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## Children’s Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ’s Class Action

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Through a complex litigation strategy that involved “freedom of information” requests, budget analysis, and media dissemination, the Civil Association for Equality and Justice (*Asociación Civil por la Igualdad y la Justicia*, or ACIJ) pressured the formerly reluctant government of the city of Buenos Aires, Argentina, to acknowledge a legitimate unsatisfied claim related to school vacancies for initial-level education and commit to making significant policy changes.<sup>2</sup>

### 1. The Right to Early Education and the Shortage of School Openings in the City of Buenos Aires

Argentina is a federal country comprising 23 provinces and the autonomous city of Buenos Aires. The national government coexists with 24 local governments, all of which enact their own constitutions and laws. However, every local rule must be compatible with the principles, declarations, and rights enshrined in the national constitution, which include the rights to teach and learn.<sup>3</sup> The national constitution also dictates that congress must legislate so as to organize a free, fair system of education that respects the principle of equal opportunities throughout the country.<sup>4</sup> Moreover, one of the conditions that the national constitution places on the guarantee of autonomous functioning for all local governments is that the provision of primary education is ensured. Furthermore, local jurisdictions are constrained by specific national statutes that impose minimum standards on the education system, such as maintaining budget allocations to education that are higher than six percent of the GDP of each local jurisdiction.<sup>5,6</sup> It is under these provisions that every province and the city of Buenos Aires have the authority to plan, organize, administer, and finance the local education system. Local institutions are in charge of formulating the education budget, but they must comply with the above requirements.

However, education policies of the city of Buenos Aires must comply with even more demanding conditions. The Constitution of the City of Buenos Aires entrenches the right to education and establishes that the government must guarantee and finance a public, secular, and free education system that respects

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<sup>2</sup> For more on ACIJ, visit [www.acij.org.ar](http://www.acij.org.ar).

<sup>3</sup> Articles 5 and 14 of the Argentine Constitution.

<sup>4</sup> Article 75.19 of the Argentine Constitution.

<sup>5</sup> Two of these statutes are the National Education Act (*Ley Nacional de Educación*), No. 26.206, and the Education Funding Act (*Ley de Financiamiento Educativo*), No. 26.075.

<sup>6</sup> Article 3 of the Education Funding Act, No. 26.075.

the principle of equal opportunities.<sup>7</sup> Moreover, while the national government has the duty to provide access to education to every child aged five years and older, the city's duty applies to every child over the age of 45 days.<sup>8,9</sup> Further to this, the city's constitution dictates that budget items assigned to education cannot be reallocated.<sup>10</sup>

For many years, a shortage in the number of openings for early education in the city of Buenos Aires was notable. From 2002 to 2009, while the number of children applying to schools steadily increased, the enrolled student population stayed constant.<sup>11</sup> The shortage of initial-level education openings was a consequence of a dearth in the number of early education facilities or kindergartens.<sup>12</sup> Every year, since at least 2002, thousands of children between the ages of 45 days and five years were excluded from public schools.<sup>13</sup> Between 2002 and 2006, the number of children excluded from early education increased by 37 percent. By 2006, 6,047 children were excluded; this number had increased to almost 8,000 by 2008.<sup>14</sup>

The city government's violation of its constitutional obligation to guarantee universal access to early education is not linked to the policies of the party that is in power. Over the years, different administrations have been guilty of underspending the budget allocated to improving school infrastructure. Former high-ranking officials and ministers of education of different governments of the city of Buenos Aires acknowledged these problems when interviewed by a prominent newspaper.<sup>15</sup> The major economic crisis that Argentina suffered at the beginning of the 21<sup>st</sup> century and the impossibility of efficiently administering resources without precise and useful information were given as excuses. Some even confessed to mere inefficiency.

It is important to note that the existing available school spaces are also not equally distributed among the city's districts. Children who live in the six most disadvantaged districts are less likely to access initial education than those who live in the six most affluent districts. More than half of the excluded children lived in the poor districts; less than 15 percent lived in the affluent districts. Because of a shortage of schools in the poorest neighborhoods — and overcrowded classrooms in the existing schools — many of the children from these neighborhoods needed to be transported to other districts in order to access early education.

An expert in education policies, Professor Silvina Gvirtz, suggests that early education may have been consistently neglected by successive city governments because no agent in the education community acts in defense of the children's interests. Unlike in the U.S., there are no parents associations that play a significant role in education in Argentina. The only two relevant actors are the teachers unions, which mostly concentrate on advancing workers' interests, and the state, which should but does not always care

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<sup>7</sup> Article 24 of the Constitution of the City of Buenos Aires.

<sup>8</sup> Article 16, Law No. 26.206. No obligation to provide initial-level education was established at the national level until 1993. Education expert Silvina Gvirtz explains that it was not until the nineties, when evidence showed the impact that initial-level education has on children's future, that it started to be seen as relevant. Initial-level education was traditionally considered a luxury item, not a right.

<sup>9</sup> Article 24 of the Constitution of the City of Buenos Aires.

<sup>10</sup> Article 25 of the Constitution of the City of Buenos Aires.

<sup>11</sup> Data from the Direction of Information and Evaluation of Education Quality of the National Education Ministry, available at: <http://www.mapaeducativo.edu.ar/Atlas/inicial>.

<sup>12</sup> Interviews with Martín Sigal and Marcela Goenaga, interview by author, written notes.

<sup>13</sup> Martín Sigal and Dalile Antúnez, "Budget Analysis and the Right to Education in the City of Buenos Aires," *European Human Rights Law Review* (Issue 3, 2010), p. 319, footnote 11.

<sup>14</sup> Data incorporated in the file of the analyzed case ("ACIJ c/ GCBA s/ Amparo Exp. 23.360") by the Government.

<sup>15</sup> Claudio Savoia, "Desde 2002 aumentó la desigualdad educativa en la Ciudad," *Clarín*, 14 June 2009.

about children's rights.<sup>16</sup> In this context, the intervention of new agents was necessary, and, as is the case in the U.S., courts could play a role in enforcing children's rights.<sup>17</sup>

## 2. ACIJ's Plan to Address the Problem

### *ACIJ's background work on education*

Established in 2002 in the context of a major economic, social, and political national crisis, ACIJ is a Buenos Aires-based civil society organization (CSO) devoted to the protection of disadvantaged groups' rights and to strengthening democracy. Its impact strategies include advocacy campaigns, preparing watchdog reports, proposing policy reforms, and accessing and disseminating relevant public information. However, possibly due to the fact that it was founded by and mainly comprises lawyers, public interest litigation is the key tool of ACIJ's work.

ACIJ organizes its work into five programs. Its Education Equality program is directed at contributing to eradicating the structures and practices that make the poorest children suffer the lowest quality of education.<sup>18</sup>

In an attempt to tackle inequality in education, ACIJ has carried out a diverse set of actions. Among these was a community outreach initiative, in which the organization set up cooperative networks with grassroots organizations in urban slums, conducted workshops, and channeled complaints about access to education to the relevant authorities. This work made ACIJ aware of the extent of the problem of access to early education. The organization also organized workshops on public education directed at promoting the first of the city's laws on education. In doing so, ACIJ made contact with all the relevant actors in the education community and became involved in public discussions on education reform. Having learned that the information systems used to monitor schools' vacancies, enrollment, and registration procedures were inadequate, ACIJ prepared a draft bill aimed at regulating those procedures. It also produced a documentary aimed at raising awareness about inequality in access to education and conducted research about the allocation and spending of budget resources for school infrastructure between 2002 and 2008.<sup>19</sup> The conclusions reached as a result of this research fed ACIJ's litigation strategy in the case presented here.

Litigation is ACIJ's primary advocacy tool. This approach differs from that of other organizations working on education issues. According to Axel Rivas, the education program director of the Center for Public Policy Implementation for Fairness and Growth (CIPPEC for its acronym in Spanish), another well known Argentine CSO, litigation should be considered a last resort in efforts to advance educational reform. According to this view, policy changes are better fostered by political means, such as reform proposals followed by public advocacy, public debate, collaboration with the government, and consensus building.

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<sup>16</sup> The problem of a shortage of school spaces was a "historical demand" of the teachers' unions. However, they decided not to litigate because of their distrust of courts and legal solutions. Interview with Alicia Pongetti and Daniel López.

<sup>17</sup> Mariano Tomassi, *The Politics of Policies. Economic and Social Progress in Latin America* (David Rockefeller Center for Latin American Studies: Harvard University, 2005).

<sup>18</sup> ACIJ's other programs are Community Legal Action, Anti-Corruption work, Rights and Community Building in Urban Slums, and Strengthening Democratic Institutions.

<sup>19</sup> *El Sur También Existe* ("The South Also Exists: Educational Inequality in Buenos Aires"), 2008. This documentary was declared to be of educational interest by the Legislature of the City of Buenos Aires. Available at: <http://vimeo.com/8176012> (last visited 7/18/2011).

In this case, however, ACIJ had good reasons for turning to litigation. The violation of children's right to early education in Buenos Aires had been continuous and unaltered for several years, indicating that the political process was insensitive to this violation. This was even accepted by Rivas, who, as mentioned above, is usually reluctant to promote educational reforms through litigation.<sup>20</sup>

Moreover, the legal context was propitious for ACIJ's lawsuit. Argentina has signed international human rights treaties as well as provided for class actions in the constitution, both of which have given rise to the development of judicial activism.<sup>21</sup> This follows a global trend, which is especially strong in Latin American democracies.<sup>22, 23</sup> In contexts of extreme poverty and inequality, the constitutional entrenchment of rights facilitated an increasing number of claims being brought before the judiciary, demanding answers from judges in matters that used to be considered purely political.<sup>24</sup>

### *ACIJ's litigation strategy and objectives*

By filing its lawsuit against the city, ACIJ aimed to make two clear points. First, that year after year many children were denied their right to early education because of a shortage of vacancies at schools. Although the situation was worse in the south of the city than in the north, it did occur in all districts, which justified making a general claim about the violation of the right to early education, as well as a claim about the violation of the right to equal treatment and autonomy.<sup>25</sup> Second, ACIJ aimed to show that while there was a shortage of vacancies, the government had been underspending budget resources specifically allocated to schools' infrastructure and maintenance.

By proving these points, ACIJ hoped it would be able force the judiciary to intervene and compel the government to reverse such high exclusion rates. The fact that the government was underspending budget resources that should have been used to increase the number of school spaces made the case suitable for intervention by the courts. The unspent budget allocations showed that a political decision to advance infrastructure work in the education system had already been made and that the government should be held accountable for not executing that decision. These two points provided a good counter-argument to the claim that the courts should not intervene because the case was essentially a political one.

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<sup>20</sup> Axel Rivas' only criticism about ACIJ's intervention is that its litigation efforts should have been deployed in Argentina's other 23 provinces because the city of Buenos Aires enjoys the best initial-level education situation in the country. Of course, this criticism does not take full account of ACIJ's material limitations.

<sup>21</sup> Articles 75.22, and 43 of the Argentine Constitution.

<sup>22</sup> Neil Tate and Torbjörn Vallinder (Eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995); Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge: Cambridge University Press, 2003); Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, (Cambridge: Harvard University Press, 2004).

<sup>23</sup> Roberto Gargarella, "The New Latin American Constitutionalism: Promises and Questions," Lecture Notes 2010, pp. 11-14 (available at <http://www.mediafire.com/?90b2w8sm6rcr8sv>).

<sup>24</sup> Literature is quite vast on this subject. Among others, see Javier Couso, "The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity," in R. Gargarella, P. Domingo and T. Roux, Eds. *Courts and Social Transformation in New Democracies. An Institutional Voice For the Poor?* (Hampshire: Ashgate, 2006), p. 68; Christian Courtis, "Judicial Enforcement of Social Rights: Perspectives from Latin America", in (R. Gargarella, P. Domingo and T. Roux, Eds.), *idem*, p. 169.

<sup>25</sup> Interviews with Mariela Aisenstein, Dalile Antúnez, and Martín Sigal. Public Ministry Magistrate Gustavo Moreno, who had a relevant role in the case and backed ACIJ's main claims, thinks the action would have been easier to advance on the grounds of socioeconomic discrimination against a few southern districts rather than on the basis of a structural violation of the rights to initial-level education and to equal protection. ACIJ's approach was more ambitious, and Moreno warned that it was riskier.

ACIJ was one of the first Argentine CSOs to use litigation to bring about education policy reform. Described as a pioneer in this regard by experts in the field, its approach of using litigation was certainly new for both the education and the legal communities.<sup>26</sup> While the work of other CSOs in the field of education had been devoted to doing research and putting forward policy proposals, ACIJ took a leading role in advancing the right to education through strategic litigation, as well as in using budget analysis findings to advance litigation strategies.<sup>27, 28</sup>

### 3. ACIJ's Intervention and its Results

#### *"Access to information" requests and litigation*

Spending data and other relevant information about the execution of public policies are not widely available in Argentina. Both the national and the provincial governments are reluctant to publish data on the Internet, and the administrative conditions for accessing information about spending data and public policies are generally numerous and tedious.<sup>29</sup>

With the objective of making historical inequalities visible and raising awareness about the need to eradicate them, ACIJ has often worked with "access to information" requests. Thus, before introducing its lawsuit, ACIJ's first move was to use the city's Freedom of Information Act to get the necessary data.<sup>30</sup> It requested information about the total number of existing schools offering early education, a detailed and disaggregated account of the number of students who had applied for early schooling between 2001 and 2006, and the number of children placed on waiting lists in each school within that timeframe. It also requested information about all budget resources allocated to schools' infrastructure between 2001 and 2005, as well as complete and detailed spending data on construction, maintenance, and school provisions for those fiscal years.<sup>31</sup> With this information the CSO would have been able to compare school infrastructure allocated to spent resources.

However, as the government did not provide ACIJ with the requested information, the organization decided to litigate on the grounds of the Freedom of Information Act. By April 2006 it had the case and the government was forced to provide the information. Data on the number of early education facilities, applicants, and children relegated to waiting lists were essential for showing the collective nature of the violation, while information on budget allocation and spending was vital for arguing that while the children's rights were being violated, the government was not spending the full amount allocated in the budget.

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<sup>26</sup> Interviews with Silvina Gvirtz and Mariela Belski, interview by author, written notes,

<sup>27</sup> There were very few precedents of class actions regarding the right to education in Argentina before the one described in this case study. ACIJ had taken part of a pioneer case, first submitted by third parties and also advanced by Public Ministry Magistrate Gustavo Moreno that succeeded in making the judiciary order the government to eradicate a discriminatory type of classroom (*aulas container*).

<sup>28</sup> In a later case, ACIJ claimed that the government had unconstitutionally reassigned budget resources originally allocated to schools infrastructure. The case was closed once the government decided to backtrack and stick to the original allocation.

<sup>29</sup> CELS, *Derechos humanos en Argentina. Informe 2010*, (Buenos Aires: Siglo XXI, pp. 334-340.

<sup>30</sup> City of Buenos Aires Statute No. 104. This is one of the very few freedom-of-information acts in force in Argentina. There is no similar statute at the national level, but rather a Presidential Decree that often is conservatively interpreted. See CELS, cited in note 44.

<sup>31</sup> ACIJ submitted two notes to the city's secretary of education on 28 October 2005.

### *Budget analysis*

ACIJ has expertise in conducting budget analysis and considers it to be a key feature of human rights activism. The organization believes that the protection of rights requires public expenditure, and that most social inequalities can be traced to unfair budget allocations or unequal spending. For this reason it decided to train its staff in budget analysis and incorporates a budget-reading approach in most of its programs.<sup>32</sup>

After collecting all the necessary information, ACIJ was able to compare allocated budget resources to actual spending data for the same budget items in a given time period. In this way, ACIJ learnt that for five years the city's government had underspent an important proportion of resources allocated to the infrastructure, building, and maintenance of early education facilities.<sup>33</sup> According to the data gathered, between 2002 and 2005 an average of 32.3 percent of the resources allocated had not been spent. In 2005 underspending amounted to 25.5 percent of the total budget for those items; in 2007 it was reduced to 7.73 percent, but in 2008 it reached 41.2 percent.

### *Media coverage*

Media coverage is a useful tool for promoting judicial activism. Public scrutiny of cases directed at ending injustices creates a disincentive to judicial restraint and increases judges' accountability. In this case, ACIJ managed to attract the attention of journalists and achieved wide media coverage in Argentina's most important newspapers.<sup>34</sup>

ACIJ was in a good position to disseminate its work through the media and mobilize an important part of the affected community behind its action. Because of its background work, journalists regarded the organization as a trustworthy source. Moreover, the media found the case interesting because it showed that both the current and previous governments were inefficient when it came to budget spending and because it revealed that a deeply rooted social problem was actually a rights' violation.<sup>35, 36</sup> In addition to this, the subject matter of the case was education, which is something that most people hold in high regard.<sup>37</sup>

### *The lawsuit: background and grounds*

A class action was filed in December 2006. On the grounds of the information it had gathered, ACIJ claimed that the government of the city of Buenos Aires had not complied with its constitutional obligation to guarantee and finance universal access to initial-level education. The evidence it presented showed that said obligation had been systematically breached from 2002 to 2006, despite the availability of resources. ACIJ alleged that for five years, an underspent budget coexisted with a shortage of vacancies at the initial level of education. The organization claimed that not only the right to education but also the

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<sup>32</sup> Martín Sigal, interview by author, written notes.

<sup>33</sup> Interviews with Martín Sigal, Dalile Antúnez, and Mariela Aisenstein. See also Martín Sigal and Dalile Antúnez, "Budget Analysis and the Right to Education in the City of Buenos Aires", in *European Human Rights Law Review* (Issue 3, 2010), p. 318.

<sup>34</sup> *La Nación*, *Clarín*, *Página 12*, *Perfil*, *26Noticias*, *Crítica*, *El Argentino*, *La Razón*, and *Noticias Urbanas*. Several websites such as *Ciudad.com* also covered the story.

<sup>35</sup> Claudio Savoia, interview by author, written notes.

<sup>36</sup> Eduardo Videla, interview by author, written notes.

<sup>37</sup> Claudio Savoia, interview by author, written notes.

right to lead an autonomous life was violated, since the capacity to be autonomous is dependant on receiving an education.<sup>38</sup> ACIJ also claimed that the right to equal protection of the laws had been breached, because some children had access to initial-level education while many others had not, which leaves the latter in a disadvantaged position *vis-à-vis* the former.<sup>39</sup> ACIJ asked the court to order the government to comply with its constitutional obligations and to design and execute urgent measures to remedy the situation.

After an unsuccessful attempt at exploring a solution with government authorities, ACIJ tried to approach the executive again soon after filing the lawsuit.<sup>40</sup> However, the government was unresponsive. Almost simultaneously, the city's ombudsman sent the government two reports about the shortage of vacancies in the education system. The ombudsman also received no answer. Both before and after filing the lawsuit, ACIJ carried out a public campaign, which consisted of disseminating information about the education crisis and encouraging members of the public to write letters of complaint to public officials. Although it is hard to ascertain the impact of this part of the campaign, it may have helped to raise awareness about the problem and attracted the attention of journalists.

### *The government's position*

The government held that the class action should not succeed. Besides presenting procedural objections, it claimed that no omission could be attributed to the local state, and thus no right had been breached. The government denied that it had failed to fulfill its duties, and showed a number of infrastructure works that were being developed in school facilities in order to argue that the problem of a shortage of spaces was being addressed. However, it ignored, and never refuted, the findings that ACIJ had submitted on the grounds of its budget analysis.

Denying the facts contained in the lawsuit is a common defensive practice in these types of cases, and displaying a litigious attitude when faced with charges of rights' violation is common to every government in Argentina — both local and national. However, in this case there may have been another reason for the government's response. A shortage of vacancies for initial-level education and budget underspending were clear facts, but a former minister of education asserted that the government did not have enough, or systematized, information to acknowledge the actual situation.<sup>41</sup> Indeed, the government's difficulty in producing and incorporating trustworthy information, even in support of its own positions, was evident throughout the case. The arguments presented before the court rested heavily on disagreements about the accuracy of the information supplied by the government.

### *The first court ruling*

In August 2007 the court sided with ACIJ. It stated that the case did address the collective right of children to education because it was not advanced to promote the initial-level education rights of an individual child, but rather to make the authorities implement a public policy. The court added that the case was complex, not because of the rights in question, but because of their implementation (or lack thereof). The government's failure to guarantee initial-level education in light of the clarity of the constitutional directive made it mandatory for the judiciary to intervene. The court explained that it was

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<sup>38</sup> Article 19 of the Argentine Constitution.

<sup>39</sup> Article 16 of the Argentine Constitution.

<sup>40</sup> Martín Sigal, interview by author, written notes.

<sup>41</sup> See Mariano Narodowski's testimony in, "Desde 2002 aumentó la desigualdad educativa en la Ciudad", *Clarín*, 14 June 2009.

not for the judiciary to tell the government *how* to comply with its obligations, but it could order it to prepare and submit a plan showing *that* it would. This plan should include short-, medium-, and long-term goals.

Thus the court ruled that the government should start guaranteeing and financing universal access to initial-level education for children between the ages of 45 days and five years. In order to remedy the rights' violation, it ordered the government to submit detailed information about all works being carried out and projects for new works directed at satisfying the existing space demands, with the caveat that none of the plans should reach completion after 2010. Moreover, the court demanded that the government produce specific plans aimed at guaranteeing access to initial-level education for qualifying child since 2008, taking into account those children who had been excluded in 2007. An observer of the case argues that the ruling was never really likely to be complied with because of the then-government's attitude, the aggressive nature of the ruling, and because implementing structural reforms is difficult.<sup>42</sup>

#### *The government's appeal—The debate regarding courts' role in public policy*

The government appealed the court's ruling, arguing that the court had breached the principle of the division of powers by interfering in matters that are the preserve of the political branches of government. This position follows what has traditionally been called *the political questions doctrine* — the idea that courts, lacking direct popular legitimacy, should not engage in policy making or in any matter which is essentially political. This position is usually based on concerns about both democratic principles and specialization; the very nature of the judiciary is counter-“majoritarian” and judges often lack specialized knowledge about the complexities surrounding a particular political policy. The current litigation director of the Education Ministry of the city, Diego Marías, suggests that judges do not usually know enough about the problems and difficulties that the administration faces when implementing policy programs. “It's just not that easy,” he states.<sup>43</sup>

The teachers unions shared the government's mistrustful view of the judiciary. Asked about the case, union leaders acknowledged that they had always been skeptical about any judicial decision over education policy, because judges do not have sufficient knowledge about education issues and policy processes.<sup>44</sup>

Indeed, a skeptical position about the courts' role in public policy is not completely unreasonable. It is true that courts lack direct popular legitimacy; they are not representative bodies. In addition to this, neither in procedural nor on substantive grounds can it be said that the courts' decisions have a better chance of being correct than those of the popularly elected powers of government.<sup>45</sup> Furthermore, it is also reasonable to believe that courts are less able than politicians to measure the social consequences of their decisions.<sup>46</sup> This is especially applicable in the case of public policy decisions, which are essentially distributive in character. Since courts generally lack any accurate knowledge about public budget and the

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<sup>42</sup> Eduardo Videla, interview by author, written notes.

<sup>43</sup> Diego Marías, interview by author, written notes.

<sup>44</sup> Interview with Daniel López and Alicia Pongetti, Delegates of the Education Workers Union (UTE for its acronym in Spanish), interview by author, written notes.

<sup>45</sup> Jeremy Waldron, “The Core of the Case Against Judicial Review,” *Yale Law Journal* (Vol. 115, 2006).

<sup>46</sup> Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*, (Cambridge: Cambridge University Press, 2007), p. 31.



availability of economic resources, it can be argued that judicial decision making in allocation matters entails the risk of producing unintended consequences in the whole economic system.<sup>47</sup>

However, these arguments hardly applied to ACIJ's case. Budget allocation had already been decided by the legislature. The court was not asked to make any distributive decisions, nor was it called upon to design education policies. It was only asked to make the government comply with its own commitments, its own policies, and its own budgets and laws. In a sense, ACIJ was not asking the judiciary to tell elected officials what to do, but only that they do what they had already decided the state should do with public resources. This was stressed by both the judge who delivered the first judgment and the Court of Appeals, which in March 2008 confirmed the judgment.

*The process before the city's highest court: amici briefs and an agreement with the government*

As the result of a final appeal, the case arrived at the city's highest court. During this stage, ACIJ strengthened its dissemination strategy in order to garner support by means of *amici curiae* briefs.<sup>48</sup> The court received presentations from several CSOs and experts in education, showing that ACIJ's lawsuit was legitimate, as well as solidly grounded.<sup>49</sup> Although the *amici* briefs were rejected by the High Court on procedural grounds, ACIJ members believe, nevertheless, that these briefs played an important role in showing how robust their case was.<sup>50</sup>

At a later stage, while the file was studied by the High Court justices, conversations between the plaintiffs and the government started to take place. This dialogue was promoted by a member of the Public Ministry who had intervened in the case. Because of the High Court's record regarding judicial decisions, he was afraid that the court would reverse the previous rulings and take a more conservative approach. He thought that the best possible solution was for both parties to reach an agreement.<sup>51</sup> Almost simultaneously and unexpectedly, due to the resignation of a recently appointed minister of education, a new minister with an open and flexible perspective took office. Thus the previously litigious attitude of the government was replaced, by a fortunate shift, that resulted in a new dialogic approach on the side of government.<sup>52</sup>

The idea of reaching an agreement was also promoted by the High Court. During formal hearings, its president suggested that reaching an agreement would be the most beneficial way of ending the conflict.<sup>53</sup> While the government's legal argument was weak, it was unlikely that the court would have ruled against the government to the degree that ACIJ desired.<sup>54</sup> Because of this, the parties decided to work together in

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<sup>47</sup> Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* (Vol. 92, 1978), pp. 397-400. See also Javier Couso, cited in note 32, p. 73.

<sup>48</sup> An *amicus curiae* brief is a presentation from an individual or an organization which is not part of the case, with the objective of providing further arguments or specialized knowledge about subject matter relevant to the court's decision.

<sup>49</sup> *Amici* briefs were submitted by CIPPEC, ADC, the Center for Legal and Social Studies (CELS), the Latin-American Team on Gender and Justice (ELA), Professor Paola Bergallo, and Women in Equality Foundation, the City's Ombudsman, and Education Professor Silvina Gvirtz.

<sup>50</sup> Interview with Martín Sigal and Dalile Antúnez. In her interview, Silvina Gvirtz expressed the same idea, interview by author, written notes.

<sup>51</sup> Public Ministry Member Gustavo Moreno, interview by author, written notes.

<sup>52</sup> Diego Marías, interview by author, written notes.

<sup>53</sup> Dalile Antúnez, interview by author, written notes.

<sup>54</sup> Martín Sigal, interview by author, written notes.

order to draft an agreement. Seven months of negotiations between numerous state agencies, public officers and ACIJ members resulted in a draft agreement, which was put before the High Court.<sup>55</sup>

*The agreement, a public hearing, and the High Court's decision*

The agreement contained a clear statement that ACIJ's demands were legitimate, which was celebrated by all the relevant actors in the case.<sup>56</sup> Both parties agreed to carry out a sustainable work plan, and the government committed to take action in order to meet all space needs at existing initial-level educational facilities (prioritizing those districts that showed a higher demand), as well as to comply with a work plan to create new spaces. Deadlines were set both for finishing and submitting the plan to the court and for concluding all planned works. The government also committed to guaranteeing that the budget resources required for the completion of the work plan would be available and that it would include specific budget items earmarked for fulfilling new needs in every budget put before the legislature. The agreement established the government's commitment to carrying out several other actions directed at increasing initial-level education spaces, such as implementing a digital system to centralize and systematize all information related to the shortage of initial-level education spaces. Moreover, it established a working forum, as well as the appointment of a special master in charge of monitoring the execution of the work plan.<sup>57</sup>

Following ACIJ's request, the High Court set up a public hearing, which took place in February 2011, to discuss the agreement. This was a major achievement for ACIJ because it was the first public hearing ever held by the city's highest court. The hearing gathered all relevant actors in the education community and engaged them in a fruitful and enriching public debate. At the hearing, support for the draft agreement was almost unanimous; the only exception was the attorney general of the city, who still insisted that the judiciary was overstepping its jurisdiction.

The High Court retained jurisdiction in order to intervene at a future date should either party fail to comply with the agreement.<sup>58</sup> The establishment of monitoring mechanisms also indicated that the case was not yet over. When remedies to rights' violations depend on the execution of public policies, the implementation phase is as important as the ruling itself. In Argentina a few precedents have been set of structural reform cases decided by the National Supreme Court, which generated fairly moderate expectations regarding the performance of monitoring bodies.<sup>59, 60</sup> In the past, the implementation phase has often been stymied by conflict, which suggests that it is important for judicial oversight to continue throughout the execution phase.<sup>61</sup> This was guaranteed by the city's High Court.<sup>62</sup>

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<sup>55</sup> Dalile Antúnez, interview by author, written notes.

<sup>56</sup> Interviews with ACIJ members Martín Sigal and Dalile Antúnez, with government officials Marcela Goenaga and Diego Marías, with union leader Daniel López, and with experts Silvina Gvirtz and Mariela Belski.

<sup>57</sup> The forum comprises the city's Ministries of Education and Social Development, ACIJ, the Public Ministry, and the city's Ombudsman. It meets every two months.

<sup>58</sup> Decision of 15 February 2011. The consequences of the court's decision are not completely clear to either party. Both ACIJ members and the legal advisors to the Ministry of Education said that they did not know for certain what it meant for the court not to homologate the agreement. Interviews with Martín Sigal, Dalile Antúnez, and Diego Marías.

<sup>59</sup> Argentina's Supreme Court of Justice, "Verbitsky, Horacio s/ habeas corpus", Judgment of 3 May 2005; "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios", Judgment of 20 June 2006.

<sup>60</sup> Former ACIJ member Mariela Aisenstein believes that those monitoring and debate mechanisms are of very little use. Interview with Mariela Aisenstein.

<sup>61</sup> In this regard, Dalile Antúnez believes that is easier for the government to recognize the right and the existence of a legitimate demand than to comply with implementation measures to enforce it. Public Ministry Official Gustavo Moreno agrees with this perspective. Interviews with Dalile Antúnez and Gustavo Moreno.

ACIJ is confident that so far the outcome of the case can be regarded an important achievement.<sup>63</sup> After two judicial decisions that found the city accountable for the violation of the right to education, the government itself conceded that it was facing a legitimate demand and committed to developing and executing an ambitious work plan in the coming years. This was hardly a predictable result when ACIJ planned the litigation strategy a few years ago.<sup>64</sup> In addition to this, the agreement was discussed in a lively public hearing that was widely covered by the press — an extraordinary bonus in terms of raising awareness about the importance of both the rights in play and the institutional mechanism that the legal system provides for their enforcement.

#### 4. Explaining the Results

ACIJ's litigation strategy was highly successful in changing the government's attitude toward long-standing deficient policies for initial-level education. Litigation was necessary because the political process had already proven to be insensitive to the problem.<sup>65</sup> Through litigation, ACIJ was able to force the government to focus its attention on the problem.

Moreover, litigation was possible because of the city's independent judiciary and its generous constitutional framework. According to the city's director of initial education, no other government faces as many constitutional obligations as that of the city of Buenos Aires.<sup>66</sup>

In addition to this, ACIJ was well equipped for its litigation-based strategy. It was an experienced actor in public education debates; it had well-established contacts with the education community and journalists; and its staff includes sophisticated attorneys who were highly experienced in both class-action litigation and budget analysis.

Indeed, the litigation strategy succeeded because of the incorporation of budget analysis — an innovative approach for Argentina's legal practice that no other organization in either the legal or the education community would have been able to advance.<sup>67</sup> This legal strategy has scarcely been explored in Argentina, where budget analysis seems to be restricted to economists. To find policy analysis totally or partially founded in budget review is a difficult task. Moreover, budget analysis can hardly be found in education studies.<sup>68</sup> ACIJ's work was innovative in this regard.

Proof of budget underspending provided the courts with a reason to find that the government had breached the constitutional right to education. It made it easy for the courts and the general public to acknowledge that the shortage of school spaces was linked to an inefficient administration of resources, rather than to complex problems that political powers needed to debate and fix. Budget analysis facilitated the courts' intervention by providing a key counter-argument to the government's claims that the judiciary lacked the jurisdiction to address political questions or make decisions about budget allocation. The

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<sup>62</sup> The monitoring forum's first meeting took place in March 2011. Participants from both the government and ACIJ said that it was a good start, and that they would possibly engage in a fruitful dialogue from now on. Interviews with Marcela Goenaga, Diego Marías, Martín Sigal, and Dalile Antúnez.

<sup>63</sup> Martín Sigal and Dalile Antúnez, interview by author, written notes.

<sup>64</sup> Martín Sigal, interview by author, written notes.

<sup>65</sup> Axel Rivas, Silvina Gvirtz, Mariela Belski, interview by author, written notes.

<sup>66</sup> Marcela Goenaga, City of Buenos Aires' Initial Education Director, interview by author, written notes.

<sup>67</sup> Daniel López, interview by author, written notes.

<sup>68</sup> Axel Rivas, interview by author, written notes.

judiciary was able to point out that the case was not about political priorities or decisions around the distribution of budgets, which had already been made, but rather about the execution of these decisions.

Finally, ACIJ's dissemination activities yielded positive results. Not only did the CSO manage to get support from several specialists and other organizations in the form of *amici curiae* briefs but it was also able to attract wide media coverage at certain stages of the litigation process. As two observers of the case suggest, this may have helped in motivating government and in making public officials accountable.<sup>69</sup>

## 5. Contextual and Other Contributing Factors

ACIJ's refined litigation-based strategy played out within a propitious context, which may explain why litigation led to negotiation and agreement.

After approximately three years of litigation, the arrival of a new minister of education, due to reasons not linked to the case, influenced how the case developed in its final stages. An agreement with the government would have been less probable had any of the former ministers still been in office. At the least, the new minister's dialogic approach to a solution decisively contributed to the attainment of an agreement.<sup>70</sup> Since, in the view of the new minister and his staff, ACIJ was one of the most active organizations of civil society and this case was a paradigmatic one, the government's attorneys devoted all their efforts to settling the case.<sup>71</sup> However, this change in the government's attitude should not be exclusively attributed to the new minister's arrival; it could also be interpreted as a consequence of government having already faced two negative rulings in the case.<sup>72</sup>

Furthermore, although it is not likely that ACIJ took these external factors into consideration when planning its litigation strategy, the outcome of the case may have been influenced by the fact that 2011 is an election year at both city and national level.<sup>73</sup> That the head of the city's government may run for reelection or for the presidency may have had some bearing on the way in which the government handled the case. While the head of government has always stressed efficiency in budget administration as one of his assets, this case showed the opposite. In juxtaposition to this, education policies has always been at the core of the opposition parties' criticisms about the government, and stories about massive student protests over poor school infrastructure had recently flooded the news. Wide media coverage about the High Court's decision to hold the government accountable for high rates of budget underspending and inefficiency would have been bad news for the electoral campaign.

In addition, judicial activism is especially intense in the city of Buenos Aires, where the judiciary comprises a new generation of judges with innovative ideas about the role of the judiciary and its independence from the political branches of government.<sup>74</sup> Moreover, as was mentioned in section one, the city's legal system contains clear and generous constitutional rules establishing a well-defined right to initial-level education. It also establishes wide rules of standing that allow for class-action litigation.<sup>75</sup> This was fundamental, as

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<sup>69</sup> Silvina Gvirtz, and Eduardo Videla, interview by author, written notes.

<sup>70</sup> This was mentioned by almost all interviewees, such as journalists Eduardo Videla and Claudio Savoia, ACIJ member Dalile Antunez, and government officials Diego Marías and Marcela Goenaga.

<sup>71</sup> Diego Marías, interview by author, written notes.

<sup>72</sup> This observation was made by Public Ministry Magistrate Gustavo Moreno, interview by author, written notes.

<sup>73</sup> This remark was made by Eduardo Videla, and by Claudio Savoia, interview by author, written notes.

<sup>74</sup> The city of Buenos Aires's judiciary was formed in 1996, following the establishment of the city's constitution. Prior to this, as a Federal District, the city lacked its own judiciary and federal judges had jurisdiction in the city.

<sup>75</sup> Article 14 of the Constitution of the City of Buenos Aires.

the only means by which the structural violation of the right to initial-level education would be solved was through a collective, not individual, remedy. An individual action would have allowed one child to access initial-level schooling while leaving all the others excluded, and almost certainly producing the exclusion of some third child as an unintended consequence. Only a class action could tackle a problem that was social by nature.<sup>76</sup>

Finally, new judicial policies and a strong attitude of judicial activism developed by the National Supreme Court of Justice may have removed certain fears or checks rooted in judicial conservatism, especially at the level of the city's highest court.<sup>77</sup>

## 6. Conclusions and findings

Since the implementation phase has only just begun, it is too early to assess the agreement's impact on the situation of the number of available spaces for early education. However, for several reasons it is fair to regard ACIJ's agreement with the government as a huge achievement. Firstly, the government acknowledged the existence of a legitimate demand. This means that it acknowledged not only that there is a collective right to education but also that this right is judicially enforceable. Thus, beyond the fact that the government affirmed that it is willing to comply with its word,<sup>78</sup> both the agreement and the High Court's ruling envisage judicial oversight.<sup>79</sup> This means that implementation will be monitored. Though many structural reform cases have failed in the implementation phase because of the complexities that this phase entails, established mechanisms of oversight, deadlines, and public knowledge of the case provide reasons for optimism with regard to compliance.

Secondly, the duties to which the government committed itself are wider and more detailed than those contained in any possible judicial injunction. A judicial decision would never have reached the agreement's detail and precision.<sup>80</sup> The only risk the agreement faces is that of noncompliance within the specified timeframe. However, no judicial decision would have avoided that risk.

Thirdly, the agreement and previous judicial decisions set extraordinary precedents for social rights litigation. The use of budget analysis is a very innovative litigation strategy in Argentina, and ACIJ is one of the few organizations to have used it. This case may have demonstrated its usefulness and encouraged other activists within the public interest litigation community to follow suit. The case may also have stressed the need for improving budget transparency and information systems about budget allocation and expenditure.

The case will surely have a positive impact on civil society movements and judicial officials, giving both new and better motivations for action. Two journalists agree that it is significant that the courts held the government accountable for not providing education services, because this fact helps make visible a crucial social need.<sup>81</sup> Furthermore, it is likely that the case's impact will be extended to the education community,

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<sup>76</sup> Silvina Gvirtz, interview by author, written notes.

<sup>77</sup> Claudio Savoia, interview by author, written notes.

<sup>78</sup> Diego Marías and Marcela Goenaga, interview by author, written notes.

<sup>79</sup> Dalile Antúnez, interview by author, written notes.

<sup>80</sup> Mariela Aisenstein and Martín Sigal, interview by author, written notes.

<sup>81</sup> Claudio Savoia and Eduardo Videla, interview by author, written notes.

reversing deeply rooted distrust and skepticism about courts and litigation. The case may help bring the legal discourse closer to education and thus facilitate useful new interactions.<sup>82</sup>

Moreover, ACIJ's litigation-based approach in the case may influence CSOs' future strategies. Budget analysis revealed itself to be a greatly useful tool for social rights litigation. When it is used well, it can provide arguments for courts that are willing to enforce the law but are reluctant to intervene in public policy debates. This case demonstrates the importance of a well-planned litigation strategy. It highlights the value in collecting all relevant evidence and reveals how freedom of information regulations and mechanisms play a significant role in achieving this aim.

Furthermore, thanks to ACIJ's litigation, the debate over education policies was brought into the public sphere.<sup>83</sup> Media coverage of the case illustrated the importance of the discussions to actors in public debates. The case showed that education matters, and that there is a consensus around its public value.

Beyond the fact that the case has been resolved and the necessary creation of new school spaces, the government can take advantage of a number of positive "side effects" of the litigation. A new digital information system was implemented, which will strongly improve the systems of enrollment and registration, as well as initial-level education administration in general.<sup>84</sup> Professor Gvirtz describes the current state of information systems on education policies as disgraceful.<sup>85</sup> This new tool may significantly improve conditions of analysis for the government, academics, parents, journalists, and the citizenry in general. Furthermore, the case forced different state agencies, such as the ministries for education and social development, that had traditionally worked in an uncoordinated fashion, to start working together.

In conclusion, ACIJ's intervention through a litigation-based strategy that included "access to information" requests and "access to information" litigation, budget analysis, and media coverage was successful enough to make the government abide by the law in an area that had been historically neglected. Although it is still too early to conclusively assess its impact on school spaces for early education, the results of the case is already proving to be beneficial to the education community, the legal community, judicial and governmental practices, and to society in general.

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<sup>82</sup> Daniel López and Alicia Pongetti, interview by author, written notes.

<sup>83</sup> Silvina Gvirtz, interview by author, written notes.

<sup>84</sup> Marcela Goenaga, interview by author, written notes.

<sup>85</sup> Silvina Gvirtz, interview by author, written notes.

## List of Interviewees

### ACIJ's Work Team:

- Martín Sigal
- Dalile Antúnez
- Mariela Aisenstein (former ACIJ member)

### Government of the City of Buenos Aires

- Marcela Goenaga (Initial Education Director at the Ministry of Education)
- Diego Marías (Litigation Director of the Ministry of Education)

### Education Workers Union

- Daniel López
- Alicia Pongetti

### Civil Society Organizations

- Mariela Belski (Education Program Director of the Association for Civil Rights, ADC)
- Axel Rivas (Education Program Director of the Center for Public Policy Implementation for Fairness and Growth, CIPPEC)

### Public Ministry

- Gustavo Moreno (Public Ministry Magistrate before the Court of Appeals of the City of Buenos Aires)

### Academics

- Silvina Gvirtz (Education Expert, San Andrés University)

### Journalists

- Claudio Savoia (*Clarín* Newspaper)
- Eduardo Videla, (*Página 12* Newspaper)