

Conservative litigation against sexual and reproductive health policies in Argentina

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Abstract: *In Argentina, campaigns for the recognition of sexual and reproductive rights have sparked opposition through litigation in which the dynamics of legal action have come from self-proclaimed “pro-life” NGOs, particularly since 1998, when the conservative NGO Portal de Belén successfully achieved the banning of emergency contraception through the courts. The activities of these groups, acting as a “civil arm” of religion, are focused primarily on obstructing access to legally permissible abortions and bringing about the withdrawal of a number of recognized public policies on sexual and reproductive health, particularly the 2002 National Programme for Sexual Health and Responsible Procreation. This paper analyzes the litigation strategies of these conservative NGOs and how their use of the courts in Argentina has changed over the years. It gives examples of efforts in local courts to block individual young women from accessing legal abortion following rape, despite a ruling by the National Supreme Court of Justice in 2012 that no judicial permission is required. In spite of major advances, the renewed influence of the Catholic hierarchy in the Argentine political scene with the accession of the new Pope poses challenges to the work by feminists and women’s movements to extend and consolidate sexual and reproductive rights. © 2014 Reproductive Health Matters*

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For the last ten years, Argentina has seen an increase in litigation related to sexual and reproductive rights. The dynamics between the actors and the ways in which these cases have made it into the courts have played out in different ways. On the one hand, LGBTIs* have turned to the courts in an attempt to widen the spectrum of sexual rights.^{1,2} It was in this way, for instance, that prior to the Civil Code reform legalizing same-sex marriage in 2010, the Argentinian Federation of Lesbians, Gays, Bisexuals and Trans (FALGT),[†] founded in 2006, launched a successful legal strategy to seek authorization of a series of same-sex marriages through the courts of justice. Their purpose was to open a national debate and set legal precedents that would lead to a transformation in the country’s legislation on marriage.

As far as reproductive rights are concerned, however, the dynamics of legal action have been different, as it has been conservative social actors who, from the 1990s and the beginning of the 21st century onwards, created an intense litigation environment surrounding the topic. Since 1998, when the conservative NGO *Portal de Belén* (Stable of Bethlehem) successfully took a case against emergency contraception, achieving the banning of the method in the country,³ several self-proclaimed “pro-life” NGOs have increased their legal activities in an attempt to obstruct access to legal abortion services and to bring about the withdrawal of a number of public policies on sexual and reproductive health.^{4–8}

The conservative litigation strategy is in direct response to advances in the recognition of the right to sexual and reproductive health, which started in the 20th century in Argentina. While there are still some sexual and reproductive rights to attain, such as the legalization of

*Lesbians, gays, bisexuals, transexuals and intersexuals.

[†]See: <http://www.falgt.org>.

abortion,* a number of laws and policies favourable to these rights have been passed. In 2002, for example, Law 25.673 created the *Programa Nacional de Salud Sexual y Procreación Responsable* (National Programme for Sexual Health and Responsible Procreation), which aimed to lower maternal mortality and morbidity, prevent unwanted pregnancies, guarantee adolescents' access to sexual and reproductive health, and prevent sexually transmitted infections and HIV. In 2006, Law 26.130 eliminated restrictions on access to tubal ligation and vasectomy, which had been a criminal offence in the Penal Code until then. That same year, Law 26.150 introduced comprehensive sexual education. In 2010, Law 26.618 was amended, allowing same-sex couples the right to marry and adopt. Then in 2012, Law 26.743 guaranteed the right of recognition of self-defined gender identity.

In the context of these considerable advances in sexual and reproductive rights, the conservative sectors have found in the judicial arena a space to dispute and resist these new rights. This is a phenomenon that jeopardizes both our hard-won sexual rights and women's reproductive rights as well as access to sexual and reproductive health services, and needs further exploration.

This article aims at shedding some light on some of these matters. Firstly, it describes the emergence and historical evolution of the self-proclaimed "pro-life" NGOs in Argentina. Secondly, it analyzes the court challenges by the self-proclaimed "pro-life" NGOs to restrict the National Programme for Sexual Health and Responsible Procreation and the role and impact of the NGO *Portal de Belén* in the litigation against the National Programme. Thirdly, we analyze the main judicial interventions by conservative NGOs aimed at blocking women's access to legally permissible abortions in Argentina.

Our analysis is based on three different sources of information: online and paper documents published by the self-proclaimed "pro-life" NGOs concerned, details of the legal proceedings presented by these organizations in court in the years 1998–2013, and individual interviews with 14 members of these NGOs. Drawing upon these data, we have mapped the aims of these NGOs,

tracked their historic evolution and analyzed their main litigation strategies.

The development of the self-proclaimed "pro-life" NGOs in Argentina

While the conservative sectors upholding their version of sexual morality are made up of a multiplicity of actors,^{9,10} the academic literature in general has focused on the role that certain religious institutions play, especially the Catholic hierarchy and some Evangelical churches, who are key actors in the struggle against sexual and reproductive rights in Argentina.^{11–14} Nevertheless, and despite the central place that these religious groups hold in this field, the self-proclaimed "pro-life" NGOs have gained momentum as opponents of such rights.⁹ Whereas these organizations reinforce the actions carried out by some religious leaders, acting as a "civil arm" of religion, they have also allowed conservative activists to resort to strategies that lie beyond the scope of the churches involved.

These conservative NGOs came into existence in Argentina at the beginning of the 20th century. As Mallimacci and Giménez Béliveau¹⁵ point out, during the 1920s and 1930s, the Vatican put forward a proposal that took the name of "Integral Catholicism" in which they appealed to the Catholic community to occupy ground in the arenas of politics, trades unions and universities, among others, carrying Catholicism into the whole of society. It was in this context that Argentina saw the emergence of organizations in Buenos Aires such as the *Consortio de Médicos Católicos* (Consortium of Catholic Doctors, 1929), *Fundación Nueva Cristiandad* (New Christianity Foundation, 1930) and *Corporación de Abogados Católicos* (Association of Catholic Lawyers, 1935), all aiming to promote Catholicism in professional and/or educational arenas. Others, in contrast, were formed in the mid-20th century as a response to debates arising from social transformations that challenged the traditional roles of men and women in the domestic and public spheres. Such was the case, for example, of the *Liga por la Decencia* (League for Decency, Santa Fe, 1963) and in Buenos Aires the *Liga de Madres de Familia* (League of Mothers, 1951) and *Tradición, Familia y Propiedad* (Tradition, Family & Property, 1967). Their actions went hand in hand with a discourse strongly focused on the idea

*While abortion is penalized in Argentina, Article 86 of the Penal Code sets forth exceptions to the law in cases involving rape and risk to the health and life of the woman.

of “the family” always understood as marital, monogamous, heterosexual and reproductive.¹⁶

From the 1980s onwards, these organizations underwent important transformations in line with international events that began to consolidate new forms of conservative activism. On the one hand, the prioritization of the conservative sexual agenda of the Catholic Church (against abortion and the use of contraception), with Pope John Paul II as its leader, promoted a discourse based on the “unrestricted defence of life at conception”. Since then, the discourse of absolute “protection of life from conception” has become a key demand of conservative NGOs in their opposition to policies championing greater sexual independence.¹⁷

The Catholic organization Human Life International was created around that time in the United States to orient NGOs to support the stance of the Catholic hierarchy.^{18,19} Under their auspices, several countries in Latin America saw the emergence of such NGOs, renewing the impetus of conservative activism in civil society, who began to identify themselves as active members of a growing movement, self-proclaimed “pro-life”, emulating organizations in the United States and Europe of the 1970s.²⁰ By the 1980s there was a network of such groups whose aim was to defend restricting the sexual order.

In all, there have been some 140 self-proclaimed “pro-life” NGOs in the history of Argentina,²¹ most of which still exist today. At present, only a few have the structure and resources necessary to resort to litigation as a strategy to oppose sexual and reproductive rights, the most important of whom have been *Portal de Belén* (Córdoba), *Fundación 25 de marzo* (25th of March Foundation, Córdoba), *Mujeres por la Vida* (Women for Life, Córdoba), *Movimiento Familia y Vida* (Family and Life Movement, Tucumán), *Vitam* (Mendoza), ProFamilia (ProFamily, Buenos Aires) and *Corporación de Abogados Católicos* (Buenos Aires).

The *Portal de Belén* case and its impact on sexual and reproductive health policies

In 1994, Argentina underwent a process of constitutional reform which introduced the right to file a court case under a collective writ of *amparo*, which had previously only been available as an individual right. The writ of *amparo* has been widely employed by conservative NGOs, who claim to represent an abstract group of people and interests in order to legitimize appearing before

the courts.²² There are three main legal arguments they put forward to oppose sexual and reproductive health and rights policies. The first, present in all their lawsuits against access to abortion and contraception, has been the protection of the right to life of possible “unborn children”, whom they claim to speak for.^{23–26}

Apart from being against contraceptive technologies, their discourse has also focused on the damage they allege that modern contraception can cause to women’s health. Thus, they also claim to represent the community of women, whose right to health they claim could potentially be affected by the use of these methods.^{23,24} Finally, they frequently refer to the effect of sexual and reproductive health policies on the authority of parents or guardians of children, in that they believe all matters related to family planning should belong exclusively to parents in all matters related to their minor children and children with disabilities, and should be excluded from State control.^{24,27}

In addition, changes in the international and regional context in the 1990s incited the use of conservative litigation against sexual and reproductive policies. During that decade, feminist, women’s and LGBTI movements succeeded in developing an integrated conceptualization of these rights, especially in the context of the 4th International Conference on Population and Development in 1994 and the 5th World Conference on Women in 1995. In this international scenario of advancement and acknowledgment of sexual and reproductive rights, one of the issues that was prioritized in Latin America was access to emergency contraception. According to Faúndes et al,²⁸ the first emergency contraceptive pills began to appear in Argentina from 1997. Due to both the legal restriction on abortion in most countries in the region and the high rates of sexual violence against women, the introduction of this method in each country was promoted and supported by networks of women’s organizations. In response, different conservative groups started working in many countries to stop the sale of emergency contraception and litigation was one of the top strategies employed by them.^{5,6}

Towards the end of the 1990s, Argentina witnessed one of the most resounding judicial cases at both national and regional level in terms of conservative litigation. The case was known as *Portal de Belén*, the name of the NGO that

initiated the case.³ In 1998, *Portal de Belén* sued the National Ministry of Health with the aim of prohibiting the manufacture and distribution of an emergency contraceptive pill called *Inmediat* in defence of the unborn child's right to life, which they claimed was violated by this medication. In March 2002, in a judgment full of major scientific and legal inaccuracies, the Supreme Court of Argentina ruled in their favour and ordered the Ministry of Health to revoke their approval of the method and banned its manufacture, distribution and sale nationally. Among their arguments, the court stated that human life starts at conception and declared that any method that prevents implantation should be considered as causing an abortion. This ruling has been capitalized upon by the self-proclaimed “pro-life” movement in subsequent litigation, not only against emergency contraception but also against abortion. Moreover, some years later, this ruling was cited as a precedent in court cases against emergency contraception in other countries of the region, e.g. Chile and Perú.^{29,30}

The *Portal de Belén* case represented the beginning of a series of legal proceedings that would increase at the beginning of the 21st century as a form of resistance against the progress in the sexual and reproductive rights agenda that was taking place in the country. One of the main achievements in the field of sexual and reproductive health in Argentina was the passage of the law that created the National Programme of Sexual Health and Responsible Procreation, which contains provisions for access to contraception and information on sexual and reproductive health, among other services. The self-proclaimed “pro-life” NGOs made intense use of litigation as a way of challenging this policy, falling back on the successful arguments used in the *Portal de Belén* case.

As in the 1990s, the focus of conservative litigation was opposition to abortion. The conservative groups considered the National Programme of Sexual Health and Responsible Procreation as a path leading to the legalization of termination of pregnancy.^{31,32} Since 2002, six collective writs of *amparo* have been filed against that law and its regulations, five of which have been filed by self-proclaimed “pro-life” NGOs. Four of the writs were tabled by NGOs from Córdoba (two by *Mujeres por la Vida*, one by the *Fundación 25 de marzo* and another by *Portal de Belén*) and one by an organization from Tucumán (*Movimiento Familia y Vida*). At the same time, lawyers from

self-proclaimed “pro-life” organizations were involved in at least two of the three individual writs of *amparo* filed against this policy. Simultaneously, in the provinces of Córdoba, San Luis, Santa Fe, Buenos Aires, and Río Negro, among others, many conservative NGOs also attempted to nullify local policies on sexual and reproductive health via judicial proceedings.^{33–37} The *Mujeres por la Vida* case, filed in 2002, is a paradigmatic example in that the courts brought the National Programme of Sexual Health and Responsible Procreation to a halt.²³ In December of that year, the same judge who presided in the case started by *Portal de Belén* against emergency contraception passed an interim order, under which the implementation of the programme was suspended across the country. However, a few weeks after the publication of the sentence, the ruling was revoked by the House of Appeals of the Federal Justice of the Province of Córdoba.

Despite the many attempts to annul the National Programme of Sexual Health and Responsible Procreation, this policy is still in force in Argentina. The development of cases against it has fluctuated. Some have achieved favorable rulings to the petitions of conservative NGOs in the lower courts, which were later reversed in higher courts. Others have been appealed and rulings remain pending. There are also cases that have been shelved, leaving the petitions by these NGOs without any outcome.

Actions against abortion

By 2005, efforts to promote the legalization of abortion started gaining steady ground in Argentinian political space. One of the higher impact factors in this sphere was the *Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito* (National Campaign for the Right to Free, Safe and Legal Abortion), launched in 2005.* The politicization of the issue put several requests for legally permissible abortion in the public spotlight, many of which sparked counter-actions from the self-proclaimed “pro-life” NGOs. According to the Penal Code, no judicial authorization is necessary

*The Campaign is an alliance of more than 250 groups, organizations and people in trade union, academic, scientific and political arenas, among others. The alliance has presented a bill for the legalization of abortion at four different moments (2007, 2008, 2010 and 2014), though the bill has not yet been approved.

to have access to legal abortions; however, health services oftentimes require such a document in order to carry out the procedure.³⁸ Such was the case, for example, of a woman in the city of Mendoza whose daughter is mentally disabled. In 2006, she requested that the court provide her with the legal authorization to have her daughter's pregnancy aborted, which was the result of rape.³⁹ Once the authorization had been granted, the NGO *Vitam* filed a writ of *amparo* to block the daughter's access to an abortion. With the support of the Supreme Court of Justice of Mendoza, the abortion was performed, despite threats against the doctors and the hospitals involved.

This case is only one of the many examples of the persistence of these groups in seeking to create barriers to accessing abortions permitted by law.⁸ Against this backdrop, in March 2012, the National Supreme Court of Justice gave a ruling clarifying the scope of the term *aborto no punible* (legally permissible or non-punishable abortion). The case that led to this ruling, *F., A.L. S/MEDIDA AUTOSATISFACTIVA*,⁴⁰ was initiated in March 2010 by the Deputy Secretary General of the Province of Chubut, after the Supreme Court of that province ruled in favour of an abortion for a 15-year-old girl who had been raped by her stepfather. On this occasion, the National Supreme Court ruled that legally permissible abortion should be available to all women whose pregnancies were the product of a rape, and that access to abortion need not be subject to any judicial, administrative or police procedure. In addition, the Court ordered that the provinces develop legal abortion regulations so as to avoid future prosecutions and to guarantee access to the procedure. In 2013, the Association for Civil Rights of Argentina published a report⁴¹ showing that 17 of the 25 jurisdictions of the country (24 provinces and the City of Buenos Aires) currently have the requisite regulations as requested by the National Supreme Court of Justice. Nevertheless, eight of them set forth a series of regulatory requirements that are at variance from the guidance established by the Court, such as time limits to access abortion, requirement of authorization by health centre directors, or the intervention of interdisciplinary health teams. At the same time, eight provinces do not have any legally permissible abortion regulations yet.

Legal proceedings were once again taken up as a key strategy by conservative actors in this

scenario; they turned to provincial courts in an attempt to resist locally what had been established by the National Supreme Court. Such was the case, for instance, of the writ of *amparo* filed in October 2012 by the NGO *ProFamilia* to prevent a victim of human trafficking from terminating her pregnancy.⁴² Among other points, *ProFamilia* questioned the constitutionality of Resolution 1252/2012, which had created the non-punishable abortion protocol for the City of Buenos Aires. In this instance, due to a conflict of authority arising as a result of *ProFamilia* filing cases simultaneously before both the City of Buenos Aires Court and the Federal Justice Court, the National Supreme Court intervened once again, ratifying its ruling in *F., A.L. S/MEDIDA AUTOSATISFACTIVA* and nullifying the interim order requested by *ProFamilia* against legally permissible abortion.

Another example is the writ of *amparo* presented in 2012 by *Portal de Belén* against the regulations governing legally permissible abortions approved by the Ministry of Health of the Province of Córdoba, and in accordance with the Supreme Court ruling. In this case, however, the lower courts (of the first and second instance) of the Province of Córdoba passed an interim order suspending the implementation of the regulations in provincial hospitals.^{43,44} This case has been appealed in both instances and is pending at the Superior Court of Justice of the Province of Córdoba as of this writing.

The National Supreme Court's 2012 ruling was seen as a failure for the self-proclaimed "pro-life" NGOs as regards national justice. The court cases initiated by these NGOs in provincial courts can be interpreted as a strategy to get support in arenas more receptive to their demands, given that the local sphere is oftentimes more receptive to their conservative stance than at the national level. Moreover, as pointed out by Sieder, Schjolden and Angell,⁴⁵ under decentralization policies in federal systems, provincial governments are often able to challenge the federal authorities through the courts in hopes of voiding sexual and reproductive rights that are guaranteed by national laws and policies.

Final considerations

Strategic litigation has been a key strategy for some movements in favour of sexual and reproductive

rights to broaden the scope of recognition of these rights.^{1,46} However, the same strategy has also been taken up frequently by those sectors upholding a restrictive sexual morality.

When delving into such complex legal processes, it is necessary to consider the judiciary as a key actor in the development of public policy. Apart from the legal effects that litigation can have on sexual and reproductive health policies, when conservative litigation against these rights is the only form of litigation taking place, the impact may be considerable on the perceptions of those providing health services, who are essential actors in the implementation of such policies. In particular, when treating issues that for many sectors still carry a heavy moral load, such as abortion or adolescent sexuality, conservative litigation may reinforce traditional moral notions, thereby deepening the symbolic effects of litigation. Even when litigation has not succeeded in nullifying sexual and reproductive health policies, as in Argentina, and even when, ultimately, most of the legal abortion cases have been supported by the higher courts, the intensity of the judicialization may spark feelings of being under threat or of insecurity about the legal position in those in charge of implementing public policies.

Moreover, and as we have tried to show in this paper, it is not possible to think of conservative litigation efforts as an unvarying strategy over time. The forms these processes take change according to the different political and legal scenarios facing groups campaigning against sexual and reproductive health and rights. Although legal action was not an option for the conservative NGOs during the 1980s, the transformations that took place in the following decade promoted their use of it. In the 1990s, the conservative litigation focused mainly on preventing the international advances in sexual and reproductive health from being achieved in Argentina nationally. Now, in more recent years, litigation initiated by the self-proclaimed “pro-life” NGOs is aimed at opposing policies and legislation that have been approved nationally and are being implemented.

As Mala Htun points out,¹² the windows of opportunity in Latin America for the approval of policies in favour of these rights usually take place in political contexts where there is tension between conservative churches and the administration in power. During the presidency of Carlos Menem (1989–1999) in Argentina, the national

government maintained a close relationship with the Vatican, opposing a series of sexual and reproductive health policies. In 1994, for example, while the process of constitutional reform unfolded, Menem led a campaign to establish the constitutional protection of life from conception, which was finally rejected by the National Constitutional Assembly. In 1998, the government approved the *Día del Niño por Nacer* (Day of the Unborn Child) through Decree 1406/98, coinciding with the Catholic festival of the Annunciation of the Virgin Mary, clearly organized to counter the attempts being spearheaded by the feminist movements of the time to legalize abortion. Thus, if in the 1990s public policies and legislation on sexuality and reproduction generally had a conservative imprint,⁴⁷ the breakdown in the alliance between the national executive and the Catholic hierarchy during the presidency of Néstor Kirchner (2003–2007) meant a change in Argentine sexual health policy, which became more favourable to the sexual and reproductive rights agenda. This in turn led the self-proclaimed “pro-life” activists to rearrange their strategies, leaning towards stronger litigation efforts.

The basis of the legal arguments of conservative litigation, even in cases taken against contraceptive methods and broad sexual and reproductive health policies, has generally revolved around opposition to abortion. In this scenario, the legalization of abortion is necessary not only to guarantee this right for women, but also to protect other rights that are threatened because conservative NGOs have associated them with the criminalization of abortion. Despite the increasing relevance that the legalization of abortion is gaining, the current scenario in Argentina presents important challenges on the road towards legalization. One is the political changes in Argentina brought about by the election of the new Pope in 2013. Since this event, the national executive and the Vatican have come closer together, altering the tense situation that had existed between them for a decade. The consequences of this new relationship can already be observed. On the one hand, reform of the Civil and Commercial Code has just been instituted. The reform was strongly influenced by pressure from the Catholic hierarchy, after the enthronement of Jorge Bergoglio as Pope. Thus, the final version of Article 19 of the new code states that life starts at conception.

Even though it is too soon to determine what impact this reform will have on the litigation activities of conservative NGOs, it may be supposed that such reforms, far from being a curb on the phenomenon of conservative litigation against sexual and reproductive rights, may contribute to

the continuation of these actions. Therefore, both the recent legal framework and the renewed influence of the Catholic hierarchy in the Argentine political scene pose new challenges to the work by feminists and women's movements to extend and consolidate sexual and reproductive rights.

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Résumé

En Argentine, les campagnes pour la reconnaissance des droits sexuels et génésiques ont provoqué l'opposition par les litiges, dans lesquels la dynamique de l'action en justice est venue d'ONG auto-proclamées « pro-vida », en particulier depuis 1998, date à laquelle l'ONG *Portal de Belén* a réussi à faire interdire la contraception d'urgence par les tribunaux. Ces groupes, qui opèrent comme « bras civil » de la religion, ont pour but principal d'entraver l'accès aux avortements légalement autorisés et de faire retirer plusieurs politiques publiques reconnues sur la santé sexuelle et génésique, en particulier le Programme national de 2002 pour la santé sexuelle et la procréation responsable. L'article analyse la stratégie de litige de ces ONG conservatrices et montre comment leur utilisation des tribunaux en Argentine a changé au fil des années. Il donne des exemples d'activités menées auprès des tribunaux locaux pour empêcher des jeunes femmes d'avoir accès individuellement à l'avortement légal après un viol, en dépit d'un arrêt de la Cour suprême nationale de justice de 2012 affirmant qu'aucune autorisation judiciaire n'était requise. Malgré des progrès majeurs, le regain d'influence de la hiérarchie catholique sur la scène politique argentine avec l'élection du nouveau pape complique le travail que les féministes et les mouvements de femmes accomplissent pour élargir et consolider les droits sexuels et génésiques.

Resumen

En Argentina, los procesos políticos por el reconocimiento de los derechos sexuales y reproductivos han suscitado oposición por medio del litigio en el cual la dinámica de la acción judicial ha surgido de las ONG autoproclamadas “pro-vida”, particularmente desde 1998, cuando la ONG conservadora Portal de Belén logró la prohibición de la anticoncepción de emergencia por medio de las cortes. Las actividades de estos grupos, que actúan como el “brazo civil” de la religión, se enfocan principalmente en obstruir el acceso a abortos permitidos por la ley y en lograr la obturación de varias políticas públicas reconocidas referentes a la salud sexual y reproductiva, en particular el Programa Nacional de Salud Sexual y Procreación Responsable, de 2002. Este artículo analiza las estrategias de litigio de estas ONG conservadoras y cómo su uso de las cortes en Argentina ha cambiado a lo largo de los años. Da ejemplos de esfuerzos por bloquear en las cortes locales el acceso de las mujeres jóvenes a servicios de aborto legal después de una violación, a pesar de una sentencia emitida en 2012 por la Corte Suprema de Justicia de la Nación Argentina, que establece que no es necesario un permiso judicial. Pese a importantes avances, la renovada influencia de la jerarquía católica en la escena política argentina desde que asumió sus funciones el nuevo Papa presenta retos para el trabajo de feministas y movimientos de mujeres para ampliar y consolidar los derechos sexuales y reproductivos.