal abortion, as her pregnancy was the result of gang rape by five men and three adolescent boys, and her health and mental state were at risk. However, she did not receive proper medical care, nor was a pregnancy test even done. At seven months of pregnancy she was found to be carrying an anencephalic baby and was delivered by caesarean section.<sup>18</sup>

Considering Belén’s case in Tucumán and Juana’s in Salta, Mariana Álvarez, a professor of human rights at the University of Tucumán told the *Buenos Aires Herald*: “There is a systematic pattern of human rights violations in the district [Tucumán] relating to women, reflecting an agreement between the health care system and the judiciary to criminalize women who face pregnancy complications.”<sup>19</sup>

### **Health care providers**

Institutional connections between the courts and the health care system may be more likely due to a lack of adequate medical education on abortion for health care students in Argentina. Indeed, a case study in 2015-2016 of health care students’ knowledge of abortion law in Argentina found that of 740 students who answered the questions about abortion according to current Argentinean law, half the students (52.5%) answered correctly that abortion was legally restricted, 24.9% thought it was always illegal, and 21.5% admitted they did not know.<sup>20</sup> The authors of this study worried that lack of knowledge may lead these future health care providers to deny a legal abortion to someone with an unwanted pregnancy who is legally entitled to it, resulting in recourse to unsafe abortion.

### **Anti-abortion groups also using the law**

Alongside the progress represented by some SRHR laws and policies in Argentina, an article in 2014 describes how anti-abortion NGOs have sought to use litigation to undermine sexual and reproductive health policies, and especially to oppose any extension of the right to abortion.<sup>21</sup> The authors describe these groups as the “civil arm of religion”, particularly since 1998, when the conservative NGO Portal de Belén successfully achieved the banning of emergency contraception through the courts. There have also been several attempts to force the withdrawal of the National Programme for Sexual Health and Responsible Procreation, one of which temporarily succeeded in December 2002, although it was revoked a few weeks after the ruling was published.<sup>22</sup> As early as 1994, anti-abortion groups were using legal arguments to oppose sexual and reproductive health and rights. Under a collective *writ of amparo* in 1994, they were able to enforce legal recognition of the so-called “right to life from conception”, and since then have tried to use the 1994 ruling as a legal precedent to try to criminalise legal abortions, for example by attempting to block young women from accessing legal abortion following rape.<sup>23</sup>

Monica Gogna et al. note that the “defence of life from conception” clause, promoted by former President Menem in 1994, was a “manifestation of Argentina’s then complete alignment with Vatican policy on abortion”.<sup>24</sup> They note that Menem’s enthusiasm for this

<sup>18</sup> Ximena Schinca. Activists protest in Buenos Aires after 12-year-old is denied legal abortion. [Buenos Aires Herald](#), 16 June 2016. Reported in: International Campaign for Women’s Right to Safe Abortion. 17 June 2016. <http://www.safeabortionwomensright.org/activists-protest-in-buenos-aires-after-12-year-old-is-denied-legal-abortion/>.

<sup>19</sup> Ximena Schinca, 2016. Tucumán’s abortion trials placed in spotlight. *Buenos Aires Herald*, 23 August 2016. <http://www.buenosairesherald.com/article/220404/tucum%C3%A1n%E2%80%99s-abortion-trials-placed-in-spotlight>

<sup>20</sup> Op cit. Provenzano-Castro, Oizerovich, Stray-Pedersen, p.21

<sup>21</sup> Maria Angelica Peñas Defago, José Manuel Morán Faúndes. Conservative litigation against sexual and reproductive health policies in Argentina. *Reproductive Health Matters* 2014;22(44):82-90. [http://www.rhm-elsevier.com/article/S0968-8080\(14\)44805-5/pdf](http://www.rhm-elsevier.com/article/S0968-8080(14)44805-5/pdf)

<sup>22</sup> Ibid. Peñas Defago, Morán Faúndes.

<sup>23</sup> Ibid. Peñas Defago, Morán Faúndes.

<sup>24</sup> Mónica Gogna, Mariana Romero, Silvina Ramos, Mónica Petracci, Dalia Szulik. Abortion in a restrictive legal context: the views of obstetrician-gynaecologists in Buenos Aires, Argentina. *Reproductive Health Matters* 2002;10(19). [http://www.rhm-elsevier.com/article/S0968-8080\(02\)00014-9/pdf](http://www.rhm-elsevier.com/article/S0968-8080(02)00014-9/pdf)

initiative stemmed from his wish to gain support of the Church hierarchy in the 1995 presidential elections. More recently, with the election of the Argentinian Pope in 2013, the Argentinian national executive, Conservative NGOs and the Vatican have strengthened their relationship. This has already led to the Catholic hierarchy putting pressure on the government, and succeeding in influencing the reform of the Civil and Commercial Code. Consequently, the final version of Article 19 states that “life starts at conception”,<sup>25</sup> giving conservative NGOs the potential to counter progress made by abortion rights groups.

The coalition of the Catholic hierarchy and conservative NGOs with the Argentinian national executive has highly negative effects for the health and well-being of women and health care providers all over Argentina. The Asociación por los Derechos Civiles (ADC) indicates that the majority of Argentinian provinces are not following guidelines on abortion set out by the national Supreme Court.<sup>26</sup> Indeed Juana’s case in the Salta province evidences the ability of local authorities to disregard the law at will. The Salta province, among 15 others, either does not have any protocols in place to allow access to legal abortion, or has protocols in place that aim to hinder access to legal abortion.<sup>27</sup> The ADC found for example that Salta was the “worst province in terms of guaranteeing access to non-punishable abortion” through its collusion in blocking the right to abortion in cases of rape and risk to the woman’s health. Salta province allows doctors to refuse to carry out an abortion in cases other than moral objection, requires the intervention of the Public Ministry, and the presence of parents in cases involving minors for an abortion to take place. It also limits the time until which abortion is legal to 12 weeks.<sup>28</sup> As Shena Cavallo notes, practice more often than not differs from what is written in law and facilities supposedly provided.<sup>29</sup> Because of Juana’s case, the Lower House of Congress issued a report stating that “all courts and administrative authorities are to comply with comprehensive health care protocols to deal with cases of non-punishable abortions.”<sup>30</sup> It remains to be seen whether this will be acted upon.

### **The use of advocacy and information in support of women's need for safe abortion**

Civil society organisations, women’s groups and safe abortion information hotlines, such as the Socorristas en Red<sup>31</sup> and La Línea Aborto,<sup>32</sup> are increasingly helping women to get accurate information on the medical abortion pills called misoprostol, and provide pre- and post-abortion counselling and support.<sup>33</sup>

Moreover, to end on a positive note, legislative and judicial progress in the past few decades has created legal space for women and health care providers to counter conservative NGOs. This has been mirrored in statements by the new UN Special Rapporteur on Torture from Argentina, Juan Méndez, who supported the release of “Belén” and called on all nations to decriminalise abortion and to ensure access to safe and legal abortion. He said: “States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care.”<sup>34</sup>

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<sup>25</sup> Op cit. Peñas Defago and Morán Faúndes, p.87.

<sup>26</sup> Asociación por los Derechos Civiles, 2015. Acceso al aborto no punible en Argentina: Estado de situación. <http://despenalizacion.org.ar/pdf/publicaciones/ADC-Acceso-al-aborto-no-punible-Marzo-2015.pdf>

<sup>27</sup> Celina Andreassi. Majority of provinces not complying with abortion rights. The Argentina Independent. 13 March 2015. <http://www.argentinaindependent.com/currentaffairs/majority-of-provinces-no-complying-with-abortion-rights/>

<sup>28</sup> Ibid. Andreassi.

<sup>29</sup> Shena Cavallo. Abortion in Argentina: women twice betrayed. Open Democracy, 3 May 2016. <https://www.opendemocracy.net/democraciaabierta/shena-cavallo/abortion-in-argentina-women-twice-betrayed>

<sup>30</sup> Op cit. Schinca, ref 18.

<sup>31</sup> [www.socorristasenred.blogspot.com.ar/](http://www.socorristasenred.blogspot.com.ar/)

<sup>32</sup> <http://www.abortoconpastillas.info/>

<sup>33</sup> Silvina Ramos, Mariana Romero, Lila Aizenberg. Women’s experiences with the use of medical abortion in a legally restricted context: the case of Argentina. Reproductive Health Matters 2015;22(44/Supplement):4-15. [http://www.rhm-elsevier.com/article/S0968-8080\(14\)43786-8/pdf](http://www.rhm-elsevier.com/article/S0968-8080(14)43786-8/pdf)

<sup>34</sup> International Campaign for Women’s Right to Safe Abortion Newsletter, Statement: Special Rapporteur on Torture. 20 May 2016. <http://www.safeabortionwomensright.org/statement-special-rapporteur-on-torture/>

The conditional release of "Belén" has been described as a "collective triumph of the women's movement".<sup>35</sup> Over 300 feminist, women's rights and abortion rights groups worked together in Argentina to secure her release and to press for confirmation of her innocence. Belén's lawyer described the cancellation of her preventative detention and release as "the beginning of the end of injustice."<sup>36</sup> Today activists are waiting on the appeal court to overturn Belén's conviction, which will hopefully create a legal precedent, preventing the same thing happening to other women in future.

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<sup>35</sup> Luciana Peker. Cuando Belén se escribió con V. Página12, 19 August 2016.

<http://www.pagina12.com.ar/diario/suplementos/las12/13-10798-2016-08-19.html>

<sup>36</sup> Ibid, Peker.