

Cycles, Highs and Lows of Open Government in Argentina: Access to Information, Experts, and the Structure of Political Opportunities

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Abstract

In the past few years, Argentina has gone through a cyclical process in terms of State openness public policies. The path traveled since the enactment of decree 1172/2003 on access to public information, its joining the Open Government Partnership in November 2012, and passing of Act 27275/2016 that regulates access to public information has not been immune to ups and downs, and has included many challenges. Building on previous research (Gattoni: 2015 and 2016), this paper presents a brief overview of State openness, contrasting it with the concept of open government. Later on, I analyze the case of Argentina and explain how the participation of experts, the rights of access to information and the structure of political opportunities (type of government, structure of the executive cabinet, and cohesion of the governing elites) had an influence on the cyclic process of participation, transparency, and access to information policies. I conclude by reflecting on how these cycles and ups and downs have impacted the design, consultation, and implementation of open government action plans.

I. Introduction: The Concept of State Openness

The concept of State openness extends beyond that of open governments. As I have previously articulated (Gattoni: 2016), I understand the concept as a socio-historic process comprised by several stages in which the agendas of participation and transparency emerge, come together, develop, and interconnect. In this process, State openness extends beyond openness in government administration, as it transcends political transitions and cuts across scales (local, national, and global). The creation of open states represents more than the implementation of open government action plans and even the adoption of openness in administration of a given government. It entails that is possible to tell a story about how countries have become more open in the past few decades and how it has created and shaped (for different reasons) various institutional manifestations of participation and transparency, including laws regulating access to information, participatory budgets, mechanisms for direct democracy, and others. But, why is it important to link these State openness processes with open government action plans? Because the factors that lead governments to open up before the citizenry affect policy outcomes.

In Latin America, the processes of State openness had different institutional manifestations, from legal frameworks and institutions and public policies, to open government action plans. However, these processes have rarely been analyzed in a comprehensive way taking into account the national socio-political processes, as well as the different contexts behind participation and transparency initiatives. Rather, the empirical studies address the creation, development and impact of participation and transparency initiatives separately. A few studies have stood out by refraining from analyzing the processes in terms of results and development of such initiatives and focusing, instead, on analyzing them from an innovation point of view and in relation to their ability to deliver democratic outcomes, or highlighting their strategic importance in terms of strengthening the executive branch.

In this paper, I focus on Argentina's State openness process. This process has been characterized by what I call a "cyclical openness process", in which policies of participation and transparency were fostered along with the influence of a) epistemic communities of experts that were largely linked with international networks that advocate for the right to access to information and the fight against corruption and, b) a context of representation crisis and political transitions. In particular,



I analyze a specific manifestation of the openness process: regulations around access to information and its process in Argentina. First, I focus on what led former President Nestor Kirchner to enact in December 2003 decree 1172 of access to public information, and then I analyze the factors behind the various unsuccessful attempts to pass legislation around access to information before 2016. Towards the end of the paper, I present how these cycles, ups and downs, challenges and opportunities that characterized the process repeat themselves and also impact the design and implementation of action plans created as part of the Open Government Partnership (OGP) process.

II. The State Openness Process in Argentina

Two main legacies, left by Argentina's democratic transition and of the democratically elected government in 1983, have influenced Argentina's state openness process and the appearance of the first institutional manifestations around transparency and participation: the human rights movement and the appreciation of the role of institutions.

The human rights movement became a key player in Argentina's politics in the late 70s and throughout the 80s. The influence and legacy of this movement paved the way to consolidate the constitutional and democratically elected government of Raul Alfonsín in 1983. The way in which access to public information gained human rights status was a direct result of the work carried out by a network of experts with expertise on freedom of expression. Activists of freedom of expression and access to information started to use advocacy tactics (such as strategic litigation) and organized around the establishment of international networks, inspired by the human rights movement to influence the different domestic realities of the Latinoamerican region. However, when we analyze how access to information and concerns of opening up public administration were included in the State openness agenda in Argentina, it is clear that the second legacy: the "moral base of a republican order" with "solid and powerful institutions" lead the foundation for the epistemic community that finally achieved the enactment of the first and only access to information regulation that was valid through 2015 in Argentina: Decree 1172/2003.

In Argentina, as in most Latin American countries, State openness and access to information initiatives resonated with the public together with the State modernization and the issues of corruption and efficiency. Experts from civil society organizations (CSOs) in this matter played a key role in the establishment of the relationship between the issues of corruption and institutional reforms, as well as the need to implement transparency and outreach initiatives in the country. However, unlike in other countries, the process in Argentina has been cyclic, with moments of openness, that coincided with crises or alternation moments, and moments of withdrawal, which have coincided with the phases of highest power of the ruling party and the strengthening of a nationalist discourse in terms of foreign affairs. The Argentinian case underscores the importance of understanding the impact that international factors might have in state openness processes, as well as their interaction with domestic political opportunities. Meanwhile, besides affecting the establishment of an agenda of access to information, the subordination of the foreign policy before the internal political dynamic resulted in the withdrawal of the openness process and separation of the government from CSOs, which was related to the source of the funds they attracted to fund their campaigns.



III. The Start of the Openness Agenda

III. I The Role of the Experts

In the late 1980s, the Poder Ciudadano foundation was created. This civil society organization reflected the spirit of the legacy of the democratic transition: on the one hand, the republican ideals and the value of institutions, and on the other, the importance of participation and civic engagement that resulted as part of the human rights movement. Its founding members, Luis Moreno Ocampo and Marta Oyhanarte, had become more visible during the administration of Alfonsín, and their stories were closely linked to the recent past and the transition issues: Luis Moreno Ocampo following his role as deputy prosecutor in the prosecution of the military government, and Marta Oyhanarte due to the kidnapping and killing of her husband Osvaldo Sivak. The tragedy became public once Oyhanarte abandoned the institutional path and turned a private kidnapping into a public demand for justice.

Established in 1989, Poder Ciudadano was created during the transition from Alfonsín to Menem. However, despite the non-partisan nature of the Foundation reflected in the political diversity of its members, two of the founding members and two of the executive directors had been closely linked to the Unión Cívica Radical (UCR) party and to the institutional discussions during the transition. As Pereyra (2013:43) describes, one of the forums for reflection that had hosted conversations around the democratic consolidation and that would influence the programmatic terms of Poder Ciudadano was the “Council for Democratic Consolidation”. Carlos Santiago Nino, a constitutional attorney who got his degree in Oxford and Alfonsín’s advisor, was president of the Council. He gathered several attorneys, including Roberto de Michele and Roberto Saba, who would then be two of the first Executive Directors of the foundation in the 90s (Pereyra, 2013:43). Perhaps partly due to the track records of the founding members and directors, but also due to the national and international political context, one of the main topics the organization started to address was the issue of corruption. The focus for this issue steered away from punitive visions and focused on prevention and “raising awareness” among the citizenry.

Poder Ciudadano was a pioneer organization in the region, and its work influenced other organizations that were created later on in Argentina, such as Asociación por los Derechos Civiles (ADC), Asociación Civil por la Justicia (ACIJ) and Directorio Legislativo, to name a few. Argentina was one of the first countries to implement openness initiatives around transparency and to establish relevant networks in Latin America.

Four attorneys and experts in corruption crossed paths: Marta Oyhanarte, Roberto de Michele, Roberto Saba and Nestor Baragli. They all participated in the first projects and the foundational work of Poder Ciudadano, and later on, were involved in the drafting and advocacy activities of the access to public information decree in Argentina, although not as members of Poder Ciudadano, but as government officials. Their expertise was key in this process, as it allowed them to reconstruct how the issue of access to public information became part of the public agenda and how it has been linked to the issue of corruption from its origins.

Roberto de Michele and Roberto Saba knew each other since they attended school together at Colegio Nacional de Buenos Aires. They both went to Yale University and worked with Carlos



Nino at the Centro de Estudios Internacionales. De Michele joined Poder Ciudadano to manage the USAID-funded project “Private sector in the fight against corruption”. After that, De Michele was Executive Director of Poder Ciudadano between 1991 and 1993, and in 1995 became chair, as Roberto Saba took charge of the Executive Director position through 1998. Meanwhile, Nestor Baragli worked with De Michele on the USAID project and, when De Michele left the foundation to work on a Moreno Ocampo research project, Baragli was left in charge of the project.

One of the key moments in the introduction of a State openness agenda was when Oyhanarte left Poder Ciudadano to become a public official in the Government of Buenos Aires in 1996. Baragli and Saba joined her as their advisors, and from the Center for Citizen Participation and Control, they promoted citizen participation and transparency in the administration. Oyhanarte recalls in her writings how they were seen by other government officials as “hostile and suspicious”, as “outsiders” (Oyhanarte, 2006:5). This leap of being an “outsider” that made “militants” suspicious represented a split between the politics and the technical world, where expertise replaced militancy, and where citizen engagement did not mean affiliation of a specific political affinity, but the engagement of citizens as shareholders and watchmen of the public administration. One of the first outcomes was Act 104 of Access to Public Information which remain the main access to information act in the City of Buenos Aires until it was updated in 2016. In parallel, the Center for Citizen Participation and Control also fostered public audiences and participatory budget initiatives, as well as promoted the participation of civil society organizations.

Oyhanarte’s work at the Center during Fernando de la Rúa’s administration was very brief, since in 1997 the Deliberating Council was replaced with the Buenos Aires legislature, and Marta Oyhanarte was at the top of the list of the candidates to radical legislators in the legislative elections. Buenos Aires was a very unique case, as it had been declared autonomous in the constitutional reform of 1994, allowing citizens to elect the head of government and legislature, positions that had previously been appointed by the President. Furthermore, by the time Oyhanarte ran for the legislature, the UCR had partnered with FREPASO (Front for United Argentina), a confederation of political parties largely consisting of Peronists that opposed the neoliberal program of Menem. The City was where the “Alianza” (Alianza para el Trabajo, la Justicia y la Educación) was starting to come to life. This Alianza was instrumental in allowing De la Rúa to become President in 1999.

During her campaign for the legislature, Oyhanarte stated: “I am a citizen who has taken on a political duty”. The discourse of an ordinary citizen with concern for the public good and the significance of the fight against corruption of her campaign were just some of the features that showed the beginning of a crisis of political representation that was originating in Argentina’s society. The extent to which the “transparentism” and “proximity” (Annunziata, 2009) were pursued again, the distance between the ruled and the rulers was rejected and evoked in the idea of being “just another citizen”. In fact, this contrast between the militant-politician and the expert-politician becomes clear in Oyhanarte’s remarks when she left her position at the Center:

I left the Center to be elected as a legislator of Buenos Aires. In my place was appointed a person who was “they party’s kidney”. Despite the fact that certain employees tried to maintain the



learned moralities, in time the system engulfed the individual efforts, blurred the mission, and dismantled the center. (Oyhanarte, 2006:6)

In the next sections, I will analyze how this tension influenced the process of enacting a law of access to information.

Meanwhile, De Michele and Saba started to advise Alianza's campaigns and setting the stage for platforms and government plans from the think tank Instituto Programatico de la Alianza (IPA). From the campaign, the proposal was to establish a system of sworn statements, regulate lobbying, institute mechanisms for citizen participation and foster participatory creation of regulations. Even though these proposals were put forward as tools in the fight against corruption, their content was closer to the neo-managerial idea of citizen participation that was very popular in the United States at the time, in particular in the service delivery sector. De Michele and Saba's experiences on transparency were of great value to the political alliance that had based their campaign on the idea of fighting the corruption the Menem years. Alianza won the elections of 1999 and De Michele joined the government as Director of Transparency Policies of the recently established Office for Anticorruption of the Ministry of Justice. Nestor Baragli joined as Senior Analyst of the Office.

Experts joined the government in 1999 for the first time via the Office for Anticorruption. As described later on, two institutions have been key in the regulation of access to public information at the national level: the Office for Anticorruption and the Subsecretariat for Institutional Reform and Democracy Enhancement. The former was where the first participatory process to engage the citizenry in the development of a national access to public information. However, and despite the background we presented here, the Alianza did not implement these new initiatives. The social, economic and political crisis of Argentina was deepening and the first regulation around access to information was still years away.

III.II Crisis of representation and key institutions for the enactment of the Decree of Access to Public Information

The "crisis of 2011" was a political, economic and social watershed moment in the history of Argentina. In political terms, it has been analyzed as a "salvage crisis" or as a government crisis, rather than one of democratic stability, as it helped prevent a breakdown in the democratic regime and identified solutions among the existing resources and institutional capacities (Bosoer: 2003; Perez Linan: 2003 and Ollier: 2004). In socio-political terms, various authors have designated it a period of radical transformation of the representative format, of legitimacy deficit in the leadership, of crisis in political institutions, and reshaping of the new political and social identities (Cheresky & Blanquer: 2004; Pousadela: 2001).

The events of December 19 and 20 are marked in Argentina's memory as the social and political reflection of a unique and relatively long process of economic agony that resulted, among other factors, from the exhaustion of the Law of Convertibility (valid since 1991) and the increasing foreign debt. This burst happened between the declaration state of siege by President De la Rúa



and the police mobilization and repression of protesters against the economic measures of the Government at Plaza de Mayo: individual citizens, *cacerolazo* leaders, union leaders, and members of the *piquetero* movement, to name a few. These protest acts, in addition to the lootings that took place across the country, led to the resignation of Fernando De La Rúa and departure of the Casa Rosada in a helicopter. During these contentious events, thirty-nine people died and many more were hurt in the hands of police repression. The motto of these protests was: “let them all go”, which showed great discontent of the politicians and an explicit demand for new authorities, beyond solely protesting against the economic situation.

Although the political process kept running its course at an institutional level with the adequate enforcement of the “Ley de Acephalia”, in economic terms, the country was declared bankrupt and implemented a set of economic, financial and tax measures that radically transformed Argentina’s economy. The Alianza was effectively disbanded after President De La Rúa resigned. Between December 2001 and April 2003, four presidents took office: Ramon Puerta, Adolfo Rodríguez Saa, Eduardo Camano and Eduardo Duhalde. Finally, in March 2003, Duhalde called for an early election, after which Nestor Kirchner became President in May with only 22.24% of the votes.

In this context, and with a president whose legitimacy was extremely low, the implementation of State openness policies represented a key tool to recover citizens’ trust. Alianza’s campaign focused on anticorruption. However, later on it became the central player of the “las coimas en el senado” scandal, which reflected internal conflicts within the coalition. This situation contributed to an increasing generalized distrust in the political establishment, strengthening the idea that corruption was a structural issue and deeply rooted in Argentina.

At the beginning of the millennium, the CSO landscape had become highly complex. By the time Poder Ciudadano came into existence, it was one of few foundations that did not focus on human rights, and engaged in institutional issues, especially on corruption. In 1995, the Asociación para los Derechos Civiles (ADC) was established, headed by Roberto Saba between 2001 and 2009. In 1999 Directorio Legislativo, an independent project by María Baron and Beatriz Guerra was created in an effort to facilitate access to information in the legislature. Later on, in 2002, Ezequiel Nino (son of Carlos Nino), Gustavo Maurino and Martín Sigal established the Asociación por los Derechos Civiles y la Justicia (ACIJ). These organizations, together with the think tank CIPPEC and FARN, would establish an advocacy network to promote access to information in Argentina.

Going back to the experts and their trajectories, Marta Oyhanarte’s work at the legislature resulted in at least six bills related to citizen participation and information disclosure, public audiences, popular consultations, referendums, mandate revoking and access to information. Act 104 of Buenos Aires, passed in November 1998, was advocated for by Oyhanarte and Anibal Ibarra during her tenure at the legislature, in coordination with Roberto Saba, then advisor of Oyhanarte, who was directly in charge of drafting the law.

In 2000, the Anticorruption Office’s draft bill of access to information was broadcasted in two major newspapers: La Nación and Clarín. The Office for Anticorruption, Infocívica (news agency of Poder Ciudadano) and Fundación Konrad Adenauer co-hosted two workshops for journalists.



According to the documents published by the Office for Anticorruption, between June and July 2001, five more workshops were held, only this time they also engaged business representatives, the media, academics, and CSOs. In August, the Office for Anticorruption, CELS, Poder Ciudadano and the Clinica Juridica of Universidad de Palermo held a meeting. Meanwhile, Office for Anticorruption officials met with the special rapporteur of the United Nations on freedom of opinion with regards to access to public information (Baragli, Raigorodsky & Gomez: 2003).

Even though these meetings took place prior to the social outburst of 2001, the participatory spirit that started in late 2001 and through 2002 without a doubt contributed not only to giving political relevance to the law, but also to the fact that the procedure was in itself an incentive to the dissemination and transcendence of the measures. The partnerships and cooperation with the British Council, the Inter-American Dialogue, Article 19, TI and Fundacion Konrdan Adenauer were key during the whole process, both in terms of finance of the CSO campaigns, and to help gather experts interested in this issue. Thus, beyond the existence of the community of experts that were working on anticorruption in Argentina, the regional momentum around access to information was a result of the convergence of stakeholders advocating for the measure: anticorruption experts, a network of journalists and activists that were fighting for freedom of expression, and a network of attorneys that saw the exercise of this right as a matter of public interest.

The Access to Public Information draft bill was ready in December 2001, which coincided with the events described earlier in this section. Three months passed before the draft bill was presented before the Executive branch – which was then headed by Duhalde – and before the Congress. However, despite the major advocacy work and the work carried out by CSOs and the Office of Anticorruption, the Congress only approved the law in May 2003. One year later, as described below, during the presidency of Nestor Kirchner, the bill was taken to the Senate. However, its passing was subject to revisions, so the bill was sent back to the Congress, where it was not approved until 2006.

Although the advocacy strategy of these organizations did not trigger and reactivate the parliamentary debate that took place at the Congress in 2006, this strategy was not in vain, as the organizations were advocating the most when the Office for Anticorruption was most engaged in fostering the right to access to information right before the enactment of Decree 1172 by Nestor Kirchner in 2003.

The “Decree for Improvement of Democracy and Institutions”, popularly known as the decree of access to public information, did not only regulate access to public information from the Executive branch, but also contributed to developing a set of initiatives aimed at “strengthening the relationship between the State and civil society (...) in order to establish the necessary institutional reforms to develop legitimacy, transparency and efficiency in democracy.” Like the first transparency reforms of Chile, this decree underscored the importance of institutional reforms for management efficiency. In addition, the decree regulated lobbying, the process for regulating reforms and open meetings of public service regulators.



How was Decree 1172 that finally regulated the three proposals put forward by the Office for Anticorruption – interest management, free access to public information, and participatory creation of regulations – enacted?

The answer to this question, again, lies in the experts and the second most important agency in terms of access to information in Argentina: the Subsecretariat for Institutional Reform and Democracy Strengthening of the Minister Cabinet of the Executive branch. On May 2003, Alberto Fernandez, then Chief of Cabinet of President Kirchner, appointed Oyhanarte as Subsecretary. Oyhanarte had been working at the Executive Dialogue Board in Argentina, a political experiment that, in times of crisis, gathered representatives of the United Nations, the Catholic Church, union members, business peoples, CSOs and political leaders. The Board drafted several socio-political reports, understanding that it was necessary to bring the government and civil society together in order to support progress. With support from the Board as well as a range of CSOs, Oyhanarte became Subsecretary in 2003. There, in collaboration with the Office for Anticorruption where De Michele and Baragli were working, she drafted the contents of Decree 1172.

The passing of the decree gave rise to controversy among the CSOs that were advocating for the bill, given that the decree addressed the lack of regulations around access to information, but could hinder the evolution of the legislative process. While limited, Decree 1171 was the realization of many initiatives that resulted from the coordinated and continued work of experts as well as one of the first institutional openness initiatives of Argentina: the Office for Anticorruption. The Subsecretariat would then become the authority in charge of enforcing the law. As we will describe in the second section, institutions that are in charge of accountability are not always able to maintain their political autonomy.

The crisis of representation in Argentina affected the procedures and initiatives that were put forward, as did the expertise of the members of Poder Ciudadano, who from the beginning had a vision to “empower the citizenry”. The same was true in other openness initiatives, such as the “letter of commitment toward citizens”, drafted by the Chief of Cabinet. Although this letter was directed at increasing the quality and efficiency in management as a result of a World Bank-financed project, it was marked by the wide participation that characterized the historic moment.

In the next section, I will analyze the evolution of the State openness process after the first years of Kirchner’s administration. I will lay out the evolution of the debate around access to information and how the complexity of passing laws and advancing different types of measures was linked to the closure of political opportunities. First, I will analyze how openness first occurred in the context of an economic boom, state reforms and restitution of the representative bond through the creation of cross-cutting partnerships. Then, I will show how later on a withdrawal and breakdown of the relationship between the government and experts took place in the context of political polarization, dispute with the media and the dominance of a nationalistic foreign policy.



IV. Beginning of the Withdrawal Process

IV. I. Blocked Consensus

Unlike other Latin American countries where demand for access to information came late and as a result of international influence, as we described in the first part of this section, Argentina very early on reached a consensus on the need to develop an openness agenda that included an access to information component. The joint work of CSOs on the transparency and outreach agenda that leveraged the crisis of 2011 and the “creation” of their own political opportunities (Risley: 2006), resulted in a generalized consensus around the need to open up the State and pass legislation around access to information, not only among CSOs, but also among the political class.

This consensus was reflected in the many access to information bills the Congress and Senate from different parties presented, as well as on court rulings by the Supreme Court of Justice. In the next sections I will elaborate on several aspects of this legislative and judiciary consensus and lay out why this has been an “apparent consensus”, given that the legislature itself blocked many accountability initiatives.

IV. II. Bills but no Acts

The first attempt to pass an Access to Information Act occurred on May 18, 2002, when President Duhalde sent the Congress a bill, which had been drafted by the Office of Anticorruption in a participatory manner. This project was approved by the Congress in May 2003, thanks to the advocacy campaign by CSOs around access to information and in the context of a political crisis. However, the project was discussed in the Senate a year later and approved with revisions. It was sent back to the Congress, where it was shelved and lost parliamentary status in February 2006.

The second attempt took place in 2010, where the opposition of both the Congress and the Senate picked up the debate around access to information. In September, the upper house gave preliminary approval to the Access to Information Act, which was initially approved unanimously but had 26 votes against because several legislators showed concern about specific articles. At the Congress, it was approved by the Commission on Constitutional Issues and Justice. However, when sent to the Budget Commission, the preliminarily-approved bill was shelved, as Congressmen from the opposition were seeking to put forward their own access to information bill. By the end of 2012, the bill had lost parliamentary status.

In 2015, the issue was addressed again as the President of the Congress Commission for Constitutional Issues and member of the ruling party (Frente para la Victoria), Diana Conti, stated that, because there were over 10 bills with parliamentary status and, despite the efforts taken by the Congress to unify projects including the hosting of a workshop around the Model Act of OAS (hosted by radical and official Congressmen), the issue, yet again, failed to be included in the Congress agenda.



In early 2016 and in the context of the political transition that resulted in the political coalition (“Cambiamos”) taking the power, the projects were finally unified. The bill was approved unanimously by the Congress on May 18, 2016. On September 7, the Senate approved the bill with revisions, and it was finally approved by Congress nine days later.

As shown by Calvo & Tow (2009:2), the role of the Presidents of the Commission is key to understand how majority groups are able to push their legislative agendas and define how the different issues are addressed, given that the majority of bills stay at the Commissions and are “shelved” by these authorities, who do not send them to consideration of the overall body. This is particularly important in the context of access to information bills, as the process that precedes how the bill was addressed was a reflection of the reactive capacity of the legislature.

Both civil society representatives and legislators agreed on the difficulties of passing access to information acts in Argentina. The amount of bills that were discussed are seen as an indicator of a consensus. However, they solely represent an “apparent consensus”, because although the regime and the opposition actively presented bills, their inability to pass an act in the Congress was a result of their efforts to actively block all initiatives. The legislative process was also characterized by the fact that the congressmen that were actively participating in the debate had a strong technical expertise on transparency and anticorruption, either as former members of the Office for Anticorruption, or as former activists or civil society members. Examples of these actors are former Congressman Garrido, who served as Director of the Office for Anticorruption (1999-2003), head of the Prosecution for Administrative Investigations through 2009 and member and Director of Transparency at CIPPEC; Laura Alonso, who currently heads the Office of Anticorruption and was Congresswoman between 2009 and 2015 and Executive Director of Poder Ciudadano; and Karina Banfi, who currently is a congresswoman representing the Province of Buenos Aires and was Executive Secretary of the Alianza Regional por la Libre Expresión e Información between 2009 and 2013.

IV. III. The Rulings of the Supreme Court of Justice: An Insufficient Endorsement

The Supreme Court of Justice has endorsed several access to information efforts in the past few years. As such, the Judiciary has recognized the right to access to information at least three times: a) the case ADC vs. PAMI, b) the case CIPECC vs. the Ministry of Social Development, and c) the case Giustiniani vs. YPF.

a) Case ADC vs. PAMI

In 2009, the ADC presented a petition against the Judiciary, following PAMI’s failure to inform how the official guidelines were distributed. Even though the case was favorable, PAMI resorted to bringing the case to the Supreme Court of Justice, where a public audience was hosted. The Supreme Court of Justice’s ruling recognized, for the first time, the constitutional basis of the right to access to information and mandated that all public agencies are required to secure the right to access to information and respect the principle of maximum dissemination. All national, provincial and municipal public agencies, as well as State agencies and private institutions acting in State capacity were required to comply. Finally, a key aspect of the ruling was the acknowledgement of



the right to access to information as a human right closely linked with the right of freedom of expression, like the Inter-American Court of Human Rights had ruled in the case Claude Reyes vs. Chile.

b) Case CIPECC vs. the Ministry of Social Development

On July 1, 2008, CIPECC made a request to the Ministry of Social Development regarding the beneficiaries of social programs, benefit delivery, transfers, subsidies, and their territorial reach between 2006 and 2007. CIPECC declined to provide these data, and CIPECC presented a petition that was ruled by the Supreme Court of Justice on March 26, 2014. The Court required the State to publish the requested information, maintaining that such information was not categorized as sensitive or personal. The Court also encouraged the National Congress to urgently pass an act regulating the process through which authorities are required to observe the access to information requests. The ruling built on international regulations, as well as previous cases such as Claude Reyes vs. Chile and ADC vs. PAMI.

c) Case Giustiniani vs YPF

In this case, the petition was presented by socialist Senator Ruben Giustiniani after YPF (Oil fields) failed to provide information regarding the agreement reached by YPF and oil company Chevron to extract oil from the Vaca Muerta field in Neuquen. On November 10, 2015, the Supreme Court of Justice issued a ruling requiring the Government to disclose the secret clauses, given that YPF is required to comply with access to information requests, not only for being part of the Executive Branch of the Government, but also because their activities are of public interest and related to environmental law.

It could be said that these rulings demonstrate the existing symbolic judiciary consensus on access to information. However, in practice, their real value lies on the fact that they reactivated the public debate, given that the level of enforcement of rulings has been very low. Even the Access to Information Act 27.275, passed in 2016, includes an article regarding participating entities and is against the Court's ruling in the case Giustiniani vs. YPF. The Senate made modifications to this section, but they were later on refuted by the Congress.

Also, even though the rulings are a precedent to leverage when making data requests, in reality they require specific expertise, making it difficult for ordinary citizen to present petitions. Beyond the law realm, the process requires expertise to include specific procedures and deadlines associated with information requests. As mentioned by members of the ADC and ACIJ, in addition to presenting petitions, it is sometimes necessary to also present an additional information request to ratify the previous one in order to ensure that deadlines are met. Furthermore, the Court could take up to several years before ruling sentences, so although the petitions are presented to enable access to data, these tend to be outdated by the time the approval comes through. Therefore, the rulings real value was symbolic as they reactivated the legislature debate and enforcement via social accountability actions.



IV. IV. Obstructions by Mass Media

The impact of the mass media on the access to information regulations of Latin America has been studied by Michener: 2008, 2010 and Villanueva: 2003. In Argentina, although the media had not had an active role in the use of access to information as an everyday tool as in other countries, they had supported the legislation by providing coverage and offering air time to CSOs (Alonso, 2010:106).

In 2004, support for access to information was weakened when the Senate recommended broadening the list of subjects that were required to comply with the law to include private entities. In addition to legislative blockings, the agenda faced additional hurdles resulting from the lack of coverage from the legislative debate, as well as advocacy action by the media. Beginning from the last stages of Nestor Kirchner's administration and through the administration of Cristina Fernandez de Kirchner, as well as in early 2016 after the new government took charge, the media was reluctant and suspicious of the passing of an access to information act.

This distrust was hidden behind arguments that these regulations reversed the right to access to information, which was unthinkable years earlier, considering that the right to access to information was seen as a human right. Once Mauricio Macri of the Alianza Cambiemos took charge, the media limited to covering the election process. In September 2016, the Congress-led bill passed and excluded private entities and State companies, such as YPF, from the list of entities required to disclose public information to private citizens. Then, the media again ran a few stories on the passing of the Act. However, these were not published with priority in any of the main media outlets across the country.

The lack of media support resulted in the reversal, between 2004 and 2015, of the partnership on access to information that had been created. During this period, mass media withdrew their support from the Access to Information Act and refrained from giving publicity to civil society-led campaigns. In addition, this gap was deepened once the "Media Act" was enacted and through the enactment of the Access to Information Act (in 2006), which did not explicitly threaten the media's rights. Stories were increasingly rare. In turn, the first fractures of the alliance also started to occur among the participating CSOs. Between 2004 and 2014, the campaigns, bills and strategies were weakened, international donations were scarce, and the Kirchner administration was going through a contentious moment.

IV.V. The Executive Branch as a Key Player

Legislation, decrees and public policies around openness tend to be fostered and implemented from the so-called "government center" (Peters et al.: 2000) or "institutional presidency" (Moe: 1993; Moe & Caldwell 1994); Llanos & Inacio 2015), namely, the group of institutions and processes that directly support the President, do not make up the Cabinet and are focused on guiding the public administration and its relationship with society.



However, in Argentina, the main openness initiatives have been implemented by the Ministry Cabinet Office, which in Argentina is considered a Ministry. The role of “Chief of Cabinet Ministries” was introduced with the Constitutional Reform of 1994 in an effort to decentralize the President’s authority. Article 99 mandates that the Chief of Cabinet is in charge of the nation’s management, budget execution, and other duties tasked by the President. Although the Chief of Cabinet and Ministers are appointed by the President, the Chief of Cabinet is also politically answerable to Congress and can be dismissed if both the Congress and Senate vote to do so.

Unlike what takes place in other countries, the role of the Chief of Cabinet is independent from institutional presidency, providing liberty to implement and influence public policies. However, and despite the fact that this position was designed to decentralize the President’s authority and incorporate an institutional role that is closer to parliamentary regimes, the centrality of the Argentinian Executive branch has neutralized the independence of the Chief of Cabinet, leaving him as the President’s trusted advisor. The centrality of the Executive Branch enables, as De Luca stated (2011:37): “important government matters to be decided by individuals whose appointment was exclusively mandated by the President, and not by popular will”.

In Argentina, during the administration of Nestor Kirchner (2003-2006), the role of the Subsecretariat for Institutional Reform and Democracy Strengthening of the Ministry Cabinet was key to strengthen openness initiatives and their promotion strategies. Led by Marta Oyhanarte, this body that, in her words, fostered “partnerships to put the State in front of itself and the citizens” (Le Monde Diplomatique, 2005) established a network of decentralized entities of over 200 officials, who met regularly at the Secretariat to be trained and be accountable with regards to information requests presented through Decree 172 in each of their agencies. The Subsecretariat, in charge of enforcing Decree 172, was from the beginning tasked with coordinating the cross-cutting implementation of the right to access to information and the registry of public hearings. In practice, this meant that the agency in charge of regulating the Executive Branch was a part of this branch itself, leaving the resolution of conflicts of interest regarding information requests to the discretion of the Chief of the Ministry Cabinet and therefore, the President’s. Furthermore, the Subsecretariat lacked budget autonomy, thus its members resorted to applying for international funding sources, such as the UNDP.

Therefore, although this was formally valid through Nestor Kirchner’s administration and both of Cristina Fernandez de Kirchner’s terms, it was not applied until 2008 when there was a transition period and the openness processes began to recede. This continuity influenced the type of openness policies that were implemented by the Chief of Cabinet during the first six months of Cristina Fernandez de Kirchner’s administration. However, when Alberto Fernandez resigned on July 23, 2008, the rotation in leadership in the Chief of Cabinet Position (five in seven years) severely impacted the continuity of openness initiatives and the Secretariat development.

The rotation in the position of Chief of Cabinet, by itself, cannot explain the start of the withdrawal of the openness agenda. The political context that surrounded Alberto Fernandez’s resignation coincides with the conflict that started in March 2008 between the government and agriculture entities around the tariffs imposed on exports. In July 2008, then Vice-president and radical “K” Julio Cobos voted against the draw at the Senate and rejected the regime-led bill that sought to



legitimize agriculture retentions. This not only represented a breakdown of the government coalition that had led Cristina Fernandez de Kirchner to the presidency months earlier, but also the start of a cycle of dispute with mass media.

The government justified Alberto Fernandez's resignation as the start of a rotation in public officials that could help reorganize government support. The resignation happened during a time of change, where the partnerships established between the Government and certain provincial governments, some of which were radical but also outsiders of the strictly *justicialista* logic, confirmed its weakening.

After Alberto Fernandez resigned, his trusted team members resigned as well. Marta Oyhanarte resigned her position at the Subsecretariat and, after she left, the authority in charge of enforcing the Access to Information Decree stopped publishing statistics on how the law was observed by government agencies of the Executive Branch. Also, the Subsecretariat's recommendations regarding the scope of the right to access to information also stopped being published (Oyhanarte: 2014), the network of access to information officials was disbanded, and the public hearings took place at the discretion of each public official.

After Oyhanarte resigned, she was replaced by Marita Perceval and later on by Andres Larroque, Franco Vital and Leandro Santoro. This indicated that the government was replacing experts with politicians that were close to the President. The last three Secretaries were members of the political group "La Campora" and lacked experience in citizen participation, transparency and institutional strengthening.

As experts left the government, there was a reversal process in the openness policies. The openness agenda was only a formal function of the Subsecretariat for Institutional Reform and Democracy Strengthening and the Office for Anticorruption. The gap between the experts and politicians was widened by the conflict between the media and the mainstreaming and openness conversation, present at Nestor Kirchner's administration. The government was increasingly polarized and left little room to implement openness policies.

Meanwhile, in late 2008, there was a rupture in the relationship between the government and CSOs, especially those working on institutional matters that had led the partnership for access to public information (Poder Ciudadano, ADC, Directorio Legislativo, ACIJ, etc.). This rupture was not directly linked to the debate around access to information, but was rooted in a wider political debate that allowed the regime to distinguish the CSOs that were closer to the government that were focused on human rights, such as CELS or Fundacion Madres de Plaza de Mayo, from those associated to the "interests of the right", as various government representatives stated.

This tension between the government and CSOs reached the highest level of contention in April 2013, when the regime presented a judiciary bill and the CSOs took action to reject this reform, including the campaign "12 congressmen", consisting of an advocacy campaign led by 12 congressmen who had not reached a decision. On April 24, the Senate issued a resolution that



rejected “extortion and antidemocratic practices”, which was used by ACIJ, CIPPEC, and Poder Ciudadano to lead:

a strong, intimidating escrache campaign that spread pictures and telephone numbers of 12 congressmen of various political parties to put pressure and force them to vote a specific way on the Executive Branch related to the judiciary reform, a clear sign of intolerance to the debate of ideas and rejection of democratic institutions

Even Congressman Agustin Rossi, leader of the *justicialista* group referred to a “clearly fascist attitude, a strategy that the right and the media have used before”.

This division between CSOs and the government resulted in the loss of influence by the organizations in the legislative debate, as well as a withdrawal in the strategies that were promoting access to information.

Letters and other documentation demonstrating endorsement to access to information initiatives were still presented. However, the majority of advocacy actions were reduced to a symbolic nature, because the conflict with the government caused international funding that was financing campaigns to come to an end, and the organizations turned to writing grant proposals that were not necessarily linked to working with the national government. For instance, ACIJ stated that, despite being in communication with the Kirchnerism to coordinate education and housing initiatives in Buenos Aires, this was not the case at the national level.

Thus, the conflict affected the funding that CSOs received to support their activities, given that one of the main requirements of international donors was the potential impact and ability to coordinate with government stakeholders, which was difficult to comply with between 2008 and 2015.

The debt cancellation strategy presented by Argentina to multilateral credit organizations, such as the International Monetary Fund, as well as the tension resulting from the declarations of both Nestor Kirchner and Cristina Fernandez de Kirchner and their ministries regarding their rejection to the guidelines presented by the International Monetary Fund, negatively impacted the cash flow from multilateral development banks, international organizations, and foundations from the United States that allocated funds to projects implemented by the civil society.

However, it was not just the conflict that was taken into account by the government, but also the fact that various CSO members and leaders started “taking a leap” from being a member of civil society organizations to having partisan political views, enhancing the conflict and the politicization environment.

The media gave wide coverage to Laura Alonso’s case, who in 2009 left her position as Executive Director of Poder Ciudadano and became a candidate to the Congress by the PRO. Since Macri took charge in 2015 she heads the Office for Anticorruption. Nicolas Ducote, former director and founder of CIPPEC left the renowned think tank to run as councilman in Pilar; after he became



mayor of the same municipality. Miguel Braun and Manuel Garrido also left CIPPEC and became politicians; the later became Congressman by UCR in 2011. Alvaro Herrero, Executive Director of ADC, left the organization to become a political advisor and later on joined the government of the City of Buenos Aires as Deputy Secretary of Strategic Management and Institutional Quality, where he pushed the open government agenda.

As we can see, in the past few years, many civil society representatives turned to partisan politics and occupied elected or executive positions of the political party that, in 2015, won the presidential election: the PRO , the main party of the CAMBIEMOS coalition. The political alternation brought about a new cycle of technocratic openness in Argentina, in which experts were once again central to decision making. During this time, initiatives such as the Access to Information Act were again addressed, together with the issue of corruption.

V. Political Alternation and a New Openness Cycle

On December 14, 2015, four days before Mauricio Macri took charge as President, four CSOs (Poder Ciudadano, ACIJ, ADC and Directorio Legislativo) presented their “Argentina’s Transparency Agenda”, which included 12 public policy proposals to strengthen the democratic system, including: passing a transparency and access to information law, strengthening the justice system and control organisms, improving contracting practices and public contracting, among others.

On December 21, one week after these organizations presented their Transparency Agenda, the new Secretary for Political Affairs and Institutional Strengthening invited the CSOs to a meeting as a gesture of political willingness to collaborate on the transparency agenda. In this meeting, not only members of the CSOs participated, but also Laura Alonso, head of the Anticorruption Office and former Executive Director of Poder Ciudadano, Karina Banfi – former Director of the Office for Access to Information of the UBA and former Executive Secretary of the Alliance for Freedom of Expression and Information – among others. The stakeholders at the meeting defined priority issues in terms of transparency and determined that President Macri would present a draft bill on access to information in early 2016, which would be previously discussed by the organizations. Also, members of ACIJ and other organizations stated that the government had no intention of enforcing Decree 1172, but that the goal was to move directly to the enactment of a new legislation.

Only eleven days after taking charge, there was a new State openness cycle in which experts and public officials started working together again. Unlike in 2003, this new cycle was not a result of a representation crisis but was presented as a reform package to modernize the administration and restructure the State.

VI. Final Remarks: State Openness and its Impact on the Open Government Action Plans

Argentina’s state openness process has been cyclic, with various gains and setbacks in terms of State openness and open government. The participation and transparency processes were



affected by the participation of experts from CSOs that were linked to international networks that advocate for access to information and the anticorruption debate, as well as the representation crises and political alternation.

One of the first milestones of Argentina's openness agenda was the first access to information regulation: Decree 1172/2003, which was valid through 2015. This norm was drafted by CSO experts who joined the government following the representation crisis of 2001 and who advanced the participation and transparency agendas. Their role in the government was possible in the context of a government with low levels of legitimacy (Nestor Kirchner received 22% of the votes in 2003), political alternation, and a crisis of citizen representation.

International organizations played a key role in Argentina, as in other Latin American countries. The acknowledgement of access to public information as a human right would not have been possible without the financial and operational support of such organizations. The enactment of Decree 1171 coincided with the moments of the most abundant funding and advocacy actions by the national alliance on access to information.

Argentina's first regulation was not comprehensive in terms of the entities that were required to comply with the law, it lacked an enforcement agency, and the conflict resolution mechanism was in the Executive Branch. Thus, the openness process was subject to the ups and downs of the Executive Branch and the changes in the Cabinet and the President's advisors.

Later on, there was a withdrawal process that overlapped with a moment where the ruling party had high political capital (Frente por la Victoria). During this period, various attempts to legislate access to information were blocked. Also, a group of experts resigned from the government and the national discourse in terms of foreign policy undermined the relationship between the government and CSOs.

Paradoxically, it was precisely in this context that Argentina joined the Open Government Partnership (OGP). Led by the former Chief of Cabinet Juan Manuel Abal Medina, Argentina became a member of OGP in 2012. However, the tension between the government and CSOs heavily influenced the first two action plans. Argentina's early participation in OGP was characterized by a setback in terms of state openness, negatively affecting the design and implementation of the country's first action plan. Unlike Uruguay or Chile, who were more consistent in terms of design and implementation of the action plans, Argentina has been evolving from engagement to collaboration in the past few years.

The cyclical nature of the State openness process was also evident in the country's OGP process. The development of the first action plan had low levels of collaboration between the government and CSOs – it only consisted of a preexisting forum, "Agenda Digital" – and included 19 commitments, 73% of which were relevant to access to information. Also, 36% of commitments had transformative or moderate impact (10% were transformative) and only 36% were fully implemented. These results are not coincidental, as they are a result of the setbacks in the state openness process, where the access to information law was the main challenge.

After the first action plan with poor levels of collaboration between the government and CSOs, the second action plan (2015-2017) also presented challenges early in the process. Together with



the restoration of the modernization paradigm, the country was initiating a new state openness cycle in the context of political alternation and the incorporation of CSO experts to the government. This affected the implementation of the access to information regulations, and in the context of the OGP process, is evidenced in the decision to restart the cocreation process and incorporate commitments to the existing plan, which included commitments proposed by the previous administration.

Previous experience underscored the need to develop a specific work methodology and a multi-stakeholder forum to formalize the open government agenda. Finally, the third action plan, submitted in July 2017, incorporated the establishment of the National Open Government Board, integrated by four CSOs and four government representatives.

The third action plan is currently being implemented, and the institutionalization of the National Open Government multi-stakeholder forum will surely impact the implementation of the plan. It is still early to assess its results and impact, but the consultation process has engaged a wide range of stakeholders from government and subnational entities. The plan contains 15 commitments that cover issues such as gender, open contracting, and climate change, which increases its level of ambition. However, the ruling coalition has increased its electoral capital in the last elections, and the impact of this capital on the advancement of openness policies remains to be seen. It is also important to consider how this new open cycle relates to modernization policies and State structural reforms. Therefore, a comparative study of the region's openness trajectory and its impact on the action plans is useful and has great explanatory power on the impact of State and open government reforms. Why do governments decide to open up to the citizens' scrutiny, what incentives they have, and how these factors affect specific openness policies and mechanisms are questions which are necessary to keep considering.

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