

STRATEGIC LITIGATION

AS A TOOL THE ENFORCEABILITY OF THE

RIGHT TO EDUCATION

POSSIBILITIES AND OBSTACLES



programa educación

ADC / Asociación por los
Derechos Civiles

Using strategic litigation as a tool for the enforceability of the right to education: possibilities and obstacles

PRESENTATION AND ACKNOWLEDGEMENTS

This document is the result of a workshop called “Using strategic litigation for the enforceability of the right to education: possibilities and obstacles” which was made by the Association for Civil Rights (ADC) in the Institute for Economic and Social Development (IDES) on May 20th, 2008. The aim of the meeting was to discuss with guests, some of them experts and others activists, working in different fields such as legal or educational, the potentialities, possibilities and weaknesses of strategic litigation; and thus, encourage the exchange of experiences and the search of common channels to strengthen such litigation.

During the course of the workshop, we worked to identify the possibilities and objections in the use of strategic litigation. Many successful as well as non successful experiences of comparative law were put forward, while making special reference to possibilities of the Inter-American System under the San Salvador protocol framework, in order to generate a debate among participants.

Historically, the Association for Civil Rights (ADC) has shown a particular interest in the use of strategic litigation as a tool for social change. Thus, for more than a decade, the ADC has been working on the defense and promotion of fundamental human rights through the use of this tool.

In the year 2006 in particular, the ADC started to develop a project to show the characteristics, situation and the extent of the inequality in the access to public schools in the Province of Buenos Aires. In order to attain this goal ADC identified situations of educational inequalities which could be strategically litigated. Within this framework, we started to debate, reflect and gain insights into strategic litigation in the educational field. We then organized the workshop which we are presenting to you through this publication.

The following people participated in the workshop: the United Nations Special Rapporteur on the right to education Vernor Muñoz; the Economic, Social and Cultural rights Legal Officer, of the International Commission of Jurists Christian Courtis; and a member of the Interamerican Commission of Human Rights, Victor Abramovich. The valuable presentations of Paola Bergallo, professor at San Andres University, Gustavo Maurino, executive director of the Civil Association for Equality and Justice (ACIJ) and Gaston Chillier, executive director of the Center for Legal and Social Studies (CELS) also contributed to the workshop quality. The ADC is most grateful to all participants for their insightful contributions.

The ADC also thanks Mariela Belski, Director of the Education Program and Micaela Finoli, lawyer of this program. They considered that it was very important to have this meeting where interdisciplinary dialogue could be generated and who worked hard to achieve the established aims. The ADC also thanks Flavia Terigi and Paula Pogre for the permanent support.

Lastly, the ADC would like to thank the John Merck Fund and Ford Foundation for their support on the activities made.

Opening

OPENING WORDS BY ROBERTO SABA, MANAGING DIRECTOR OF THE ASSOCIATION FOR CIVIL RIGHTS.

On behalf of the Association for Civil Rights we wanted to thank all you present here. This meeting is really important for us, something we wanted to do long time ago.

This is quite an atypical meeting in the sense that we are all under the same roof and under the same workshop: Lawyers and experts from different fields: education, educational policies, activists, etc. We think it is interesting to focus on the issue of strategic litigation in the field of social rights in general, and specifically in the right to education, discussing about it with different groups of people from different spheres and professions. The human rights organizations that are here today have been working for a long time with public interest litigation, in the use of litigation as part of a strategy to move forward on the political and human rights' agenda. But at the same time, we have a lot to learn about how to make the most of this litigation and how to make it functional to the strategy of political action. To that end, we decided to bring together the group that is here today. Indeed, I want to thank in particular those people who came from distant countries, the United Nations Special Rapporteur on the Right to Education as well as Christian Courtis. Our main aim is that we all learn from our mutual experiences and enhance our work.

Thanks to all those who came here.

Introduction

MARIELA BELSKI DIRECTOR OF THE ASSOCIATION FOR CIVIL RIGHTS EDUCATION PROGRAM

Good morning to everyone. The current meeting originates on the framework of a project that the ADC has been working on for more than a year. The aim of this project is to show the characteristics, situations and magnitude of inequality of the access to education in the province of Buenos Aires by identifying the situations of educational inequality that could then be strategically litigated.

The project's methodological design seeks to foster a debate that will help to identify the opinions and perspectives of various actors with respect to the most relevant situations of educational discrimination. In this context, a discussion group of well-known academics, researchers, specialists of various disciplines- all members of the civil society that works on educational issues and all substantive contributors to the identification of the different issues raised in our investigation- were summoned.

This meeting was complemented by many interviews with different actors from different areas, including public officials from the education department of the Province of Buenos Aires, and especially with different experts, scholars, member of civil society organizations, lawyers and colleagues that work on educational problems from the human rights' perspective.

We identify many education problems that could be translated into litigation, but we started to examine four of them thoroughly. Firstly, the inequality to which various groups are exposed during different parts of their educational experience, namely the case of those students who are not promoted and thus, have to re take the first year of secondary school. Secondly, the fact that not all schools meet the regulated obligation to hold class for 180 days during the school year. Thirdly, educational availability, in terms of how many children are outside the educational system due to lack of vacancies. Fourthly, the inequality of access for children whose mothers are confined in prison.

In many of our meetings with experts, activists, educational professionals and even colleagues, we could feel some skepticism toward the use of strategic litigation as a tool to solve educational problems. In some cases some professionals considered litigation as a last resource. Furthermore, in an article published by La Nación in May 2008, titled "Justice enters the classrooms and decides", the current Secretary of Education, Juan Carlos Tedesco, emphasizes that calling for justice in pedagogical issues is inappropriate, even though he admitted that there are educational issues that can be litigated.

The main idea of this meeting is to think about the potentialities, possibilities and weaknesses of the strategic litigation in the educational field, taking strategic litigation as a tool that can bring about social change through the creation, adoption and the modification of public policies in education.

Strategic litigation differs from traditional two-party litigation. The latter involves two physical or legal entities with totally opposed interests and a court's decision which is limited to both

parties. In contrast, strategic litigation is atypical; it is multipolar, the facts that are argued are related to the general functioning of complex public institutions, and their resolutions require long-term structural changes.

This type of litigation allows dealing with issues that transcend individual circumstances to enter the judicial environment. It attempts to:

- Determine that state action or omission violates the rights of certain people or groups.
- Foster legal reforms.
- Order the implementation of a certain public policy, whose omission affects the rights of certain individuals.
- Assure that the interpretation and application of certain regulations and rights are adequate.
- Identify loop holes in the law.
- Place an issue on the public agenda and call the attention of the authorities and the population to that issue, thus improving visibility.
- Promote public debate and educate society.
- Construct coalitions that create pressure for social changes.
- Aid disadvantaged groups.

There are many valuable comparative practice examples of intervening lines with this type of litigation. For example, in the education arena, the judicial experience of the United States is

one of the most precious sources. It began with the renowned Brown case, which gave rise to a process of debate and social progress. It was the product of a previously meditated strategic litigation that led to the declaration of racial segregation in public schools as unconstitutional.

Strategic litigation also allows us to create alliances with different national and international actors, Ombudsman's Offices, supervisory bodies, and local and international non-governmental organizations. In many cases a court ruling may strengthen the organizations, opening new avenues of civic participation.

The experience of our colleagues at both, the Center for Legal and Social Studies (CELS) as well as the Civil Association for Equality and Justice (ACIJ) are instrumental in demonstrating the usefulness and effectiveness of this tool, particularly when used to advance in the realization of human rights and to influence public policies.

The situation in the educational field is a very particular one, except in the case of teachers who have union representation, and certain cases in which cooperative institutions can represent both a school and its students, many educational problems cannot be addressed with ordinary group logic, in the sense of working as an identifiable, articulated, and mobilized group.

Often, educational problems can only be resolved on an individual basis, although their impact is of a collective nature. In this way, the judiciary can be used to ensure some means of political participation, and to draw attention to the widespread failure to fulfill educational policy obligations.

The truth is that, with the exception of a few very valuable cases brought by our colleagues (for example, by ACIJ), the courts have not been used to strategically claim violations of the right to education, domestically or internationally. It is striking that no complaints have been filed under such a strong international framework. For example, the Protocol of San Salvador, the most important economic, social, and cultural rights framework in the inter-American system, establishes a truly broad protection of the right to education in article

Strategic litigation begs certain questions. You will wonder:

- Why use the judiciary to settle social problems when there are other institutions that were specifically created to deal with these issues?
- To what extent can tribunals obtain the information necessary to resolve social problems?
- With what level of efficacy can judges understand and manage social science data?
- What capacity does the judiciary have to make the other branches of government comply with an order given in the context of a case involving educational issues?
- What capacity does the judiciary have to supervise the implementation of rulings?
- Is it effective to use the judiciary to solve educational problems without social mobilization?

These are some of the concerns that we will try to address in this meeting.

Most of us share the idea that judges can create a social debate over problems that concerns all of us and which the political powers are ignoring. They can also create the conditions for a dialogue, assure the ways of participation of groups as well as individuals and even motivate them.

Here today there are academics, workers in the educational sphere, sociologists, anthropologists, and activists, representatives from NGOs, educational guilds, public defenders offices, juvenile representative offices, and litigators. These colleagues, who have spent a long time reflecting and working on these issues, are here today to think and debate with us all the issues that this type of litigation raises.

To conclude, I want to invite everyone to create a participative conversation so that our work could be enriched. Once again, thank you very much.

Panelists

GUSTAVO MAURINO, COEXECUTIVE
DIRECTOR OF THE CIVIL ASSOCIATION FOR
EQUALITY AND JUSTICE
THEORETICAL CONSIDERATIONS REGARDING
STRATEGIC LITIGATION

Thank you for the invitation. The truth is that, seeing many people here who I know, it is distressing to be in my position, as many of you know and have probably worked on these issues with more intensity than I have. Taking advantage of this, I will try to focus my comments on some characterizations that will allow us to take better advantage of the discussion, given that the discussion will exceed what I can share with you.

Within this framework, some initial comments to characterize the practice of strategic litigation, perhaps emphasizing some of the things Mariela said and highlighting some others. I would like to indicate certain characteristics and assumptions that make strategic litigation possible in countries such as ours. Then, some ways in which we can perhaps distinguish conceptually the reflex in practical terms on the advantages and disadvantages of the practice. And, if I have time, comment on some cases that can

illustrate some of these distinctions for our forthcoming discussion.

I would characterize three elements that others have already emphasized. The first is the instrumental dimension that the juridical or litigious tools achieve. In general terms, people go to court when they need to see a certain right respected and there they exhaust the aim of their access to justice. In strategic litigation, the aim is different; it is something more than the simple outcome of litigation. It has to do with using the tools of litigation to achieve different things than the mere result of the process. This is, in a certain sense, against the culture in countries like ours in which the judiciary was seen as an area that exhausted its work in conflict resolution. Hence the instrumental use of this sacred forum of the tribunal to achieve objectives that are related to an agenda that is broader, political, institutional, etc., is one of the unique characteristics.

In the second place, related to the instrumental use, I would like to present strategic litigation as linked to an aim that is not strictly defensive of rights, but rather that seems to be something more to those who use it. It seems to achieve a certain type of public affirmation or social self-affirmation, of a social recognition that has to do with its general agenda, but that makes it so that one goes to the judiciary, not with a defensive point of view to face an invasion on rights, but rather, with a purpose more affirmative and more participatory than the arena of public discussion.

The third element of strategic litigation that I will describe is that it puts the judiciary, in a very unorthodox manner, considering our institutional traditions, precisely in a situation capable of

giving recognition—public, political, or institutional—to subjects that perhaps will not achieve it through public or private arenas. The idea that the judicial branch deliberately transforms itself, in an instrumental manner and with the purpose of self-affirmation for those who use the tool in a field that can affirm or deny public recognition, I once again insist, to resolve the case, is also a particular characteristic, given that in our political practice the ways in which a lawsuit can achieve public recognition for social claims has never been through going to the judiciary but rather through going to the street or to politics.

Related to the judicial branch's intervention, is the fact that the disputes are articulated in what we call the language of rights, which is another unorthodox thing in our practice. There is a language for lawsuits and social complaints that is political, presented in terms of interest, and there is a different manner used when these issues are discussed in the language of rights. Here, naturally, the legal community, lawyers, has a particularly active role because they are adept at this language. However, I think this characterization becomes complete when we think that we discuss the conflicts in a different manner within strategic litigation.

These initial characteristics, that are an instrumental activity, pursue aspirations of public self-affirmation where the judicial branch does or does not give recognition and public affirmation of the subjects that use litigation and the dynamic of the language of rights to discuss these social conflicts, I find these characteristics worth mentioning in order to move on to analyze certain assumptions in order that this practice works. Perhaps the weakness the institutional systems have in satisfying these

assumptions can show us the difficulties that this practice can have.

The first and most obvious is that this practice needs independent tribunals that can be forums of autonomous recognition of the individuals. If the tribunals are mere political, institutional or ideological appendages of the state before the group that is using litigation and is wishing to obtain recognition and affirm its position, it makes no sense to practice litigation because it is simply knocking on the same door, but in a different spot. While in certain parts of our country one can affirm there exist tribunals with a sufficient amount of impartiality, independence and autonomy to carry out its function, it is not obvious to me that all of our judicial system, in all of our provinces, meets such a requirement in a way that makes this type of practice make sense.

The second requirement that I think necessary for this practice to function, is the existence of groups who are capable of working out their own agendas. Such an agenda can then be publicly presented and self-affirmed through tools such as impact litigation. A group who recognizes itself as a group, identifies its own interests and can organize its own agenda to deal with those interests is essential. This is something that exists in certain areas of public life. It is clear, for example, that farmers in Argentina have identified themselves as a group and have created an agenda; they have not yet used strategic litigation in structural terms but certain individuals have used it. Nevertheless, I believe that in the sector of education the situation is radically different, due to the way in which the educational functions in our country, and the manner in which the educational communities are or are not organized. Indeed, it is an interesting challenge to think about

the progress of the right to education through tools such as strategic litigation.

The third element is, if we have relatively independent tribunals that can function as forums of affirmation and recognition and we have a group with the capacity to identify its own agenda and interests. Then the third assumption necessary for strategic litigation, given its instrumental character, is that the group can control this tool. In a certain sense the group that is going to use the strategy should manage this tool in order to how to act and make decisions on how to play the judicial game with strategic litigation. And this impacts on the relationship that has the challenge to construct groups or organizations that are going to use strategic litigation, with the lawyers who are going to use channels of communication in the language of rights before the judiciary. In this sense, I believe there exists a notorious vacuum, not only in the educational sector, but in general practice in Argentina, a rather large vacuum of knowledge, confidence, and capacities of communication between lawyers and communities that could be considering using tools of litigation.

Basically lawyers are viewed as bad guys, and indeed, as having a poor performance that guarantees this general understanding. It is difficult to think of a group of parents handing over to a lawyer any issue relevant to the educational future of their children. It is not rational in the context of distrust or lack of knowledge. This vacuum that I put down to the lack of possibilities of real control of interested groups is a challenge for the legal community and perhaps for civil society organizations, like ADC or CELS. They are created for the litigation of rights, and they have begun to remove this lack of confidence and trust that the legal professionals have.

Based on these characteristics and assumptions we begin to have a tool to discuss the challenges facing strategic litigation for education. I would like to make a distinction between the modalities of strategic litigation that will enrich our view. There is not just one way of working with this type of litigation; in any case I think it will be interesting to discuss the different possibilities.

There are two distinctions I would like to make. One is the distinction between individual and class action cases. Mariela's presentation emphasized the collective dimension that strategic litigation can have, and I believe there are good reasons to emphasize why that is sometimes what characterizes the practice in Argentina, but one can also think of individual cases or conflicts that are litigated with an instrumental goal and that seek recognition from the judicial branch, using the language of rights.

Another distinction I would also like to make is related to the instrumental aspect of strategic litigation, between litigation that has an end, a goal or in any case an outcome with a symbolic impact and that which has an end, a goal or an outcome with a structural impact. I believe this distinction allows us to think about the different ways in which strategic litigation works. Many times the recognition of a problem and the affirmation of certain individuals as relevant actors is satisfied by a symbolic expression of the judicial branch even though it does not turn into relevant structural change, since this symbolic recognition can open doors for mobilizations, alliances, and make visible the problems in the long-term agenda of the group, and can be as important as a structural solution or no solution to the conflict. I

would like to underline this distinction in the effects that the outcome of strategic litigation can achieve.

A special feature of the practice in Argentina is that class action litigation and the goals of structural change have only recently become viable. These were not possible in the institutional system in Argentina and I think it is the clear result of changes that, since the constitutional reform of 1994, our country has executed, broadening the list of rights, to include rights called group rights, that allow the recognition and isolation of this collective component of conflicts, and translate the conflict to the language of rights into its own collective terms.

The right to education has been understood by our jurisprudence as a right susceptible to being understood as a class action, which facilitates litigating it in these terms. Not only have we broadened our rights to recognize their group dimension but also the Constitution and certain legislative tools have been constructed and also the jurisprudence has conducted channels of access for collective justice. This is to say there are possibilities and proceedings especially designed for collective action legal claims.

The Supreme Court of Justice has recently handed down, in the context of the case of the Riachuelo contamination, a series of procedural decisions aimed at building an explicit rule of class action litigation of conflicts that, if this initiative consolidates, will possibly influence other tribunals. In addition, the other thing that has made possible these collective and structural modalities of litigation has to do with the change in the understanding of the political role of the judicial branch. Although historically the court was viewed as a mere apolitical

agent that resolved individual conflicts, starting with certain events in our institutional practice tied to the crisis of legitimacy of the Supreme Court; coupled with increased pressure that cases have brought, plus more rights and more channels of access to the judiciary, and more pressure to resolve institutional or public issues, the political role of the court has now become evident. Also, I believe that the renewal process of, for example, the head of the federal judicial branch, which the ADC and CELS had much to do with, has made the political and institutional dimensions of the judicial branch more transparent.

Finally, as a result of the democratic development in Argentina and also of the constitutional reforms like that of 1994, new actors like NGOs and public defenders on the provincial and federal levels are starting to be welcomed by the institutional system as legitimate actors to bring forward these claims. In a certain sense, they are also viewed as actors that can perhaps resolve the problem of a lack of groups that can self-identify as sectors of interest and can work out their own agendas. And it is not by chance in this sense that a good part of the strategic litigation and collective action on education has been brought forth, not by the educational communities, but rather by official agencies and NGOs.

To conclude, I'll comment on some cases and point out a few possibilities and problems. One of the cases, perhaps the one that is most striking to me, is the case brought in the City of Buenos Aires by the juvenile defenders of first instance in the jurisdiction Contencioso Administrativo of the City of Buenos Aires. In a very simple case, the government had put forth a law that ordered the building of a school in a poor area of Buenos Aires City. The law had been forgotten and the juvenile defender went to court

and said that the school must be constructed. Incredibly, the judiciary ordered the school to be constructed and the construction began amidst much back-and-forth from the administration. It was an unprecedented situation that the judiciary ordered the construction of a school. This action, initiated by a sole juvenile defender, marked the first possibility in the City of Buenos Aires of judicial intervention in the area of educational policy. It is difficult to determine if this is a pedagogical issue or not, if this is judicial intervention in pedagogical issues or if this is judicial intervention that one can bring into different areas. What is certain is that the judicial branch, in fulfilling this function of recognizing and giving effect to the promises given by the political branches, is doing something most valuable and unprecedented in our practice.

Another case, more tied to symbolic issues than structural ones, is the case in which an NGO, Fundación Mujeres en Igualdad, with the legal representation of the Judicial Clinic of the University of Palermo, went to the court because a university filled its program vacant spaces—and there were very few of them—in an unequal manner between men and women. For reasons never explicitly explained by the State, the women had fewer vacancies than the men, and there was no reason to justify this distinction based on the sex. The judiciary, incredibly or not, ordered the City Government to reformulate its policy of admission in this educational establishment. In this case, even if structurally the impact was lower, symbolically, in terms of the principle of non-discrimination rather than in terms of the structural protection against sex discrimination by the judicial branch in the educational sphere, the impact had strong symbolic recognition. I would like to discuss the case that interests me most, because in a certain sense I am involved in it; it is the ACIJ

case. It is related to the structural situation of the lack of vacancies in preschool in the City of Buenos Aires. Even though there is a constitutional guarantee that the State has to provide preschool, it is a case in which the aim is structural. The obligation is linked with the promotion of structural cases. Until now it has had favorable sentences from the courts but it is still subject to appeal to a higher city court. The judiciary has ordered the state to solve the problem, through a proceeding that the state itself is going to design and will be controlled by the judiciary through the execution of the sentence. The State has to exceed the deficit of at least 6000 annual vacancies, which means the reassignment of spaces or the construction of schools or a number of other means that will necessarily last longer than the litigation itself.

One of the important issues one thinks of when dealing with collective strategic litigation is that apart from the recognition that it achieves, it gives visibility to a problem, something that I think this case has effectively shown. After this case, ACIJ has been invited to discuss the City of Buenos Aires's new educational law, which wasn't even a goal tied to this case, but in terms of the effects of strategic litigation it is important to mention. The implementation of these sentences can be as complex, or more complex, than the litigation, and here once again, the involvement of the educational community, or of actors, and the possibility to mobilize the agenda are relevant.

Thank you very much.

PAOLA BERGALLO, PROFESSOR AT THE
UNIVERSITY OF SAN ANDRÉS (UDES)

THE FUNCTION OF THE JUDICIAL BRANCH IN STRATEGIC LITIGATION

Good morning and thank you for inviting me.

I want to bring to the discussion today a point of view from research tradition concerning the problems of the impact and implementation of strategic litigation. In the framework of a project in which I am studying some local practices of public interest litigation, I am conducting an investigation on the impact of social rights litigation in Argentina and, in particular, litigation on the right to health. This is an area in which the claims before the courts have been extended in an interesting manner and from which there is much to learn related to discussions on the use of litigation to promote the right to education. Due to this project, I have familiarized myself with discussions on impact and implementation of strategic litigation in the United States and I think that this can bring something to the dialogue on litigation in education among all of us whom the ADC has invited here today.

I will divide my presentation in order to introduce three issues that I believe can help us in our discussion. First, I want to present three possible ways to reconstruct the objections traditionally raised in opposition to impact or strategic litigation. Second, I want to present some responses that are frequently given to show the ways in which these objections can be overcome through different strategies, including redefining the objectives of litigation and revising its function and use. Finally, I want to present a distinction that might be interesting in responding to these objections when discussing the design and

implementation of strategic litigation: the distinction between distinct populations of impact and implementation.

Objections to Strategic Litigation

We will first look at objections to strategic litigation. According to one common objection that I will call the normative or democratic objection, it is problematic to introduce in court issues that belong in the political or democratic sectors. According to different versions of this objection, the judicial intervention in issues of public policy is anti-democratic because it violates the idea of separation of powers, and the courts lack the democratic credentials that the other branches have. This objection, in my opinion, is the least interesting because it puts forth a discussion that idealizes the roles of public institutions, and furthermore, it precludes discussion on interventions that the judicial branch could do. Nevertheless, it raises a relevant issue that courts should keep in mind when defining the scope of their intervention.

A second issue concerning the issues of judicial intervention in public policy is what is known as “the technical objection.” According to this objection the judicial branch lacks the institutional capacity to intervene in questions of public policy because the judges lack the tools and the knowledge to manage questions that require knowledge of policy (for example, of health and education) or that involve interference in budgetary issues. These technical objections take on distinct forms based on the type of incompetence they address. When they question the capacity of the judges to intervene in the management of public policy and the possibility of a disruptive budgetary impact, the

critics allege the court lacks knowledge of the tools to intervene in the management of remedies and they also blame the judicial branch for the unequal redistributive effects that these interventions can produce. Those who lay the blame on judicial intervention argue that social policy requires the management of the budget to be done with sufficient information, with a systemic vision that those who design and implement public policy have. The judicial branch, because it lacks this information, this structural view, ends up making bad remedies, wasting and allocating funds as if they were limitless. The judges are only concerned with the rights of the individual or group plaintiff, but in the guarantee of these rights they are using resources that are for assuring everyone's rights. Finally, the institutional capacity critics allege that frequently judges make bad public policy decisions from their benches.

Finally, in the third place there are a series of objections that state that judicial interventions produce an institutional prejudice against the political branches. Some allude to the demobilizing effect strategic litigation can have on social movements. This demobilization can further implicate a strong disincentive to political participation. Others consider that these judicial interventions overburden the judicial system, distorting that which is its primary function: conflict resolution in the traditional model of two-party disputes that are what the judicial branch knows and should do first. This distraction of the judiciary's function can saturate the capacity of the judicial branch and cause them to give poor judicial services. Finally, those who worry about the harm that strategic litigation can cause to social mobilization and political participation also believe that this harm only produces a re-certification of the status quo. It makes it clear that the same people always win, and the inequality in which the

political system functions evinces some of the uses some people make of the judiciary.

When one reviews the almost forty years worth of research and study on the impact and implementation of strategic litigation in various themes of the civil rights agenda in the United States, one observes that in a sense these objections raise real problems at various levels of judicial intervention in public policy issues. Nevertheless, it is also possible to see in this abundant interdisciplinary research, much evidence of alternative and different ways of understanding litigation, and they allow us to overcome these objections, particularly in the case of the second and third objections I presented.

Some possible responses

In response to the first objection many have tried to respond it using different theoretical views on the role of the judicial branch in the Constitution. On the one hand, they have responded that the judicial branch is the guarantor of the democratic process and therefore, in cases in which the democratic process doesn't satisfy democratic standards when formulating public policy, judges are justified in intervening in the process. Furthermore, they often add that there are certain fundamental rights whose guarantee is a presupposition to participate in the democratic system. Therefore, in this case, when basic rights are being violated and need to be protected, the normative problem disappears because the judicial intervention is justified by the effect that the protection of the rights produces, which is inclusion in the democratic system.

Concerning the objection on the technical incapacity of the judicial branch, the usual response is to generically say that judges intervene in complicated, technical issues all the time. When parties bring their conflict before the court, courts have to manage technical knowledge and they have procedures to figure out how to bring technical knowledge to the chambers. These proceedings include introducing experts to teach judges. There are other responses the judiciary can give to deal with complex problems, such as those Gustavo Maurino mentioned in his exposition. It is possible to think of alternatives for participation, transparency and access to more and better information during the judicial process. We can also think of ideas about models of remedies, processes of execution of the sentences, and more complex projects for evaluating the implementation of sentences. Some creative ideas, like public hearings and requests for special information that our courts use today, can initiate a transformation in the process that opens a discussion and the request for more information than was traditionally used in the two-party process.

Regarding the objections about institutional prejudice in judicial intervention, the research on American experience has shown mixed results. Additionally, over the years people have created various mechanisms to respond to these objections. First, for many years proponents of strategic litigation have worked with actors from social movements who view the judiciary as one of many possible strategies that other social actors might not be aware of. From this stems the awareness of the judicial actors and social movements of the need to work together, to recognize the political dimensions of the issue, and to see litigation as an instrumental tool. This functions to avoid the problems pointed out by those who believe litigation has a demobilizing effect.

This use of litigation as part of other strategies and the coordinating and leading by the social actors who are already involved in the struggle can avoid the much feared political rejection that isolated strategic litigation in the hands of “enlightened jurists” can sometimes generate. The recognition by juridical actors of their instrumental role and their service to social actors, and the warning that the legal battle is only a tool and not a substitute for those who lead these struggles is key to push away the ghosts of political rejection that the judicialization of public policy can generate.

Finally, there are distinct ways to evaluate what it means to responsibly use the tool of strategic litigation when facing the judicial system and the red tape administrative agencies that deal with public issues. This responsible use entails some thought on the use of litigation; regarding what it can and should ask for and how the implementation will work. The complexity of the manner in which one can file complaints is also part of a responsible exercise of strategic litigation. This complexity can include the strategic consideration that the other side has civil servants who need to implement the policy under discussion. This entails, among other things, the responsibility not to ask for intransigent, all-or-nothing complaints, and to be creative when it comes to deliberating in order to achieve the best possible policy.

Of course, all these alternatives that respond to the objections to strategic litigation in Argentina have to take into account what types of actors judicial systems are, the different situations of the judges within the judicial hierarchy, and the interactions between the judicial system and the bureaucracies that in our country we know are not strong, stable, nor particularly empowered.

Impact and Implementation: the four impacted communities

To conclude I would like to present some categories that I find useful and that have been used in studies of impact and implementation of outcomes of litigation in the U.S. It is interesting to look at four communities at the moment of designing the strategic litigation and at the moment of its implementation. These communities are:

- 1. The communities of interpretation which include, first, the legal communities, particularly the courts. When one asks for a judicial decree, one wants a decree that produces jurisprudence, that produces impact in the tradition of interpretation of a right and, therefore, a strategy needs to be defined to achieve the impact that one wants, keeping in mind the possibility of implementation of this impact in terms of this first community that is made up of lower court judges or judges of other jurisdictions. Many define the outcome of a sentence as a symbolic outcome. I believe that the outcome of a sentence that conceptualizes a right that had not before been conceptualized as enforceable is much more than symbolic. It is a sentence that has the capacity to make a real impact on the judicial system and the interpretation of a right.
- 2. The communities of implementation are the public officials or a private institution that have to change a developing policy, modify some sort of behavior or an institutional practice. When designing litigation, it is

important to consider: what this community can do, what it will want to do and what it will never accept. I suggest one takes time to deliberate, to interact with actors in the communities of implementation so that the exchange of possible solutions reaches a consensus, which is better than a judge's imposition that satisfies one party without the consent of the other. This is something that the Court has supported in recent cases. Certainly, it is also important to keep in mind for these stages that the implementation has to generate sustainable policies. To think about what kinds of institutional changes one can ask of a bureaucracy that will generate a long-lasting policy is, therefore, part of a responsible litigation plan that keeps in mind that the implementation stage is the key to long-lasting change.

- 3. The communities of consumers are the direct affected ones, users, those whose rights are in play. Obviously, the community is not just them, but also the community mobilized around these users (in education: it is the parents, students, teachers, etc).
- 4. The secondary communities are diverse political actors who can produce a more stable and long-lasting change, creating a law that counters the situation of a violation of a right. Therefore, it is also important to think to what extent, when one is planning a strategy or following its implementation, one is following the legislature. This cannot be coordinated from a judicial standpoint, but it is part of a broader vision of social change and the instrumental role of litigation in producing changes that

can be more stable and long-lasting than legislative reforms. If strategic litigation in a particular case is framed as a political struggle that includes the impact on the political community from the beginning, it is possible that the objections raised will have less force than many attributed to them.

I believe the classification of the communities of impact that I have presented could be an interesting tool for the planning stage of more comprehensive strategies that include impact litigation. Keeping in mind all the dimensions of potential impact of strategic litigation, the classification can also help surmount some of the objections to strategic litigation.

GASTÓN CHILLIER, EXECUTIVE DIRECTOR,
CENTRO DE ESTUDIOS LEGALES Y SOCIALES
(CELS)

STRATEGIC LITIGATION AS A TOOL IN PUBLIC POLICY: REFLECTIONS ON SOME EXPERIENCES

I am going to set forth different ways in which to analyze strategic litigation. The first stems from the interests of the actors, the strategies of the actors, of groups organized to demand justice or organizations that work to protect rights, work in public interest: human rights organizations. For example CELS raised the use of habeas corpus as a deliberate strategy despite the fact that it wasn't an effective solution during a military dictatorship. But the use behind the systematic presentation of habeas corpus claims had to do with legally documenting violations, to later use the documentation during transition, when the dictatorship ended.

A second way, from the point of view of the judicial or administrative processes, is to analyze the law of these issues that we have raised here in terms of legitimacy, collective or individual legitimacy, as something more than the end itself of the decision, like many roads that exist in the judicial process itself.

A third way is to analyze the remedies—the result of the cases and the efficacy that the remedies have. In this way we can analyze the impact of the litigation.

Another way is to analyze litigation through the relationships between the actors, between organizations, victims, and state actors. This is the most insightful way because one can also analyze relationships between the various actors (executive branch, judiciary branch) within the state itself. Strategic litigation creates a scenario in which there are many disputes, and it is used differently by different actors. It is not linear; none of the relationships is linear.

Another way to look at this is through international litigation. The Inter-American Commission of Human Rights (IACHR) has strengthened this process. Many of the issues we are discussing in terms of national cases have already been addressed in the international sphere, particularly at the Commission, but also in other international forums. One example is the Rimel case.

All of these methods of analysis are discussed in the book that CELS just published. The book systematizes more than ten years of experience in human rights litigation, in various themes related to crimes against humanity, political violence, and social and

economic rights. The book analyses issues stemming from our litigation experience.

Conclusions from the book, to keep on enriching the use of litigation in our agendas:

- One of the first themes is the idea of litigation as a tool, as a means and not as an end in and of itself, that it should be a tool in part of a broader political strategy. As a tool strategic litigation can expose different issues, uncover patterns of illegal conduct that systematically violate human rights. Strategic litigation has been used to denounce violations (social protest, political violence, the case of 19 and 20 December). The judicial responsibility when no sanction is imposed. The relationships between the police who investigate with patterns of concealment the conduct of their own colleagues, and the judiciary that accepts these investigations and doesn't control them. First objective, uncover and expose violations.
- Idea of promoting non-guaranteed rights, because of a deficiency on the part of the State – since State institutions that have to guarantee them are not activated - or because protection only occurs through litigation.

The Viceconte case ended by creating a vaccine. There was a definite policy of creating a vaccine that was never activated, and litigation activated the obligation and the responsibility of the state to produce it. It ended with the construction of a laboratory that produced this vaccine.

Something similar occurred in the cases of the migrants in which the right is protected but there are no institutions protecting it.

- Controversial public policies that contradict international standards, because of design, because of the content or because of the implementation. In the Verbitsky case, the Mignone injunction (for the right to vote, for the non-condemned prison population).
- To add to the judiciary's agenda themes that are absent from the public agenda and also themes that are absent from the judiciary. For example: the Tiscornia case, which had to do with access to information, a case about malnutrition, and a case about the criminalization of social protest. Here, the use of strategic litigation is to utilize a case to promote the themes of the agenda. In this sense, the need for an independent judiciary is a basic prerequisite, but this independence is also what we know as independence that strengthens the political role in the protection of the right.

These are some of the examples that we proposed for the use of litigation as a tool. In this sense, we understand litigation as complementary. It is also necessary to precede litigation with deep investigations into the systemic nature of the problems we analyze, and above all, to complement it with strategic communication of the cases. Many times judicial sentences are not presented as collective, because of the difficulty of presenting the collective nature of a case. But, once the implementation of a right is presented in individual terms, the communication of the case can have a subsequent effect in the sense of promoting a

complaint (for example in the Aguilera Reyes case an immigrant was discriminated since she was denied her the right to a pension for being handicapped).

A first point is to raise litigation as a strategy and not as an end in itself. Incorporate strategic litigation in a larger toolbox.

A second issue that we analyze in the course of our different experiences with litigation has to do with the strengthening of groups and political strategies and the relationship they have with legal claims. For us it's important to understand the role groups legitimated by this action have.

Litigation can be useful to strengthen certain group's capacity of action, open new routes of participation and win concrete battles in the political sphere. It can also serve the purpose of stating that the processes and controls over the state organs are not definitive. Litigation opens a new area of relationships between actors and the state and relationships at another level, a level in which legitimacy is distinct. In this sense alliances related to strategic litigation are very important. Alliances between groups are key, as are alliances with peer organizations, such as the organizations here.

A third theme that we analyze are the channels to get to justice, including the different routes that the judiciary raises so one can get to it, and the different types of access. We analyze the legitimacy of the organizations.

There are examples of cases in which the collectivization of problems has different forms of entry. The Viceconte case was a clear case of collective action; the Verbitsky case was the collectivization of the complaint that had to do with the

inefficiency of the channel of the individual claim. The individual claim channel is not helpful.

We also analyze remedies, which some cases have discussed. Remedies can raise various issues, and not only where a favorable result has to do with a solution to the conflict raised. There are other remedies that can also contribute to litigation.

- Definition of standards and monitoring the adequacy of those standards. In the Verbitsky case.
- Authorization of the processes that looks for participation in decision-making about public policy.

Other issues are the conflicts that the judicial process generates, the conflicts that groups generate within themselves, and conflicts generated between groups from different sectors. How is the process of a case used to weaken the actors? Traditional examples of using the judicial process to weaken and divide groups can be seen in cases of indigenous rights.

I would like to make some final comments:

- The necessity of understanding legal strategy of a certain case about rights as a tool to be used with others.
- The sentence is not the end of the process. In many cases it is the beginning and raises distinct difficulties in relation with the State. The State is complex, has many actors and the sentence given requires us put ourselves in the State's shoes to see the problems at the time the sentence is enforced.

- Decision to reposition the themes.
- Capacity of litigation to modify the judiciary's self-perception of its role in these cases. In cases like Mendoza or Verbitsky, the judiciary realizes that it has a function that is much more relevant than that which it has taken on until now.

COMMENTS FROM ROBERTO SABA.

Many thanks, Gastón. Mariela has invited us to a sort of marathon but we can devote at least half an hour before the break and before the other panel for questions, comments, and reactions. The only thing I ask you is that if you have more than one question, budget time wisely, so that we can have many participants discussing

Dialogue between the panelists and the public

Christian Courtis: Paola's first objection generally impacts on the other two because the response regarding the questions of why the judiciary is technically deficient, or why it makes bad decisions, is that the political process is better. The other four presentations raised the issue: we are in the context of strategically deciding about a legal tool because of the deficiencies of the political process, and of the democratic process. This seems to be a point that needs to be underscored, if the democratic process resolved the issue of equal access to

social goods, in terms of education or any other resource, we wouldn't be here discussing these issues.

Secondly, it seems to me that we need to place on the agenda the issue of opacity and the lack of democratic legitimacy of administrative agencies that cannot receive political legitimacy from votes, like a governor or a president. So, most of the decisions made in terms of education, health, are not made by the president or the head of government, but rather by political people who aren't responsible to the citizenry. It seems to me, there are issues to discuss in relation to the legitimacy of the decisions made by the administration and of the process by which administrative decisions are made. It also seems to me that this strongly supports the idea of a process to open up more dialogue in decision-making, in the transparency of decision-making, and in the implementation of the decision.

Eduardo Sosa: -One question for the panelists concerning what Paola said, in relation to the errors of the judicial system when it enters into spheres that are not its own, or which are said not to be its own. To what extent do lawyers, litigants, and other interest groups push this decision toward this sector? To what extent do lawyers contribute to this vision and push the decision of the judiciary to this sector?

Ingrid Sverdlik: Three specific questions, and a reflection about something that worries me.

- The first question has to do with Paola's definition of this technical obstacle. My question is if we can say that this is really a technical problem, or if this is a political technical problem, for example the theme of vacancies in preschool. We can ask for

more vacancies because it is defending the right to education, now, this asking for more vacancies is intervening in a public policy which at best has a distinct strategy. So, here I would like to see if we can explore this theme a bit more.

- A second question stems from my lack of knowledge: Does litigation generate or constitute something that is judged? Once this theme is litigated, can it not be litigated again? For example, there are not vacancies in preschool, in four years it is litigated again since there aren't vacancies, because this situation can't be resolved within four years.

- Another reflection has to do with the judicialization of some problems: wouldn't the judicialization divert the formulation of political problems? The negotiations of ideological struggles need to be done in other areas, not because they can't be done here—I mean using litigation as a strategic tool—, but because it seems we are de-ideologizing or de-politicizing battles that are basically political. And if this occurs, then we are transforming political problems into affairs that can have the value of truth. And the value of truth is the judiciary value.

Vernor Muñoz: First, Congratulations. A comment to Paola and Gustavo on the tension that exists between the individual and the collective, basically because many times strategic litigation is proposed in literature by organized groups, respecting the needs or rights that, according to these groups, are being violated, but this assumes a process that has some sort of representation of this same collective literature that doesn't necessarily correspond to reality. That is to say, we see many cases, particularly in the right to education for handicapped people, that don't have a legal complaint like they should. Precisely

because there aren't collective actions to exercise this kind of right. That is to say, up to what point can organized groups use judicial routes, and express these necessities and rights that historically have been invisible.

Flavia Terigi: I have been a public servant and I have seen the initial years of strategic litigation for education in the City of Buenos Aires. I know all the cases that have been referred to here.

I want to see if we can add some elements to advance a little further the recognition of some problems with education. I will mention a few:

- In the areas of education of the government, and in the fulfillment of the right to education there are territorial problems that haven't been mentioned. Education concerns populations, in large numbers. Concerning metropolitan areas, not only in this country but in all countries that have large metropolitan areas there is the problem of population transfers that make educational planning weak in the face of these social phenomena. For example between the census of 1994 and the census of 2004, the area of the city that corresponds with school district 19 increased its population by tenfold. No educational plan could have foreseen something like this and it's no coincidence that, given this phenomenon, there were unfulfilled rights. The territorial issue also creates the problem of deciding at what level to make decisions. For example, the national law, supported by the national executive and voted on by the national congress, places responsibility on the provincial governments but there is not a parallel distribution of resources that assures compliance with this responsibility.

- In addition to the demography and who decides and assigns resources I would like to raise the problem that in education we are discussing the significance of some words. An example is the problem of equality in education, which is discussed as a matter of distribution, which is the way in which it has generally been understood. Furthermore, it is being discussed as an issue of the quality of the goods to be distributed. There are aspects of the right to education that do not have to do with something reaching someone, but rather with what arrives and how. Some of the disputes discussed earlier seem to me to have something to do with this.

Gustavo Maurino:

As for Ingrid's comments, your first comment on the technical or political obstacle is linked with your last comment about the distinction between the arena of legal discourse and the arena of political/ideological discourse. At least, my response points to this. The question is what we call legal discourse. You explained it as a discourse that aspires to the truth, and hence ideological-political perhaps does not aspire to the truth, perhaps it aspires to struggles for different interests. There is a way to understand legal discourse that eschews this tension that you raise, which presupposed a certain manner of working with law and that legal discourse is political but not about the antagonism of interests. It is political citizens of a political community who look for a way in which to settle their differences based on certain principles that are in constitutions and laws, and discuss what those principles mean. And surely this discussion does not have the value of truth that this imaginary legal discourse has. When we discuss the meaning of equality in constitutional terms, I would not call

those responses of truth. They are better responses than the ones we have in a discussion that tries to articulate our ideological differences in a communicative manner. This legal discourse that is interpretive, communicative and not defining in terms of truth is more sophisticated than the usual way of understanding legal discourse, and closer to the way we understand political discourse. I hope we understand political discourse as a moral discussion on what is fair in a society. If we redefine our understanding of political discourse and redefine our understanding of legal discourse, the point is that there is not much difference between them. For lawyers, redefining our understanding of our political practices and redefining what is now fashionably known as a "call to dialogue," depends on what we mean by a call to dialogue. If it is a dialogue about public reasons, then the discussion is political and legal because it is a constitutional discussion. If the dialogue is short and secretive, it is then junk policy. The question then is when these discourses will combine and the judiciary will transform itself in the area of deliberation like Paola and Christian say. The possibility of subtracting things from the judiciary is also then more disputable. But the judiciary should not see itself as an oracle of incontrovertible truth. We need to redefine the role of the judiciary. Today we have a Supreme Court that says "the truth is that I don't yet know what to do with the Riachuelo, so we are going to discuss it and in any case I'll say something." This humility, that keeps some grain of truth, changes the game.

What is different about the legal discussion is the language of rights, which is the discourse that legitimizes judicial decisions. This is a strange language for our political community. We are not used to talking about rights. But I would not find a categorical difference in what the judiciary does, in that it still

takes decisions that must be respected. These decisions don't necessarily presuppose truth.

In terms of equality, I find it very enlightening what you said, Flavia, "In education we begin to discuss certain words, like equality". I would say okay, what have we been doing for 200 years in education? The Constitution ordered equality in 1853 as a basic principle of our educational policy. How can we make policy decisions about education without thinking about what the Constitution demands from us when it ordered equality? What are we playing at? We are playing on the fact that the distinction between policy and constitution, between administration and justice, is an abysmal one. Is there an abyss in the middle, such that the Constitution does not have anything to say on the subject of education? In any case, the experts on the issue of education construct their own discourses, their own language, and all of a sudden the legal advisory comes along and says hold on a minute. The bureaucracies are invaded by a discourse that they do not control and that the judiciary imposes on them. The game has become complex; the law questions the decisions of public policies. The actors that are complaining need to understand the limits of public decision-making, understand how this decision-making works, and understand the compromises of it.

I find it interesting to note how the game changes, the challenges are different and the possibilities are different.

My last comment is on the capacities and representation of the groups that complain. The capacities of the groups that complain about education are very limited. Owing to the way in which the game is structured, it has not traditionally been viewed as a forum where rights had any role, it was a theme of public policy-making decisions and therefore did not create a legal climate.

Now, one comment about capacity and another about representation. One can think about groups with a large capacity to identify affectations of rights, but with little representation of the positions of the communities they will lead. I am not sure about the role that representation plays, of how much representation we should demand from those who first raise the voice of a group that has been marginalized. It is likely that the idea of representation appears when there is a large group. Many times litigation constructs possibilities to later establish a relation of presentation between the spokespersons and the groups. With education we are at a point at which we have neither capacity or representation, but in any case I would first seek to build capacity and then generate a demand for representation.

Paola Bergallo:

I agree with Christian. My hasty ruling out of the problem of legitimacy has to do with the criticism of thinking about problems of legitimacy out of the context of social phenomena. That is why I said that we all agree that this type of objection isn't the axis of our discussion.

It is not true that there is more deliberation in Congress than in other spaces, especially because in the last few years we have seen a type of silencing in a space where many people could be talking, discussing different issues. With commissions that don't work, don't meet. Thus, my assumption that this wasn't what made the most sense to discuss. I agree with you in highlighting the lack of management of this area.

Regarding what Ingrid said, the distinction between politics and judges is interesting. When you use the word politics, it seems to me that you assume certain legitimacy in this usage. Maybe you

don't, but some people assume this idea of politics. Nevertheless, I believe that as a regulative ideal we should all agree that this is the place. The problem is if participation and action in this space excludes other alternatives.

I would also like to respond to the question about *res judicata* or thing judicially decided. In fact, there is heated debate between precedent, between the authority of precedent, in closing some discussions. I don't believe so, and the example you raise is a good one. The idea is not that a case ends; the idea is to have a long-term view, to think about why we are in a certain situation. An extraordinary situation is a reason one can give a judge to remedy an extraordinary territorial situation, of a different territorial movement than the one desired. A judge should understand an extraordinary situation that is unforeseeable, he is accustomed to understanding this in all legal situations that are raised, and a situation that occurs because of the lack of foresight on the part of a public official, reasonably exercising his professional mandate, should consider that it should be foreseen. There are standards that judges use to resolve normal conflicts that they can use to judge the way in which this is an extraordinary problem.

Thinking about litigation in a more sophisticated manner, look at what we are asking. No one is asking for 6000 vacancies. Rather, we are asking for a process that would generate policies that produce vacancies, that don't produce this deficit that obviously violates the rights of those who don't receive an education. It seems to me, what we are putting forward is that we need to reflect on strategic litigation, on what is done, what is asked for, and think on the basis of this line of reasoning about Eduardo's question if lawyers take these issues far enough, and don't push the legal decisions. I commented on the responsibility of those

who lead a litigation strategy that keeps in mind that this is a political tool that has to be coordinated with others, that a team of lawyers shouldn't lead by themselves, but should interact with those affected. A more responsible usage of this tool should eliminate litigation used simply to achieve a short-term result.

The issue of the decision-making level, of the complexity of the educational system, which is designed at the federal level and implemented every day at the local level is in this way assumed by the judges and litigating lawyers without understanding who it is that needs to apply this principle which is included in a national or federal law. Perhaps this raises some issues to reflect upon how to think about or use strategic litigation, concerning knowledge of the theme, of the prior research, in order to shape what one is going to ask, in terms of understanding thoroughly who the people involved in the problem are. That is, how to think about and use strategic litigation, and shape what one is going to ask while understanding the agents involved in the problem. What is necessary is knowledge of the political terrain, not only of the institutional weaknesses concerning management, but also of the organization and the complexities of Argentine federalism.

Gastón Chillier:

Just to add to what Gustavo, Paola and Christian said about the relationship between legal and political discourse. I believe that one can view the use of litigation, the relationship between the administration, justice and politics as a mechanism for strengthening policy. The use of the judiciary also contributes to the political struggle of conflict of interests. There are thousands of examples in which the use of litigation contributes to politics;

there is a relationship of dialogue with the policy of Congress. For example, in the Mignone case (about the right to vote) litigation was used, and once there was a decision that ordered Congress to adjust its policy according to the decision's recognition of the right, Congress passed a reform to the Electoral Code that the judiciary then regulated.

Another example is the reform of the military justice system. There is a case in the Interamerican System on violations of standards by the military justice system. Once a case is resolved, it is returned to the judiciary so that the judiciary can deal with it, discuss it and then send it to Congress to discuss the reform, like the democratization of the armed forces. In the example of the case of the vaccines, once the judiciary intervenes, it activates some mechanism that institutions or the State do not do, which is precisely the satisfaction of rights in terms of the right to health.

The second point is that in strategic litigation there are cases in which the truth is not decided; rather, the task of reforming the law is sent back to distinct actors. In this sense, the sentence does not give the truth, but rather establishes criteria for the various forums in which they must decide. Another example, where there is not a sentence (including the Mendoza case where there was no judicial sentence), but rather, a process is opened stemming from a complaint, is the South African Tribunals. Here, a process where different parties were called on was opened, but there was no sentence.

Another point that I would like to mention in relation to what Eduardo said is, it seems to me, he is thinking about resolving some conflicts of interest but not others. The idea is to push so that justice takes on conflicts that it is currently not taking on. In

strategic terms, the work of CELS, ADC and other organizations has been complemented on one the hand by litigation, but on the other, with an agenda that is more about justice, and the reform of justice, to meet these demands fairly.

Everything concerning the reform of the Court, starting with Decree 222, has to do with a Court, which is envisioned to administrate certain conflicts, politically dependent on governments and others. We question this role of the Court, and think that it has to be an independent power that can resolve other conflicts, look at other sectors, with a larger role in protecting rights.

In terms of the theme of legitimacy, I think it is true. There is tension here. We have often proved legitimacy subsequently, for example is the arena of voting, we didn't have a clear idea of the legitimacy we had when we brought forward action, or if the prisoners wanted to vote. Fortunately, the prisoners voted and it was a move in which the prison population was interested in exercising this right, which in a certain sense legitimized what we had thought.

It also has to do with the designs and alliances that I mentioned. Indeed, this issue of the capacity to identify needs and legitimacy also has to do with the policy of alliances, with organizations like the ones that litigate when they raise certain cases. Part of the legitimacy is the policy of alliances with the sectors that are represented. This legitimacy has to do with the relationships of power in this area, in which what needs to be avoided is this paternalistic role and in any case a peer role.

SECOND PANEL

VERNOR MUÑOZ, UNITED NATIONS SPECIAL RAPORTEUR ON THE RIGHT TO EDUCATION THE RIGHT TO EDUCATION: ITS JUSTICIABILITY

Many thanks and good morning to everyone. It is a great pleasure to share a moment with you. I am particularly honored to have such distinguished colleagues with me at the table, who I admire and appreciate.

Since 2004 I have been working on the subject of the right to education and what I would like to do in these minutes is to try to contextualize the theme of justiciability, in the broadest framework of the human right to education, so that this can serve as an introduction to the expositions on the theme of strategic litigation that Victor and Christian are going to achieve. I intend to do this characterization while signaling some of the fundamental obstacles that the right to education has encountered in the last few years. Finally, I will try to signal some of the tendencies that, from my point of view, justiciability should address to advance in the theme of the right to education.

The first thing that needs to be said is that there is a normative advance that is unequal. There are certain regions of the world in which the right to education and its contents, like the ones declared by the Committee of Social, Economic and Cultural Rights, have failed in this conceptual and normative

development. In contrast, there are other countries or regions that have advanced notably, like Latin America. Despite this normative development, in practice education is not recognized as a human right. In addition, when we talk about the patriarchal framework we necessarily have to point out that education remains a vertical mechanism, in which the relationships of power are asymmetrical and in which students are the losers. Furthermore, education also has a utilitarian accent insofar as the educative processes and the processes' construction of knowledge are being subordinated to ends other than those established by the framework of human rights. When we look at the aims of education that are being pursued in our globalized world and contrast them with the aims in the Convention on the Rights of the Child, we will see there is an enormous abyss.

From a historical and social point of view, I should remark that we live in a world where there are about 80 million children out of school and 800 million illiterate adults. This is an approximate number because we do not even have the indicators to let us identify the actual situation. These are the numbers given by UNESCO. They do not coincide with the numbers of UNICEF nor of CEPAL.

Almost two million children in Latin America are outside the educational system and almost 40 million adults are illiterate. This is the number that we have historically counted to date, at least in this region.

If we readjust the realization of the right to education to the goals of UNESCO's Education for All, or to the objectives of the Millennium Development Goals, we have to admit that we are facing an ostensible delay. Remember that a part of the

Millennium Development Goals talked about gender parity, an objective of the discussion on the theme of equality. Gender parity failed miserably; by the year 2005 the objective of gender parity in primary education should have been achieved, but in 94 out of 147 countries it completely failed. Furthermore, we should consider the theme of gender equality not only in the sense of parity, but also consider that equality is much more than access of boys and girls to education.

Eighty-six countries in the world run the risk of not achieving gender parity, that is, equal access to education for girls by 2015 and it is possible that many of these countries won't achieve gender parity for another 20 years after that. In the case of Latin America, we have remained idle for a long time; because many of the countries in the region have achieved gender parity in primary education, but only 12 have achieved it in primary and secondary school. Only Mexico and Peru have achieved gender parity in university-level education

No country in the world has completely overcome the gender gap. Even in developed countries, the inequalities between men and women are notable, which allows us to draw two conclusions: first that the theme of gender equality is not only a theme of poor countries, and second that the educative processes have failed to strengthen the processes of equality which would contribute to a better world for all. This also forces us to note that patriarchal processes, the processes of inequality, not only refer to the domination of men over women, but also imply the maintenance of a series of asymmetries between groups with power and groups without power.

Forty-seven countries failed to secure the universal right to education until mid-century and the majority of these countries

are made up of thousands of children who also have mothers who don't have any possibility to get an education.

All of this makes us realize about the existence of the great inequality, inequity, lack of opportunities between countries, populations, regions and between families. Latin America is a region of great contrasts that confirms this situation because it is the most unequal region of the world and these conditions of inequity transcends to the educational sphere. Latin America is second, after the industrialized world, in investing the most in education, between four and five percent of GDP, but I should say that it is the small countries of the Caribbean that invest the most in education, not the big, rich countries of the continent. These educational resources are very badly distributed, as the quantity of money that is invested in the educational process has not benefited historically disadvantaged populations.

For the past three years I have worked with disadvantaged communities, and on the basis of this work I have written a report about the right to education of the girl-child, and a report on the right to education of handicapped persons. The report I will present next month is on the right to education for persons in conflict zones, namely the people who have been removed from educational opportunities because of war, or natural disasters. Female children and adolescents who are removed from education, not only because of patriarchal asymmetries, but also because domestic child labor violently attacks opportunities for girls; as well as the gross discrimination that educational processes exercise through gender stereotypes and the access to education which discriminates pregnant teenage mothers.

The theme of handicapped people allows us to identify that approximately between 1 and 5 percent of handicapped children are in school. That is to say, an overwhelming majority of these children don't have any educational opportunities and those who have had educational opportunities have had them within a framework of segregation, in special educational establishments, which violates their right to an inclusive education that protects their rights.

The theme of indigenous populations has also been a motivation for my work. This is of notable importance for our Latin American region, since we live in a region with 50 million indigenous people, who speak languages from at least 500 different language families. They have not found options to their rights, which shows once again that this standardized framework of the educational system, that was conceived in the same historical context as prisons, factories, psychiatric hospitals, has certainly not been able to modify itself to attend to their needs. Here a point that is fundamental to the justiciability of the right to education to be made. The conceptual framework of the right to education incorporates external elements and internal elements. The external elements are the ones that Katarina Tomasevski terms the elements that refer to the right to education strictly speaking. That is to say we are talking about the offer of education itself, of the obligation of accessibility understood not only as the material possibility of actually going to school, but also the economic accessibility, from a financial point of view, so that poor families can take advantage of educational opportunities. The element of accessibility also incorporates the right to obtain an education without discrimination. But in addition to these external elements, the right to education includes the acceptability of the right, the need for the

educational process to be situated in the historical and cultural context of the people who live in that community. From this point of view, the rights of indigenous people have not been met in a manner that is adequate to their historical needs. And the other element is adaptability, the need for the processes to adapt to the interest of the child but also the needs of all people, because the right to education is not only a right for children and in this regard the contents of the right to education have in some sense fallen behind as compared to the educational needs of adults.

The accessibility and adaptability of the right to education are the ones named rights in education. We should also find options of justiciability that have not been explored, that is to say, the majority of the cases we know have to do with possibilities of access, possibilities of availability. Even when jurisprudence related to opportunities, for example educational opportunities for handicapped persons exists, many of the tendencies that organizations involved in the litigation use are not related to the internal elements of the right to education.

We have interesting advances made in accordance with the indicators of the UN agencies on the right to education. In the last few years, at least in this continent, there has been a notable advancement in primary school and preschool. However, it is also valid to say that many of the functions traditionally assumed by the States have gradually passed into the private sector, which has specifically aggravated the problems of access, in that they involve the families and transfer to families educational costs that should be assumed by the State.

From this point of view, all these obstacles show us a very difficult reality. If we had to characterize this complex reality perhaps the first thing we would say is that there exists a tendency to look at education as a service, as a commercial good. As you know, education forms part of the catalogue of commercial goods at the World Trade Organization. From this point of view, there will be those who dare to ask for complete freedom to sell education as a completely negotiable service. This is a tendency that we perhaps have not fought with all the force that is needed and this conception of education as a service has had harmful consequences:

- It is not considered a right, in a true and concrete sense. There are constitutions that do not even incorporate a right to education or which incorporate it in precarious manners or limit conditions to its access. In this way we also have precarious access, access to education without teachers, without textbooks, without pedagogical tools, or which semi-incorporate the right, but without including the condition that it be free and compulsory.
- Education is not viable nor does it serve to develop public policies sensitive to the dignity and rights of all people. If education is not considered to be a viable factor through which to design and construct public policies it will continue to be considered that the processes of development are processes that have nothing to do with educational processes. Education is a phenomenon that is here and development is a phenomenon that is there and the connection between one element and the other is completely invisible.

- It does not allow the creation of the type of citizenship whose objectives are clearly delineated in the Convention on the rights of the child, which indicate that the goals of education do not necessarily exist in order to satisfy the needs of the employers. It is true that there is a relationship between education and economic improvement, but education cannot be reduced to those processes. That type of citizenship, sensitive, proactive and responsible can only be achieved through an education based on human rights on the construction of human dignity that goes beyond the rational and instrumental logic that has prevailed in education for so long.
- Education can be suspended, deferred or denied in any moment. There is no commitment greater than the possibilities that a government may have at any given moment.
- It cannot be judicially mandated, demanded. If it is not developed in a judicial context and in context of a right to education it cannot be demanded in the judicial realm. The absence of this justiciability may have its roots in the famous theory of the generations of human right and in the notion of progress which has tainted economic, social and cultural rights. But this is a theme which Victor and Christian will be able to develop more fully. This notion is implied in the belief that the states are allowed not to develop it, and which, contrary to what is provided for in the International Pact on Economic, Social and Cultural Rights they do not even have an obligation to take real and concrete steps to enable the right to education.

To conclude, I would like to point out some elements that justiciability ought to include:

- It ought to include high impact processes of promotion and disclosure (communicating, spreading) of the right to education. In this forum it has been indicated that there are not enough cases brought to the interamerican jurisdiction or to the international jurisdiction. But many times, these limitations to litigate on the right to education are due to the simple fact that people do not know that they can do so. Hence, the processes of justiciability should definitively incorporate communication, information and promotion of the fact that this is a matter of a human right which is a category equal to and interrelated with the rest of the topology of human rights.
- It is not possible to think in terms of processes of justiciability without the creation of methods by which people can exercise this right, demand it in the political and judicial arenas. This creation of methods not only refers to the methods of NGOs and of the organized communities that decidedly obey different logic, but also, inevitably to the creation of methods between judicial actors and judges. It is not enough to have the possibility to bring a case to trial, it also necessary to obtain a response in line with the needs of the times and with a culture of human rights that we all wish to promote.

When we talk about strategic litigation, we not only talk about the possibility of action against the courts of justice, but also

about obtaining judicial results that are in line with the judicial culture and with human rights in general.

- Political action, like the real possibility to demand in the parliamentary realm that the contents of the right to education be incorporated in normal rules, in federal or local rules and that they be developed conforming to international standards which have been adopted recently. The implementation of public policies ought to be one of the fundamental elements in the processes of political occurrences and, ultimately, the spread of knowledge that can benefit groups which have been historically marginalized. If we do not develop these capacities with the groups that have been the most disadvantaged and whose rights have been violated, it will be difficult to obtain a democratic and socially egalitarian development which allows these groups to defend their rights consistent with their specific realities.

I hope that this introduction serves as a basis for a much more specific development on strategic litigation, and I remain available to all of you in order to expand on any of the topics which I have developed.

CHRISTIAN COURTIS, DIRECTOR OF THE
ECONOMIC, SOCIAL AND CULTURAL RIGHTS
PROGRAM OF THE INTERNATIONAL
COMMISSION OF JURISTS, GENEVA

STRATEGIC LITIGATION IN EDUCATIONAL MATTERS: SOME COMPARATIVE EXPERIENCES

Thank you. Mariela asked me to give an overview, which is at times difficult to do in a limited period of time, in order to at least note the most important characteristics of litigation in this matter. The first thing that I would like to say is that the central point which we have dealt with and which interests us is the access to quality public education in groups that are highly vulnerable. Though the experience of litigation in matters of education has involved other aspects I will only mention two or three lines of jurisprudence. There is one line of cases related to litigation of parents who oppose or question the content or some specific regulation of public education policy, because they consider them to contradict their philosophical or religious convictions.

There is another line of cases dealing with the matter of the limitations of the notion of fundamental rights in relations among private schools, especially in those in which the provision of services is the responsibility of a private school, on this there is jurisprudence in different countries. And the third line of cases already explored in some countries has to do with equity, the reasonableness of education subsidies for private schools. There is also a line of cases that I will not explore but I will only mention in order to demonstrate the complexity of the matter and the existence of different fields of litigation.

On this matter which interests us, access to free, quality public education, especially from groups which are vulnerable, I think that one could highlight two approaches to this topic. Some have that to do with defining the specific circumstances of groups in a vulnerable situation or people belonging to collectives, this has been a line which, in general is related to the different readings of the provision regarding discrimination and principles of equality, dealing both with material equality and equality in opportunities and substantive equality. Much litigation in different places around the world deal with this matter in order to demonstrate that a particular group, defined in various ways (the classic one having to do with the existence of classes of people presumably in vulnerable positions.) This has been a line that has advantages and disadvantages.

The other line of approach has been one which deals with the matter of the normative definition of what is meant by education quality, accommodation, especially of public education. There can be some overlapping between the two types of litigation, but it appears to me that the two approaches have been different.

On the first line, the focus on the guarantee of the right to education of groups in situations of vulnerability, one may approach the issue from the perspective of which groups have brought forth litigation on this matter, It appears to me, one could make a list of the line of some of the characteristics of the categories of persons already named by Vernor which have suffered some difficulties in equal access to education in different countries. A classic example of this is how the Supreme Court of Costa Rica dedicates itself to trying interesting cases about nationality as a factor for exclusion, cases in which being a foreigner implies exclusions from access to education. The

Supreme Court of Costa Rica has interesting protections; it declares it unconstitutional that subsidies for children with learning disabilities that attend traditional schooling be limited only to natives, and it has extended the protection offered by these subsidies to foreigners.

The case that Mariela mentioned in the beginning has to do with a traditional line of work in this matter, which is race, differences between ethnicity and race, *Brown v. Board of Education* is perhaps the classic case in this matter. But there are some more recent manifestations of this, last year the European Court on Human Rights, in a case of utmost importance, the case *DH v. Czech Republic* deals with the matter of the educational inclusion of Roma children, of gypsy children, it is a complicated case. What happened essentially is that without any rule that would destine Roma children to receive a second-class education, the effect of the application of a policy aiming at sending children with cognitive disabilities to special schools disproportionately affected Roma children. There are many statistics used in the case demonstrating that Roma children are 27 times more likely to be sent to these special facilities. Obviously, as a result of this, they completely miss out on the possibility of being able to receive normal education. Consequently, this opens the door to failing courses or dropping out of school, which results in a complete lack of education. This is linked to the idea that a group which was not targeted by normative legislation may be affected by the application of visible and invisible policies. The interesting thing about the case is that intent is not discussed, that is, the intention of the educational authorities to discriminate against this group is not discussed. The difficulties of Roma children to communicate in Czech was a factor to determine whether a child would receive special education instead of

regular education. The aggregate affect is that 50% of children in special education are originally Roma, Roma children only make up 8% of the total number of children in the regular education system. It is this type of statistics that is used to prove indirect discrimination in this case.

The Interamerican Court of Human Rights has mentioned on some occasion the combination of these factors, national and ethno-racial origin in the case of the girls Yean and Bosico in the interpretation of the rights and protection of children. The Court includes the right to education in a paragraph which says “the failure to register a child based on her ethnic background implies a violation to the right to education.” This is another regional example.

A few other categories, cases related to gender: *Colegio Monserrat* is an interesting national example. Disability is an area in which there have been strong advances in the areas of litigation and perhaps the North American example is the strongest in this respect. Most of litigation in the United States is based on a federal law, the law known as IDEA which implies the individual rights of children with disabilities to receive an education in the least restrictive environment possible and the formulation of a specific plan to achieve educational integration. Segregated education is the exception, the rule is integrated education. There is a great deal of individual as well as collective litigation in the United States, and the majority of statistical studies with respect to litigation show that where there has been litigation is when schools have made better plans for educational integration. There are thousands of cases of this type to include children with disabilities in mainstream education.

Colombia has some interesting cases about the right to education of children that are forcibly geographically displaced, children in situations of conflict and post-conflict. One important defense sentence which aggregates the situation of the 4500 families requires, among other things a judicial order to the political powers: Protection 25/2004, about including the service of education for children in the minimum coverage plan, at least for those children that are elementary aged. This is an important measure because it unveils deficiencies in the implementation of public policies that follow the former line of cases on this same matter. This is another important case in Latin America of an imposition of affirmative obligations on the state in order to at least provide minimum access to education to children in situations of forced geographic displacement.

The last issue that I am going to link with the second category, which is that of litigation in educational matters, has to do with the way in which litigation on educational matters began in the United States.

This beginning had to do with the notion of inequity, a lack of equity in the distribution of the educational budget. A great part of the litigation in the United States is not at the federal level but rather at the local level, it is the equivalent of our provincial litigation, 45 states in the Union have experience in litigation on educational issues, litigation of this type, of impact, strategic litigation, destined to provoke structural modifications in the way in which educational plans are structured, and the guarantee of access to education for boys and girls.

This litigation began at the beginning of the 70s until the middle of the 80s. It took as a fundamental basis the arguments about the

legal principals surrounding the violation of the principle of equity or equal protection, in a way reflecting the tradition of federal-level litigation in the United States. A large part of the arguments were about the matter of financing primary education. To summarize the main issue is that the biggest source of financing primary education was municipal, local taxes, as a result, the rich municipalities had better education and poor ones had worse education.

A large part of the litigation in the matter was litigation aimed at modifying the source of financing, obligating the state to cover the imbalances that were due to the fact that the central source of financing was based on real estate taxes. Much litigation, the majority of successful litigation was in that vein: Challenging the constitutionality of the financing scheme of the education in order to create equal education in the poorest communities; which are those that bore the burden of regressive taxes.

To some extent this attempt was successful but the politics of the implementation of these ruling was fairly ambiguous and created a certain consensus. Despite obtaining modification in the methods of financing, the equalization that occurred between rich and poor municipalities was low. They took from the rich to give to the poor and this meant that the level of education services was low for everyone. The level of the rich municipalities decreased without really increasing for the poor ones. This is 15 years of litigation on this matter.

This caused strategies to be modified; they ceased to evaluate the abstract and began to analyze how to transform normative matters into matters that indicated measurable changes in education quality. What is demanded of the state in order to

transform the causes for which there is a demand for a primary education that is of high quality and free.

Approaches to this matter:

- One of the first ways to define quality is through exclusion, which is to say that quality is not something. It is not an educational system in which children are hit.
- Another line which has been used in the United States has to do with the gross inadequacy of the physical facilities. Part of the litigation in the United States in order to define quality education is to show schools where there are rats, cockroaches, where the classes are conducted in a closet, schools that are flooded, which generally correspond to the poor municipalities. In other words, schools that do not provide conditions for quality education. There is much narrative testimony related to these matters which is not much different from ACIJ on the container schools. There is a need for adequate facilities.
- A third issue is related to vacancies by which quality is also defined in the negative by the existence of sufficient vacancies, that is to say, the inexistence of vacancies.

Since this idea has been put forth in positive terms in specific matters is the notion of quality education:

This type of litigation, adequacy of education begins to develop at the beginning of the 90s and already had experience. From 28 states in which it was put forth, in 21 litigation was successful

and has mostly achieved the changes on educational plans and laws concerning education.

To summarize, the courts have tried to do three things:

- 1) Translate the clauses that establish the right to education in Constitutions. Clauses mandating primary education. Define the standard of education which is obligatory. The definitions have to do with linking two aspects, one is the civic aspect, education ought to be adequate in order to produce citizens and the measurement in the United States is to be able to vote and participate as a jury. The integration side in the contemporary labor market. This is the most general formulation; there are some more concrete formulations which would involve the standard of results.
- 2) Translate this standard into concrete measurable indicators. Indicators which have to do with indicators in educational matters: failing courses, drop-out rates and academic results have been used in the United States. There are some standardized tests in the American educational system, which help to compare how many students that come from poor schools perform well at that level.
- 3) Establish a standard and translate this standard in terms of measurable public policies, the question is what is necessary in order to comply with these standards. There are discussions on this matter with respect to the proportion of teacher students or professor students in relation to educational financing. Part of this litigation is

litigation in order that the state provides the necessary resources in order to meet these objectives; and the third are the accommodations of the institutions which require a definition in terms of what is the educational standard that is desired, clarified in terms of how many computers, how many laboratories we need. This is the litigation used in the United States in the majority of states.

All of this is documented through cases and it would be interesting to study some in order to see to what extent these situations are compatible with the way in which one can attempt litigation in our country. Procedurally, we are used to this but one could derive at least some lines of litigation that are interesting on this matter.

VICTOR ABRAMOVICH, MEMBER OF THE
INTERAMERICAN COMMISSION OF HUMAN
RIGHTS ON THE USE OF THE INTERAMERICAN
SYSTEM IN ORDER TO GUARANTEE THE
RIGHT TO EDUCATION

Well, I'd like to thank Robert for the invitation. I will try to be as brief as possible.

The idea is to relate some perspectives on the use of the Interamerican System. The axis upon which the system functions is that its central application is that of a treaty, an instrument that is the American Convention on Human Rights which is

fundamentally an instrument of civil and political rights. And this marks a tradition in the use of the system of protection not only of the Interamerican Commission but also of the Court for the protection of civil and political rights.

One first line of cases, which are very few, are those which analyze the right to education and do it within the context of the application of the political and civil rights of the Convention. This, in theory is going to generate some limits on the possibility to know cases that directly affect the right to education.

There is a second line of cases that has to do with direct effect on the right to education. It is, in reality a possible line because so far there are no cases, neither the Commission nor the Court has spoken directly on the violation of the right to education. They could do so, because the San Salvador protocol, which is signed by 14 of the 34 countries that make up the OEA (the majority of countries in America are part of this protocol), establishes a right to education, it has a concrete article on the right to education, which would allow, for example the development of a litigation strategy in order to determine a litigation that can be accommodated, with minimal obligation on the part of the state in relation to the direct protection of the right to education.

I am going to refer to some cases of indirect protection of the right to education via civil and political rights and reflect on some issues that could anticipate in eventual cases of direct protection in the area of the Interamerican System.

I have observed three cases of indirect protection of the right to education which are linked with groups or social sectors in

situations of exclusion, structural discrimination and in situations that are clearly extreme.

Panchito López case is a case about the conditions under which children are detained in juvenile detention centers, affected by problems of overpopulation and violence. The petitioners and the Commission, when the case got to the Court, put it forth like a case linked to the affectation of conditions of detention, the lack of educational programs for children in that educational center. This was paradoxical because Paraguay, at the moment in which this case took place was part of the San Salvador Protocol and had an obligation directly linked to the right to education. Nevertheless, the Court decides not to analyze the case under the direct right to education and analyzes it only as indirectly affecting the right to physical integrity and the right to life. To what extent the lack of existence of specific policies regarding the education of children detained or deprived of their liberty in this center entails a violation of their right to physical integrity, and to a certain extent, although it is not well defined, the right to life understood as a minimum standard of life with dignity which presupposes a certain level of access to healthcare and basic education? The Court considered this, but has a paragraph (number 174 of the sentence) which talks about how this right to the education in particular situations of children deprived of liberty is related to guaranteeing decent conditions in those centers and guaranteeing reinsertion after the hardship of detention and the development of a plan for independent life. The Court includes in the reparations the obligation of the state to guarantee specific educational programs for children that had been in this detention center for an established period of time.

Another case is about two indigenous populations in Paraguay affected by conflict over territory, they were demanding the reclaim of ancestral lands. In that case the Court establishes the obligation of the state to recognize and hand over the territories to the indigenous communities that find themselves excluded from their territory and living in an area bordering on national highways, a high risk area. The Court adopts a series of measures of temporary protection, up to now there has been no land handed over, there are a series of issues that have to be analyzed by the state and which have to do with certain rights to survival, linked with the minimum requirements to have a dignified life, among which are provisions for access to healthcare, public transportation, safety and access to basic levels of education. There is no direct analysis only one that is linked with the right to life, understood as a dignified level of life. In this case in the means of reparation which obligates the state to create a type of fund for community development (which includes healthcare, public transportation and education) and which makes a specific mention of one of the temporary schools that existed in another zone where the community was indigenous and the creation of another temporary school in another zone where the community had no possible access. It even holds that they have to have an education in cultural terms and bilingual, in the language of the community and in another alternative language as selected by the community. There is an indirect analysis.

In the case of Yean and Bosico there was an indirect look at the right to education in the context of an exclusion linked to nationality. It is a case of two Haitian girls in the Dominican Republic which, due to certain administrative rules of the state have difficulties in obtaining their National Identification and citizenship. The Dominican Republic establishes a rule that

requires identification and voting papers for both parents, in this case they were girls who had been born on Dominican territory but were daughters of Haitian mothers and Dominican fathers that did not have identification. Since they did not have Dominican documents the state refused to allow the girls to enroll late in the school and at the same time this had something to do with an arbitrary reading of the Dominican Constitution itself (all people born in the territory have Dominican nationality and cases where people are born when their mother is traveling should be held as exceptions). The Dominican agencies that proceed to process the inscription process read the provision as providing that immigrants, especially Haitians that do not have legal residency or paperwork are in transit, besides the fact that they could have been 20 or 30 years as was the case of some of the family members of the girls. This is an interesting case because the laws of the state would have allowed the inscription but for the administrative practices by way of a series of requirements, which in this case appear to be completely arbitrary, stalled the possibility of inscription and kept the girls without a national identification and without citizenship and this created obstacles in their exercise of certain rights, the risk of expulsion from the Dominican Republic at any given moment and the violation of certain rights, the difficulty of not being able to access to education (because they had already enrolled) or to have access but only to a particular school and to have to take classes for one year in night school with adults. The Court analyzes to what degree the irrationality of the requirements on the granting of Dominican citizenship and registering one's identification lead to an indirect infringement on the right to education.

There are two elements in this case that serve to identify possible lines of cases in the system with relation to issues of equality and education. The first matter is that even if this was an individual case, the analysis that the Court makes on the lack of reasonableness in the administrative criteria and the arbitrariness of the administrative practice of the state does not only analyze the situation of the two girls in an individual manner, but also used it to put the situation of the two girls in the context of the situation with the Haitian migrants in the Dominican Republic. That is to say, it linked the individual situation to the situation of a subordinated or vulnerable group that are the Haitian migrants in the Dominican Republic. This is important because it implies a collective dimension to the incorporation of the analysis of equality. This is a way of changing the traditional view of equality, within the Interamerican System. The second important matter in this case, regardless of the fact that the logic behind these requirements aimed deliberately at affecting the Haitian population in the Dominican Republic, is that the rules regarding late inscription were general rules, that is to say, they were applied to all the population. This is important because the court analyzes these practices of late inscription in terms of the discriminatory impact on one group and also it is important for the majority of the cases on equality in the Interamerican System are cases of direct and not indirect discrimination.

Perhaps this is a more complex interpretation of what the Court intended in this case, but it anticipates a possible line of the Interamerican System for an inclusive collective litigation concerning equality and education. One of the matters that is being anticipated is, first, a principle of equality which aims at considering the situation of the groups and not only the situation of the individuals. It widens the focus to a social context and it

pays attention to their own history of inequality that certain individuals who belong to subordinated or discriminated groups bring with them. The second matter that I think is important is that the Court admits an analysis to some extent on indirect discrimination. It analyzes the potential effect or discriminatory impact of norms or practices on the individuals of a group. It seems to me, that this opens some interesting paths into litigation about equality. This is an important path if one bears in mind that the direct right to education has a scope limited to the realm of the OEA because only 14 states are those that approve the San Salvador Protocol. There is also the American Declaration on Human Rights.

One last interesting case that deals with the right to education is a case of equality, but of individual equality. It is a case against Chile, here an adolescent gets pregnant and because of her pregnancy her private school refuses to enroll her for the following year. Her parents began a claim against the school and the school refuses to enroll the girl for the following year, citing normative rules about the private school itself (a pregnant teenager does not coincide with the ethical and moral principles of the school).

The family files a suit and before its beginning, the school expels the girl. The case reaches the Chilean courts and they ratify the decision of the school. The case is put forward to the Interamerican Commission, not as a case against the school but against the state because the Commission only intervenes in cases against the state. The argument is that the Chilean state undermined the right to education by not establishing effective means of protection of the right to education. They put forth that the decision of the Judicial Power violated the principle of the

right to education, since Chile is not a member of the San Salvador Protocol this is discussed in relation to the principle of equality and with the right to protection of autonomy. When this case was in process for the Commission before it pronounced its decision, a process for a friendly resolution between the state of Chile and the petitioners (Ceжил and the family) is begun. They signed an agreement to an on the bases of a friendly resolution. On the one hand the state recognizes that the expulsion had been arbitrary and puts forth a form of compensation: a scholarship for the victim and a scholarship for the son of the victim. The issue is that in the process of an amicable solution the pending institutional problem is not addressed, namely, to what extent the mechanisms of the state prevented arbitrary actions by an individual actor. Here it was the state's duty of protection that was in play. The case is resolved without addressing this issue.

The few cases that are in the system have to do with indirect infringements on the right to education through infringing on other civil and political rights. Almost all of them are cases of social exclusion. The most interesting space that is opened here is that of the potential infringement of the right to education through infringement on the principle of equality, and at the same time the principle of equality not only in individual situations but also the possibility of thinking about using the system in order to tackle problems of structural inequality in access to education, including that of the collective type.

The pending matter is why cases are missing and what might happen in the future with the direct application of the Protocol. One of the issues that is seen most clearly is that among actors that use the system this does not appear to have been a relevant

matter in their agenda, and among the actors who follow the right to education at the internal level, the Interamerican System has not been a relevant scenario for their struggle concerning the right to education.

For the 14 countries of the Protocol (Argentina has signed it), the System is open to addressing cases that directly affect the right to education. With one limitation: article 19 states that the Commission can hear cases on the violation of the right to education when that violation comes from an action directly imputable to the state. It might be possible to think that that restriction excludes cases where one makes demands upon the state due to an omission, and that it would only be competent to hear cases where there are direct government actions that infringe upon that right.

Besides those types of cases, the Interamerican System has two other mechanisms open for the supervision of the situation of the right to education:

- The mechanism of periodic review, which will soon be implemented with the creation of a work group that will monitor and reports by the states before this work group which include reports on education. This is a system of periodic reports, which will require that the states present reports and that NGOs present alternative reports and that open discussion forums be generated about these reports.
- A process of supervision will be the responsibility of the Commission. The Commission can create special reports on the situation of the right to education in countries and

recommendations. So far they have not created reports specifically on the right to education but they have considered some matters related to the right to education in thematic reports or reports on countries. This is a means of indirect supervision but which allows social organizations to present topics to the commission so that it incorporates them to its agenda, and that the commission may be able to follow them in a manner parallel to the supervision of periodic reports established by the Protocol.

Discussion

Mariano Fernández Valle – In the whole review that was made on disadvantaged groups in their access to education there is one that is missing and it is the one having to do with sexual diversity and the problems of access to education which exist or the quality of education. The drop out rates for people who are not heterosexual is much higher than for those who are heterosexual. The drop out rates for transvestites is much higher than for people who are not transvestites. There is a series of problems strongly linked with persecution experienced inside the schools, which translate to problems with learning, dropping out of school or violence within the school, all of which are very important. My suggestion is that sexual diversity be added to the reports of the Commission or in the reports of the rapporteurship.

Alberto Croce – Three issues. The first is partly political and partly technical, but at times the poorest sectors of the population have little access to this type of resources. Thus the

question is whether the possibility of the access to this type of strategic litigation by certain sectors cannot unbalance a little the reality as to the representation and fixation of themes on the agenda with respect to the most generic needs of the population. In other words, perhaps some problem put forth by a specific sector that might have access to this type of resources can change the order of the agenda of a public actor and this can be negative for everyone. The second issue that I thought is that perhaps it would be good to know about the costs of all of these systems. What type of costs there are, and I suppose that there are costs, and it would be good that we could manage it within this civil society

Joaquin Millon: I wanted to, not in terms of authority but rather in terms of a practical matter if it is convenient to use international standards created by international organizations that are removed from the contexts in which internal judges are going to apply these decisions using those standards. I mean that when it's a matter of structural discrimination there are complex frameworks that the standards are not considering and their application can make the use of those standards is not useless.

Camila Crosso – I would like further exploration of the issue of what has to be done in order to collectively debate some elements in different instances, that issues inside schools be discussed, such as the matter of curriculum, the matter of the conditions within specific schools. Otherwise, it is very difficult that all the movements that want to focus on schools or the political pedagogical processes that occur in schools will be able to enhance these matters. The other thing that I think would be interesting to know is how these mechanisms interact with the thousands of declarations that exist. How does this interaction

work, are there bridges? Are these matters dealt with here? How can we make bridges between the many existing mechanisms in the international arena?

Carolina Fairstein – Many times the Court appeared to treat the issue of education through the right to life, through a broad concept, what is a dignified life like. In this sense I was wondering if we have seen incentives which set forth the issue of education from a broader point of view, from all the factors that cause that the educational level of marginalized or disadvantaged groups be lower even when they have good schools or good facilities because of the conditions in general in which they live. For example, the low quality water they drink which causes them to have lower intellectual capacities. I wonder if there are dialogues among people who work for the right to education where all these things are discussed.

Vernor Muñoz- I think it is essential to create international standards. What is necessary is to establish minimum contents that are consistent with the notion of the universality of interdependence of human rights, without which it would be truly difficult that the duties of the state be developed and that the rights of people be realized. This minimum content of a right to education, of course ought to be a type of construction in the local plan such that the particular characteristics can be adopted in a particular community to these minimum standards. But these standards should remain as a fundamental guarantee that the content of the right to education can be effectively protected. This has to do with the need of a historical adaptation of a human right which has only recently been seen as a right to education. The plan of the 4As is a plan which begins to develop in the arena of the right to food and to decent housing. Katarina

Tomasevki makes an adaptation to the language of the right to education, which has been very problematic because when it comes to comparing this plan with the educational realities, it has been difficult for it to be understood. I at least defend it and support it to the extent that it supposes the construction of a common language in the issue of the right to education. This common language has to include the interaction of the general instruments of human rights with the specific instruments. To the extent that the right to education is a right with its own deontology, with its own legitimacy, ethics, philosophy or jurisdiction, it also allows the realization of other rights. Thus, none of these instruments that Camila discusses is foreign to the right to education, specifically in the context of discriminated communities.

Christian Courtis: - The issue is the access to justice as a guarantee of the compliance of fundamental rights. The traditional model of bilateral advocacy does not work, it has serious defects. There are many actors that are involved: the association of attorneys, universities, and civil organizations that should think about this problem. Since it deals with the lack of access to judicial needs, it is a matter that worries us all. But it is true; it is possible that this will happen. If one links this topic with free quality education for vulnerable groups, this is somewhat reduced. In education, since the middle class stratifies itself and sends their kids to private schools those who use public educational services are the poorest. Here, one has fewer problems of defining the target.

Regarding standards, the same as Vernor; the international standards should be a minimum not a maximum. If we cannot at least define minimum standards, we are in difficulties.

International standards can work when there is nothing locally. Yet, the use of international standards should not be an end, but rather a means. If I have better local standards, that is to say, if I can define, in terms of the political process constitutional standards, legal or administrative or whatever, if there is an administrative telephone relationship that works and that gives the order to a public official so that he does something, and it works, that is better than nothing. What we are lacking in terms of education is the development of standards at the local level. If we have them and we implement them and that is the basis for them to be carried out, I don't care if the basis is constitutional or legislative. However, sometimes one uses international standards because there isn't anything else. If I have a tradition of 100 years of litigation which states that the right to primary education, from article 15 has some minimum content, I do not need to see what the Committee on Social Rights said. I think that in many matters in Argentina it has been useful to resort to the international standards because we did not have anything else.

If I do not have a standard to state, "you are failing to comply with the obligation that is set forth by the constitution or pact of human rights", then it is more difficult to litigate. I am not bound to the international standards; they are useful when there is nothing else. Again, they are minimum standards, local ones are much better since they are much more specific.

With respect to what Camila said, I agree, there are different areas which focus on the matter from different points of view and part of our job is to link them. There are different approaches, approaches linked with specific situations, approaches related to the definition of the content of right and part of our responsibility

is to link them. The way in which these systems of litigation works is that when there are no standards one uses non-mandatory standards in order to interpret the content of the right to education. In this way, when the first cases on the right to education from the Interamerican System come down it will be necessary to give the Court and the Commission a grade and part of the grade comes out of non mandatory standards. This process has already evolved in all the other rights which have been litigated. Our obligation is to provide standards that are there and those to which the states have committed.

Concerning what Carolina said, part of the litigation in the United States has been on that side, quality education implies positive obligations and especial ones in cases of children in vulnerable situations, who are generally the poor. Therefore, this requires taking into consideration the necessity of different policies to supplement the cases in which someone comes with an educational or environmental shortcoming.

Victor Abramovich – Complementing the matter of how different documents and different scenarios of supervision are articulated, I believe that it is very important to continue the process of elaborating indicators for the San Salvador Protocol in educational matters in the arena of the Interamerican System because those indicators will be able to be linked, for example with a process of supervision of the goal of the millennium. There is an important point to think, how to make these supervision processes profit from others and not generate a dispersion of efforts of those supervising bodies and also of social organization which are financing the policies of the state. There lies a possibility to achieve a greater articulation on the job of supervision if the indicators that are created for the

Interamerican arena take into account problems or discussions that are taking place in the monitoring of the goals of the millennium.

Matters of costs and representations, the two are intimately linked, costs and capacities. What costs and what capacities require a structural litigation in a system of international protection. They are high costs and complex capacities and these are important obstacles in the access to structural litigation with which groups find themselves discriminated, which are those which one would aim to protect in the access to the systems of international protection. There are systems which have been thought of in order to overcome these obstacles in terms of costs and capacities. I think that there have been, at least since the Interamerican System very interesting alliances in order to enable those excluded social sectors to access international protection (migrants, people deprived of liberty, natives, etc.) There have been networks created with non-governmental organizations which have facilitated that certain litigation strategies of structural litigation benefit these sectors. Of course, here huge tensions arise; they are some of the ones which were discussed here. The type of tensions which can arise in any type of public interest litigation; tensions that can be resolved but which have to be addressed.

Final thoughts

ROBERTO SABA

The need to influence or impact the process of this decision on the cases is exactly at the center of our job in strategic litigation.

But precisely what we are trying to discuss is if litigation is a tool in itself that exhausts its goals when a case is won, or if litigation should be part of a complex strategy with political objectives and substantive agenda. I think that to know this we must realize that it is necessary to create bridges with communities of knowledge, professionals, activists, not necessarily lawyers. The intention that we had was to start to create this discussion with those who know about educational policies, and those who we believe that this can be put forth in terms of a right through litigation.

The agenda ahead is very complex. It goes from including the theme of education in the job, like some have already been doing, to including the strategy of litigation in the organizations, and not any type of litigation but the type of litigation that will be functional in order to advance this agenda. An agenda that is very ambitious: to reform the Judicial Branch so that it can understand these types of concerns. This is ambitious, but that is how it is. The agenda goes from substantive agenda to institutional reform, reform in practices, and in relations between work communities. This is what lies before us.

From the Association for Civil Rights we want to thank all of you; especially those of you who came from very far and even helped with funds for the meeting. What I would say to you is that, as from now we at least commit ourselves to keep up this conversation and to do a follow up of this meeting. Thank you very much.

WORK GROUP

EXECUTIVE DIRECTOR: ROBERTO SABA

DIRECTOR OF EDUCATIONAL PROGRAMMING: MARIELA BELSKI

LAWYER OF THE PROGRAM: MICAELA FINOLI

EDITING: VIRGINIA FEINMANN

DESIGN: WWW.LIEBREDEMARZO.COM

FRONT PAINTING: GENTILEZA DE MILO LOCKET

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