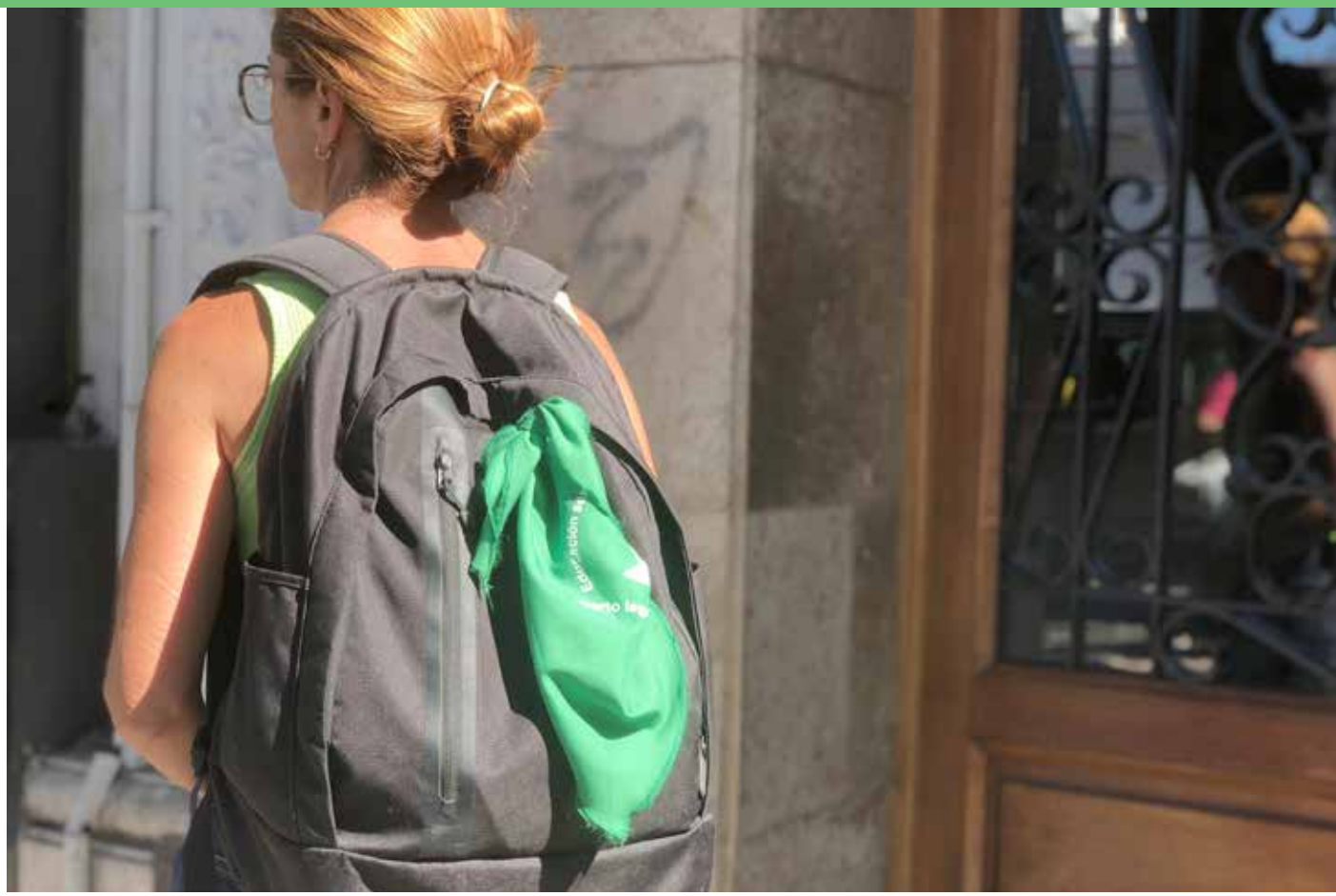
Legal Termination of Pregnancy in Argentina
Understanding the Health Indication



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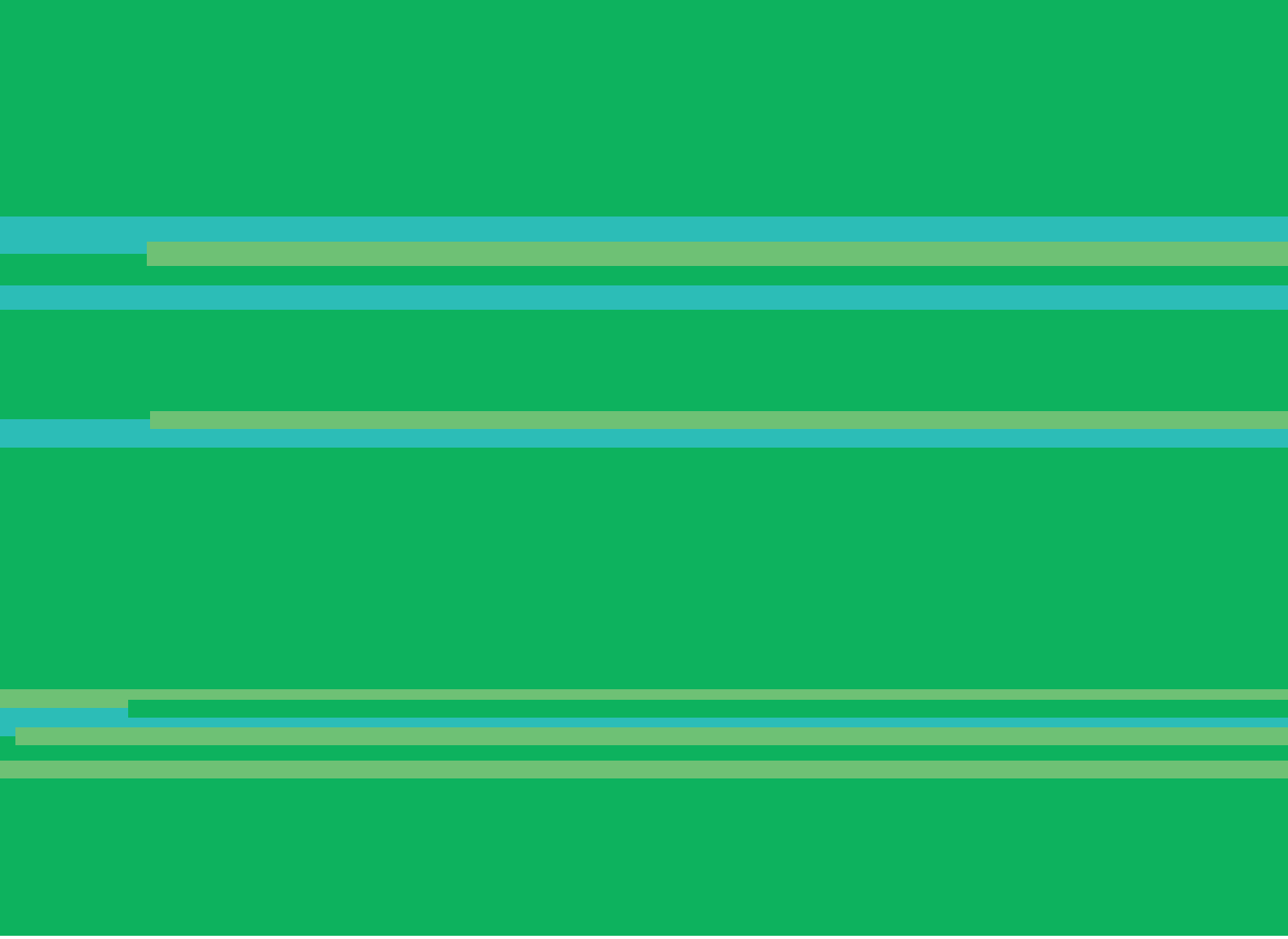

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The Network of Health Professionals for the Right to Choose and Ipas collaborated in the development of this document to support professionals working to increase access to safe and legal termination of pregnancy (ToP) in Argentina. Our objective is to improve the theoretical and legal understanding of the application of the health indication for legal ToP, in accordance with international human rights treaties.

The health indication encompasses one of the situations in which a woman or pregnant person may legally end a pregnancy in Argentina, and is sanctioned by abortion laws in most Latin American and Caribbean countries. This indication refers to the possibility of terminating a pregnancy when it presents a risk to the woman's health. However, in practice, the application of this indication faces a series of barriers that prevent thousands of women from accessing legal termination of pregnancy (ToP) services in a safe and timely manner.

Introduction

Human rights and within those, the sexual and reproductive rights of women, adolescent girls, and people with the ability to conceive, must be prioritized for discussion within regions like Latin America, where abortion is more restricted than in almost any other part of the world. In Latin America, abortion is generally regulated by penal codes and is often criminalized, despite the fact that thousands of women resort to clandestine procedures every year, putting their health and life at risk.

Argentina's 2018 social and legislative debate on expanding legal ToP helped the country prioritize this issue as a public health problem. A bill that would have permitted the "voluntary termination of pregnancy" in Argentina was presented to Congress by the National Campaign for the Right to Legal, Safe and Free Abortion and was debated in both chambers for the first time after six attempts to introduce similar legislation in previous years.

The "green tide" is a social movement made up of diverse groups and organizations (women, feminists and health professionals), though most are predominantly young people from all walks of life who took to the streets, making history through their demand for access to safe and legal ToP in Argentina. The green handkerchief symbolizes that abortion is a right that should be guaranteed by the State. It calls for the social decriminalization of abortion. It also proclaims that society is in favor of safe and legal ToP, in favor of women's lives, and vehemently opposed to clandestine abortions and the deaths of young women caused by those procedures.

Although the discussion around legalizing abortion in Argentina began at the legislative level, the Argentine health system must continue to work toward ensuring access to legal ToP under existing indications for induced abortion. Human rights bodies have clearly stated that it is the duty of the government to protect their population's right to health, reform restrictive abortion laws, and guarantee access to safe abortion options for women and people with the ability to conceive.

Since 1921, legal ToP in Argentina has been addressed by article 86 of the Penal Code, which decriminalizes abortion when the following three indications:

- Rape
- Risk to the life of a pregnant person
- Risk to the health of a pregnant person

In this document, we will focus on analyzing what is meant by the **"health indication"** and how a woman or person with the ability to conceive can access a legal ToP when their physical, mental, and/or social health is at risk.

The Network of Health Professionals for the Right to Choose and Ipas collaborated in developing this document for professionals working to ensure access to safe and legal ToP in Argentina. Our objective is to improve the theoretical and legal understanding of the application of the health indication, in accordance with international human rights treaties.

The health indication is one of the legal considerations for legal ToP, included in abortion laws in most Latin American and Caribbean countries. This indication refers to the possibility of terminating a pregnancy when it presents a risk to the woman's health. However, in practice, the application of this indication faces a series of barriers that prevent thousands of women from accessing legal ToP services in a safe and timely manner.

Abortion in Latin America

The consequences of abortion for a woman's health depend on the legality of abortion in a given setting and access to safe abortion care, which is dependent on the social context. The World Health Organization (WHO) defines an unsafe abortion as "a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimum medical standards or both" (WHO, 2012). Conversely, an abortion is considered safe when technologies are available that do not place the life or health of a pregnant person in danger, and when that person can access skilled health providers and services.

The WHO now categorizes abortion according to the level of safety: abortions are **safe, less safe,** or **least safe**. The WHO and the Guttmacher Institute (2018) estimate that of the 55.7 millon abortions occurring globally each year, 55% (30.6 million) are **safe**. That is, all abortions were performed under safe conditions. Specifically, these abortions were carried out by skilled health professionals using a method recommended by the WHO. Almost one third, 31% (17.1 million) of abortions are considered **less safe**. These abortions are provided by skilled health providers, using an unsafe or outdated method or, using safe methods, but in the absence of a health provider with the necessary clinical skills. Fourteen percent of abortions are **least safe** abortions (eight million), which may be due to the ingestion of caustic substances, insertion of foreign bodies, or use of traditional concoctions, among other unsafe methods.

The number of deaths due to complications from abortion was high in regions where the majority of abortions were performed under unsafe conditions. Complications resulting from unsafe abortions can include incomplete abortion, hemorrhage, vaginal, cervical and uterine injuries, and infections.

For Latin America and the Caribbean, the WHO estimates that of the 6.42 millon abortions performed each year, 23.6% are safe, 60% are less safe, and 16.7% are least safe. The highest annual rate of abortion, between 2010 and 2014, was recorded in the Caribbean, where an estimated 59 abortions per 1,000 women of reproductive age occurred during this time period, followed by South America, where 48 ocurred. North America represents the lowest rate in the region with 17 abortions for every 1,000 women of reproductive age.[1] Latin America and the Caribbean is the region with the most induced abortions worldwide, and where the most "less safe" abortions are performed. At 63%, South America has the highest proportion of less safe abortions in the world.

Regarding the legal context, globally, the trend has been to expand laws permitting safe and legal ToP. Between 1994 and 2014, legislation in at least 30 countries loosened abortion restrictions. Currently, more than 60% of the world's population lives in countries where abortion is permitted without legal restrictions or under broad indications (Center for Reproductive Rights, 2014). In Latin America, despite this tendency to loosen abortion restrictions in the last 20 years, more than one country has changed its laws to further restrict legal ToP. Today, more than 97% of women of childbearing age in this region live in countries where abortion is legally restricted or completely banned (Center for Reproductive Rights, 2014).

In places where access to abortion is restricted, the procedure is usually clandestine and performed in less safe or least safe conditions. The estimated number of deaths related to abortion in 2014 reached 44,000 women. At least 10% of the maternal deaths registered annually in Latin America are the result of least safe abortions, and an estimated 760,000[2] women in the region are treated annually due to complications resulting from unsafe abortions (Guttmacher Institute, 2018).

In Argentina, it is estimated that unsafe abortion is responsible for 18% of maternal deaths registered annually and that each year, between 370,000 and 520,000 abortions are performed. This translates to more than one abortion for every two births (Pantelides, 2009). Official statistics indicate that there are more than 50,000 hospital discharges each year for abortion-related causes, and for the past two decades, complications related to abortion are the third cause of hospital discharges associated with pregnancy, childbirth, and the postnatal period (OSSyR, 2014). Undoubtedly, unsafe abortion is a public health problem that puts the health and life of women and persons with the ability to conceive at risk.

A study conducted by Ipas (2013) between 2011 and 2013 in Argentina, Bolivia, and Brazil reveals the different ways in which the punitive power of government harms the reproductive autonomy of women, putting them at risk for arrest and imprisonment, and forcing health professionals to make unethical decisions regarding their patients. In Argentina, 417 convictions related to abortion were identified from 1990 to 2008, mostly among women seeking abortion care. This report also revealed that many health professionals reported women whom they suspected of having had an abortion, although laws and regulations typically do not require them to do so.

In Argentina, current jurisprudence establishes that when a health provider reports a woman for having procured an abortion outside of the indications permitted by law, this violates her right to patient confidentiality (provider-patient privilege) and as well as her right against self-incrimination. This jurisprudence, reaffirmed by the Supreme Court of Argentina in 2010 (Natividad Frías Case of 1966), has contributed to a reduction in the number of reports filed against women who undergo abortions.

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1 https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide
2 https://www.guttmacher.org/fact-sheet/abortion-latin-america-and-caribbean

Health risks, human rights, and the health indication

The proper interpretation of the health indication must be based on a comprehensive vision of the right to health, in accordance with the laws of each country and within the established human rights framework.

It is important to understand the content of the law that defines the health indication in a literal sense, without adding qualifications that hinder women's access to legal ToP. The literal interpretation is a criterion that protects women's and pregnant people's human rights. When a regulation requires a certificate for a woman to access a legal ToP, the certificate cannot be considered to be proxy for the authorization or denial pertaining to the procedure. It only certifies the risk the pregnancy poses to the health of the woman or pregnant person. This certificate can be a specific document or can be included within the medical chart.

Should doubts arise about how to correctly interpret the health indication, one should adopt the interpretation that best supports the pregnant woman or person's rights, in accordance with the *pro homine* principle. This assumes that the health indication must be interpreted as broadly as possible, to cover the greatest number of potential situations. It also assumes that this interpretation is based on the right to health, and recognizes that this right and all other human rights are interdependent. As such, a woman's right to health is intertwined with her right to autonomy, well-being, and self-determination.

A health risk is generally defined as the probability that the continuation of a pregnancy will result in harm to a woman or pregnant person's health. Therefore, the application of the health indication seeks to prevent harm to the health and life of women and pregnant people associated with the continuation of a pregnancy. This does not mean that the damage has already occurred, nor that there is an imminent risk of death. For example, when there is no open communication or dialogue to negotiate condom use with a partner, especially in cases of abuse or violence, or other situations that limit a pregnant person's ability to make decisions regarding reproductive health, this person is eligible to access ToP under the health indication.

When considering psychological and social health determinants, one should also consider risk factors associated with gender stereotypes that limit options for a pregnant person. For example, when there is no open communication or dialogue to negotiate condom use with a partner, especially in cases of abuse or violence, or other situations that limit a pregnant person's ability to make decisions regarding reproductive health, this person is eligible to access ToP under the health indication. The determining factor should be the person's own perception of the risk the pregnancy poses to their health. If the pregnant person decides to continue with the pregnancy, the state must ensure access to health care and the necessary material conditions so that the person can carry the pregnancy to term. Alternatively, if the person decides to terminate the pregnancy, the state must also guarantee their right to access an abortion.

International human rights instruments have a binding legal nature. They are mandatory to states that are committed to upholding human rights and carrying out efforts to ensure compliance. The state has an obligation to protect human rights, including the right to health. This entails that health providers must ensure access to safe abortion as part of their country's obligation to uphold the right to health.

Consequently, to apply the health indication, it is necessary to organize all structures of the government apparatus to facilitate access to health facilities, goods, and services. Therefore, the principles that should guide the application of the health indication derive from the international human rights framework and include:

- **Respect and protection:** refrain from directly or indirectly obstructing access to legal ToP and ensure that third parties do not obstruct this care.
- **Compliance:** timely and effective access to legal ToP under the health indication, with the adoption of measures to ensure the right to health.
- **Equality and equity:** all people have the same rights; adoption of adequate measures to meet different needs.
- **Non-discrimination:** all women and pregnant people must be protected by existing legal indications, so that health professionals may carry out their duties with freedom of conscience.

Ethical considerations for the application of the health indication

1. **Respect for patient's autonomy and informed consent is paramount.** This is considered from the moment comprehensive, clear, accurate, and timely information is provided to each woman to help her make an informed decision concerning the risk that she faces as a result of the pregnancy. Regarding patients with disabilities, it is important to provide information in an empathetic way that facilitates comprehension. In the event that a surrogate decisionmaker is involved, one must consider the option that best protects and defends the rights of the patient.

   If the patient is a minor, the concept of evolving capacity[3] should be applied so that the minor can make an autonomous decision. In any scenario, the first consideration must be to protect the best interests of the minor, limiting parents' or legal guardian's power to decide for the minor as her decision-making capacity evolves.

2. **Principles of non-maleficence and beneficence:** These are based on the obligation to prevent and avoid any harm. Regarding legal ToP under the health indication, harm must be evaluated on the basis of a person's overall health and well-being, so as to ensure their right to the highest levels of physical, mental, and social well-being.

3. **Justice is a concept based on the principle of equity:** It serves to prevent the limitation or denial of access to legal ToP due to discrimination based on age, ethnicity, educational level, or socio-economic level.

   Matters of religion, morals, or conscientious objection (CO) cannot be used by health professionals to obstruct access to legal ToP. The parallel principles of objectivity and non-maleficence require that professionals not impose their beliefs on those who need

3 Office of the United Nations High Commissioner for Human Rights. Convention on the Rights of the Child. 18 November 2002. http://www2.ohchr.org/english/ law/crc.htm#art5

these services, and that they not interfere with women's nor pregnant people's choices regarding a pregnancy. CO can be exercised within certain limits, while ensuring that the principle of non-maleficence is respected by complying with professional duties and obligations, and in accordance with regional standards for the protection of human rights:

- CO can only by claimed by individuals and not institutions.
- Denying abortion care cannot put a woman's or pregnant person's life and health at risk.
- Public and private health facilities have the obligation to ensure access to legal ToP by ensuring patients' access to health professionals who provide abortion care.

Because the application of the health indication requires that there is a risk to the life or health of the pregnant woman or person, the use of CO has certain limits:

- When a woman's or pregnant person's life or health is at risk and a legal ToP is required urgently, CO cannot be used.
- When the procedure is not urgent, the doctor who refuses to provide abortion care must refer the woman or pregnant person to a skilled health professional who will provide a legal ToP in a respectful and timely manner.
- Health professionals are obligated to provide women and pregnant people with comprehensive, clear, accurate, and timely information.
- Once a risk to the woman's or pregnant person's life or health has been established by an appropriately trained health professional, the client must be granted access to a legal ToP, and CO cannot be used in response to the risk already determined.

4. **Protecting patient confidentiality is an ethical duty that has special relevance for abortion care:** Women and pregnant people who are not guaranteed confidentiality often avoid seeking timely health care and may resort to unsafe practices that put their lives and health at risk.

   When conflicting issues arise between regulations that require health professionals to report a suspected abortion and the duty to protect patient confidentiality, international human rights treaties take priority over these regulations (i.e. the protection of the right to life, health, personal integrity, and privacy, among others). It is important to mention that it is rare for a health professional to be required to report a patient that they suspect has procured an unlawful abortion. In fact, health professionals in several countries, including Argentina, are **not** required to do so. In any case, the autonomy of the pregnant person must be respected regardless of their age or marital status, in accordance with the principle of beneficence.

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Jurisprudence for the application of the health indication in Argentina

Argentine legislation regulates abortion using "authorizations" or "indications," each of which determines the situations in which induced abortion is permitted. The health indication is applicable when, during pregnancy, it is likely that continuing the pregnancy will cause harm to a woman's or pregnant person's health or affect their well-being in a negative way, given the understanding that *health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity* (WHO, 1948). However, the Penal Code does not establish the seriousness of this harm, meaning that health professionals have the responsibility to provide all the information concerning a patient's health status and support them in making an informed decision about whether or not to continue the pregnancy.

Despite the fact that the Penal Code (1921) has been in force for nearly 100 years, controversies and difficulties still exist regarding women's and pregnant person's access to legal ToP, thus contributing to the increase in unsafe and clandestine abortions. It is important to remember that the indications for legal ToP in Argentina are supported by the federal constitution, by human rights treaties incorporated into the Constitution, and by other national laws that seek to uphold human rights (for example, the rights to equality, health, self-determination, privacy, and non-discrimination.) This means that the rights women and pregnant people have when seeking a legal ToP are enshrined in Argentina's constitution and international human rights law (MSAL, 2010).

Several human rights treaty bodies have indicated that Argentina must recognize the difficulties and barriers that women face when trying to access a legal ToP in the country's health system, and take the necessary measures to ensure their access to these services. Accordingly, in August 2010, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) urged Argentina to: *"(...) review existing legislation that criminalizes abortion, with serious consequences for the health and lives of women. The State party should ensure that the "Technical Guide for Comprehensive Care for Non-punishable Abortions" is applicable in the whole country in a uniform manner so that there is equal and effective access to health services to interrupt pregnancies."*

Along the same lines, the Committee on the Rights of the Child recommended that of Argentina *"Take urgent measures to reduce maternal deaths related to abortions, in particular ensuring that the provision on non-punishable abortion, especially for girls and women victims of rape, is known and enforced by the medical profession without intervention by the courts and at their own request; e) Review article 86 of the Penal Code on a national level to prevent disparities in new and existing provincial legislation with regard to legal termination of pregnancy (...)."*

Due to these disparities, and given the lack of knowledge and uncertainty concerning the regulation of legal ToP and the barriers and/or obstacles to its application, Argentina's Supreme Court of Justice issued a key sentence known as ruling F, . A. L. (CSJN, F, .A.L, 2012), which clearly recognizes that every woman who becomes pregnant as a result of rape has the right to a legal ToP. The Court affirmed that *"the State, as guarantor of public health administration, has the obligation, under circumstances that warrant a legal ToP, to provide the medical and sanitary conditions necessary to the person who requests this practice, in a timely, accessible, and safe manner"* (CSJN, 2012).
This ruling has been essential for beginning the process of removing legal obstacles to

abortion within the Argentine health system. Additionally, the Court conclusively stated that no clause in the Constitution or human rights treaty signed by Argentina imposes an absolute ban on abortion; hence, the regulation that establishes the indications for legal ToP is both constitutional and conventional (Bergallo, 2017).

The Court also urged authorities to implement and operationalize hospital protocols for legal ToP under the current indications, particularly those which will support comprehensive care for victims of sexual violence. Reactions from Argentina's provinces and jurisdictions to the F, A.L. ruling were diverse. Although the approval of health-care protocols in and of itself does not ensure access to legal ToP, it does represent an important regulatory step toward facilitating access, standardizing best practices, and establishing a common set of criteria for caring for those seeking abortion care.

Criteria for the interpretation of the health indication in Argentina

In Argentina, it is best practice for a woman's or pregnant person's decision to end a pregnancy under the existing legal framework to be preceded by certification of the relevant indication. This indication can be certified in a report or written in the person's medical file. This certification is an analysis of the woman's or pregnant person's particular situation, and is based on an interview conducted with each person requesting a legal ToP.

During this interview, the person seeking a legal ToP is asked to explain their reasons and/or motives for choosing to terminate the pregnancy. As part of this interview, the health professional evaluates the risks that may negatively affect the overall health of the woman or pregnant person if forced to continue with the pregnancy. It is important that health professionals understand that this process should be guided by the WHO's holistic definition of health and that they consider the impact of the pregnancy on the life plans of the pregnant woman or person, as well as their overall well-being.

There are several situations in which the health indication can be applied. There are no categories within these situations that can sufficiently account for the diversity and totality of patients' unique lives. These situations can be expanded at the discretion of the health professional and according to the experiences and living conditions of each woman who decides to terminate a pregnancy.

In Argentina, health professionals are not required to verify a physical or mental illness to certify the health indication for a legal ToP. All each health professional must do is identify that the state of well-being (in which the right to health exists) is being affected and/or that the pregnant woman's or person's life plans will be undermined by continuing the pregnancy.

- **Physical Health**

Considering the risks or impact of the pregnancy on a patient's health is an essential part of preventing illness or harm. A variety of medical conditions have the potential to affect pregnant person's health and cause complications that can threaten their lives.[4]

Risk determining factors include:

- Vulnerability factors: These are physical factors that can lead to the emergence of health impairments such as chronic genetic diseases or physical malformations, among others.

- Precipitating factors: These are factors related to physiological changes that occur during a normal pregnancy and can aggravate a pathological process in pregnant people. Examples include medical complications during pregnancy, a disease that was controlled but has worsened during pregnancy, diseases acquired during pregnancy that put a patient's health at risk, some communicable diseases, etc.

- Consolidating factors: These are factors that occur when continuing a pregnancy is incompatible with an adequate, effective, or reasonable treatment for the concomitant illness, resulting in chronic effects on the pregnant person's health. One of these factors can be delayed access to a legal ToP, as well as gender and/or sexual violence that produce chronic effects on one's health.

- **Mental Health**

Mental health is recognized as a dimension of health by international human rights law and by most laws within Latin American countries, including Argentina. Mental health can be affected to varying degrees and does not imply absolute disability or severe mental illness.

The concept of mental disorder has been extended to include psychological pain or mental suffering associated with the loss of personal integrity or self-esteem; for example, in the case of pregnancy due to rape or incest, when a fetus has severe malformations, or when a woman or pregnant person experiences a disease that seriously impacts her overall health.

- Vulnerability factors: Women are more likely to suffer from a mental illness. In part, this is due to the social vulnerability that results from traditional gender roles. Consequently, women face a lower degree of autonomy, which increases their risk for experiencing gender-based violence, sexual violence, and unwanted or forced pregnancies, among other forms of harm. These situations can lead to problems such as depression, anxiety, post-traumatic stress, alcohol abuse, and other sequelae.[5]

- Precipitating factors: These are factors that derive from personal situations that can lead or contribute to mental illness. Examples include suffering following the death of a loved one, termination of a long-term relationship, unemployment, an unwanted pregnancy and/or denial of a legal ToP, as well as posttraumatic stress (for example, having received a diagnosis of fetal malformation; having suffered torture, physical, sexual or psychological abuse; having survived armed conflict; or being forced to continue a pregnancy against one's will).

- Consolidating factors: These may be the same as vulnerability factors. Socio-

4 https://scholar.harvard.edu/files/viterna/files/libro_jocelyn_final.pdf

5 https://www.researchgate.net/publication/318733233_Mental_Health_Consequences_and_Risk_Factors_of_Physical_Intimate_Partner_Violence

cultural conditions may be relevant in the assessment of a mental illness or disorder. Continuing a pregnancy can perpetuate conditions that affect a person's well-being. There are social factors that can worsen a disorder and should be considered as a category for a legal ToP to protect a woman's or pregnant person's mental health.

- **Social Health**

The social dimension of health is based on the underlying determinants of health and includes the basic factors that impact a person's material welfare, such as access to drinking water, good sanitary conditions, adequate nutrition and housing, healthy conditions at work and the environment, and access to education and information.

The right to health in its social dimension is associated with the highest standard of physical and mental health and overall well-being. Its role within the health indication requires an understanding of the social determinants of health: poverty, social exclusion, and marginalization.

Broadly speaking, the social determinants of health are all the factors that impact a person's well-being and quality of life, such as the number of children they desire, the conditions in which they raise children, working conditions, and the option (or lack thereof) to terminate a pregnancy that represents a health risk.

1. Vulnerability factors: The social context in which women and pregnant people live determines their well-being and their physical and mental health. Unemployment rates and discriminatory situations have an impact on a woman's or pregnant person's decision regarding whether or not to continue a pregnancy and aggravate their physical and mental health. Discrimination especially affects people who are indigenous, rural, migrants, of African descent, living with HIV/AIDS, living with a disability or deprived of their liberty, among other groups of people.

   Vulnerability factors that affect the social dimension of one's health operate systemically, perpetuating the cycle of poverty. When evaluating these determinants as risk factors, it is important to review each woman's and pregnant person's life plans. An important factor to consider is employment discrimination due to pregnancy.

2. Precipitating factors: These are factors related to material circumstances (for example, housing or work environment), behavioral factors (for example, drug use or smoking), psychosocial circumstances (for example, lack of social support), and lack of access to health care, which create risks for women's and pregnant people's health.

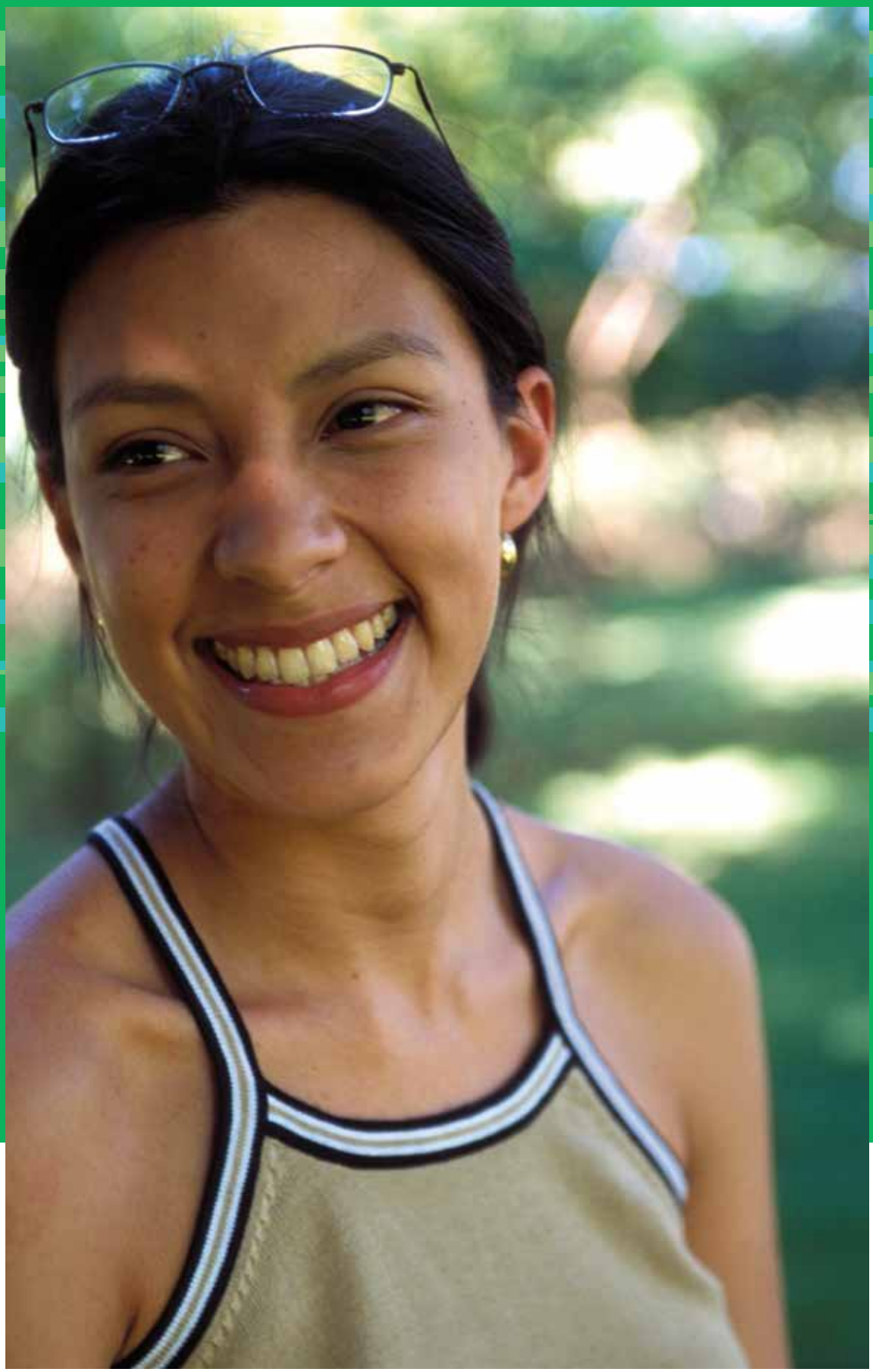
3. Consolidating factors: These are social factors that may be perpetuated or exacerbated by continuing a pregnancy, affecting the woman's or pregnant person's well-being. These include: chronic poverty, difficulties finding a steady or good-paying job, or continuing one's education.

Conclusion

It is a priority for the Network of Health Professionals for the Right to Choose and Ipas to strengthen health professionals' ability to broadly interpret the health indication, considering each of its three dimensions: physical, mental, and social.

We consider the various aspects of the health indication we've outlined above to be useful in improving the capacity of and encouraging reflection among health authorities and health professionals tasked with implementing public policies aimed at ensuring access to the right to abortion in Argentina. We are also hopeful this document will help decrease the frequency with which medical providers deny women and pregnant people access to these services, thereby reducing the number of clandestine abortions in Argentina and in all countries where the health indication allows for legal ToP.

Health-care teams should work to ensure that abortion care is respectful and grounded in human rights. As part of this process, they must integrate a gender perspective into the care they provide, as well as ethical and legal principles that support access to high-quality reproductive health care in accordance with Argentina's existing legal framework. It is especially imperative that these professionals work to increase access to safe and legal abortion care for women and people with the ability to conceive throughout Argentina.



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