

ACCESS TO JUSTICE AND JUDICIAL REFORM IN ARGENTINA

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PRESENTED AT THE
FIFTH ANNUAL COLLOQUIUM ON CLINICAL LEGAL EDUCATION
15 – 16 NOVEMBER 2002
WARSAW, POLAND

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THE CRISIS IN ARGENTINA

Argentina today is faced with one of the greatest crises in its history. A once proud and prosperous nation with the largest middle class in Latin America, Argentina's economy, institutions, and spirits have fallen. Over a quarter of the population is unemployed (which is higher than the unemployment rate during the Great Depression), over half lives below the poverty line, subsisting on less than US\$222 per month.¹ The breakdown of political, economic, and social institutions has shattered the faith of many Argentines. Recent polls by the major daily newspapers chronicle the fact that confidence levels in Argentina's already fragile institutions have dropped to staggering new depths. Argentines have expressed an epidemic distrust in their financial and business sectors, politicians, and Judiciary. Massive demonstrations, picketers closing roads, rising crime, public disgust, and hopelessness have all become part of the daily lives of Argentines.²

While it is impossible to identify with absolute certainty the direct causes of the current crisis, it is difficult to ignore the fact that Argentina's history has revolved in cycles of institutional disfunction, collapse, and "reform," oscillating between chaotic democracy and military dictatorship. To explain this institutional instability, some Argentines cite dependence theory or decry the role of the military and the Catholic Church or blame corruption and patronage by politicians and judges. Others, most notably Carlos Nino, also have advanced a theory of Argentine anomie, a pervasive societal disrespect for the rule of law.³ Past reform efforts have largely limited themselves to the re-conceptualization and re-working of institutional texts but have ignored the contextual cultures of individuals who through their deeds (or misdeeds) give life to Argentina's institutions. The Palermo Group is committed to the idea that lasting legal reform in Argentina requires a reform strategy that includes both "top-down" and "bottom-up" efforts.

THE FORMATION AND ACCOMPLISHMENTS OF THE PALERMO GROUP

Since 1995, the Palermo Group has been working to reduce barriers to entry to the justice system in order to increase access to justice and solidify the rule of law in Argentina.

In 1995, Martin Böhmer (with the support of the Ashoka Foundation⁴) and a group of young lawyers at the University of Palermo founded the country's first university legal clinic that actively seeks out precedent-setting civil rights cases. The clinic's initial aims were 1) developing proactive legal strategies to protect the rights of citizens and 2) reforming legal education to promote public interest law. In the years since, the Palermo Clinic, working with Non-Governmental Organizations (NGOs) and Community Based Organizations (CBOs), has successfully brought cases defending the rights of the poor, women, consumers, indigenous groups, the disabled, sexual minorities, and many others.⁵

While working on these cases, the Palermo Group found that despite the wealth of rights and laws set up to protect disadvantaged groups, most were either unorganized or focused entirely on lobbying the Executive or Legislature to achieve their goals—almost none had experience using the Judiciary to protect the rights of their members. Perhaps more surprisingly, they also found that despite expectations, many of the cases brought were successful. The Palermo Group took these lessons to heart: the power that disadvantaged groups in civil society can attain through effective legal capacity and the existence within the Judiciary of judges who will decide cases favorably for minority groups when presented with well-founded legal arguments.

But the Palermo Group also discovered that the cases produced interesting secondary effects: they increased the organizational capacity of groups in civil society and simultaneously trained lawyers in the effective practice of public interest law. These insights, which occurred in the midst of the economic and institutional crisis, led the Palermo Group to reformulate their concept of public interest law. Rallying around the lessons learned in practice, the Palermo Group launched a more robust and ambitious access to justice initiative targeted at the needs of the poorest and most disadvantaged members of Argentine society.

CURRENT PRACTICE AND ORGANIZATION OF THE PALERMO GROUP

The Palermo Group's reformulated access to justice initiative required that they engage both the supply and demand for free legal services in Argentina. They determined that it was necessary for the project to set two general goals: 1) on the supply side, the development of institutions to provide free legal services to disadvantaged groups and 2) on the demand side, the organization of disadvantaged groups so that they can efficiently and effectively exercise their legal rights.

The Palermo Group's first strategy for increasing the supply of "free" legal services seeks to reform Argentina's legal curriculum to include legal clinics that use a combination of lawyers/professors and law students to litigate cases that otherwise would not be brought. Legal clinics produce several desirable effects: 1) free legal services for the poor and disadvantaged, 2) practical training for law students in a system of legal education that currently emphasizes memorization and dogma, 3) a new generation of lawyers who value and have experience working in public interest law (making them prime candidates for NGOs, CBOs, or donors of pro bono services), and 4) full-time legal faculty positions (which are the rare exception to the rule in Argentina), professors with the time and objectivity required to analyze the law without the conflicts of interest of lawyers and judges who teach part time. The Palermo Group, with the assistance of the Ford Foundation,⁶ continues to help build legal clinics at law schools and NGOs throughout Buenos Aires and the provinces.

The Palermo Group's second strategy for increasing the supply of legal services seeks the development of the concept of pro bono law (where private law firms donate free legal services to those who cannot afford lawyers) within Argentina's legal culture. Towards this end, the Palermo Group has formed partnerships with groups in civil society, commercial law firms, and Bar associations to develop pro bono programs. As a direct result of these efforts, 15 commercial law firms now participate in an embryonic program at the Bar Association of the City of Buenos Aires, where they screen, discuss, and take cases referred to them by NGOs and CBOs.⁷ The Palermo Group is currently working to develop a more comprehensive pro bono "clearinghouse" with the capacity to educate and organize the private bar, solicit and screen large numbers of cases, and match attorneys with NGOs and CBOs based on the experiences of each, lowering the information costs that might otherwise prevent commercial law firms, NGOs, and CBOs from coming together.

On the demand side, the Palermo Group's strategy has been to find and structure the demand for legal services. To determine what kind of legal demand exists, the group has created two projects, one focusing on developing legal capacity in existing organizations within civil society, the other on determining the legal needs of Argentina's poorest and most disadvantaged individuals.

In order to develop legal capacity in existing organizations within civil society, the Palermo Group has created partnerships with existing NGOs and CBOs to train their officers and staff in relevant legal matters, help them coordinate legal strategies that promote their goals, and uncover rights violations and systemic inefficiencies.

To determine the legal needs of Argentina's poorest individuals, the Palermo Group has begun working with recently formed CBOs that have sprung up as a result of the current economic crisis and include many residents of the poorest neighborhoods who struggle with issues affecting their most basic needs such as food, shelter, utilities, health care,

and access to government services. The Palermo Group is setting up a “Community Law School” pilot program where newly formed CBOs based in poor areas of Buenos Aires can send representatives to a two to three month “law school” where they learn about their legal rights and the way the legal system functions. Throughout the course of their training, these representatives in turn teach the participating lawyers and students about the needs that exist in their communities. They are also encouraged to bring potential cases from their neighborhoods which can then be assigned legal counsel by the pro bono “clearinghouse” or the legal clinics. Through these “paralegals,” communities not only generate their own efficient and reliable means of access to legal services, but also develop the sense that the law is there among them, ready to avail them of its protections.

THE PALERMO GROUP AS A TOOL FOR LEGAL REFORM IN ARGENTINA

Although the Palermo Group developed its access to justice initiative primarily as a means of giving impoverished and traditionally disadvantaged groups access to the legal system, their efforts produce significant systemic effects, they: 1) create a more proactive role for the legal profession in addressing Argentina’s problems, 2) foster transparency in the judicial process by increasing the ability of informal institutions to monitor and criticize the Judiciary, 3) structure the demand for legal services so that the consumers of legal services have a stake in the system working well, 4) increase government awareness and responsiveness to the concerns of the most impoverished and disadvantaged members of society, and 5) solidify the rule of law among groups that have grown cynical towards the Judiciary. These secondary effects can fundamentally alter the legal landscape that forms the context within which any top-down reforms of Argentina’s institutions must take place.

In Argentina’s history, there have been many top-down approaches to legal reform which have emphasized improving legal certainty, efficiency, and transparency in the Judiciary. These attempts at reform have largely ignored Argentina’s legal culture, choosing instead to rely on “trickle-down” theories which focus entirely on the government institutions which are the central actors responsible for the administration of justice: the Executive, the Legislature, and the Judiciary. Past top-down legal reformers have created new institutions such as the Judicial Council, increased the Judiciary’s manpower and access to new technology, and mandated new laws and regulations such as those guaranteeing public access to information. While top-down efforts are a necessary component to lasting legal reform in Argentina, they have inherent problems which are often intensified by the current legal culture.

For example, the institutional actors currently involved lack the proper incentives to cooperate in order to make reforms succeed. Judicial reforms spearheaded by the Executive run into conflict of interest problems since the Executive litigates before the

Judiciary and many judges have shown that they know how to play political hardball when conflicts with the Executive arise. Reforms from within the Judiciary can be sabotaged or half-hearted since members of the Judiciary are invested in the status quo or simply lack the motivation for change.

Similarly, the private sector and academia both currently lack the incentives to support reform efforts. Private attorneys also litigate before the Judiciary and many believe that the status quo benefits their clients. Argentine law professors are only employed part-time, their full-time jobs are in private law firms or within the Judiciary, placing them in a similarly conflicted position. "Independent" actors who might otherwise speak out or support reform efforts face a situation where the advantages of doing so are few and the disadvantages many.

Not surprisingly, the reforms which result from these incentive structures are either short-lived or cosmetic institutional alterations that only mask fundamental problems of corruption, patronage, and overall disregard for the rule of law. By focusing solely on top-down strategies, would-be reformers have missed a crucial element of the solution: a bottom-up low cost strategy involving lawyers, law professors, law students, NGOs, CBOs, and the disadvantaged which aims to reform the culture of law in Argentina.

¹ The poverty threshold is set at the "canasta familiar" (which includes all costs incurred by a family, including rent) which currently stands at 800 pesos per month, or US\$222 at the official exchange rates on September 15, 2002. This averages out to US\$7.40 a day. The threshold for indigence (which usually does not include rent since the indigent are largely homeless) is set at 500 pesos per month, or US\$139 per month. This in turn averages out to US\$4.63 a day.

² See, e.g. *Washington Post*, "Despair in Once-Proud Argentina; After Economic Collapse, Deep Poverty Makes Dignity a Casualty," August 6, 2002.

³ Nino, Carlos. *Un Pais al Margen de la Ley*, Emece Editores, S.A., Buenos Aires, 1992.

⁴ See, Ashoka Foundation: "www.ashoka.org", Ashoka Fellows, Martín Böhmer.

⁵ See, Palermo University: "www.palermo.edu.ar/derecho/fac_casostramitados.htm".

⁶ See, Ford Foundation: "www.fordfound.org/global/office", Global Offices, Latin America, Santiago, 2000, Peace and Social Justice, Governance and Civil Society, University of Palermo Foundation.

⁷ See, Colegio de Abogados de la Ciudad de Buenos Aires: "www.colabogados.org.ar", Comisiones Internas, Comisiones, De Trabajo Pro Bono e Interés Público.