



# Persecuted

Political Process and Abortion Legislation  
in El Salvador: A Human Rights Analysis

THE CENTER FOR REPRODUCTIVE LAW AND POLICY

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# Executive Summary

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Current abortion laws in El Salvador are among the most restrictive in the world. The new Penal Code that came into effect in April 1998 eliminated all legal grounds for abortion and penalized new forms of inducing abortion. In January 1999, Article 1 of the Constitution was amended to establish the protection of life from the moment of conception. This report is devoted to examining how these restrictive regulations and their application violate women's reproductive rights recognized in international human rights treaties signed by El Salvador.

This study illustrates the overall situation of women in El Salvador, as well as the political process that led to the adoption of the new Penal Code in April 1998 and the new Constitution in February 1999. It also calls attention to the influence of the Roman Catholic Church and right-wing Catholic groups in countries like El Salvador, which use similar strategies in various Latin American countries to exert direct influence on regulatory changes that limit the exercise of women's rights, counter to international agreements in this area.

This report also looks at the way in which the judicial branch has applied penal legislation in this area since the new laws came into effect. In this respect, it is worth highlighting certain facts that reveal the impact of restrictive abortion legislation. The information was gathered from cases that went to trial between April 1998 (the date the new Penal Code came into effect) and October 1999 (the start date of this research).

- Information was gathered from all of the prosecutors' offices operating in El Salvador. Of the 69 files on abortion cases for the period under examination, 46 involved women charged for having abortions; the rest were investigations of abortion providers, or files opened for reported fetus findings, with searches underway for the women who aborted.

- The majority of the women brought to trial were young (29 were between the ages of 15 and 24; three were between 10 and 14); unmarried (31 of the 46 women were single); with little education and very limited resources (18 were domestic workers); in other words, the country's most vulnerable women.
- The study found that, when faced with the impossibility of obtaining a safe and legal abortion, women resorted to a wide variety of abortion methods: clothes hangers, iron bars, high doses of contraceptives, fertilizers, gastritis remedies, soapy water and caustic agents (such as car battery acid).
- The report also reveals the role of public hospitals in bringing charges; women are accused on suspicion of abortion, in violation of their right to privacy and their right to expect professional confidentiality. In the case records examined, hospitals were responsible for a significant number of accusations. Out of 46 cases, 23 accusations were made by hospital staff, while the other 23 were made by third persons, including police officers and private individuals.
- Nineteen of the 46 women who went to trial were or are currently being represented by public defense counsel. The type of defense was not specified in 23 of the cases.
- In El Salvador, it is quite common for persons accused of a crime to remain in prison for the period preceding the trial. According to the study's findings, while Salvadoran legislation provides for possible "substitutive measures" instead of preventive custody, the latter is used fairly frequently (preventive custody was ordered in nine of the 46 cases, and substitutive measures in nine cases).

Finally, this report frames the situation faced by Salvadoran women in the context of national and international regulations to protect women's rights, including their rights to health, liberty, security of person, and even their right to life. In addition to the rights violated by the legislation itself, by the accusation process and by the legal proceedings against women who have abortions, abortion providers who report women violate a number of other human rights, such as the right to be presumed innocent and the right to privacy. This study reveals the nature of these human rights violations and makes recommendations to both the

Salvadoran government and the international community to put an end to these abuses.

In general terms, this report shows that young, poorly educated women of limited financial means are the typical victims of unsafe procedures. Whatever the reasons they may have for making the difficult decision not to have a child, these women are persecuted by the health care system and the judicial system in El Salvador. Not only does the existing legal system fail to provide alternatives that would allow Salvadoran women to exercise their reproductive rights, it violates their human rights.



# Introduction

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Current abortion laws in El Salvador are among the most restrictive in the world. The new Penal Code, which came into effect in April 1998, eliminated the legal grounds which permitted abortion in limited circumstances and penalized all forms of inducing abortion. As part of the tendency to restrict women's access to legal abortion, Article 1 of the Constitution was amended in January 1999 to protect the right to life from the moment of conception. Chile is the only other country in Latin America with such restrictive legislation.

Currently, 62% of the world's population live in countries where induced abortion is generally allowed, and 26% live in 74 countries where abortion is prohibited, or only permitted to save the woman's life.<sup>1</sup> Abortion laws vary from country to country, but there has been a noticeable trend toward liberalization.<sup>2</sup> In fact, since 1985, 19 countries have liberalized their abortion legislation. El Salvador is one of only two countries that have made abortion legislation more restrictive since 1994.<sup>3</sup>

Since abortion is highly restricted or illegal, statistics on induced abortion in El Salvador and in Latin America are not entirely reliable.<sup>4</sup> Nevertheless, an estimated four million abortions are performed in Latin America every year,<sup>5</sup> 900,000 of which are performed in Central America.<sup>6</sup> Abortion is an important issue not only because the number of cases is so high, but also because restricting abortion constitutes a serious public health problem that claims the lives of thousands of women every year. The World Health Organization (WHO) estimates that 13% of the 600,000 pregnancy-related deaths worldwide each year are due to unsafe abortions.<sup>7</sup> It is calculated that 21% of maternal mortality in Latin America is directly related to unsafe abortion.<sup>8</sup> In this context, El Salvador has one of the highest maternal mortality rates in Latin America, and abortions performed in high-risk conditions are the second highest cause of maternal mortality.<sup>9</sup>

The abortion situation in El Salvador is directly related to women's desire to have smaller families and to the unmet demand for family planning. In El Salvador, 35.7%

of pregnancies are unplanned, and 13.8% of unplanned pregnancies are unwanted.<sup>10</sup> Although a majority of Salvadoran women between the ages of 15 and 44 surveyed (97.1%) say they are familiar with contraceptive methods, only 38.3% state that they use any of these methods.<sup>11</sup> Moreover, an estimated 52.3% of Salvadoran women do not use family planning methods despite their wish to use them.<sup>12</sup> This indicates inadequate access to and use of contraceptive methods. This lack of access combined with the failure rate of many contraceptive methods, results in a high rate of unwanted pregnancies that end in clandestine abortions performed in unsafe conditions, endangering women's lives and health.

In El Salvador, clandestine abortion is a critical problem for the female population, particularly low-income women. But the criminalization of abortion is an even more serious problem, because it eliminates access to safe abortion, even for rape victims and women whose lives are in danger. Criminalization also veils the true magnitude of the abortion situation in El Salvador and increases the stigma attached to women who have abortions.

Although the situation is obviously critical, the Salvadoran state refuses to address the issue, thus violating women's internationally recognized rights. Lack of access to contraceptive methods leads to unwanted pregnancies that end in unsafe, poorly performed abortions, contributing to high female mortality and morbidity rates. These combined factors result in the violation of women's rights to life, to physical integrity, to health, to privacy, and their right to decide the number and spacing of their children — all internationally recognized rights. The criminalization of abortion denies Salvadoran women the right to control their bodies and their lives, and the right to reproductive health services that enable them to enjoy full and healthy lives.

## A. OBJECTIVES

This study examines the political process that led to the adoption of the new Penal Code in April 1998 and the new Constitution in February 1999, as well as the judiciary's application of penal legislation in this area since the new legislation came into effect. It analyzes the cases opened after the penal reform came into effect, examining how justice is carried out, how the prosecutor's offices proceed in these cases, and the profiles of women prosecuted for abortion. It also identifies violations of the human rights of women resulting from this situation in light of national legislation and international treaties signed by the Government of El Salvador.

The first chapter places the research in the overall national context, with a look

at the Peace Accords and the country's current political and socioeconomic situation with a short summary of the recent history of violence. Chapter II looks at the situation of women in El Salvador and their reproductive health in the civil and political context. Chapter III studies former abortion legislation, revealing the process and actions of various players that led to the adoption of the current laws in this area. Chapter III features an analysis of the new penal regulations of 1998 and the 1999 Constitution, including the reaction of various professional sectors involved in the abortion issue in Salvadoran society.

The second phase of the research focuses directly on the impact of restrictive abortion laws, analyzing the abortion trials initiated since the new penal legislation came into effect. It also studies the profile of women prosecuted for abortion, the role of the Public Prosecutor's Office — which carries out all criminal investigations — of hospitals and of the persons who report abortion cases. There is also an attempt to examine the outcome of trials so far, since most cases were still open at the time the research was completed.

Finally, the situation of the women brought to trial is placed in the context of national and international human rights regulations, establishing the Salvadoran State's international liability for failing to fulfill its obligations under agreements it made to protect women's human rights, since it neither respects, protects nor guarantees the reproductive rights of Salvadoran women.

## B. METHODOLOGY

This report is based on research carried out during a six-week period between August and October 1999. The research focused on obtaining information illustrating the political process leading to the criminalization of abortion and the judicial branch's application of the new regulations. This information made it possible to document and analyze, from a human rights perspective, the violation of Salvadoran women's reproductive rights.

In-depth interviews were carried out with numerous people who are involved in reproductive rights issues, or who belong to the various sectors of society that played a determining role in abortion legislation reform and its application in El Salvador. Interviewees included members of the medical profession, lawmakers, public officials, government representatives, law enforcement officials, representatives of international organizations present in the country, representatives of the women's movement and members of right-wing Catholic groups (which call themselves "pro-life" groups).<sup>13</sup> There was also an examination and analysis of laws, policies, studies and other secondary sources such as newspaper articles, on

the issues of reproductive health and abortion in El Salvador, related in particular to the legal reforms and their application.

The research involved reviewing all abortion cases from April 1998 to October 1999, recorded in the 18 regional or subregional offices of the Public Prosecutor throughout the country.<sup>14</sup> All cases opened since the new Penal Code came into effect were reviewed through visits to the prosecutors' offices or in reports provided by officials from the prosecutors' offices that could not be visited because they were too remote and difficult to reach.<sup>15</sup>

While the research presented in this report is meant to be exhaustive, it is by no means an empirical study of abortion in El Salvador. Nor did the researchers use "fact-finding" methodology to collect the testimony of women victims of the application of abortion legislation to denounce the violation of Salvadoran women's human rights.<sup>16</sup> This report focuses instead on the information obtained from interviews, documents and legal case records, on the basis of which it concludes that, through punitive abortion legislation and its implications for the lives of Salvadoran women, the Salvadoran State is violating women's human rights that are recognized in the international human rights treaties signed by El Salvador.

# I. Overall Context

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## A. POPULATION AND DEMOGRAPHY

With a surface area of 21,000 square kilometers,<sup>17</sup> a population of 6.2 million inhabitants (an estimated 91 million by the year 2015)<sup>18</sup> and a *per capita* income of 115.74 USD,<sup>19</sup> El Salvador is the smallest, most densely populated country in the region. It is also one of the poorest. El Salvador is bordered by Guatemala and Honduras, and it is the only country in Central America that does not have a coast on the Caribbean Sea.<sup>20</sup> The Salvadoran population is 94% mestizo, 5% indigenous and 1% white.<sup>21</sup> The country's official language is Spanish, and the indigenous language is Nahuatl, which is spoken only by a very small portion of the indigenous population. Seventy-five percent of the population is Catholic.<sup>22</sup>

El Salvador is divided into four major areas: Zona Occidental, Zona Central, Zona Paracentral and Zona Oriental, which are in turn divided into 14 departments: Ahuachapán, Sonsonate and Santa Ana, which are part of the Zona Occidental; San Salvador, Mejicanos, Nueva San Salvador, San Marcos, Apropa, Chalatenango and Soyapango, which are part of the Zona Central; San Vicente, Sensuntepeque, Zacatecoluca and Cojutepeque, which are part of the Zona Paracentral; and La Unión, San Miguel, San Francisco Gotera and Usulután, which are part of the Zona Oriental.

## B. THE CIVIL WAR AND PEACE ACCORDS

By the mid-1970s, after half a century of rule by 15 military dictatorships and more than 100 years with the political economy being dominated by just 65 families,<sup>23</sup> El Salvador's social, political and economic fabric began to unravel and around 1980, the country was plunged into a civil war that marked its history. The war arose in the context of a political ruling class that lacked the will to devise strategies to resolve the country's political and economic problems. The armed forces controlled the government, and the landholding class was the only beneficiary of an economic system that excluded the majority of the population, made

up of the peasant class.<sup>24</sup>

The combined factors of an oppressive economic system, poverty and a political system completely closed to popular participation cut off all legal and democratic channels for change. This led men and women across social classes to join together to create an armed movement to fight the existing regime.<sup>25</sup> After 12 years of armed conflict that claimed the lives of 75,000 Salvadorans, in January 1992, the Government of El Salvador and the Frente Farabundo Martí de Liberación Nacional (FMLN) signed a peace agreement in Mexico, known as the “Chapultepec Agreements.”

The peace process embraced four basic goals: to put an end to armed conflict via political means; to advance the country’s democratization; to guarantee unrestricted respect for human rights; and to reunify Salvadoran society.<sup>26</sup> In order to achieve these objectives, the Chapultepec Agreements included Armed Forces reforms, the creation of a National Civil Police Force, judicial and electoral system reforms, socioeconomic measures, demobilization of the FMLN’s military forces, and the FMLN’s institution as a legal political party. Constitutional reform was also agreed to as a way of incorporating a number of points agreed upon during the peace process.<sup>27</sup>

### C. CURRENT POLITICAL CONTEXT

Although there have been political achievements such as the Peace Accords and a number of peaceful changes of government, there has been no significant change in the country’s overall situation, particularly in terms of the living conditions of the majority of the population.<sup>28</sup> It has proven difficult to implement the Peace Accords due to resistance on the part of certain political sectors and a series of economic difficulties.<sup>29</sup> The Peace Accords are still in effect despite these problems, but the root causes of the war, in particular land distribution and poverty, have not been properly addressed, much less resolved.<sup>30</sup>

There is widespread mistrust and discontent among the Salvadoran population when it comes to political processes, which is reflected in the low political participation rates.<sup>31</sup> There is discontent not only with the electoral and political system, but also with political parties. Their inability to meet the population’s demands seems to be the source of this mistrust.<sup>32</sup> Of the nine existing political parties, the main ones are the Alianza Republicana Nacionalista (ARENA), which has been in power since the first elections held after the signing of the Peace Accords, and the FMLN. Despite popular dissatisfaction, both parties have an incontrovertible hold on their constituents.

### D. THE ROMAN CATHOLIC CHURCH AND THE POLITICAL

## PROCESS

In a country where the majority of the population are practicing Catholics, the social influence of the Catholic Church is very significant.<sup>33</sup> It has always played an important role in Salvadoran society. In the seventies, the Church helped create the peasant organizations, which were one of the driving forces in the civil war. The ruling class accused the Church of instigating a class war and launched a campaign against clerics in general and Jesuits in particular. A number of clerics were assassinated.<sup>34</sup>

The Catholic Church's role as a protector of social justice and human rights, and its impact on social issues changed in the mid-1990s, with the appointment of the new Archbishop of San Salvador. He is a member of the right-wing Opus Dei and has the support of the ruling class<sup>35</sup> as well as close ties with right-wing nongovernmental organizations.<sup>36</sup> This change has influenced the stance of both the Church and the government with regard to social issues that affect women in particular.

## E. ECONOMIC AND SOCIAL CONTEXT

### ***1. Employment, major industries and infrastructure***

The main objective of Salvadoran economic policy in the past decade has been to build a more open economy by creating a more dynamic private sector open to exports and international markets.<sup>37</sup> Institutional changes and economic policy led to considerable economic growth at the beginning of the nineties, which later decelerated. Nevertheless, this system emphasizing growth and modernization proved incapable of dealing with poverty, job creation and huge regional disparities.<sup>38</sup> In fact, while the economy grew by 3.5% in 1988, with an inflation rate of 4.2%,<sup>39</sup> between half and two-thirds of Salvadoran men and women were living in poverty, with an estimated poverty rate of approximately 80% in rural areas.<sup>40</sup>

In 1997, 63% of the economically active population (EAP) were men and 37% were women;<sup>41</sup> close to 60% of the Salvadoran population was unemployed or underemployed, and 8% of the EAP was idle.<sup>42</sup> Indicators show regional disparity in terms of employment and salaries: the unemployment rate is higher in rural areas (8.7%) than urban areas (7.5%), and the average urban income is 2.3 times higher than the average rural income.<sup>43</sup> It should be noted that money sent by family members abroad, particularly from the United States, has helped sustain the economy and maintain its stability, although it has been used more for consumption than for investment.<sup>44</sup>

The most important productive sectors of the economy in El Salvador are the

manufacturing sector, the commercial sector, and the agricultural sector. Together they generate over half of the Gross Domestic Product (GDP). Market liberalization has had a negative impact on agricultural-sector participation, which dropped from 16.5% of the GDP in 1992 to 13% in 1997, whereas the financial and insurance sectors grew from 2.3% of the GDP in 1992 to 3.4% in 1997.<sup>45</sup> Within the sectors of production, a higher percentage of men work in agriculture, industry and trade, whereas women work primarily in services, trade and industry.<sup>46</sup>

Infrastructure investment is not carried out equitably, which disproportionately affects the rural and poorest population.<sup>47</sup> This can be seen above all in the telecommunications and electricity sectors, which have poor overall coverage and targeted investment in urban areas.<sup>48</sup> A similar situation exists with respect to the road system, particularly in rural areas, where two-thirds of the roads are in poor condition.<sup>49</sup>

There is a housing shortage in El Salvador that primarily affects the country's rural sectors and low-income families.<sup>50</sup> The most pressing needs of the country's poorest households are drinking water, sanitary services and electricity. Only 55% of homes in urban areas have access to sewage services. These same levels of inequality are seen in electricity distribution, with 95.9% coverage in urban areas and 55.7% in rural areas. The housing shortage and lack of basic services make the Salvadoran population particularly vulnerable to disease and natural disasters.<sup>51</sup>

## **2. Health**

There were an estimated 36,000 deaths per year in El Salvador between 1990 and 1995.<sup>52</sup> In 1994, the primary cause of death was external causes, such as accidents, homicides and suicides.<sup>53</sup> Among children, diarrhea and respiratory infections were the most common causes of postnatal and child morbidity and mortality.<sup>54</sup> The third-most-prevalent cause of mortality among adolescent girls was pregnancy and postpartum complications.<sup>55</sup> Other illnesses, including mental illnesses, alcoholism, vascular diseases and malignant tumors, had a severe impact on the health of the Salvadoran population.<sup>56</sup>

The health care system in El Salvador is made up of three subsectors: the public sector, the social security sector and the private sector. Each of these sectors has its own resources, care systems and management. The public system is administered by the Ministry of Public Health and Social Assistance (MSPAS), which is estimated to cover 40% of outpatient care and 76% of hospital admissions.<sup>57</sup> The social security system, operated by the Salvadoran Social Security Institute (ISSS), provides coverage to the employees of private companies and to civil servants, accounting for approximately 15% of hospital admissions. The private system cov-



ers 9% of hospital admissions and 45% of outpatient consultations. NGOs also participate in the health care system; it is estimated that they provide care to between 25% and 40% of the rural population.<sup>58</sup>

After a period of sustained growth that began in 1990, health care expenditures dropped in 1997, both in real terms and as a percentage of GDP, to US \$24 per capita, compared to the Central American average of US \$250.<sup>59</sup> According to World Bank estimates for the period from 1990 to 1997, there were 0.7 doctors per thousand Salvadorans, and only 1.4 hospital beds per thousand inhabitants.<sup>60</sup>

### **3 Education**

Although the illiteracy rate dropped from 31% in 1979 to 20% in 1997, there are still inequalities in terms of access to education.<sup>61</sup> In 1997, one out of every five Salvadoran women over the age of 10 was still illiterate. The situation is even more serious in the country's rural areas, where 31.8% of the population is illiterate, compared with 11.3% in urban areas.<sup>62</sup> In 1997, 79% of students went to public schools and 21% went to private schools, with 56% of students concentrated in urban areas.<sup>63</sup> There is a direct correlation between years of schooling and income, with higher salaries for those with higher levels of education living in urban areas.<sup>64</sup> This makes it difficult for a large proportion of the population to compete in the job market.

## F. VIOLENCE AND CITIZEN SAFETY

Not only is El Salvador one of the poorest countries in the region, but it is also one of the most violent countries in Latin America.<sup>65</sup> Despite the high hopes fostered by the 1992 Peace Accords and the efforts made throughout the nineties, the culture of violence, arms possession and institutional impotence place Salvadorans at a high risk of physical violence.

Studies highlight the fact that the war gave rise to a culture of violence<sup>66</sup> that has been present in the society for decades, and that the transition to peace failed to stop the spread of this culture.<sup>67</sup> The population continues to harbor mistrust of institutions responsible for providing justice and public safety, as revealed in the findings of various surveys and studies.<sup>68</sup>

Successive governments have failed to acknowledge the true magnitude of crime and violence, and have shirked their share of responsibility for this ongoing and increasingly more serious problem.<sup>69</sup> The measures they have applied — such as passing tougher criminal legislation and increasing the number of police officers — have been inadequate to guarantee the population's safety. Due to the government's inability to enforce the law and ensure safety, citizens continue to

arm themselves and seek private means of protection.<sup>70</sup>

## II. The Situation of Women in El Salvador

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### A. GENERAL OVERVIEW

Women represent just over half of the country's population, and there are slightly more women than men in rural areas. The female population is young and for the most part poor, particularly in rural areas.<sup>71</sup> Salvadoran women tend to enter into relationships and have children at an early age. The majority of these women end up as the head of their family: in El Salvador, one third of households are headed by women.<sup>72</sup> There have been studies focused on the influence of a "machista" culture in which Salvadoran society sees motherhood and raising children as women's natural social function.<sup>73</sup> While the findings of these studies show that the war helped change this model somewhat, since many women decided to join the armed conflict and abandoned the traditional role of housewife,<sup>74</sup> they further demonstrate that when the war ended, Salvadoran women returned to their traditional family and social roles.<sup>75</sup>

With regard to most education, statistics show that 21% of women are illiterate — with most illiterate women living in rural areas.<sup>76</sup> While the enrollment rates are almost the same for men and women at the primary- and secondary-school level, women account for only 33% of enrollment in college or university.<sup>77</sup> This indicates restricted access to higher education for women, a factor that puts them at a disadvantage when competing in the job market.

Although Salvadoran women have one of the highest job-participation rates of women in the region,<sup>78</sup> they do not receive equitable pay for work done outside the home. The average wage of Salvadoran women is only 73% of men's average wage in the same job sector, regardless of education level.<sup>79</sup> There is also discrimination in other areas, particularly management positions. Seventy-six percent of business owners are men, compared with 24% who are women.<sup>80</sup> In large companies, only 22 of every 100 women have administrative or management positions.<sup>81</sup>

Women's level of participation in political life continues to be low despite an increase in participation following the civil war. Although the number of women deputies in the Legislative Assembly rose from 11% in 1996<sup>82</sup> to 16.6% in the 1997 parliamentary elections,<sup>83</sup> women are virtually absent from decision-making positions within the government.<sup>84</sup>

## B. VIOLENCE AGAINST WOMEN

Domestic and sexual violence are two of the most common and recurring forms of violence in El Salvador. Given the hidden nature of these types of violence, statistics do not reflect the magnitude of the problem. However, some of the existing data is alarming. Between March 1995 and March 1996 alone, the Salvadoran Institute for the Advancement of Women (ISDEMU) handled over ten thousand cases of domestic violence, of which 90% of the victims were women.<sup>85</sup> Women accounted for 88.1% of the total number of victims of sexual abuse between December 1996 and February 1998; 73.5% of these were girls, or women under the age of 20.<sup>86</sup> Similarly, reports from 1998 show that 31% of Salvadoran girls and boys are victims of sexual violence and 67% are victims of psychological violence.<sup>87</sup>

Domestic violence is regulated by two legal instruments, the Law Against Domestic Violence (LVI),<sup>88</sup> passed in November 1996 and the Penal Code,<sup>89</sup> which came into effect in 1998 and characterizes the crime of domestic violence in Article 200. The LVI establishes the state's obligation to prevent, punish and eradicate domestic violence. The law defines domestic violence as direct or indirect acts or omissions that "cause harm, physical, sexual or psychological suffering or death to the persons who belong to one's family" and distinguishes among three types of domestic violence: psychological violence, physical violence and sexual violence.<sup>90</sup> The law also sets out the process for police intervention and defines the legal jurisdiction to deal with such cases, as well as the types of protection available to victims.<sup>91</sup>

Domestic and sexual violence has drawn the attention of the Institute for the Advancement of Women (ISDEMU), created in February 1996. The ISDEMU addresses this issue via its Program for Healthier Family Relationships, directed by the Violence Watch Department and supported by an Inter-institutional Committee. The program's objectives include: raising public awareness among the population and in institutions, providing psychological, emotional, social and legal support to victims of violence, and carrying out research and diagnostic studies of the problem.<sup>92</sup>

## C. WOMEN'S REPRODUCTIVE HEALTH

The fertility rate has decreased considerably in El Salvador over the last 30 years. In 1960, the national average was calculated at 6.85 children per woman; it dropped to 3.7 in 1997.<sup>93</sup> El Salvador's maternal mortality rate is one of the highest in the region: 300 maternal deaths per 100,000 live births for the period from 1990 to 1997.<sup>94</sup> In 1995, 80% of maternal mortality was directly linked to pregnancy.<sup>95</sup>

### ***1. Reproductive health and family planning services***

Family planning services are provided mainly by three entities, two of which belong to the public sector (the MSPAS and the ISSS), and one of which is private, the Salvadoran Demographic Association (ADS).<sup>96</sup> These entities are responsible for carrying out the National Family Planning Program.<sup>97</sup> The MSPAS covers 48.9% of demand, the ADS covers 15.3%, and the ISSS covers 14.5%. In urban areas, the ISSS and pharmacies are the principal source of contraceptive methods, whereas the ADS is the principal source in rural areas.<sup>98</sup> The methods offered by the above institutions are: female sterilization, oral contraceptives, injectables, condoms, intrauterine devices (IUDs) and other less frequently used methods such as male sterilization, vaginal methods and Norplant®.<sup>99</sup>

### ***2. Prevalence of family planning methods and access to reproductive health services***

Although 97% of Salvadoran women were familiar with some contraceptive method in 1998, only 38% of women used contraception.<sup>100</sup> The most common contraceptive method up until that point was female sterilization, which had a prevalence rate of 32.5% among contraceptive users nationwide, compared to 17% for temporary methods.<sup>101</sup> The main sources for obtaining contraceptive methods were the MSPAS and the ISSS.<sup>102</sup> The fertility rate is closely related to education and income level;<sup>103</sup> contraceptive methods are more difficult to obtain and are used less frequently in rural areas.<sup>104</sup>

Recent surveys also show that El Salvador has a high rate of unplanned and unwanted pregnancies. Furthermore, there are many women who wish to postpone motherhood and control the spacing and number of their children but have limited access to contraceptive methods.<sup>105</sup> This situation is due to the historical lack of appropriate reproductive health programs and policies for the Salvadoran population, especially for women, and the resulting unavailability of necessary information for women to make decisions about their reproductive capacity. In response to this situation, the Attorney General's Office for the Protection of Human Rights in El Salvador has stated that complete and objective information

on the use of family planning methods is nonexistent or limited.<sup>106</sup>

A study carried out by the Pan-American Health Organization (PAHO) in the city of Guazapa, in conjunction with the MSPAS and other institutions, showed that men frequently make the family planning decisions for the couple.<sup>107</sup> This finding was confirmed by a number of interviewees who indicated that there are very powerful religious and male chauvinist behavior patterns that permeate the issue of family planning, especially in the country's rural areas.<sup>108</sup>

It is also important to note that the teenage pregnancy rate in El Salvador is one of the highest in Latin America.<sup>109</sup> In fact, 20% of all births are to women under 20,<sup>110</sup> and 41.6% of women have already had their first child before the age of 20.<sup>111</sup> The low rate of contraceptive use among adolescents is also cause for concern; only 4.4% of women between the ages of 15 and 24 used contraceptives during their first sexual relations.<sup>112</sup>

With regard to access to maternal health services, recent statistics show significant regional disparities. Between March 1993 and February 1998, 76% of Salvadoran women had some kind of prenatal monitoring, but access to this type of monitoring was far lower in rural areas.<sup>113</sup> Similarly, during the same period, 77.7% of deliveries in urban areas were assisted by hospital staff, whereas only 42.7% of deliveries in rural areas were so assisted.<sup>114</sup> Of the total number of hospital deliveries, 43.3% were assisted by MSPAS services, 11.7% by ISSS services and 3% by private hospitals.<sup>115</sup> It is calculated that, for the period from March 1993 to February 1998, 58% of all deliveries were hospital deliveries and 42% took place outside of hospitals.<sup>116</sup> Of the deliveries that took place outside of hospitals, 22.2% were in urban areas and 57.3% in rural areas.<sup>117</sup> Thirty-two point four percent of deliveries that took place outside of hospitals were performed by midwives in the woman's home.<sup>118</sup>

### ***3 HIV/AIDS prevalence***

With regard to HIV/AIDS, it is estimated that an average of seven persons per 100,000 inhabitants were infected with the virus during the period from 1996 to 1998. Heterosexual intercourse was the most frequent means of transmission (77.6%), with the highest incidence of infection among those between the ages of 25 and 34.<sup>119</sup> Although 75% of reported HIV/AIDS cases are among the male population, the rate of infection among women, particularly housewives, is approaching that of men.<sup>120</sup>

## D. ABORTION

Unsafe abortion is a serious public health problem and the second direct cause of maternal mortality in El Salvador.<sup>121</sup> Since abortion is illegal, and consequently performed clandestinely, the real figures for induced abortions are unknown. There have been no studies of this phenomenon, and the public health and demographic studies carried out by government and nongovernmental agencies do not address abortion and its relationship to women's mortality and morbidity.<sup>122</sup> This makes the situation especially difficult to ascertain.

The only data currently available are the hospital admission statistics compiled by hospitals and the MSPAS.<sup>123</sup> MSPAS statistics, which systemize the number of hospital admissions due to abortion in the health centers under its jurisdiction, show that, in 1998, the MSPAS recorded 7,436 abortion-related hospital admissions nationwide.<sup>124</sup> In the first half of 1999, the ministry recorded 3,766.<sup>125</sup> However, these figures for abortions treated in hospitals can only be seen as an indication of the prevalence of abortion. They are imprecise and do not reveal the full extent of the induced-abortion problem in El Salvador. For example, hospitals classify abortions inconsistently;<sup>126</sup> they keep the number of abortions treated by the institution constant, but due to the numerous and confusing categories used, fail to accurately record induced abortions.<sup>127</sup>

Similarly, due to the criminalization of abortion, women generally avoid going to the hospital when they suffer complications from an unsafe abortion. They are afraid of being reported to the authorities. For this reason hospital statistics only reflect a segment of the population who have induced abortions: women who go to a health center when there is a severe threat to their life due to induced abortion. One of the goals of the National Plan for Reproductive Health is to ensure that all hospitals treating women who have abortion complications have the necessary human and material resources to provide proper care.<sup>128</sup> The Plan's strategies also include promoting services in institutions that treat women with abortion complications.<sup>129</sup> In practice, however, not only are women discriminated against by hospital staff when suspected of having had an abortion, but also they run the risk of being reported to the authorities and brought to trial.

The lack of reliable information on abortion in El Salvador illustrates that the criminalization of abortion not only leads to a lack of accurate studies on the incidence of abortion, but also results in imprecise statistics, which in turn make it more difficult to ascertain the real situation.

The criminalization of abortion has extremely serious consequences for

women's lives and health: abortions performed under dangerous conditions; high mortality and morbidity rates; a lack of reliable studies that could help health services provide better care to their clients, including women who have had abortions in unsafe conditions. As discussed below, this situation is further exacerbated by the persecution of women by the Salvadoran justice and health systems.



## III. Political Process and Abortion Legislation in El Salvador

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This chapter will describe the current legislation on abortion and review the political process that led to the Penal Code and constitutional reforms that criminalized induced abortion in El Salvador. It will also examine the positions and actions of the various groups that pushed for reform in the Salvadoran Legislative Assembly, and of the groups that were against the continued criminalization of abortion. The chapter will look at reactions to the reforms on the part of various players in the medical profession, the judicial and legislative branches and a number of organizations operating in El Salvador.

### A. CURRENT LEGISLATION

While induced abortion has always been a criminal act in El Salvador, up until April 20, 1998, the law did not penalize therapeutic abortion, abortion as a consequence of rape, or eugenic abortion.<sup>130</sup> From that date forward, all abortions became punishable with stiffer sentences for the accused than in the previous Penal Code, with the exception of unintentional abortion committed by a pregnant woman or her unsuccessful attempt to induce an abortion.<sup>131</sup>

Chapter II of the reformed Penal Code, which deals with Crimes Against the Life of Human Beings in the First Stages of Development, penalizes: women who induce their own abortions or give their consent to someone else to induce an abortion; persons who induce an abortion without a woman's consent or who obtain consent through violence or deception; doctors, pharmacists or other health care workers who practice abortions; persons who encourage a woman to have an abortion or provide the financial means to obtain an abortion; and persons who unintentionally cause an abortion. The only case in which abortion is not punishable is unintentional abortion caused by the pregnant woman through negligence.<sup>132</sup>

1973 PENAL CODE	CONSENSUAL AND SELF-INDUCED ABORTION
<p>SELF-INDUCED OR PROCURED ABORTION</p> <p><i>Article 161</i> - A woman who intentionally causes her own abortion shall be sentenced to one to six years in prison.</p> <p>CONSENSUAL ABORTION</p> <p><i>Article 162</i> - A woman who consents to have another person perform an abortion on her shall be sentenced to two to four years in prison. In this case, the person who performs the abortion shall be sentenced to two to four years in prison.</p> <p>ABORTION WITHOUT CONSENT</p> <p><i>Article 163</i> - Whosoever causes an abortion without the pregnant woman's consent, using physical force, intimidation or deception, shall be sentenced to three to eight years in prison.</p> <p>UNINTENTIONAL ABORTION</p> <p><i>Article 168</i> - Whosoever unintentionally causes an abortion shall be sentenced to six months to one year in prison.</p> <p>NON-PUNISHABLE ABORTION</p> <p><i>Article 169</i> - The following are not punishable:</p> <ol style="list-style-type: none"> <li>1) Self-induced unintentional abortion on the part of the pregnant woman, or the attempt to cause herself an abortion.</li> <li>2) Abortion performed in order to save the mother's life, in the absence of any other means to do so, carried out with the woman's consent and based on a medical report. If the woman is a minor, incapacitated or unable to give consent, the consent of her spouse, legal guardian or close family member shall be required.</li> <li>3) Abortion performed when the pregnancy is presumed to be the consequence of the crime of rape or sexual intercourse with a minor, and the abortion is performed with the woman's consent.</li> <li>4) Abortion performed with the woman's consent, when the purpose is to avoid a serious foreseeable deformity of the product of conception.</li> </ol> <p>PENAL CODE CURRENTLY IN EFFECT</p>	<p><i>Article 133</i> - Whosoever induces an abortion with the woman's consent, or a woman who induces her own abortion or consents to have another person perform an abortion on her, shall be sentenced to two to eight years in prison.</p> <p>ABORTION WITHOUT CONSENT</p> <p><i>Article 134</i> - Whosoever induces an abortion, without the pregnant woman's consent, shall be sentenced to four to ten years in prison.</p> <p>Whosoever performs an abortion, having obtained the woman's consent through violence or deception, shall receive the same sentence.</p> <p>AGGRAVATED ABORTION</p> <p><i>Article 135</i> - Any doctor, pharmacist or person who carries out activities related to said professions, who performs an abortion, shall be sentenced to six to twelve years in prison. They shall also be suspended from practicing their profession for the same period.</p> <p>ENCOURAGEMENT OR ASSISTANCE TO OBTAIN AN ABORTION</p> <p><i>Article 136</i> - Whosoever encourages a woman to have an abortion, or provides economic or other means for her to obtain an abortion, shall be sentenced to two to five years in prison. If the person who assists or encourages a woman to obtain an abortion is the person who performs the abortion, the sentence shall be increased by one third of the maximum penalty indicated in the previous subsection.</p> <p>UNINTENTIONAL ABORTION</p> <p><i>Article 137</i> - Whosoever unintentionally provokes an abortion shall be sentenced to six months to two years in prison. Neither unintentional abortion caused by the pregnant woman, nor the attempt to abortion, is punishable.</p>

Salvadoran law's restriction of abortion was further solidified in early 1999, with the amendment to Article 1 of the Constitution,<sup>133</sup> which confers constitutional status to the notion that life begins at conception, stating: "El Salvador recognizes human beings, from the moment they are conceived, as the basis and the end goal of activity by the State, which is organized to attain justice, legal certainty, and the common good."<sup>134</sup>

## B. THE REFORM PROCESS

### *1. Position of the Salvadoran government at international conferences*

At the international level, the Salvadoran government took a stance in defense of the protection of life from the moment of conception and, consequently, a position against abortion. In fact, at the International Conference on Population and Development (ICPD) held in Cairo in 1994,<sup>135</sup> El Salvador expressed reservations with regard to chapters VII and VIII — which refer to reproductive rights and reproductive health, and morbidity and mortality, respectively — when it came time to adopt the Conference's Programme of Action.

When the delegation from El Salvador made its declarations and reservations, it also restated its position with regard to the First Principle of the Programme of Action, insisting specifically on the reservations expressed by the delegation from Argentina to the effect that life should be protected from the moment of conception. In the words of the Salvadoran delegation, "abortion should never be included . . . as a service, or as a method to regulate fertility."<sup>136</sup>

El Salvador also participated in the Fourth World Conference on Women (FWCW), held in Beijing in 1995. It did not, however, enter any official reservations with regard to the Declaration and the Platform for Action.<sup>137</sup>

Once the Salvadoran government's position on the right to life from the moment of conception was made known internationally, a public campaign in favor of the necessary legal and constitutional reforms began at the national level. The government, the Catholic Church, right-wing Catholic groups, deputies from certain right-wing political parties, such as ARENA and the Christian Democratic Party (PDC), and some members of the medical profession participated actively in the campaign. Very few groups spoke out against the complete prohibition of abortion, and only a handful of FMLN and women's group members expressed their opinions on the subject.

## **2. The Penal Code Reform Process**

### **a. Actions on the part of legislators and the government**

In 1992, the Legislative Assembly began receiving proposals to further restrict existing law by eliminating the grounds on which abortion was not punishable. The various bills included proposals to launch investigations against clinics suspected of performing abortions.<sup>138</sup> During one such initiative in 1993, several deputies backed by the Archbishop of San Salvador, the Say Yes to Life Foundation (*Fundación Sí a la Vida*) and the Employers' Association for Integrating Women into Development (PIMUDE), asked the Assembly to debate the possibility of declaring December 28<sup>th</sup> (the Day of the Innocents, according to Catholic tradition) the "Day of the Unborn."<sup>139</sup> Also in 1993, under the leadership of a PDC deputy, a study was undertaken with the purpose of closing down the clandestine clinics in which abortions were being performed. The outcome was a series of undercover police operations and arrests of health professionals.<sup>140</sup>

A draft bill to revoke the exceptional grounds for abortion in the Penal Code, written by ARENA, was introduced in 1997. Simultaneously, the Catholic Church and right-wing Catholic groups began their campaign against abortion, aimed at garnering public support for the bill.

The government's anti-abortion stance, announced at the international conferences discussed above, was reasserted at the national level by President Armando Calderón Sol.<sup>141</sup> Similarly, then Minister of Public Health and Social Assistance, Eduardo Interiano, gave his opinion as representative of the medical community<sup>142</sup> and spoke out in defense of the fetus as a human being. The MSPAS also maintained that abortion laws had to be "more restrictive, with harsher sentences and penalties."<sup>143</sup>

### **b. The role of the media**

In the months preceding the Legislative Assembly vote on the proposed Penal Code reform, the topic received extensive newspaper coverage, which intensified as voting day approached. However, very little space was given to articles that supported the already existing legislation, or articles that were in favor of maintaining the exceptions set out in the 1973 Penal Code.<sup>144</sup>

The country's foremost daily newspapers (*El Diario de Hoy* and *La Prensa Gráfica*), covered the issue extensively, particularly *La Prensa Gráfica*, well known for its conservative bent. Many of the articles published were editorials in favor of reform and opposing abortion in general, as well as articles on the actions of the various groups involved in the national debate, providing coverage of the activities and mobilization spurred by right-wing Catholic groups.

An analysis of newspapers from that period shows that editorials and articles

took positions favoring the absolute criminalization of abortion. One editorial even called for criminalizing abortion across the board and punishing women as a means of eliminating what the author identified as the causes of abortion: promiscuity and premature sex.<sup>145</sup> The media rarely focused on women's point of view, not even from the perspective of women who had been raped or were forced to make the decision to have an abortion because their own lives were in danger. Most articles concentrated on presenting abortion as a selfish decision made by a woman as a result of her promiscuousness: "To terminate a pregnancy amounts to . . . disrespect for the sexual act, debasing it to the level of hedonism, sex for pleasure, without taking responsibility for its consequences. . . ." <sup>146</sup>

There was also a noticeable tendency to stigmatize persons who did not agree with the total prohibition of abortion, branding them as people in favor of death.<sup>147</sup> The issue of abortion was rarely analyzed from a public health perspective, and very little space was given to discussing a range of positions on abortion. One of the few persons who wrote in a newspaper about clandestine abortions in dangerous conditions expressed that reform would not eliminate abortion; instead, it would continue to put the health and lives of thousands of Salvadoran women at risk: "Harsher criminal laws will not change clandestine abortions, performed in unsafe conditions, that so often result in serious injury and even death to many women. I do not see the recent legislative decisions as a humanist contribution to national life; they rather seem rash and absolutist choices that once again display the country's endemic lack of public education."<sup>148</sup>

Finally, it is also significant that the press published advertisements paid for by the Say Yes to Life Foundation in support of the total criminalization of abortion in El Salvador. The ads featured the supposed impact of abortion on women's health and alleged violations of the right to informed consent in countries where women have access to legal abortions.<sup>149</sup>

### ***c. Actions on the part of the Catholic Church***

The Catholic Church supported and reinforced the government's position on abortion. In January 1997, the El Salvador Episcopal Conference sent an open letter to the President of the Legislative Assembly condemning a bill in favor of legalizing abortion. The letter stated that the bill contained a series of provisions that violated the most basic of human rights, namely the right to life from the moment of conception. It also claimed that the bill violated El Salvador's Constitution, as well as international treaties signed by the country, a position that fails to take into account the fact that no international treaty has ever been interpreted to mean protection of the fetus's right to life.<sup>150</sup>

The Church's position received the most attention in the media and in the

political sphere, and therefore had the greatest impact on public opinion on abortion. The media publicized the position of the Archbishop, who referred to abortion as a “frightful plague”<sup>151</sup> and equated it with the extermination of human beings in “Nazi concentration camps during World War II.”<sup>152</sup> This was the position that the media disseminated, without making room for other ethical or religious perspectives on abortion.<sup>153</sup>

#### ***d. The role of right-wing Catholic groups***

With the support of the Catholic Church, right-wing Catholic groups used various strategies to promote the new Penal Code provisions. They collected signatures throughout the country’s parishes to promote the reform. They organized demonstrations in support of presenting the bill to the Legislative Assembly, during the week when deputies had to make their decision. In alliance with the Catholic Church, the groups also mobilized thousands of students from San Salvador’s private Catholic schools and other areas of the country to demonstrate against abortion.<sup>154</sup>

Right-wing Catholic groups also used the media in a number of ways; during and after the campaign to support the amended Code, the Say Yes to Life Foundation published a series of sensationalist newspaper advertisements about an abortion procedure. During the campaign, in addition to invoking God, various international treaties, the Family Code and the Salvadoran Constitution, right-wing Catholic groups used supposed scientific arguments to back their position in favor of the total criminalization of abortion.<sup>155</sup> Similarly, the Vice President of the Say Yes to Life Foundation, Julia Regina de Cardenal, stated in an interview, with no grounding in medical science, that medical progress had made it possible to save the mother’s and fetus’s lives in all circumstances, making even therapeutic abortion unacceptable. According to the Say Yes to Life Foundation, when a woman is raped she must carry the pregnancy to term; her only option is to choose whether to raise the child herself or to give it up for adoption.

In an interview, Julia Regina Cardenal argued that criminalization was the solution to abortion, since legalizing it would make the number of abortions rise.<sup>156</sup> This type of statement often appeared in the media, despite statistics and studies from several countries around the world that show the opposite to be true.<sup>157</sup> In one of her articles, in reference to efforts on the part of other groups to preserve the exceptional grounds under which a women could obtain an abortion, Ms. Regina Cardenal stated, “The Devil, tireless Prince of lies, has tried and will continue to try to change our laws in order to kill our babies.”<sup>158</sup>

Even after the campaign supporting the new Penal Code provisions, right-

wing Catholic groups continued to use the media as a platform to lobby against abortion. During research for this report, a classified advertisement for an “unplanned pregnancy clinic” offering help appeared every two or three days in El Salvador daily newspapers. Calling the telephone number on the ad confirmed that it belonged to the Say Yes to Life Foundation, which was using deception to try to persuade women not to have abortions.<sup>159</sup>

***e. Actions on the part of the women’s movement***

Within the Salvadoran women’s movement, the Norma Virginia Guirola de Herrera Institute for Women’s Studies (CEMUJER) presented a document on abortion in 1995. It proposed that the new Penal Code only establish sentences for persons found guilty of performing an abortion without a woman’s consent or by using deception. Sentences would be harsher for abortions caused by domestic violence; abortions performed by a doctor or pharmacist in breach of professional standards, for economic profit or wrongfully; unintentional abortion caused by the woman herself would still not be punishable. With regard to existing exceptions to criminal abortions, CEMUJER proposed that, since they were not punishable, they should not be included in the new Penal Code. This proposal was presented and debated in Congress before the Commission on Legislation and Constitutional Issues, and generated controversy among conservative groups and the Catholic Church.<sup>160</sup> Women’s groups tried to take a stand on abortion, but their perspective did not have the forum, support or strength to make a significant impact on general public opinion.

However, the imminent criminalization of abortion did mobilize El Salvador’s women’s groups. A few days before the vote to change the Penal Code, they circulated a document presenting a moderate proposal advocating that the clause on exceptions be preserved. The women’s groups organized meetings and convened various civil-society groups to discuss the issue. They also sent a series of memos to different members of the Assembly expressing their profound concern, spoke personally with deputies and, on the day of the vote, presented two new proposals: instead of absolute criminalization, only inducement to abortion and abortion caused by domestic violence should be criminalized.<sup>161</sup>

***f. The vote in the Legislative Assembly***

In the Assembly, the legislators who publicly advocated the prohibition of abortion belonged to ARENA and the PDC, two of the country’s most conservative political parties, the National Conciliation Party (PCN) and Christian Social Union (USC). These members of congress expressed opinions that mirrored the discourse of right-wing Catholic groups and the media.

Only two FMLN deputies, in a Legislative Assembly of 84 members, spoke out in favor of maintaining Article 169 of the 1973 Penal Code. They declared that eliminating the exceptions clause would be an attack against a woman's right to make decisions over her own body, and that repealing it would "not resolve the clandestine aspect of abortion [but rather] would, on the contrary, stimulate and encourage it."<sup>162</sup> According to Lorena Peña, FMLN deputy and member of the Legislative Assembly's Commission for the Family, Women and Children, there was an agreement to support the proposal that the exceptions allowing abortion should be maintained. However, she said in an interview that when it came time to vote, political interests such as fear of being stigmatized by the Catholic Church resulted in members voting the other way.<sup>163</sup>

The day of the vote, in a departure from usual procedure, which generally requires a special request, the legislators allowed two members of civil society to speak to the Assembly. Dr. Carlos Mayora showed a sensationalist video on abortion and gave a speech devoted to defending the point of view that life begins at the moment of conception, stating that the only ones who benefit from abortions are those who perform them — disregarding the perspective of women who have abortions. Without providing any basis for his position, he denied that some abortions might be necessary for therapeutic reasons, stating that medicine is capable of saving the woman and her child in all cases. Dr. Mayora found it inexplicable that "often, movements that defend women's rights also defend abortion, which exposes women to serious consequences."<sup>164</sup> He did not say what kind of consequences, nor did he say which studies supported his statement. In fact, it has been proven that abortions performed in sanitary conditions using the proper techniques present almost no risk to a woman's health.<sup>165</sup> On the contrary, in some cases, they can be a determining factor in saving women's lives.

The other speaker, Morena Herrera, a member of the feminist organization Women for Dignity and Life (Las Dignas), acting as a delegate of the women's movement, based her speech on the defense of women's rights. She warned the Assembly that abortion would continue to exist in El Salvador and that criminalization would not prevent women from having abortions. Instead, it would force women to have clandestine abortions, in unsafe conditions that put their lives in danger. In her speech she stated that "[abortion] is always a difficult decision; it is a decision that marks the life of every woman. So we have to understand that there are circumstances beyond personal will, and that this is not a religious issue, but rather an issue of the everyday life of thousands and millions of women in El Salvador, which they must be allowed to resolve in the sphere of private life."<sup>166</sup>

On April 25, 1997, the Legislative Assembly chose to prohibit abortion rather



than maintain the existing exceptions. El Salvador’s Legislative Assembly is made up of 84 deputies, and a minimum of 43 “for” votes are needed to pass core legislation such as the Penal Code. In this case, Articles 133 and 134 were approved by 61 votes, Article 135 by 60 votes, Article 136 by 59 votes and Article 137 by 60 votes.<sup>167</sup> These articles are part of the new Penal Code that came into effect in April 1998.

In general, the public debate centered around the total prohibition of abortion, since right-wing Catholic groups considered that maintaining the exceptions in the 1973 Penal Code amounting to legalizing abortion, even though abortion was already illegal in virtually all circumstances. The proposals of women’s groups were ignored during the debate over which provisions on abortion to include in the new Penal Code. The proponents of criminalization spoke only about protecting life from the moment of conception and the need to save the fetus’s life and safeguard its rights. They never took into account the rights of women, which are recognized in the international human rights treaties signed by El Salvador. Women’s right to make autonomous decisions about issues linked to their reproduction was never considered. In the words of a Salvadoran journalist commenting on the legislative process surrounding the reform: “The deputies behaved like the followers of a dogmatic sect by criminalizing abortion. . . . They did not consider the other side of the issue and adopted a mistaken policy that entrenches yet another form of women’s inequality. . . .”<sup>168</sup>

**3 The constitutional reform process**

In February 1999, El Salvador’s Legislative Assembly once again took a stand on abortion. This time, in the context of a debate surrounding the amendment of Article 1 of the Constitution, the legislators signed the Legislative Agreement for Constitutional Reform of April 30, 1997, giving human beings protection from the moment of conception.

The government, the Church and Catholic groups waged the campaign for

1983 CONSTITUTION	CONSTITUTIONAL REFORM OF 1999 <sup>169</sup>
<p><i>Article 1</i> - El Salvador recognizes human beings, from the time of conception, as the basis and the end goal of activities by the State, which is organized to attain justice, security and the common good.</p> <p>Consequently, the State has the obligation to guarantee to the Republic’s inhabitants, the enjoyment of liberty, health, culture, well being and social justice.</p>	<p><i>Article 1</i> - El Salvador recognizes human beings, from the time of conception, as the be all and end all of activities by the State, which is organized to attain justice, security and the common good.</p> <p>It similarly recognizes all human beings as such from the very moment of conception.</p> <p>Consequently, the State has the obligation to guarantee to the Republic’s inhabitants, the enjoyment of liberty, health, culture, well-being and social justice.</p>

constitutional reform using the same strategies as the campaign to approve the new Penal Code. The same players once again spoke out against abortion, brandishing the same arguments and mobilizing students and various civil society organizations anew to repudiate abortion in front of the Legislative Assembly a few days before the vote. The media once again gave the issue coverage, emphasizing support for constitutional reform. In some cases, certain media, with the aim of informing the population on the issue of abortion allowed persons with anti-abortion stances to give the public misleading information.<sup>170</sup> For example, some articles stated that abortion was caused by women's "promiscuousness," and that having an abortion entailed serious repercussions for women's health. These arguments completely ignored the fact that the real danger to the health of society's most vulnerable women is the precarious and clandestine conditions in which they are forced to have abortions.<sup>171</sup>

Support for the reform led to a proposal by the Committee for the Protection of Human Life and Dignity to amend Article 1 of the Constitution to recognize life from the moment of conception.<sup>172</sup> This initiative was accompanied by signatures collected in the country's churches and streets. Right-wing Catholic groups called for ratification of the reform as a way of commemorating the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights.<sup>173</sup> The Health Minister also took a public stand again, saying that his department "completely agreed with this amendment, because a human being begins when the sperm joins the ovum. . . . no one has the right to interrupt life."<sup>174</sup>

On February 3, 1999, the debate in the Legislative Assembly was rife with appeals "for life and against death."<sup>175</sup> The deputies who supported the reform of Article 1 of the Constitution, who were the vast majority, called for the reform in the name of "the morality of a people, for the morality of the country,"<sup>176</sup> and declared that what was at stake was the right to life. There was, however, no mention of women's right to life. Some legislators in favor of the reform also cited international instruments such as the Universal Declaration of Human Rights and the American Convention on Human Rights<sup>177</sup> to provide additional bases for constitutional protection for the life of the fetus. In doing so, they once again turned a blind eye to the fact that international organizations, such as the United Nations and the Inter-American System, have never interpreted the right to life as protection of the life of the fetus.

FMLN deputies argued that if there were really going to be a vote for life, it was not only the life of the unborn that should be considered. They pointed out that it was also imperative to ensure the dignity and quality of life of all Salvadorans, born and unborn.<sup>178</sup> The FMLN gave its deputies the freedom to

vote according to their own conscience, saying that the issue was too personal to make it a question of party ideology.<sup>179</sup> Some deputies voted for the reform and others abstained, but no one voted against the reform.<sup>180</sup> In fact, none of the deputies voted against recognizing the protection of human life from the moment of conception: 72 deputies voted for, 11 abstained, and one left the room. Fifty-six votes were needed to reform the Constitution.<sup>181</sup>

### C. CIVIL SOCIETY'S VIEWS ON THE REFORMS

Research for this report involved numerous interviews with people from different professions who, in one way or another, due to professional or personal experiences, had direct contact with the issue of induced abortion in El Salvador and could provide their perspective on the new provisions. The group included doctors, lawyers, prosecutors, public and private defense counsel, legislators, academics, members of women's groups and representatives of international organizations. There was a certain consensus throughout the different interviews that the prohibition of abortion was a political maneuver spearheaded by the Church and conservative groups. Those interviewed maintained that it was not necessary to repeal the exceptions in the previous Penal Code and felt that the new reforms were discriminatory, since they affected primarily poor women. Women of higher social standing will continue to be able to access abortions in private clinics, where there is less control than in state hospitals, or to travel to countries like the United States to obtain abortions. Some of the interviewees also touched on the Catholic Church's significant influence over the government in certain areas, particularly on the issue of abortion. The positions of certain persons and groups with regard to the reforms are summarized below.

#### ***1. The Catholic Church***

The Catholic Church expressed its complete satisfaction with both votes in the Legislative Assembly, because the results confirmed the success of its campaign aimed at the Salvadoran population and the government itself. The Archbishop of San Salvador, Fernando Saenz Lacalle, harshly criticized the deputies who ventured to support abortion in exceptional cases and reaffirmed the position of absolute protection of life from the moment of conception.<sup>182</sup>

#### ***2. The Office of the Public Prosecutor of the Republic***

The director of the Crimes Against Minors and Women Division of the Office of the Public Prosecutor, who is responsible for the unit that investigates abortion offenses, expressed in an interview that, with the new reforms in effect, her institution must investigate accusations of abortion, which come mainly from hospi-

tals. She expressed that, as a prosecutor, she must apply existing penal legislation and has therefore been forced to place women in preventive custody for self-induced abortions. She said, however, that she finds the sentences imposed by the Penal Code to be very severe. She similarly expressed that, for women who have self-induced abortions, she prefers to avoid preventive custody while the causes are being substantiated and to apply alternative measures such as house arrest.<sup>183</sup> Some prosecutors from the unit have spoken out against the total prohibition of abortion and have pointed to cases in which they have had to deny rape victims the authorization to have an abortion. In the opinion of these prosecutors, the legislation does not address the real issues faced by Salvadoran women.<sup>184</sup>

### ***3 Representatives of the medical profession***

Researchers were able to hear different points of view from various members of the medical profession: the Director of the San Salvador Maternity Hospital, members of the Gynecology and Obstetrics Society, the Director and doctors of the First of May Hospital, which belongs to the ISSS, the President of the Association of Women Doctors of El Salvador and a female doctor from the Institute of Forensic Medicine. Generally speaking, and in very personal terms, no one supported the absolute legalization of abortion. They did, however, think that abortion should be allowed in certain cases. Interviewees asserted that the most recent reforms of the Penal Code in this area deprived doctors of a procedure that allowed them to help their patients and, in many cases, save their lives.<sup>185</sup>

The Director of the National Maternity Hospital, the institution that treats the largest number of cases of medical complications due to abortion, stated that, as he saw it, the majority of El Salvador's doctors opposed abortion as a solution to unwanted pregnancies but did not agree with the prohibition of therapeutic abortion, because it tied their hands. In this respect, he felt that abortion is a medical procedure which, when properly regulated, is capable of saving the lives and protecting the health of women health-service users.<sup>186</sup> This same interviewee indicated that the number of women treated at his hospital for unsafe abortions had dropped since the reforms completely prohibiting abortion came into effect; women were staying at home until they were forced to go to the hospital because their life was at risk.<sup>187</sup> He said that, in his opinion, the element of trust in the doctor-patient relationship had been lost and added that, regardless of the health problems they may experience, women avoided going to the hospital because they were afraid of being reported to the police or to the Public Prosecutor's Office.

The Gynecological and Obstetrical Society of El Salvador stayed out of the debate on Penal Code reforms, since it was not approached for any type of tech-

nical or academic consultation. In a letter sent to a widely circulated daily newspaper (the letter was never published), the Society communicated its disagreement with the way the issue was being handled: “a fundamental problem has been manipulated at a political-religious level, with two main characteristics: the lack of information and discussion at the grassroots level, and the opportunistic timetable initiated by the Opus Dei Association of El Salvador for its initiative.” The letter also stated its defense of couples’ right to regulate their fertility with the contraceptive method of their choice and harshly criticized the elimination of non-punishable grounds for abortion. Finally, it declared that the absolute criminalization of abortion had underpinnings of social injustice, since it affected only women at the bottom of the social ladder.<sup>188</sup> Some of the doctors interviewed felt that it was a serious mistake for gynecologists and the Gynecological and Obstetrical Society, as a legal entity, to limit themselves to criticizing the political and legislative process from the outside, rather than getting involved in the debate at the time. In general, interviewees stated that the Society should have informed and educated the legislators, giving medical reasons not to prohibit therapeutic abortions and not to criminalize abortion in other circumstances.

#### ***4. Salvadoran women from a self-help group***

Researchers for this report attempted to interview Salvadoran women who had had self-induced abortions, to have them share their opinions on the political process that led to the Penal Code and constitutional reforms. Unfortunately, it was impossible to gather this type of information. According to some of the people interviewed, the reason for this was the stigma and shame felt by people in the face of the legal and social condemnation of the procedure in El Salvador. It was, however, possible to interview some of the participants of a self-help group for women victims of sexual assault. They all agreed that a woman should have the opportunity to terminate a pregnancy if she became pregnant as a consequence of rape. One woman, who was the victim of repeated rape by family members and strangers as a girl, said that if she had known about abortion in those days, she would have resorted to it. She feels that it caused her son a lot of pain and suffering to know that he was the product of a violent act against her. This same woman, who is now a married adult with other children, was raped by a stranger last year. When asked whether she became pregnant, she answered, “I can’t get pregnant anymore. Otherwise, I would have had an abortion.”<sup>189</sup> Another woman, who is married and has no children, was raped four years ago, when she was a student. She became pregnant and begged her doctor to give her an abortion, saying: “I can’t carry the fruit of that rape inside me.”<sup>190</sup> The doctor, however, refused to

perform an abortion. One week after her pregnancy was confirmed, she had a miscarriage which, according to her, saved her.

### **5. *Representatives of international agencies***

Representatives of international organizations in El Salvador were also interviewed. Ruth Manzano, who is in charge of Women, Health and Development issues for PAHO, stated that her organization stayed out of the abortion debate because none of the parties involved consulted international organizations. They were not even asked to give a public health perspective or an opinion on the effects that criminalizing abortion would have at the socioeconomic level.<sup>191</sup>

### **6. *Legislators***

The persons interviewed agreed that abortion and the related Penal Code reforms were politicized and used as election campaign issues. According to some interviewees, the vote in favor of prohibiting abortion was due purely to political forces, and not because the deputies were poorly informed, as some persons claim. Apparently, there were a number of deputies ready to vote against the reforms, but when the time came to vote, they did not have the courage to say so publicly.<sup>192</sup> Perhaps the outcome would have been different if there had been a secret vote. FMLN deputy Lorena Peña stated that there was a split among FMLN deputies at the crucial moment and that her party's vote was dictated by "political maneuvering."<sup>193</sup> Interviewees were also virtually unanimous in the opinion that the Catholic Church exerted quite a significant influence on the Legislative Assembly and on public opinion in general. Some maintained that the Catholic Church has too much power in Salvadoran society and politics, and that legislators "are afraid of it."<sup>194</sup>

### **7. *Organizations for the protection of women's rights***

When they were interviewed for this study, Morena Herrera, from Las Dignas, Yolanda Guirola, from CEMUJER, and Azucena Quinteros, from the Mélida Anaya Montes Women's Movement (MAM), stated that the women's movement needs more support in order to confront right-wing Catholic groups and their strong stance on the issue of abortion.<sup>195</sup> They agreed that speaking out on abortion in El Salvador carries a public stigma and can even be dangerous.<sup>196</sup> Azucena Quinteros recognized that her organization does not talk about abortion as such for fear of compromising the organization's other areas of activity.<sup>197</sup> Instead, it addresses abortion in the context of violence against women. For this reason some of those interviewed suggested that strategies for lobbying and political action be changed to reflect the real situation in El Salvador.<sup>198</sup>

In any event, these women felt that both reforms were a disastrous blow to the

Salvadoran women's movement, which was not in a position to confront the right-wing Catholic groups. Las Dignas and CEMUJER stated that they are preparing to deal with the issue more thoroughly. Herrera, from Las Dignas, believes that it is necessary to reform the abortion law in the Penal Code once again, to at least reintroduce the exceptional grounds on which abortion was not punishable. She said that it will take seven or eight years of effort but felt it was necessary to "develop a less dogmatic public opinion."<sup>199</sup> She stated that, with the current reform, middle-class and wealthy women are still able to go to private doctors, or to travel to countries where abortion is not prohibited. Poor women, however, have no choice: they have to get abortions any way they can, even if it puts their health and life in danger.

Lorena Peña expressed the opinion that, with the reform of Article 1 of the Constitution, according to which the fetus is considered a human being, "some-day they will [even] allow the fetus to vote. As it stands now, the fetus has rights."<sup>200</sup> Margarita Velado, a member of the FMLN, argued that "[w]ith or without laws, Salvadoran women have always had abortions. The situation is such that they will continue to have abortions, one way or another. This law creates the conditions under which women will continue to die. . . ."<sup>201</sup>

## IV. The Criminal Process and Abortion Prosecutions in El Salvador

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The purpose of this chapter is to provide a descriptive analysis of the impact of changes to the abortion laws in the short term. This will be done via an analysis of files on abortion prosecutions opened since Penal Code provisions were made more restrictive in 1998. The chapter also analyzes interviews with prosecutors and judges in the Salvadoran justice system. The purpose is to gain a fuller understanding of the impact generated by the application of these reforms, and to determine which women are not impacted in practice.

### A. THE CRIMINAL PROCESS

In late 1996, the Legislative Assembly of El Salvador approved the new Code of Penal Procedure (Penal Code), which came into effect in April 1998.<sup>202</sup> The foremost objective of the reform was to ensure “procedural guarantees and the equality of all persons before the law,”<sup>203</sup> by modifying the penal system based on an inquisitive model to also incorporate elements of an accusatory legal system. The reform provides for a separate investigative judge and sentencing judge, as well as the position of Penitentiary Surveillance and Sentence Execution Judge, and introduced new alternative precautionary and substitutive measures for incarceration, among other things.<sup>204</sup>

Within the Salvadoran penal process, the public prosecutor is in charge of initiating criminal investigations and bringing criminal proceedings before the justices of the peace.<sup>205</sup> In the majority of cases in the Salvadoran penal process, the justice of the peace is the court of first instance. The justice monitors the initial steps of the investigation, oversees the initial appearance of the accused, hears the plea of the accused, and orders the applicable precautionary measures pending full investigation and trial.<sup>206</sup> The court of second instance in the penal process is the court of the examining magistrate, which monitors the directives given by the justice of the peace, collects the information, can modify or revoke the precautionary measures that have been ordered and sets the date for and holds the preliminary hearing.<sup>207</sup> During the preliminary hearing, there is discussion on whether the case against the accused is viable and whether the trial should continue. At that time, parties may also introduce alternatives to end the proceedings, such as through a



settlement or “criterios de oportunidad.”<sup>208</sup> The sentencing court is where the public hearing takes place,<sup>209</sup> at which it is decided whether the accused is guilty or not guilty and the sentence is handed down. The hearing is oral, and the accused may make a statement if he or she so desires. Witnesses and evidence are presented, and the prosecuting and defense counsel make their closing arguments. Finally, the penitentiary surveillance court is in charge of seeing that the sentence is served if the accused is found guilty, and making sure the rights of the accused are respected.<sup>210</sup>

## B. RELEVANT TERMINOLOGY WITH REGARD TO PARTICIPATION AND CRIMINAL LIABILITY IN ABORTION OFFENSES

The Salvadoran Penal Code sets forth three categories that define the degree of participation and liability in committing a crime: *author*, *accomplice* and *instigator*.<sup>211</sup> The author of the crime is the person who has ultimate control over the illegal act, in other words, the person who both objectively and subjectively holds the reins throughout and is able to decide on the consummation of the act.<sup>212</sup> In the case records analyzed, the majority of women who had abortions were tried as authors of the crime of abortion as such, while abortion providers were tried as authors of the crime of inducement or aid to abortion. Accomplices are those who, without being the authors of the crime, cooperate in carrying out the incident by performing actions prior to or simultaneous with the crime committed;<sup>213</sup> instigators are persons who convince others to commit a crime.<sup>214</sup>

Other terms that will be used in this chapter, and which go beyond the purely legal sphere, are *abortion prosecutions*, which indicate criminal proceedings initiated for crimes under penal legislation such as Crimes Against the Life of Human Beings in the First Stages of Development;<sup>215</sup> *women who have had abortions*, which is used mainly for women being prosecuted for abortion,<sup>216</sup> and *providers* and *facilitators*, terms used for persons who perform abortions or facilitate the means to perform an abortion with the consent of the pregnant woman.

## C. PROSECUTION OF ABORTION SINCE THE PENAL CODE REFORM CAME INTO EFFECT

Between April 1998, when the new penal regulations came into effect, and August 1999, when research for this report began, 69 case records for abortion prosecutions were found. These records included the cases of women and providers who had been or are being tried for one of the crimes defined in the

Penal Code as Crimes Against the Life of Human Beings in the First Stages of Development. The 69 records also included cases where accusations were brought after fetuses were found in public places. In those cases, the woman responsible for the crime was being sought. It should be noted that not all investigations of this nature are initiated by the Public Prosecutor’s Office under the crime of abortion, since some fall under the crime of homicide.<sup>217</sup>

The case records studied were culled from the archives of the country’s 18 public prosecutors’ offices, each of which is in charge of a geographic region. The 69 cases records found break down as follows:

REGION	NO. OF CASE RECORDS
ZONA OCCIDENTAL	13
Santa Ana (7)	
Sonsonante (3)	
Ahuachapán (3)	
ZONA CENTRAL	45
San Salvador (9)	
Mejicanos (4)	
Nueva San Salvador (6)	
San Marcos (8)	
Apopa (7)	
Chalatenango (0)	
Soyapango (11)	
ZONA PARACENTRAL	7
San Vicente (1)	
Sensuntepeque (2)	
Zacatecoluca (2)	
Cojutepeque (2)	
ZONA ORIENTAL	4
San Miguel (2)	
La Unión (0)	
Usulután (1)	
San Francisco de Gotera (1)	

Fewer abortion case records were found in public prosecutors’ offices in rural jurisdictions. Therefore, the majority of the abortion prosecutions discussed below correspond to proceedings in the public prosecutor’s offices whose jurisdiction falls within the country’s urban areas.

For the period under investigation, 46 of the 69 abortion cases involved

women who had had abortions.<sup>218</sup> The other cases involved abortion providers, facilitators or accomplices accused of aggravated abortion or incitement to abortion, as well as discoveries of fetuses in which the women who had induced the abortion were being sought. Forty-two of the proceedings were still in progress, and in 27 of the cases, sentences had been handed down, or the case had been archived.

During the eight-month period from the time the new Penal Code came into effect (April 1998) to the end of 1998, 24 legal proceedings for abortion were initiated. Another 45 cases were initiated during the first eight months of 1999, almost doubling the number of abortion prosecutions from 1998 to 1999. This significant increase seems to indicate that the reforms had an impact in the short term on how the legal system is now mobilizing itself to investigate this offense.

#### D. ANALYSIS OF PROSECUTIONS INVOLVING WOMEN WHO HAVE HAD ABORTIONS

In order to analyze the abortion proceedings initiated by public prosecutors' offices throughout the country, this section is divided into three parts. The first part will examine the prosecutions involving women who have had abortions; the second part will address proceedings against abortion providers or facilitators; and the third part will discuss proceedings begun to investigate discoveries of fetuses as a result of clandestine abortions.

The first section will examine the 46 case records of women being prosecuted for having abortions. There will also be an analysis of the women's characteristics, taking into account their age, socioeconomic class, economic activity, education, civil status and number of children. In addition, it will discuss the abortion methods used by the women, where the abortion was performed, who made the accusations, the types of defenses available to the women during the trial, the imposition of preventive custody and the outcome of the prosecutions. It should be noted that, in many cases, the case records do not provide complete and detailed information on all of these factors. The data found in the records was nevertheless collected and analyzed, along with information gathered in research interviews with the prosecutors, judges and defense lawyers in charge of many of the cases.

##### ***1. Age, civil status and number of children of the women prosecuted for abortion***

The age of the 46 women involved in abortion proceedings ranged from 12 to 40 years old. The majority, i.e., 29 of the women, were between the ages of 15 and 24. Within this group, 14 were between the ages of 15 and 19, and 15 were between 20 and 24.<sup>219</sup> Three of the women were below the age of 15: one was 12,

and two were 13. Seven of the women were between the ages of 25 and 29, and three were between 30 and 44.<sup>220</sup> It was not possible to obtain information on the age of four of the women.

The Penal Code of El Salvador stipulates that criminal law applies only to persons over the age of 18, since special rules govern the trial of minors. It is important to note, however, that some female minors were brought before the courts and tried as adults, rather than under the special rules for minors set out in the Penal Code.<sup>221</sup>

Of the 46 women involved in the case records examined, 31 were single, three were married and one was divorced. Eleven case records did not provide information on the woman's civil status. While data on the women's number of children is incomplete, the information gathered from the records shows that 18 of the women in the sample had children. The majority of these women with children were under the age of 24. The 17 women who did not have children when the charges were brought were between the ages of 12 and 27.

This data indicates that the women most affected by the total criminalization of abortion in El Salvador belong to a specific and vulnerable segment of the population: young, single women, many of whom have at least one child to take care of.

## ***2. Economic activity and education***

Of the 46 case records, it was not possible to obtain information indicating the socioeconomic status of 18 women, but some information was gathered concerning the employment, level of education and place of residence of 28 others, giving us an idea of their economic status. The majority were domestic servants (18), and the rest (7) were factory workers, ticket-takers on buses, housewives, saleswomen and messengers; some had only primary-level education, and very few had a high school education. Only 3 of the women were considered part of the middle class. Of the 18 women for whom there was no specific information regarding their economic status, it was possible to gather from reading their files that the group included housewives, factory workers, prostitutes, service workers, merchants and students.

In the majority of cases, it was impossible to identify the women's level of education; 30 of the 46 case records did not specify the woman's highest level of education attained. Of the 16 cases where the information was available, 5 women had been only to primary school, 8 had been only to high school, and 3 were studying at the university level.

Generally speaking, the data on the different types of economic activity car-

ried out by women prosecuted for abortion indicates that they were poorly remunerated, had no access to independent income and had low levels of education. This indicates that not only are young, low-income, poorly educated women denied access to safe abortions, but also that they are more likely to be accused and involved in criminal proceedings relating to abortion. In other words, the impact of the Penal Code reform is greatest on the most vulnerable women. The discriminatory aspects of the application of the justice system were highlighted by the Assistant Director of Legal Affairs and Penitentiary Cooperation at the Ministry of Justice, Salvador Mayaña, who stated openly, “[a]bortion takes place at all social levels, but the higher levels can hide it, whereas the middle and lower levels cannot.”<sup>222</sup>

### ***3 Abortion methods and places where abortions are performed***

The prosecutors and doctors interviewed described, based on their experience, a wide variety of abortion methods used by women who were faced with the impossibility of obtaining a safe and legal abortion: clothes hangers, metal rods, high doses of contraceptives, fertilizers, gastritis remedies, soapy water and caustic fluids (such as battery acid).<sup>223</sup> The case records examined showed that the most common methods are pills, such as Cytotec and potassium permanganate (inserted vaginally),<sup>224</sup> catheters to inject soapy water or caustic liquids, and rods of any type of material to penetrate the uterus.

In fact, 17 of the 46 case records that specifically indicate the abortion methods used show that the methods most often used by women prosecuted for abortion were: pills such as Cytotec and potassium permanganate (inserted vaginally), catheters, injections of unknown solutions, or a combination of abortion methods, such as pills, a catheter and an injection, or pills and a metal rod. With respect to the place where the abortion was performed, 15 of the 46 women involved had the abortion at home, 12 in clandestine clinics and 5 in hospitals. There was no information on the place of abortion in 14 of the case records.

According to the information gathered from the case records and provided by the prosecutors interviewed, it is obvious that the women charged with abortion performed it under dangerous circumstances, using the methods at hand, even if they knew their health and life were at risk. Using pills, catheters, injections and rods can kill a woman or injure her permanently. In addition to having only dangerous methods at their disposal, the women being tried for abortion were forced to self-induce abortions in their homes, in unsanitary conditions or in clandestine clinics that could not guarantee adequate procedures. Furthermore, once women undergo this type of abortion, if complications arise due to the conditions in which

the abortion was practiced, they are then at risk of being reported by hospital staff who treat the complications. All of this highlights the risk to life, health, security of person and liberty that terminating an unwanted pregnancy represents for young, low-income women in El Salvador.

#### ***4 Complaints and the criminal process***

The case records examined for this study indicated that most complaints are made by hospitals. Of the 46 cases, 23 complaints were made by hospital staff and the other 23 by third parties, including the police and private individuals.

Despite the legal exception that excludes health professionals from having to make a complaint when the information is obtained under professional secrecy, many complaints of abortions are made by public and private hospitals.<sup>225</sup> In the opinion of the Director of the Maternity Hospital, the institution that treats the greatest number of women who have had abortion complications, most complaints of abortion come from the hospitals.<sup>226</sup>

Some prosecutors believe there is a tendency to avoid making complaints of abortion in rural areas. They attribute this to people's fear or ignorance;<sup>227</sup> they also think it is "easier to evade the law and cover up the crime" than in cities.<sup>228</sup> Prosecutors further explained that, in rural areas, during the last stage of a trial, juries made up of community members are reluctant to get involved in legal proceedings and convict someone.

#### ***5 Legal defense***

When a complaint is brought against a woman suspected of having an abortion, a prosecutor may interview her and then have her undergo tests performed by a doctor at the National Institute of Forensic Medicine. The accused has the right to legal aid throughout this process and, if she is unable to pay a private lawyer, the State is under the obligation to provide her with defense counsel appointed by the court.<sup>229</sup>

Nineteen of the 46 women prosecuted for abortion were or are currently represented by defense counsel appointed by the court.<sup>230</sup> It was not possible to carry out an in-depth analysis of the case records with regard to defense because most of the prosecutions were in the initial phase. Nevertheless, based on an analysis of the case files and interviews with a court-appointed defense counsel and a private defense lawyer, there appears to be a consensus among lawyers that allegations of abortion against women are hard to prove. Since the woman herself is the "body of evidence," it is difficult to prove the crime occurred and access incriminating evidence.<sup>231</sup> Prosecutors cannot order the tests required to proceed without the authorization of the woman or her defense counsel (public

or private).<sup>232</sup> According to the prosecutors, it is much easier to prove induced abortion when a catheter or other object used for an abortion is found inside the woman.<sup>233</sup>

A female doctor at the National Institute of Forensic Medicine who was interviewed for this study said that women who go to the hospital for complications following poorly performed abortions are usually very scared when they arrive. They do not hide what has happened to them, because they fear for their health and life. However, when it comes to their examination by a doctor at the National Institute of Forensic Medicine, accompanied by their lawyer, they are more composed and often deny having induced the abortion.<sup>234</sup>

Other interviews shed light on the types of defenses used. There are two main strategies used by the women's defense lawyers. One consists of trying to discredit the prosecutor's evidence to establish their inability to prove the facts of the case. The other strategy is to request an abbreviated process. In this case, the prosecutor requests a sentence that entails no imprisonment, or a minimal prison sentence, and the accused must plead guilty.<sup>235</sup>

A public defense lawyer and a private defense lawyer both maintained that an important part of their defense was to highlight the reasons behind the women's decisions to have an abortion, as well as their socioeconomic background. They combined these elements in their legal defense to minimize criminal liability.<sup>236</sup> "It is necessary to consider her age, the number of children she may have, whether she has a job or not," stated the private lawyer. "We should not cause a woman further problems in order to give rights to the fetus."<sup>237</sup> The public defense lawyer expressed that, in her closing arguments, she invokes women's rights recognized by international human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>238</sup>

Finally, some of the interviewees spoke of the need to further explore defense arguments, such as the "necessity defense," considered grounds to preclude criminal liability under the Penal Code of El Salvador. In fact, the defense can be used only when the woman's life is in danger, since these grounds provide for exception from criminal liability when a person acts to safeguard a personal legal right, which would be the case of a woman who interrupts her pregnancy to save her own life.<sup>239</sup> While it is unlikely that this defense will be effective, it should be explored.

### ***6. Preventive custody and substitutive measures***

For persons prosecuted for abortion, especially women charged with self-induced abortion, this crime usually marks their introduction into the penal sys-

tem. Given the structure of the Salvadoran criminal process, very often a person suspected of a crime must go to prison before the investigative and trial process is completed. When imprisonment is ordered by a legal authority, it is called preventive custody, which is total loss of liberty to ensure that the accused remains on hand throughout the criminal process and to fulfill his or her sentence.<sup>240</sup> The Director of the Crimes against Minors and Women Division of the Public Prosecutor's Office of the Republic said in an interview that, circumstances permitting, she preferred not to order preventive custody, but instead to apply substitutive measures, specifically house arrest.<sup>241</sup> Other prosecutors stated that substitutive measures apply if the woman shows "good faith" and cooperates with the prosecution; they also said such measures may apply if the woman's socioeconomic circumstances are taken into account.<sup>242</sup>

The Salvadoran Penal Code specifically provides for the possibility of ordering substitutive measures for preventive custody, such as house arrest.<sup>243</sup> In nine of the 46 cases studied, substitutive measures were ordered; preventive custody was ordered in another nine. Substitutive measures were not ordered in the remaining proceedings, in some cases because of a provisional stay of proceedings,<sup>244</sup> or because the accused women could not be found to continue proceedings, or because it was proven that there was no crime, among other reasons.

Although some prosecutors state that they do not want to impose preventive custody in abortion cases, and prefer substitutive measures, the case records show that both measures were used with virtually the same frequency. It can also be deduced from the interviews that the application of substitutive measures is highly discretionary. It is difficult to make a definitive analysis of how often preventive custody is used instead of substitutive measures, since not all of the case records provide complete information. However, prosecutors are starting to apply substitutive measures as an option and must be further encouraged in this regard so that women are not subjected to preventive custody at all.

### ***7. Outcome of criminal prosecutions for abortion***

In El Salvador, not all criminal trials culminate in a sentence. In fact, many trials end in a stay of proceedings, which may be temporary or definitive, and therefore suspend or terminate criminal prosecution.<sup>245</sup> A stay of proceedings is a way of ending the criminal trial without a ruling by the court on whether the accused is guilty or innocent, except in cases where the stay is definitive. This legal resolution can be ordered at any stage of the proceedings. There are also other ways of ending the proceeding. For example, the justice of the peace can move that the case be dismissed when it is demonstrated that the acts do not constitute a crime,



or when it is not possible to proceed, due to insufficient evidence.<sup>246</sup>

At the time of this research, the majority of the trials (25) were still in their initial phase. In the other 21, none of the women involved had been found guilty: in six of the cases charges were dismissed, four women were found not guilty, a definitive stay of proceedings was ordered in eight of the cases and three cases had been closed.

During the first phase of the research, it was discovered that there were three women in preventive custody for the crime of abortion at the Ilopango Reform Center, the only women's prison in El Salvador. Unfortunately the women refused to be interviewed. Another attempt was made during the second phase of the research, after two of the three women had been released. Once inside the prison, the assistant director of the penitentiary gave investigators permission to ask the remaining woman if she would give an interview. When asked to tell her story, tears and shame prevented her from talking about what had happened. She was only able to say that she had been in the hospital for approximately one month recovering from complications due to abortion, that the hospital had turned her in and that she had been brought to prison, where she had been detained for three months.

#### E. OTHER ABORTION PROSECUTIONS

Of the 69 trials, 46 involved women charged with self-induced abortions. The other 23 involved persons charged for practicing abortions, or discoveries of fetuses, for which proceedings were initiated to find the woman who had had the abortion, but have not progressed due to insufficient findings or incriminating evidence.

In each of the cases against abortion providers, there was more than one person involved, including women and men. Although there is little information, those charged were mainly midwives who performed abortions in their homes, and a few gynecologists. It was very difficult to extract additional information to reflect the social profile of the persons charged with practicing abortions. The most common methods used by these persons to induce abortions were the sole or combined use of pills, catheters, wires or rods inserted into the woman's vagina. As in the cases of women charged with abortion, both preventive custody and substitutive measures were used according to the authorities' discretion.

Prosecutors have stated that the most difficult cases to investigate are those initiated upon finding a fetus, where the woman who performed the abortion has

not been found, due to insufficient incriminating evidence. In most of these cases, the woman who induced her abortion cannot be found, the trials cannot continue, and the cases are closed after a certain period.<sup>247</sup> Research for this paper identified 12 trials for findings of fetuses between April 1998 and October 1999. All findings occurred in rural areas of the country and were reported by the person who found the fetus. Eight of these cases were still open, with the investigation under way, and four cases had been closed.

Some prosecutors have linked the abortion-law reform to the growing number of discoveries of fetuses, which is seen as an indicator of the conditions in which women are performing abortions on themselves.<sup>248</sup> In effect, discarded fetuses may reflect a situation in which a woman is determined not to carry an unwanted pregnancy to term, but without the legal mechanisms or resources to obtain a safe abortion, she must induce abortion clandestinely, in conditions that endanger her life and health.