

第二屆淡江大學國際生態論述會議

The Second
Tamkang International Conference on
Ecological Discourse

文學、藝術、電影中的生態想像

Ecology, Literature, and the Arts

當代生態論述

Ecology and Theory

國際 / 台灣生態議題

Ecological Issues



5~6 December 2003

Tamkang University

Tamshui, Taipei County, Taiwan, R. O. C.

ENVIRONMENTAL JUSTICE: THE ARGENTINE CASE

by

Susana Vittadini Andrés and Estela B. Sacristán

Abstract

Since 1994 Constitutional Amendment, environmental issues have been introduced in the Argentine constitutional scene as well as legal actions to control its constitutional principles. The Argentine judicial experience in the field of Environmental Law has hinged around two important topics, which have not been settled yet: a) standing to sue; and b) the effects of the judicial decision. Regarding standing, the Argentine legislation distinguishes the ones who have a legal enforceable right, the ones that have a legitimate interest, and the ones who only have a simple interest. This classification, of European roots, frequently hinders judicial review in environmental matters. Regarding the effects of the judicial decision, Courts have not arrived at a consensus in relation to issuing sentences that reach third parties who have not been involved as parties in a particular case.

This paper aims at describing the current state of affairs in the judicial scene as to both issues, posing questions and proposing answers to them in accordance with the judicial interpretation provided by the federal courts, including the federal Supreme Court. The approach will be a comparative one, covering both the Argentine judicial experience and United States judicial decisions regarding the two issues at stake.

I. Argentine environmental Constitutional Law:

The history of mankind is closely connected with nature, but human evolution has introduced a great complexity and confusion between these two parts, up to the extent that for many people "features of the natural habitat become significant only when and as they are introduced into cultural systems, and become incorporated on them as cultural elements."¹ It has different types of consequences that began with the introduction of agricultural and pastoral activities. And, as soon as societies turned to be more complex, overcrowded and developed, nature turned to be more fragile and it even suffered important changes that more than once transform a lovely forest into a desert, turning real the assessment that resources are not practically inexhaustible as it had been stated by an optimistic view some time ago.

¹ LESLIE A. WHITE, *The Evolution of Culture 5* (New York, McGraw-Hill, 1959).

Moreover, for example, the right to life and to health, are critically affected by problems of environmental degradation,² the right to equality before the law is affected by the disproportionate way in which certain sectors of the population bear environmental burden -environmental discrimination-, the right to work is affected by environmental conditions in the work place, the right to property is affected by environmental degradation, etc.³

At present, the equilibrium between human activities and the environment is an important target for governmental policies, even though many countries found it difficult to put them into effect due to their lack of economic resources, corruption, important financial and industrial groups' interests, as situations connected with the ignorance of nature's real importance for human beings.

Experience has shown that the way to make rights effective is to promote their enforcement. So it is important to consider which are the elements that made possible advances on the enforcement of human rights and whether these can be applied to environmental law. The first element stems from the recognition that human rights are fundamental rights; the second is the general consent as regards these rights, not only at an international level but also their hierarchical constitutional incorporation into the domestic judicial systems of States. To give to individuals the possibility to access justice in order to claim for the enforceability of these norms and the application of specific substantive and procedural human rights principles in concrete cases, can be considered the third element.

²It has been estimated that roughly 60 per cent of the global burden of disease from acute respiratory infections, 90 per cent from diarrhea disease, 50 per cent from chronic respiratory conditions and 90 per cent from malaria could be avoided by simple environmental interventions. World Health Organization, 1997. *Health and Environment in Sustainable Development: Five Years after the Earth Summit*. Geneva: World Health Organization

³ Judge WEEREMANTRY from the International Court of Justice makes a reflection in this vein: The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. *Gabcikovo-Nagymaros Case (Hungary-Slovakia)*, ICJ, Judgment of Sept. 25, 1997 (Sep. Op. Judge Weermantry) at 4.

Connected with the second element many constitutions have recently reformed incorporating the protection of the environment, hence, assigning this protection constitutional hierarchy.⁴

According to A.G. Tansley, the definition of ecology is closely connected with ecosystem or ecological system, which he considers as a total system, that is to say, organic elements and the whole environment.⁵ It can be defined as "any unit that includes all of the organisms (i.e., the community) in a given area interacting with the physical environment so that a flow of energy leads to clearly defined tropic structures, biotic diversity and materials between living and non living parts."⁶ But the previous one is not the only possible definition of such expressions; for instance, according to Antonio María Hernández, environment can be defined as all external living conditions that influence organisms or the community;⁷ or, as Michael Allaby has proposed, as physic and chemistry conditions surrounded or inside any living organism and it does not matter whether it is a plant or an animal.⁸

So even though Argentine legislators were aware of the importance of the environment, they could not agree on one sole and unique definition for "environment"

⁴ For example, besides Argentine Constitution: Constitution of Bolivia of 1994 (articles 136 and 137), Constitution of Brazil of 1988 (article 225), Constitution of Chile of 1980 (article 19), Constitution of Colombia of 1991 (articles 8,49, 79,80,86, and 88), Constitution of Cuba of 1992 (articles 11 and 27), Constitution of El Salvador of 1983 (article 69), Constitution of Ecuador of 1983 (article 19), Constitution of Guatemala of 1985 (article 97), Constitution of Guyana of 1980 (articles 25 and 36), Constitution of Haiti of 1987 (articles 253 and 258), Constitution of Honduras of 1982 (article 145), Constitution of Mexico of 1917⁴ (article 25), Constitution of Nicaragua of 1987 (articles 60 and 102), Constitution of Panama of 1980 (article 110), Constitution of Paraguay of 1967 (article 132), Constitution of Peru of 1993 (article 2 inc. 22), Constitution of Uruguay of 1997 (article 47), Constitution of Costa Rica (articles 46⁴ and 50⁴).

⁵ See A.G. TANSLEY, *The use and abuse of Vegetation Concepts and terms* 284-307, *Ecology* 16 (1935)

⁶ ODUM, *Fundamentals of Ecology* 8, in ROBERTO P. GUIMARÃES, *The Ecopolitics of Development in the Third World* 40. (USA-1991).

⁷ ANTONIO MARÍA HERNÁNDEZ (H.), *Proyecto de Código Ambiental*, Orden del Día No.1245, Diario de Sesiones de la Cámara de Diputados, 1995, II, 394-395.

⁸ MICHAEL ALLABY, *Dictionary of Environmental* 23, USA, 1987.

and decided to include it within the Constitution but without giving an accurate definition just mentioning some of its relevant characteristics. In such a way, the 1994 Argentine Constitutional Amendment stated a new article 41 connected with such issue. From then on, environmental issues have been introduced in the Argentine constitutional scene as well as legal actions to control its constitutional principles. Before that reform, the Supreme Court very seldom considered the environmental issue, for example, in 1887, it sentenced that "nobody can have an acquired right that jeopardizes the public health with the use that specially makes of its property and with the exercise of an industry or profession."⁹

Unfortunately, afterwards such decisions relating to environmental matters rarely appeared in the Supreme Court reports. On the contrary, lower court judges, from time to time, have considered the importance of an enforcement-based environmental law, and pointed out that there had to be an adequate judicial remedy to protect the environment from abusive actions. For example, in 1983, Judge Pablo Oscar Garzón Funes sentenced¹⁰ that "All human being has a subjective right to exert actions connected with the protection of the ecological balance," and declared null and void an act of administrative authority that, without providing any the necessary reasons, would allow for the devastation of a species, injuring or threatening the right to an environment guaranteed by National Constitution. So, individuals "are qualified to interpose shelter action, in their own name, in the name of their families, if they are not allowed to invoke rights of the whole society, or to act defending true subjective rights to defend the maintenance of the ecological balance."

At present, the 1994 Argentine Constitution, article 41, rules that:

"All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the

⁹ Case Podestá Bertram, Anderson, Ferrer y otros c/Provincia de Buenos Aires s/Indemnización de daños y perjuicios, SCJN, in FACORRO, SUSANA and VITTADINI ANDRÉS, SUSANA, *Dogmática Constitucional* 111 (Argentina-Ed. Abeledo Perrot) 1999.

¹⁰ Case Kattán c. Gobierno nacional, Juzgado de Primera Instancia en lo Federal Contencioso Administrativo, Judge Pablo Oscar Garzón Funes, Secretary, Pablo Gallego Pedriani, May 10, 1983, *La Ley* 1983-D-574.

obligation to repair it according to law.

The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education.

The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions.

The entry into the national territory of present or potential dangerous wastes, and of radioactive ones, is forbidden."

The first paragraph of this article 41 has included several characteristics concerning the right itself, encompassing, within that constitutional principle's possible projection, the idea of preservation and the duty to recompose. Its second paragraph enumerates State obligations, and the third one establishes the hierarchical division between national and provincial regulations. And the last one is connected with the prohibition to enter or circulate along the country "*present or potential dangerous wastes,*" as well as radioactive ones.

According to Antonio M. Hernandez, the verb "to preserve" can be defined as policies and measures that allow the evolution and continuity of natural processes with small human intervention that imply greater levels of protection, as well as a protection to be free from damages or risks.¹¹ Considering the importance of human development, article 41, first paragraph, also includes the definition of sustainability from an economic point of view when it determines "*that productive activities shall meet present needs without endangering those of future generation.*" Such expression is closely connected with the Brundtland Report that assumes that global economy activity could be safely increased in order to face the necessity of resources in quantity and quality terms¹²

Environmental issues are considered among the so-called "diffuse interests," that, according to Jorge A. Franza and Pedro B. Toma¹³, are all those that coexist in a

¹¹ ANTONIO MARÍA HERNÁNDEZ, ob. cit., p. 425

¹² Brundtland Report, April 1987, included in the Environment and Development Commission, Comisión de Medio Ambiente y Desarrollo, Resolución N° 38/161, December 19, 1993.

¹³ JORGE A. FRANZA y PEDRO B. TOMÁ, *Manual de Derecho Ambiental* 94 (Ediciones Jurídicas Buenos Aires-Argentina) 1997.

determined environment, "framing the true interests of the society." They are characterized by: 1) Not belonging to just one person or a clearly defined group, but to a series of undetermined individuals that are difficult and even impossible to individualize. 2) They are closely related to something indivisible, and there is a special typified connection among them so "that the satisfaction of all, as well as the injury of a single one, constitutes, *ipso facto*, an injury to the whole."

As Argentina is a federal country, each one of its provinces has its own Constitution, and some of them had included environmental issues rules even before the 1994 Argentine National Constitutional Amendment. For example¹⁴:

a. In 1986, the Province of Jujuy Constitution, article 22 (1), stated that "All provincial inhabitants have the right to enjoy a healthy and ecologically balanced environment, as well as the duty to defend it."

b. In 1991, the Province of Formosa Constitution, article 38, first part, declared that "All inhabitants have the right to live in an adequate environment for human being development, as well as the duty to preserve it."

c. In 1991, the Province of Tierra del Fuego, Antártida e islas del Atlántico Sur Constitution, art. 54, first paragraph, stated "The water, the soil and the air, as vital elements for Humans, are subject of especial protection by the Provincial state."

The 1994 Argentine Constitutional Amendment, article 41, included some of the above-mentioned Provincial Constitutions' environmental characteristics.

According to National Constitution, article 14,¹⁵ as well as a Leading case¹⁶ there are

¹⁴ Other Provincial Constitutions that mention the environment are: 1957 Province of Chaco, articles 40 and 41; 1962 Province of Santa Fe, article 28; 1986 Province of La Rioja, article 66.

¹⁵ Argentine National Constitution, article 14, determined "All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; to make use and dispose of their property; to associate for useful purposes; to profess freely their religion; to teach and to learn," and article 28, "The principles, guarantees and rights recognized in the preceding sections shall not be modified by the laws that regulate their enforcement." In such a way all constitutional rights are under article 14, first.

¹⁶ Case Ercolano, Agustín c/ Lanteri de Renshaw, Julieta s/ Consignación, Fallos, 136:161.

no absolute rights as to rule and limit the exercise of individual human rights is necessary due to social needs. Some of the limits are being determined by the Constitution, but as it could not foresee all different situations, the Legislative Branch has been empowered with the mission to rule about the exercise of such rights. A former Supreme Court Judge, Dr. Bernejo¹⁷, rejected such point of view considering that such restrictions, even though they could be considered as preventive ones, would lead to dangerous situations instead of solving the problem. He also pointed out that if the government considers itself 'judge of the abuse' it will soon turn to be 'judge of the use,' and consequently people would lose their property and freedom.

Argentine Constitution aimed to protect the environment as an autonomous legal object but at the same time, in connection with human beings, as the last ones are the final objects of protection as environmental law naturally integrates with human rights law. Some time ago, in 1972, three American Supreme Court Judges settled a remarkable concept that "trees should have standing." Justice William O. Douglass pointed out that the courts should adopt a rule "that allowed environmental issues to be litigated before ... courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers... Environmental objects [should be able] to sue for their preservation¹⁸" But if people have no access to justice in environmental matters, then the individual's role dissipates.

Thus, the American Human Rights Convention, article 25, stated that:

"1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy."

As a Latin American country that entered the American Human Rights Convention,

¹⁷ Case Ercolano, Agustín c/ Lanteri de Renshaw, Julieta s/ Consignación, Fallos, 136:161.

¹⁸ Sierra Club v. Morton, 405 U.S. 727 (1973).

Argentine Constitution included, in its article 43, first two paragraphs¹⁹, the possibility of giving individuals and certain institutions an adequate remedy to protect their rights. It settled that:

“ Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.” “This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms.”

Apparently, the Argentine Constitution protects the environment and allows people, as well as institutions, to have “a prompt and summary proceeding regarding constitutional guarantees,” but as such rights have to be regulated sometimes things turn up in a different way. Thus, it is important to analyze Argentine judicial experience in the field of Environmental Law to determine up to what extent Constitutional principles have been put into effect regarding to main topics in the field of access to judicial review: on the one hand, standing to sue; on the other, the effects of the judicial decision.

¹⁹ Argentine National Constitution, article 43, last two paragraphs, included legal proceedings for personal information, Habeas Corpus and the secret of press information, Any person shall file this action to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired.

When the right damaged, limited, modified, or threatened affects physical liberty, or in case of an illegitimate worsening of procedures or conditions of detention, or of forced missing of persons, the action of habeas corpus shall be filed by the party concerned or by any other person on his behalf, and the judge shall immediately make a decision even under state of siege.

II. Standing to sue:

a) Introduction:

Argentine Constitutional judicial review or control is diffuse, and in this sense it is similar to that of the United States. Consequently, judges of lower instances can decide on the unconstitutionality of a rule or act in a given judicial cases²⁰.

The only constitutional exception to this rule has been included in the above-mentioned Article 43 (1st. paragraph), as it states that "*In such case, the judge may declare that the act or omission is based on an unconstitutional rule.*" In such occasions it will all depend on the judge's personal decision and constitutional interpretation.²¹ Traditionally, judges considered that political powers decisions regarding governmental affairs were "political questions²²"; therefore, such decisions could not be reviewed by judges, and the judges' obligation was restricted to establishing if some of the consequent regulation was contrary to the Constitution.²³ Nevertheless, it is sometimes quite difficult to discern which are the political elements considered by them. One of the most common principles considered by judges is the "rational basis²⁴" one, that implies that there is "a reason for doing so that makes sense given the problems the state is confronted with,²⁵" in connection with law and administrative decisions;²⁶ so, according to it, they could declare a governmental act or regulation unconstitutional.²⁷ In such occasions, judicial review is connected with circumstances in which an appellate courts review other government branch's acts or decisions.

²⁰ See, among others Fallos: 308:647, consid. 8°, Fallos: 253:344.

²¹ Fallos: 178:9.

²² See, among others, Fallos: 302:457; Fallos 303:1029; Fallos 308:2246; Fallos 321:1252, in which it is settled that Judges cannot review "political questions".

²³ See, among others, Fallos 270:168, Fallos: 272:231, Peralta Case, Fallos 313:1513.

²⁴ Fallos: 234:482; 302:1284.

²⁵ DANIEL M WARNER, *The Legal Environment of Business* 58 (The Dryden Press-USA) 1992.

²⁶ See, among others, Fallos 181:264; Fallos 264:416; Fallos 318:445

²⁷ Case Banco de Galicia y Buenos Aires s/ solicita intervención urgente en autos : "Smith, Carlos Antonio c/ Poder Ejecutivo Nacional o Estado Nacional s/ sumarísimo" B. 32. XXXVIII.

Judges previously have to consider the question of "justiciability," that helps to define what proper cases and controversies are for purpose of reviewing cases, and its main elements are: genuineness, case and controversy, standing.

Thus, Argentine standing to sue, in "amparos,"²⁸ is not only connected with to an alleged injury to a enforceable right, a legally protected economic, aesthetic, environmental, private or similar interest and to the requirement that the arguably injured has to be within the zone of interest regulated by the law or norm challenged, but also with a legitimate interest. In general terms, courts and judges have decided that a legitimate interest is present when a certain person or institution is the proper litigant to challenge the rule or authorities' acts that could affect people, governmental activity, or the environment, competition, as well as users and consumers. So, according to the Argentine Administrative Procedure Act, the ones who have a legal enforceable right, and the ones that have a legitimate interest or the ones who only have a simple interest are clearly classified, and this classification, of European roots, frequently hinders judicial review in environmental matters. We will see, later on, how this classification has been interpreted by the Argentine Supreme Court.

b) The U.S. precedents:

In the U.S., as an element of justiciability the doctrine of standing is applicable to administrative law cases, but before resorting to the courts, any individual has to exhaust the administrative remedies in order to give the agency "an opportunity to correct its own errors, if possible and create a record for judicial review."²⁹

One exhaustion is achieved, to seek judicial enforcement of a public law a party must make it clear that it possesses a specific right to be heard by the court known demonstrating, in the first place, that he or she has "standing to sue." Over the past years, the U.S. Supreme Court has increased the requirements for environmental plaintiffs to show their standing to sue, and it has been "justified by concerns over deterring frivolous litigation, maintaining the integrity of the adversarial system, and preserving the separation of powers between the judicial and the executive branches."³⁰

²⁸ Summary judicial proceeding to challenge administrative decisions.

²⁹ DANIEL M WARNER, *The Legal Environment of Business* 116 (The Dryden Press-USA) 1992.

³⁰ JON OWENS, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*,

Nevertheless, recently, the Supreme Court has given a lift to enforcement of environmental law in deciding *Friends of the Earth Inc. v. Laidlaw Environmental Services Inc.*³¹ The result was a 7 to 2 decision that sends a powerful message: citizens affected by pollution can resort to court and stop that pollution, and once they get there, they do not lose their standing easily. The case dealt with a wastewater treatment plant that had been dumping pollutants into the North Tyger River in South Carolina. Although there was evidence that Laidlaw, the owner of the plant, was violating federal law, no person had been actually harmed by the pollution. A group of citizens brought a lawsuit claiming that they were injured because they had not used the river for fishing or other recreation activities as a result of their belief that it was polluted. The first question was whether such an allegation was enough to support standing to sue, or whether a plaintiff needed a more direct injury. Justice Ginsburg delivering the opinion of the Court asserted that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area" and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity.³² She also held that Article III main purpose "is not injury to the environment but injury to the plaintiff," that is why while "focusing properly on injury to the plaintiff"³³, the District Court found that FOE had demonstrated sufficient injury to establish standing.³⁴ After analyzing the testimonies, Justice Ginsburg sentenced that: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity."³⁵

<http://www.law.gwu.edu/stdg/envlwr/owens7-2.htm>

³¹ 528 U.S. 167, 120 S.Ct. 693 (2000). No. 98—822. Argued October 12, 1999—Decided January 12, 2000.

³² *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). See also *Defenders of Wildlife*, 504 U.S., at 562—563.

³³ "For example, [Curtis] he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw' s discharges. *Ibid.* (Exh. 43, at 52—53; Exh. 44, at 33)."

³⁴ App. in No. 97—1246 (CA4), pp. 207—208 (Tr. of Hearing 39—40 (June 30, 1993)).

³⁵ *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). See also *Defenders of Wildlife*, 504 U.S., at

There is no opposition between *Lujan v. National Wildlife Federation*³⁶ and *Friends of the Earth Inc. v. Laidlaw Environmental Services Inc.*³⁷ In *Lujan v. Defenders of Wildlife*,³⁸ U.S. Supreme Court held that “to satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.³⁹” But in *Friends of the Earth Inc. v. Laidlaw Environmental Services Inc.*, “the affidavits and testimony presented by FOE in this case assert that Laidlaw’s discharges, and the affiant members’ reasonable concerns about the effects of those discharges, directly affected those affiants’ recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere “general averments” and “conclusory allegations” found inadequate in *National Wildlife Federation*.⁴⁰”

And both of them are different from *Los Angeles v. Lyons*⁴¹ in which, according to the sentence, “a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a

562—563.

³⁶ 497 U.S. 871 (1990).

³⁷ 528 U.S. 167, 120 S.Ct. 693 (2000). No. 98—822. Argued October 12, 1999—Decided January 12, 2000.

³⁸ 504 U.S. 555, 560—561 (1992).

³⁹ *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977).

⁴⁰ *Id.*, at 888.

⁴¹ 461 U.S. 95 (1983)

realistic threat from the policy.⁴²

The second question in *Friends of the Earth Inc. v. Laidlaw Environmental Services Inc.*, is closely connected with the doctrine of mootness, that is to say "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."⁴³ But, according to Judge Ginsburg "if mootness were simply 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review' could not exist." The Clean Water Act, the Clean Air Act, as well as other environmental measures of the 1970's, authorized individuals to act as "private attorneys general" and collect fines on behalf of the of the federal treasury. The U.S. Court of Appeals for the 4th Circuit held that once the district court issued an injunction and the facility was brought into compliance, and the plaintiffs only asked for money, there was no actual controversy between the parties to the litigation anymore. But the Supreme Court disagreed, and Justice Ginsburg considered that the fear of pollution that limited people's recreational use of the river gave them the right to sue. And regarding the fines, Justice Ginsburg stated that they have a "deterrent effect," making it less likely that the citizens would be harmed by pollution in the future. Finally, communities affected by polluters can have access to the courts to seek relief and enforce environmental laws.

c) The Argentine case:

In Argentina, before the 1994 Constitutional Amendment, the "amparo"⁴⁴ was regulated by Act 16.986.⁴⁵ Article 1 established that the "amparo lawsuit will be permissible against all act or omission of public authority that, actually or imminently, injures, restricts, alters or threatens, with abuse or manifest illegality, the rights or guarantees explicitly or implicitly recognized by the National Constitution, except individual freedom protected by *habeas corpus*."

⁴² 461 U.S., at 107, n. 7.

⁴³ *Arizonans for Official English*, 520 U.S., at 68, n. 22 (quoting *United States Parole Comm' n v. Geraghty*, 445 U.S. 388, 397 (1980), in turn quoting MONAGHAN, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)).

⁴⁴ Summary proceeding or shelter action.

⁴⁵ Ley 16.986, sanctioned: October, 18,1966, B.O. October 20,1966.

That act regulated standing to sue by means of a negative requirement or a negative test, so that the *amparo* lawsuit would be formally inadmissible whenever "a) Judicial or administrative resources or remedies exist that allow to obtain the protection of the right or questioned constitutional guarantee; b) the opposed act emanated of an organ of the Judicial Power or has been adopted by express application of law 16.970⁴⁶; c) the judicial intervention jeopardizes directly or indirectly the regularity, continuity and effectiveness of the benefit of a public service, or the unfolding of essential activities of the State; d) the determination of the possible voidable of the act requires a greater amplitude of debate or test or the declaration of unconstitutionality of laws, decrees or ordinances; e) the lawsuit has not been brought within fifteen (15) working days from the date in which the act was executed or had to take place."

Later on, the 1994 Constitutional Amendment brought about article 43 (1) to broaden the essence of the standing inquiry, connected with legal enforceable rights, to "*any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality,*" as well as "any form of discrimination, art. 43 (2)." An regarding the legitimate interest, the Argentine National Constitution, article 43 (2) ruled that to determine who is the proper litigant regarding "*This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the Ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization.*"

According to former Supreme Court Judge Rodolfo Barra⁴⁷, regarding the legitimate interest issue, "the *amparo* can be filed by the "affected" one, the physical or legal person who ... can invoke the differentiated damage. In addition to the "affected or damaged" one, the norm incorporated all those who "are equally legitimized in regard to the special nature of right or guarantee protected, by virtue of which ... it has a collective incidence." For example, if the protected right is the atmosphere, the one

⁴⁶ Law 16970, October 10, 1966, National Security Law, "Ley de Defensa Nacional y Sistema Nacional de Planeamiento y Acción para la Seguridad".

⁴⁷ RODOLFO BARRA, *El amparo en la Constitución reformada: la legitimación para obrar* 9, in *Revista de Derecho Argentina del Regimen de la Administración Pública*, Nro. 200, Mayo 1995.

really protected is the human being and not the atmosphere, then the offense "can have a generalized and expansive effect". For these cases, the norm created two special standing-bearers: the Ombudsman (article 86 National Constitution) and the protective associations. But this special standing to sue "must be interpreted with a restrictive character, in the sense that it cannot replace the direct holder of the offended right, when a right of collective incidence is at stake, and the holder of the same right can file a lawsuit by himself."

So the problem to determine who has a legitimate interest is connected with the expression "affected" or "damaged party," as it has no clear juridical definition mainly regarding environmental issues.

It is also important to point out, that although the National Constitution included the "*associations which foster such ends*," all of them have an important limitation as they must be registered, and up to now no law determining the requirements and the creation of a register for environmental organizations has been enacted by Congress. But, at present, many judges do not accept such Constitutional limitation due to Legislative Branch absence of specific regulation, and according to Law 16.986, article 5, that allow associations whose statutes are not against public law aims, standing to sue, consequently, such associations can be considered a proper litigant. In fact, that was a way of denying people access to justice forged by American Human Rights Convention article 25, as it was stated *ut supra*. According to the Inter-American Court: "64. Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such away as to negate its effect or lead to a result that is manifestly absurd or unreasonable," and "66. A remedy must also be effective --that is, capable of producing the result for which it was designed."⁴⁸

In fact, there is collision between past legislation and present constitutional principles. So some judges still sentence *amparos* pursuant to Act 16.986 and its special requirements, and others consider more important constitutional principles and think Act 16.986 has been partially repealed by the 1994 Constitution, article 43. For

⁴⁸ IA Court HR, Case Velasquez Rodriguez, sentence of July 29th, 1988, series C, n^o. 4; paragraphs 64 and 66.

example, Federal Civil and Commercial Appeal Court,⁴⁹ *majority opinion*, maintained that they consider that the *amparo* is an exceptional proceeding just for situations of essential necessity, and that the constitutional amendment "is limited to broad extension of already protected rights and guarantees...", "to innovate in the matter of having standing to sue and to anticipate the possible possibility of declaration of unconstitutionality of..." the norm that allows the harmful act." In addition, they held that necessity of regulation that is not included within the constitutional text, that "*lex posterior generalis* does not repeal special existing law, unless mutual incompatibility among them exist. That a term for the exercise of the action must exist since the same one cannot be limited to the discretion of the judge ... , in the present case the term of lapsing must be applied that contemplates to law 16,986 in his art. 2º, Inc. e)."

Although judges do not agree on the standing to sue issue, there is a leading case, the so-called Schroder case⁵⁰, in which it was considered that the litigant had a legitimate interest because, at the same time, he was a neighbour of 3 de Febrero District and a member of an ecological organization. The Federal Court of Appeals for Administrative Litigation sentenced that arguments connected with the plaintiff's lack of standing to sue could not be accepted, as "its quality of neighbour of the Province of Buenos Aires, was not denied in the reply of fs. 81/92." Moreover, the Appellation Court considered that the National Constitution Amendment turned the lawsuit formally admissible as "it consecrated specifically that all the inhabitants enjoy the right to a healthy atmosphere, balanced and apt for human development and so that the productive activities satisfy the present necessities without jeopardizing those of the future generations; and they must preserve it (art. 41, National Constitution). On the other hand, it established a special a procedural protection ... by means of the *amparo* that ... the Constitution confers."⁵¹

⁴⁹ Case Capizzano de Galdi, Conception c/ Instituto de Obras Sociales, CNFed. Civil and Com., June, 3. 1999.

⁵⁰ Case Juan Schroder, CN Cont. Admi. Fed. , sala III , setiembre 8 - 1994, *El Derecho*, Diciembre 14, 1994 , 4-8. I. *See also*, case Seiler, M. L. c.MCBA s/amparo, CNCiv., sala D, August 28,1995, *El Derecho*, November, 22, 1995.

⁵¹ Case Juan Schroder, CN Cont. Admi. Fed. , sala III , setiembre 8 - 1994, *El Derecho*, Diciembre 14, 1994 , 4-8.

It specifically determined that according to art. 43 of the Constitution, regarding the protection of the rights connected to the atmosphere, the affected one could bring a lawsuit. And such a condition is properly fulfilled "with the personal and direct interest that, in the case, the plaintiff shows." Mainly, considering that he just wanted judges to declare the administrative decision under analysis null and void.

In the above mentioned leading case there was another important decision connected with other administrative proceedings that are supposed to be fulfilled before reaching the judicial court's jurisdiction under Act 16.986.⁵² But it was sentenced that whenever the injury has been performed with abuse or manifest illegality such legal requirements are incompatible with Constitutional principles. "In effect, its text establishes that the expeditious and fast action will be available whenever there does not exist any other more suitable judicial proceeding."

Other Appellation Courts and judges also accepted such a criteria; for example, in 1998, San Isidro Appellation Courts⁵³ decided that the plaintiffs could bring such action as their intention was to safeguard natural resources and the environment which are collective interests as well as the public health and the environment. However, that same Court denied the plaintiffs the right to plead for an immediate provision of water to the neighbors affected by its contamination, as such requirement must be carried out by the actually harmed ones. In a similar way the Province of Mendoza High Court considered that whenever public interests are being affected, the question of standing admits more flexible guidelines.⁵⁴

In a different way, Province of Salta Federal Appellation Court sentenced⁵⁵ that to

⁵² Act 16.986, sanctioned: October, 18, 1966, B.O. October 20, 1966. Article 2. - The shelter action will not be permissible when: a) Judicial or administrative resources or remedies exist that allow to obtain the protection of the right or in question constitutional guarantee;"

⁵³ Case Fundación Pro-Tigre y Cuenca del Plata s/Amparo, C C 1^aCC de San Isidro, Sala I, June 9, 1998, *El Derecho* N° 9569 del 21/8/98.

⁵⁴ Case Unión del centro Democrático y otros c. Gobierno de la Provincia de Mendoza " , Province of Mendoza Superior Tribunal , May 4, 1989, Dra. Kemelmajer de Carlucci, majority opinion , *El Derecho*, 133-714.

⁵⁵ Case Pérez Alsina , Juan c. Estado Nacional , Poder Ejecutivo , Province of Salta Federal Appellation Court , November 7, 1994, *La Ley*, 1995-A-388.

define the expression "affected" or "damaged party" is one of the most difficult issues to put into effect by National Constitutional, article 43 (2). To file an *amparo* lawsuit it is not enough to be "a simple citizen," that is to say, it is not enough to bear a simple interest. "In effect, the lawsuit authorized by art. 43 CN, ..., must be filed by the 'affected one.' The *amparo* lawsuit is an exceptional remedy for protecting the human rights that can only be brought in a case of manifest and direct offence by material acts and in the absence of other legal proceedings. In all the cases, it is required that the plaintiff hold the right that he or she invokes and, fundamentally, it is required to show a material damage and burden, present or imminent of false repair." Anyone who brings a lawsuit "must do it in search of the recognition of his or her own right, whose violation affects it in a sufficiently direct way."

d) Partial conclusion regarding standing:

So there is no present Supreme Court sentence regarding standing to sue in environmental cases, even though the National Constitution defines, up to certain extent, who are the ones who have standing in such cases.

III. The judicial decision and its effects:

According to the Argentine Constitution, judicial decisions are supposed to decide on a case, a *judicial case*⁵⁶ or *controversy*. This means, in rough terms, that the effects of the judge's decision reach only the parties involved in the case.

Nevertheless, after some empirical exposure to recent precedents, what could be said is that the latter seem to adopt a different criteria, which makes us wonder whether the above mentioned rule has been somewhat repealed or modified, regardless of the Constitutional text.

Therefore, this section aims at analyzing the precedents that apply the constitutional rule that establishes the case or controversy requirement so as to restrict the effects of the judicial decision, and the new precedents that seem to widen its effects.

a) The background:

The classical rule governing judicial decisions, as we have seen, establishes that the decision reaches the parties involved in the case. Nevertheless, as it has been pointed out, two judicial decisions seem to adopt a different view. We are referring to two

⁵⁶ Argentine Constitution, Article 116.

leading cases, "Ekmekdjian"⁵⁷ and "Monges,"⁵⁸ that seem to adopt criteria different from the one established in the Constitution.

"Ekmekdjian"⁵⁹ deals with a lawsuit that was filed by a citizen aiming at getting a TV show conductor to broadcast, during his TV show, a letter. During the previous TV show, a writer that had been invited to participate in the program had delivered some offending statements affecting the Virgin Mary and her Son. Therefore, the plaintiff wrote a letter answering back the writer's offensive speech and filed a lawsuit to have it read aloud during the program so that the audience could get to know about it. The Supreme Court decided that the letter should be read during the program and regarding the standing of the plaintiff that Court understood that the plaintiff had filed the lawsuit representing the interest of all those that could have been felt offended by the writer's statements. The Court said that "once the right to reply has been exercised, its redressing effects reach, undoubtedly, the set of individuals that could have been equally offended by the same grievance, in accordance with the conditions set by the legislator—or by the judge due to the legislator's omission...- in order to avoid the multiplication of letters of reply generated by the right that is here fore recognized... There is, on the one hand, the right of reply of the one who aims at the defense of his own exclusive right; and, on the other—exemplified by this case- there is the right of reply of the one who adopts some kind of a collective standing... [and] the one who broadcasted the offense may reject identical claims by demonstrating that the redressing answer has been already broadcasted".⁶⁰

"Monges"⁶¹ also shows a judicial trend towards widening the effects of the judicial decision. In this case, the plaintiff, a university student, wanted a rulemaking decision to be interpreted in order to know whether she had to take and pass an introductory course in order to enter the School of Medicine, or not. The Supreme Court finally

⁵⁷ Fallos 315: 1492 (1992).

⁵⁸ Fallos 319: 3148 (1996).

⁵⁹ Fallos 315: 1492 (1992).

⁶⁰ Fallos 315: 1492 (1992), pp. 1517-18. See BIANCHI, ALBERTO B., "Un fallo sobre derecho de réplica que pone en mora al Congreso", *El Derecho*: 148-339.

⁶¹ Fallos 319: 3148 (1996).

provided the interpretation that was sought, and decided that the solution, in the case, would reach all the students who were in a position similar to that of the plaintiff. Later, this approach has been adopted by Federal Court of Appeals for Administrative Litigation in "Blas" ⁶².

It is important to point out that, in cases involving environmental conflicts, these two judicial precedents, issued by the highest court in the country, could make it possible to obtain a solution reaching not only the specific parties involved, but also third parties that may have been affected.

"Ekmekdjian" ⁶³ also represents an important change in individual standing to sue which could shed light in the issue of environmental judicial decisions and their effect. In this case, the plaintiff was an individual—an attorney—who had been offended, and the solution reached others who may have also been offended. A Federal Court of Appeals for Administrative Litigation precedent follows this trend. We are referring to Schroder ⁶⁴, in which a neighbor challenged an administrative decision by which a hazardous substances processing plant would be erected. The plaintiff understood that the plant could affect him, an interpretation the Court of Appeals welcomed, consequently staying the project. It is worth pointing out that the plaintiff had not demonstrated how he would be affected by the erection of the plant. What cannot be denied is that the judicial decision meant a benefit not only for the plaintiff but also for the other neighbors.

Another important case in which an individual standing meant general effects of the sentence is "Labaton v. Estado Nacional" ⁶⁵. In this case the plaintiff was a handicapped attorney who could not access the courts' premises because the stairs meant a crucial obstacle to her wheelchair. The judicial decision of the first instance court for administrative litigation, affirmed by the Federal Court of Appeals for Administrative Litigation ⁶⁶ made the Judiciary provide special accessing places for

⁶² Sentence dated Nov. 27, 1997, *La Ley* 1998-A, 287, 289.

⁶³ Fallos 315: 1492 (1992).

⁶⁴ Schroder c. Estado Nacional-Secretaría de Recursos Naturales, CCAF. Sala III, Sept. 8, 1994, *La Ley* 1994-E, 449.

⁶⁵ JCAF No. 6, Sept. 9, 1996, *La Ley* 1998-F, 346.

⁶⁶ CCAF, Sala V, Sept. 25, 1996, *La Ley* 1998-F, 352.

wheelchairs to access the buildings where the courts are located. Obviously, in this case, the benefits of the judicial sentence reach any person who moves around on a wheelchair. The same widened effects interpretation can be inferred from a case that involved the duty of the national government to erect a new theater every time an existing theater is torn down ⁶⁷, in the same place the old one was located, as well as from a case that involved the duty of the national government to spend public moneys on general interest expenditures and not on particular interest expenses aiming at pointing out the pros and successes of a particular officer (ex- President Menem) ⁶⁸. The current Supreme Court interpretation in cases in which individuals seek relief demonstrating a collective interest –so that the eventual decision reaches not only them but also the rest of the collective– can be summarized by pointing out what the Supreme Court recently stated in ADECUA ⁶⁹: [Article 43, National Constitution] provides standing to sue not only to the affected party (any member of the collective who has not been affected in his/her subjective rights) but also to the national ombudsman and the associations...”. ⁷⁰

Under this interpretation, environmental law cases could easily be given a liberal interpretation, so that the effects of the judicial sentence reach third individuals who did not take part in the particular case, neither as plaintiffs nor as interested third parties from the civil procedures point of view.

b) A clear trend, and its exact boundaries:

When thinking of the effects of the judicial decisions, it is inevitable to consider that, regardless of the Constitutional prescription, different sources of law have established what could be called “the erga omnes effects of a judicial decision”. This means that by means of certain precedents and/or legislative rules, we could detect a specific trend: the widening of the effects of the judicial sentence.

First, we could consider the U.S. precedents regarding this issue. Until the '30s, as Tribe ⁷¹ points out, the rule consisted in understanding that an unconstitutional rule

⁶⁷ Gambier c. Ministerio de Economía y Obras y Servicios Públicos, CCAF, Sala II, June 18, 1998.

⁶⁸ Gambier c. Poder Ejecutivo Nacional, CCAF, Sala II, Aug. 19, 1999, *La Ley* 1999-E, 624.

⁶⁹ Adecua c. Poder Ejecutivo Nacional, JCAF No. 1, Mar. 18, 1999, *La Ley* 1999-C, 192.

⁷⁰ *La Ley* 1999-C, 201.

⁷¹ TRIBE, LAURENCE H.: *American Constitutional Law*, 3rd edition, Foundation Press, New York, 2000, p. 214.

was absolutely inapplicable ⁷². After the '30s, the rule would consist in considering that when a court declares that a certain rule is contrary to the Constitution, that decision is adjudicative, i.e., restricted to the specific case and the parties involved in it ⁷³. Nevertheless, the two doctrines seem to co-exist, and this is illustrated by precedents that interpret that the rule under examination is unconstitutional, ..., or unconstitutional as applied to particular facts ⁷⁴. We will see below that, under a different name, the Argentine Supreme Court has adopted such doctrines.

Second, we have to consider the doctrine of stare decision. This doctrine roughly says that not only does the Supreme Court have to follow its own precedents, but also the lower courts have to follow the Supreme Court's precedents. The Highest Court precedent "Cerámica San Lorenzo" can illustrate this doctrine ⁷⁵. In this sentence, the Court said that "when the Court of Appeals for Penal Economic Litigation applied Act 12.906, art. 19, it ignored the Supreme Court interpretation of that rule in the precedent registered as Fallos: 303:917... Such a circumstance is enough to overrule the Court of Appeals decision under analysis because, even if the Supreme Court decides the specific cases subject to its examination, and its decisions are not binding in similar cases, the lower courts have the duty to adapt their decisions to the former. Under this doctrine, and under the precedent registered as Fallos: 212:51 and 160, it follows that the lower courts decisions that do not follow the Supreme Court precedents lack support if they do not provide new reasons to justify leaving aside the Courts interpretation" ⁷⁶. From the cost-benefit point of view, this doctrine would seem to be plausible in the case of environmental litigation because it would cut down litigation costs by pushing the Administration towards paying heed to the Supreme Courts interpretation in a certain field.

Third, let us point out that, in certain cases, it is the legislator himself who has established that widened effects of a Supreme Court decision. This is the case of social security decisions under Act. 24.463, art. 19⁷⁷, which prescribes that "the final

⁷² Norton v. Shelby County, 118 U.S. 425 (1886), among others.

⁷³ Shepherd v. Wheeling, 4 Southeastern Reporter 635, 637 (1887), among others.

⁷⁴ DORF, MICHAEL C.: *Facial Challenges to State and Federal Statutes*, Stanford Law Review, Vol. 46, pp. 235-295 (1994).

⁷⁵ Fallos 307: 1094 (1985).

⁷⁶ Fallos 307: 1094 (1985), 1096-1097.

⁷⁷ The act can be found at www.mecon.gov.ar, Infoleg link.

decision issued by the Federal Court of Appeals for Social Security Litigation can be appealed before the Supreme Court of Justice of the Nation by means of an ordinary appeal, regardless of the amount involved. The Supreme Court of Justice decisions will be binding for the lower courts in similar cases". In the case of environmental litigation, such a legislative prescription does not exist, which diminishes the possibility of widening the effects of the judicial sentence.

Fourth, let us consider the Supreme Court doctrine of "formal unconstitutionality", which was suggested supra when explaining the contrast between unconstitutionality on its face and unconstitutionality as applied to the facts. That doctrine can be exemplified by means of two argentine precedents "Nobleza Piccardo S.A. v. Estado Nacional-DGF"⁷⁸ and "Fayt v. Estado Nacional"⁷⁹. In the former, "Nobleza Piccardo S.A. v. Estado Nacional-DGF"⁸⁰, the Court analysed a law that had been passed by means of a procedure that was different from the one established in the Constitution and decided that there had been "... a manifest detour from the minimum unavoidable requirements for making a law because the bill had not been passed by both Houses and, therefore, it could have reached the Executive for its examination and promulgation". In the latter, "Fayt v. Estado Nacional"⁸¹, the Supreme Court faced the hard task of analyzing the constitutionality of a constitutional amendment that had taken place in 1994. The specific amendment added a new requirement for federal judges so that after the age of 75 they would need a new Senate consent to remain in their seats. Justice Fayt sought -and obtained- declaratory relief aiming at the nullification of that constitutional amendment on the basis that the specific amendment had not been included in the congressional act that had declared the need for an amendment. The effects of the decision in this case go clearly beyond the particular case because the age-requirement amendment would be found unconstitutional not only for the plaintiff but also for any federal judge in the same nearing the age of 75. The amendment of 1994 has introduced several environmental issues in the constitutional text, and it goes without saying that if they happened to be challenged under grounds similar to Justice Fayt -i.e., that they were not included in the law that had declared the need for a constitutional amendment- they would be nullified reaching third parties far beyond the particular case.

⁷⁸ Fallos 321: 3487 (1998).

⁷⁹ Fallos 322: 1616 (1999).

⁸⁰ Fallos 321: 3487 (1998).

⁸¹ Fallos 322: 1616 (1999).

In the fifth place, we could consider the Supreme Court interpretation in the case of unconstitutional rulemaking or rules issued by the Administration. The two doctrinaire positions can be described as follows: Cassagne⁸², Gordillo⁸³, Grecco⁸⁴, Hutchinson⁸⁵, and García Pullés⁸⁶ think that an unconstitutional administrative rule could be said to have effects reaching not only the parties involved but also third parties; on the other side, Mairal thinks that the effects should be restricted to the particular case and the particular parties involved⁸⁷. The issue can be illustrated by means of a Supreme Court decision –“Defensor del Pueblo de la Nación c/ Estado Nacional”⁸⁸– in which the National Ombudsman challenged the administrative rule that established that water consumption registered in apartment buildings could be metered and charged accordingly⁸⁹. The Supreme Court decided against the validity of the administrative rule. Going beyond the particular solution arrived at by the Supreme Court, what can be questioned today is whether the Court decisions reaches all water consumers or not;

⁸² CASSAGNE, JUAN CARLOS, “Sobre la impugnación de reglamentos y demás actos de alcance general (en la L.N.P.A. y en el R.N.L.P.A.)”, in *El Derecho* 131-911; by the same author, “Acerca de la eficacia erga omnes de las sentencias anulatorias de reglamentos”, in *El Derecho* 185-703.

⁸³ GORDILLO, AGUSTÍN, “Acto, reglamento y contrato administrativo”, *Revista Argentina de Derecho Administrativo*, Nro. 3, p. 15, 24.

⁸⁴ GRECCO, CARLOS M., *Impugnación de disposiciones reglamentarias*, Abeledo Perrot, Buenos Aires, 1988.

⁸⁵ HUTCHINSON, TOMÁS: *Ley Nacional de Procedimientos Administrativos*, Astrea, Buenos Aires, 1985, T. I, p. 452.

⁸⁶ GARCÍA PULLÉS, FERNANDO: “Efectos de la sentencia anulatoria de un reglamento. Perspectivas procesales, constitucionales y de derecho administrativo”, in *La Ley* 2000-C, 1168.

⁸⁷ MAIRAL, HÉCTOR A.: *Control Judicial de la Administración Pública*, Depalma, Buenos Aires, 1984, T. II, pp. 897/902; by the same author, “Los efectos de la sentencia que acoge la impugnación de un reglamento”, en *Revista de Derecho Administrativo*, Año I, Nro. 2, pp. 223/300; by the same author, “Los efectos de las sentencias de la Corte Suprema de Justicia de la Nación”, in *El Derecho* 177-795.

⁸⁸ Fallos: 323: 2519 (2000). Also analyzed in CACCIOLATO, MIRTA y CONSTANTINO, JUAN, “Al César lo que es del César (y al consorcio lo que es del consorcio) – El caso de los medidores de agua en edificios afectados a propiedad horizontal”, in *Jurisprudencia Argentina*, 2001-I, p. 62; the sentence is published in *El Derecho* 30/11/2000.

⁸⁹ Vide SACRISTÁN, ESTELA B., “El Principio de Proporcionalidad de las Tarifas y la medición del consumo en los servicios públicos”, in *La Ley* 2001-E, 23/31.

ally, whether it reaches not only residential consumers who live in apartments, but also non-residential consumers located in apartments. The rule that fostered this could be subject to two different interpretations: on the one hand, the Ombudsman could have been filing the lawsuit on behalf of *all* water consumers of the city, in which case the sentence would reach them all; on the other hand, he could be representing the interest of all the *residential consumers* that were involved in the particular case, in which case the decision would not reach the non-residential consumers. By reading the Supreme Court decision it is clear that the only consumers affected by the sentence are the residential ones: The Supreme Court considered that the administrative rule in question –Res. ETOSS 8/94, pursuant to the Water Act 13.577, art. 72, as accepted in Act 20.324– ruled about the consumption on residential units, *in the houses or apartments*⁹⁰. Therefore, an interpretation that proposed that all consumers are included in the effects of the Supreme Court decision would be contrary to what it specifically takes into consideration.

In the sixth –and last– place, let us consider some Supreme Court decisions that, due to standing reasons, seem to widen the effects of the sentence. In the case of the National Ombudsman, unfortunately, two important cases involved the reaffirmation of the administrative rule –“Defensor del Pueblo”⁹¹ regarding the telephone rates renegotiation of 1997, and “Aeropuertos”⁹² regarding the privatization of the airport services– and, therefore, we cannot get to infer what would have happened with the effects of the judicial decisions if the administrative decisions had been rejected, nullified or revoked in the judicial scenario. Besides, in both decisions nothing was said as to the Ombudsman’s standing to sue. Anyway, the Supreme Court has decided on the issue of the National Ombudsman’s standing to sue in “Defensor del Pueblo”⁹³, stating that if an individual showing an interest seeks administrative or judicial relief after that National Ombudsman files the lawsuit, the latter’s role comes to an end⁹⁴. The associations and the effects of the judicial decisions in the cases that involve them, as plaintiffs have also been object of constitutional interpretation. In “AGUEERA v. Buenos Aires”⁹⁵ the Court admitted the association’s standing to sue and the

⁹⁰ Fallos: 323: 2519 (2000), cons. 12/15.

⁹¹ Defensor del Pueblo de la Nación c. Poder Ejecutivo Nacional, Fallos 321: 1187 (1998).

⁹² Jorge Rodríguez – Jefe de Gabinete, Fallos: 320: 2851 (1997).

⁹³ Defensor del Pueblo de la Nación c. PEN (Decreto 1517/98), Fallos 323: 4098 (2000).

⁹⁴ Defensor del Pueblo de la Nación c. PEN (Decreto 1517/98), Fallos 323: 4098 (2000).

⁹⁵ Fallos 320: 690 (1997).

widened effects of the sentence could be inferred from it, but it is important to point out that the creation of the particular association had been approved of my means of a presidential decree. In that case has been recognizes association standing –under art. 43, National Constitution- is “Asociación Benghalensis v. Ministerio de Salud y Acción Social”⁹⁶, in which the national government was forced to provide medical assistance, medical treatment and free medicines to AIDS patients.

c) Partial conclusion:

In the case of environmental litigation, the judicial precedents that have been mentioned so far do not show a clear Supreme Court trend towards widening the effects of the judicial decision in order to reach third parties. The only case in which the matter involved was absolutely environmental, Schroder⁹⁷, and in which the effects of the sentence reached third individuals alien to the particular controversy, was issued by the Federal Court of Appeals for Administrative Litigation.

An empirical analysis of the precedents, including the Supreme Court ones, shows that, in certain cases, the solution has reached far beyond the particular case. Let us just consider “Defensor del Pueblo”⁹⁸, in which an increase in the telephone rates was affirmed, reaching the telephone users of all the country, or even the case of the water meters⁹⁹, which meant a –doubtful- benefit for all residential consumers of the metropolitan area.

Nevertheless, it would be too early to predict what the Supreme Court would decide on the issue of the effects of the sentence if an environmental law case reached it.

The National Constitution seems to admit collective standing to sue, and the consequent judicial decisions cannot be said to have restricted effects, given the case or controversy is demonstrated. Different laws seem to widen the effects of certain Supreme Court decisions.

But behind all these interpretations, there is a constitutional prescription –article 116-

⁹⁶ Fallos 323: 1339 (2000).

⁹⁷ Schroder c. Estado Nacional-Secretaría de Recursos Naturales, CCAF. Sala III, Sept. 8, 1994, *La Ley* 1994-E, 449.

⁹⁸ Defensor del Pueblo de la Nación c. Poder Ejecutivo Nacional, Fallos 321: 1187 (1998).

⁹⁹ Fallos: 323: 2519 (2000).

that says that the federal Supreme Court decides cases or controversies; it does not say that the Supreme Court –and lower federal courts- legislate.

Finally, there is the last resort argumentation: the Supreme Court itself, as the highest federal court, whose decisions are binding upon lower courts, could widen the effects of its own judicial decision for litigation cost cut down reasons. This is crucial in the field of environmental litigation because environmental decision inevitably affect large portions of the community, and it would be a considerable cost for the government to handle thousands of similar cases relating to the same environmental administrative rule.

IV. Final remarks:

The effectiveness of environmental Constitutional principles depends to a large extent on all measures necessary to ensure the effective protection of the rights, but also on legislative and administrative measures to eliminate obstacles, gaps, and facilitate access to justice. As Argentine Constitutional principles states standing to sue must be considered in a broad and not narrow sense in order to ensure the human right of the individual to access justice in environmental cases. And moreover, Argentine Administrative Procedure Act should be reformed according to 1994 Constitutional principles in order to include the regulation of the “damaged ones” to define it properly according to so-called “diffuse interests,” a new category of human rights that did not exist in previous traditional Constitutional Law principles. In a similar way, the environmental associations should be allow to bring lawsuit even though no register has been created by the Legislative Branch, and also Supreme Court should settled broad guidelines principles in standing to give people real access to justice.