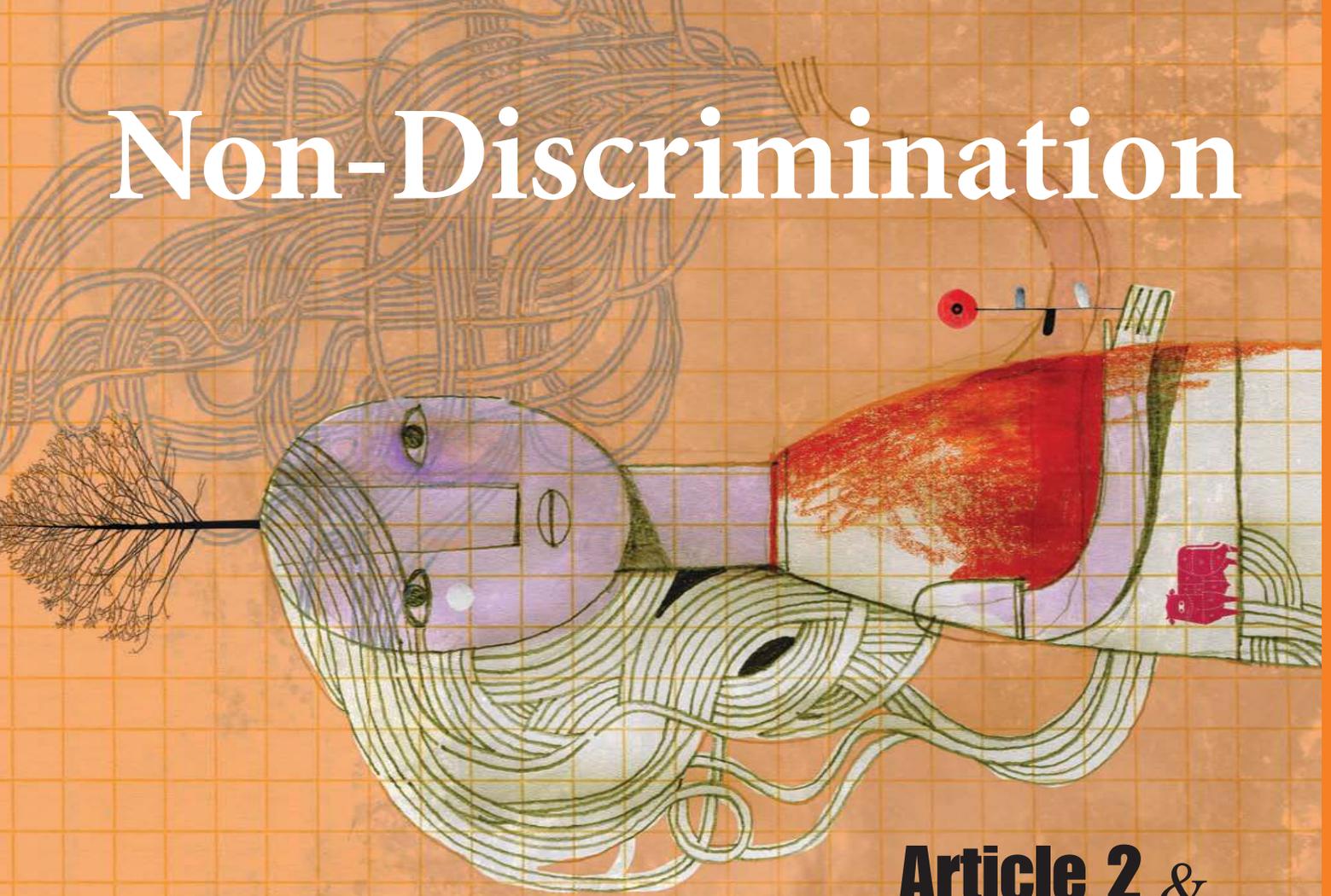


Non-Discrimination



Article 2 & Governments' Budgets

*Discriminatory allocations and expenditures
on the basis of socio-economic status*

The case in brief

Argentina is a federal system and local governments have the authority to plan, organize, finance and administer their local educational systems. Argentina's national constitution respects the principle of equal opportunity and guarantees the provision of free primary education for every child in the country from five years of age. The City of Buenos Aires goes beyond the promises in the national constitution in guaranteeing in its own constitution access to education for every child in the city from 45 days of age. It also mandates that the budget allocated to education must not be spent on anything else.

From 2002 to 2009 the number of children in early education (45 days to 5 years) in Buenos Aires remained constant, even though there had been a steady increase in the number of children applying for early education. As a result, thousands of children were unable to participate in early education in public schools. Between 2002 and 2006, the number of excluded children increased by 37 percent. In 2006, 6,047 children were left out; by 2008 that number had risen to almost 8,000.

This increasing exclusion did not affect all children equally. Children living in the six poorest districts of the city were disproportionately affected; they accounted for more than half of all excluded children. In comparison, less than 15 percent of the excluded children lived in affluent districts.

The Asociación Civil por la Igualdad y la Justicia (Civil Association for Equality and Justice, ACIJ) was established in 2002 with the goals of strengthening democracy and protecting the rights of disadvantaged groups in Argentina. Their combination of public interest litigation with research and advocacy uniquely positioned them to take up the case of early education for the children of Buenos Aires.



The human rights issue

The Constitution of the City of Buenos Aires guarantees access to education for every child from 45 days of age. This is in line with, and indeed, goes beyond, the right to education guarantees in article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Argentina has ratified.

The UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20 makes clear that ICESCR article 2(2), which prohibits discrimination on a wide range of grounds (including socio-economic status), encompasses both formal and substantive discrimination (para.8). It says the following:

- (a) *Formal discrimination: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds...*
- (b) *Substantive discrimination: [...] The effective enjoyment of [...] rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.*

The human rights argument

When formulating and spending its budget, a government must bear in mind its obligation of non-discrimination. It must not favor or disfavor particular groups solely on the basis of their ethnicity, gender, sexual orientation, political opinion or other grounds in the way that it allocates and spends its budget.

Budget allocations must be non-discriminatory; they must not unfairly earmark funds for certain groups or areas of a city or country (that is, governments must ensure formal non-discrimination). The related expenditures must also have a non-discriminatory impact (substantive non-discrimination).

While a budget or related policy may not, on its face, formally discriminate against these groups or areas, governments must also monitor the corresponding expenditures to ensure that different groups are benefitting equally from expenditures. When a government consistently spends less on key ESC rights-related goods and services directed to certain groups or geographical areas, this constitutes strong evidence of substantive discrimination.



Case study in detail



Beginnings

From its inception, ACIJ has recognized that in order to represent and fight for the rights of poor communities, it needs to have genuine connections to these communities. While in this case it could not work directly with the affected families, it did collaborate with grassroots organizations in urban slums. This work allowed ACIJ to witness the failures of the education system and to document inequality in access.

ACIJ found that the difference between schools in poor and affluent districts in Buenos Aires was enormous. While in the poor districts classrooms were poorly constructed, overcrowded, without heating, and sometimes with no electricity or teaching materials, schools in affluent districts had computer labs, sport facilities, adequate heating in the winter and an abundance of teaching and learning materials.

The most common forms of discrimination in government budgets are those based on gender, ethnicity, and socio-economic status. Discrimination is often multi-dimensional, because, for example, ethnic minorities are often disproportionately poor, and women are typically the poorest of the poor. Certain areas of a country (or state or city) are also often under-served in such sectors as health services, education, policing, affordable housing, etc., compared to other areas.

Challenges in access to information

Since a shortage of available spaces and materials in schools seemed part of the problems they had identified, ACIJ concluded that the budget was a critical piece in the puzzle. The organization soon learned, however, that neither the federal nor provincial government made detailed information of the education budget readily available.

ACIJ put the Freedom of Information Act in Buenos Aires to use, requesting of the government the following information:

- The total number of schools offering early education;
- The number of children applying for early education between 2001 and 2006, disaggregated by school;
- The number of children placed on waiting lists between 2001 and 2006, disaggregated by school;
- The budget allocated to infrastructure between 2001 and 2005, disaggregated by school; and
- Expenditure on construction, maintenance and school provisions, for the same period, disaggregated by school.



The inequality in expenditures in this case was problematic not only from the perspective of the obligation of non-discrimination, but also the obligation to use the maximum available resources (MAR) to realize ESC rights. The CESCR has said that the MAR obligation means that funds allocated for ESC rights-related purposes must be fully spent for those purposes. (See MAR booklet).

When the government failed to provide ACIJ with the requested information, the organization decided to go to court. In April 2006, the government was forced by a court decision to hand over the requested information.

Armed with the disaggregated data, ACIJ was able to compare the budget that had been allocated year after year for infrastructure and maintenance with the budget that was effectively spent. By means of this simple comparison, ACIJ made a shocking discovery: the city of Buenos Aires had been under-spending its budget for infrastructure, maintenance and supplies for schools offering early education, notwithstanding the ever-growing waiting list of children. Indeed, between 2002 and 2005 an average of 32.3 percent of the resources allocated for these purposes had not been spent.

Changing gears—A class action lawsuit

In December 2006 ACIJ filed a class action lawsuit against the government of Buenos Aires. It claimed that from 2002 to 2006 the government had not

fulfilled the guarantee of early education and had violated its obligation of non-discrimination. ACIJ showed that:

- There was a consistent pattern of children being denied access to early education because of insufficient space in schools. While this situation affected the whole city, it was much worse in the poorer districts.
- The government consistently under-spent budget resources that had been allocated to improve school infrastructure and maintenance. These resources could have been used to build more schools or classrooms and thus open space for more students.

ACIJ accompanied its lawsuit with a campaign to create public awareness about the crisis and to encourage citizens to write letters of complaint to public officials. In addition, they engaged the media in publicizing their findings. The media was interested, because the case showed a consistent failure to provide early education, regardless of who was in power in the city.

In response to the lawsuit, the government denied that it had failed to fulfill its obligations, pointing to infrastructure investments it was then undertaking. However, it could not refute ACIJ's findings regarding the under-spending of its budgets. Six months later, the Court sided with ACIJ, ruling that the government's failure to guarantee early education in line with the constitutional directive clearly called for the judiciary to intervene.

The court concluded that the government had to finance universal access to early education, and ordered it to submit detailed information about all work and projects related to satisfying the demand for spaces in early education. The court also ordered the government to develop plans that would guarantee access to early education for every child between the age of 45 days and 5 years from 2008 on.

The tide turns

The government appealed the court's ruling. Following confirmation of the ruling by the appeals court, the case arrived at the city's highest court, where *amici curiae* briefs from other CSOs, litigants and experts poured in. Fortuitously, a change in the city cabinet brought with it a more flexible minister of education who proved to be open to dialogue. The court suggested that the parties work towards an agreement. One was reached in 2011 after months of negotiations between state agencies, public officials and ACIJ.

ACIJ and the government agreed to develop a feasible work plan, with concrete deadlines. The government agreed to satisfy the demand for early education spaces, prioritizing the districts with the biggest backlog. It committed itself to making available the resources necessary to carry out the plan, and to clearly identifying subsequent budget lines that would attend to new needs. The government also committed itself to developing a database to systematize information on space shortages in early education, and to establishing a monitoring mechanism.

Overall, ACIJ's case took more than five years. Reaching an agreement could only be considered a first step in the next phase of the struggle. Implementation has to be monitored.

In analyzing the budget to identify possible discrimination, it is necessary to look for both

- 1) allocations and expenditures where different treatment of different groups is readily apparent from line items in the budgets (when considered together with other relevant data, such as population figures); and
- 2) allocations and expenditures that seem equitable on their face, but which, in their impact, affect different groups differently.

Questions you might ask yourself or your government about discrimination in allocations and/or expenditures:

Does the government develop or have access to current data disaggregated by geographical areas and socio-economic groups that can be used to assess people's access to enjoyment of their ESC rights? If so, what is that data? If not, why not?

Is such data used by the government in developing its budgets touching on ESC rights-related areas? If not, why not?

Are people in specific geographic regions or socio-economic groups particularly disadvantaged in accessing their ESC-related rights? If so, who are they?

Are *per capita* allocations for services in such areas as health, education, work, water and so on the same in different areas of the country/region; for different socio-economic groups? If not, why not?

How does the government adjust its budget, if it does, to ensure that people in disadvantaged areas or socio-economic groups will increasingly be on a par with other areas and socio-economic groups in terms of their enjoyment of their ESC rights?

Does the government have in place a system for monitoring expenditures to ensure that they are made on a non-discriminatory basis? If not, why not?

If it does have such a system, how does the system work?

If the government has no system in place for monitoring expenditures, has civil society raised issues about discrimination in expenditures?

If so, what issues have they pointed to? What has the government done in response to the evidence they have provided?

Are certain groups of people more negatively affected by under-spending than others? If so, which ones and why?

What measures, if any, has the government taken to address the problem of under-spending?

ACIJ

Founded in 2002, the Asociación Civil por la Igualdad y la Justicia (ACIJ) is dedicated to the defense of the most disadvantaged groups and to the strengthening of democracy in Argentina. Its goals are to promote effective enforcement of the National Constitution and the rule of law, compliance with laws that protect disadvantaged groups, and eradication of all discriminatory practices. ACIJ also seeks to contribute to the development of participatory and deliberative democratic practices in Argentina. To these ends, ACIJ:

- Engages in collaborative efforts to improve functioning and greater transparency in public institutions;
- Promotes the enforcement of the National Constitution and effective compliance with laws that protect disadvantaged groups, and seeks the eradication of laws and practices which discriminate against historically marginalized minority groups;
- Raises awareness among citizens about their basic rights and the channels available for their protection;
- Makes proposals for public policy reforms; and
- Trains professionals from diverse disciplines who are committed to public interest issues.

For more information on ACIJ, go to:
acij.org.ar/

The Article 2 Project

This booklet is part of the *Article 2 & Governments' Budgets* handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures. The project encourages the use by civil society and governments of the legal provisions of article 2 to monitor and analyze governments' budgets. Download the complete handbook at:

www.internationalbudget.org/publications/ESCRArticle2.

The ACIJ case study is based on Fernando Basch, "Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action", Albert van Zyl (Coord.), *From Analysis to Impact*, Partnership Initiative Case Study Series, IBP, 2011. *El Sur También Existe*,* 2008. ACIJ, "La discriminación educativa en la Ciudad de Buenos Aires," April 2009.

*http://www.youtube.com/watch?v=JyuZ0gktaA&feature=player_detailpage

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