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THE RESTORATION OF DEMOCRACY AND ENVIRONMENTAL LAW IN ARGENTINA

DANIEL HORACIO LAGO*

SUMMARY

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I. INTRODUCTION

October 1983 marked the beginning of a new era in Argentine history. It was a time of restoration and joy. After eight years of military dictatorship, a freely elected government set out to rebuild institutions and reinstate liberties.¹ At the same time, however, the new political openness brought by the restoration of democratic freedoms carried with it a hurtful realization: Argentines learned that their country, the land they had long been taught was endowed with limitless natural resources, was mired in the worst economic and social crisis of its history.

The task ahead was monumental, its proportions well beyond any previous expectation. The depth of the crisis and the gravity of its effects had been meticulously concealed from the public conscience. This abrupt and hurtful realization, however, prompted deep introspection as well as vigorous action. The time was ripe for the emergence of a new civic awareness; there grew a sense of the importance and utmost value of each old "liberty" newly regained. The full effectiveness of the judicious old Constitution of 1853 came to be regarded as a symbol of the ultimate victory of democracy. It was, after all, the Constitution's Preamble which presidential candidate Raúl Alfonsín had recited

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¹ In 1976, the army took over the government from President María Estela Martínez de Perón, the wife of the late President Juan Domingo Perón. See J. CORRADI, *THE FITFUL REPUBLIC: ECONOMY, SOCIETY AND POLITICS IN ARGENTINA* 115 (1985). Eight years later, in 1983, the people of Argentina elected Raúl Alfonsín, the leader of the Radical Party (Partido Radical), as President of the Republic. See Wynia, *Democracy in Argentina*, 84 *CURRENT HIST.* 53 (1985).

to his countrymen as a civic ritual at the end of each one of his speeches along his campaign trail.

Argentines revisited democratic notions long deprived of any vital meaning and cautiously dared to explore new avenues for their personal and collective fulfillment. Human rights became the focus of an intense social and legal debate. Environmental alertness was a core aspect of this new sentiment. Though their country was bogged down in economic underdevelopment and lay burdened by the legacy of a huge external debt, the more progressive forces at work in the new Argentine democracy ventured to devise a humane path to development.

This article reviews this ongoing process. Part II provides a background of the legal framework on environmental protection as it existed in 1983, and discusses its structure in light of its civil law roots. In particular, it examines the areas of nuisance and trespass, which, as regulated in the Argentine Civil Code amended in 1968, are the building blocks of the initial legal response to the pressing demands for a safer environment. Parts III and IV highlight the significant contribution made by case law to the development of Argentina's new environmental law since 1983. In addition, these sections show that, contrary to an extended misconception, the judiciary plays a vital role in the operation of civil law legal systems. Part V examines the drive towards building environmental safeguards into state (provincial) constitutions passed since 1983. Finally, Part VI concludes by briefly discussing a provision in a bill awaiting consideration by the Senate which, according to its drafters, is intended to create a broad individual right of action against environmental violations.

II. THE EARLY ORIGINS OF ARGENTINA'S NEW ENVIRONMENTAL LAW

A. *The Civil Code*

In the late nineteenth century, pursuant to the authority granted by the 1853 Constitution, the Federal Congress passed the two main bodies of statutory rules in Argentine private law: the Civil Code and the Commercial Code. The Civil Code contained a number of provisions aimed at regulating conflicts between neighboring land users, dealing with such conflicts on two different levels. On the one hand, in the field of tort liability, Art. 1133 - invoking a rebuttable presumption of fault - rendered the owner of an interest in land liable to his neighbor for the causation of certain damages or "inconveniences" (e.g. noxious odors or fumes, leakages, etc.). While Art. 1133 spelled out a list of such "inconveniences," its introductory sentence led to the understanding that the enumeration was merely illustrative.²

² J.J. LLAMBIAS, *TRATADO DE DERECHO CIVIL - OBLIGACIONES* § 2602, at 545 (Perrot [P.], Argen. 3d ed. 1976). The Earliest Argentine Records on environmental matters can be found in the *Leyes de Indias*, where principles of wise forestry were established. The Spanish kings showed a particular interest in nature and in the study of the flora and fauna of the New World. See

On the other hand, among the restrictions the Code placed on dominions, which was the broadest and strongest interest in land it regulated, Arts. 2618 and 2619 imposed strict liability for damages caused to neighboring land users by the operation of factories. The literal wording of the provisions was confined to damages resulting from excessive noise. Case law, however, broadened its scope both to encompass other manners of invasion and to cover analogous sources of injury. Some courts provided injunctive relief, while the absence of any express statutory authorization for granting such relief led other courts to deny it, allowing instead only compensatory damages, which, in turn, Art. 2619 limited to the loss of value of the plaintiff's land.³

The interplay between both sets of rules was hardly clear.⁴ The language of the general introductory sentence of Art. 1133 could reasonably be construed to cover the factual hypothesis of Arts. 2618 and 2619. Furthermore, the regulation provided by each set of rules differed in many crucial respects. While Art. 1133 allowed the rebuttal of the legal presumption of fault it raised, Arts. 2618 and 2619 came to be viewed by scholars and courts as regulating a hypothesis of strict liability.⁵ Items of recoverable damage under Art. 1133 were not limited to the loss of value of plaintiff's property. Nor were standing to sue requirements under both sets of rules identical.

In 1968, Law 17.711 introduced a comprehensive reform of the Civil Code. It repealed Art. 1133 and amended the system of Arts. 2618 and 2619. In the view of the reform's drafter, repealing Art. 1133, and the specific illustrations it provided, was warranted by the introduction of a general rule of strict liability for damages resulting from the operation of hazardous instrumentalities.⁶ As a consequence of the repeal, actionable interferences with the enjoyment and possession of neighboring land came to be specifically regulated by the law of nuisance as it was amended by Law 17.711. Indeed, Law 17.711 reformulated the law of nuisance by repealing Art. 2619 and redrafting Art. 2618.⁷ The thrust of the reform was to do away with the limitations imposed by the language of the old text. Drawing on local precedents, as well as on Art. 844 of the Italian Code regulating the so-called

Rotman, *Environmental Law in the Argentine Republic*, in LEGAL PROTECTION OF THE ENVIRONMENT IN DEVELOPING COUNTRIES 335, 336 (1977).

³ 6 REVISTA JURÍDICA ARGENTINA - LA LEY (L.L.) 1089 (1937); 35 L.L. 121 (1944); 100 L.L. 84 (1960).

⁴ H. Lafaille, *Derecho Civil* 4, 2 TRATADO DE LOS DERECHOS REALES § 843, at 34, 35 (Ediar, Argen. 1944).

⁵ *Id.* § 844(C), at 37.

⁶ 2 G. BORDA, TRATADO DE DERECHO CIVIL - OBLIGACIONES § 1455, at 336 (P., Argen. 4th ed. 1976).

⁷ See M. Adroque, *Las Molestias entre Vecinos en la Reforma Civil (Ley 17.711)*, TEMAS DE DERECHOS REALES 65 (Plus Ultra ed. Argen. 1986).

"immissioni" (incorporeal invasions of land), and its doctrinal and judicial interpretation,⁸ Law 17.711 extended the scope of actionable violations to the causation of all manners of inconveniences exceeding the limits of what plaintiff may reasonably be required to tolerate. Mention of heat, odors, light, noise, smoke and vibrations was expressly declared to be merely illustrative.

The new rule prescribes a judicial balancing of the equities in order to determine whether the defendant's interference goes beyond what plaintiff may normally be required to endure. In making such a determination, the Court is to consider the following factors: a) the social utility of defendant's activity; b) the plaintiff's right to the normal use and enjoyment of his property; c) whether the plaintiff acquired his interest in the land after the defendant's polluting activities had commenced; and d) the respective condition of the plaintiff's and the defendant's lands.

If the nuisance is found to be actionable, the new Art. 2618 expressly empowers the Court both to allow the recovery of damages and to afford injunctive relief. Yet, if the Court finds, after balancing the equities, that the nuisance is actionable, but that enjoining the defendant's enterprise would be unreasonable, it may confine itself to awarding the plaintiff a compensation for the damage to be sustained in the future as a result of the judicially condoned continuation of the interference.

Beginning in the early eighties, doctrinal opinions turned their attention to Art. 2618 in an effort to utilize it in the then incipient struggle for a safe and healthy environment.⁹ The courts were faced with the limitations resulting from the undeniable affiliation of the rule to the ancient theme of conflicts between owners of interests in adjoining tracts of land. They had to acknowledge, albeit reluctantly, that the history, as well as the current structure of these mechanisms, rendered the opinions nearly incapable of being developed into environmental-protection tools.¹⁰ These studies, however, laid the groundwork for later judicial developments.

III. THE RESTORATION OF DEMOCRACY: A NEW CONCEPT OF HUMAN RIGHTS

In 1983, the advent of democracy signaled a formidable surge of legal research and debate in the field of human rights. Much of that effort was aimed at devising new legal instruments for the enforcement of human rights like freedom of speech, due process of law, etc. - all of which had long been part

⁸ I G. BORDA, *TRATADO DE DERECHO CIVIL - DERECHO REALES* § 490, at 399 (P., Argen. 1975).

⁹ T. Oneto, *El Artículo 2618 del Código Civil y la Tutela de la Salud*, 1982-A L.L. 941 (1982).

¹⁰ A. MORELLO & G. STIGLITZ, *TUTELA PROCESAL DE LOS DERECHOS PERSONALÍSIMOS E INTERESES COLECTIVOS* 93 (Platense ed. Argen. 1986).

of the cultural and legal tradition of Argentina. Enshrined in the 1853 Constitution, these rights had been affected, to varying extents, by recurrent interruptions of the democratic process that had plagued the country since 1930.

At the same time, the democratic restoration of 1983 afforded a unique opportunity to secure legal recognition for other rights newly articulated and growingly perceived worldwide as falling within the developing catalog of human rights: prominent among them was the right to a safe and healthy environment. This process of gradual recognition of environmental safety as an enforceable human right can be illustrated by a line of judicial decisions starting with a pioneering minority opinion delivered in 1977.

IV. ENVIRONMENTAL PROTECTION AND THE INFLUENCE OF THE COMMON LAW

A. Judicial Innovation and Procedural Constraints

In *Celulosa Argentina S.A. v. Municipalidad de Quilmes*,¹¹ decided on October 11, 1977 (that is, shortly after the 1976 military coup), the plaintiff, a corporation operating a plant in a heavily industrialized, densely populated area in the Province of Buenos Aires, sought to have the court declare that a certain local (municipal) tax was inapplicable to it. The factual basis contemplated by the municipal government in levying the tax was the taxpayer's use of the municipal sewer systems. The tax aimed at reimbursing the local government for the cost incurred in the operation of such service.

The plaintiff alleged that the tax was not applicable to its business, since discharge of its effluent into the Rfo de la Plata was conducted by means of channels built by the plaintiff within its premises, without resorting to the municipal sewer system. The plaintiff added, however, that the effluent from its plant were discharged without any previous treatment. Such an unnecessary and surprising description by the plaintiff of the condition of its effluent amounted to acknowledging that it knowingly and customarily violated a valid statute of the Province of Buenos Aires that made failure to treat industrial effluent an actionable civil and criminal offense. The judge hearing the case at first instance made a preliminary finding that such flagrant violation deprived the plaintiff of the right to have its case heard.

The plaintiff appealed the ruling, contending that its case was based solely on the fact that effluent from its plant did not flow through the municipal sewer system. In the plaintiff's view, the condition of its effluent had no bearing on the case. The appellate court overruled the lower court by a two to one majority. In his majority opinion, Judge Larrán found that, since the plaintiff had not based its claim on the non-treated condition of its effluent, an eventual

¹¹ 1978-III JURISPRUDENCIA ARGENTINA (J.A.) 312 (1978).

favorable decision on the merits would not condone plaintiff's acknowledged violation of the provincial statute. He also found that the judge had overstepped the statutory limits of his jurisdiction in dismissing the case on grounds that had not been offered by the defendant Municipality. He addressed the issue of the purported violation of the provincial statute, holding that such infringement had been sufficiently taken care of by the lower court when it ordered that the records be disclosed to the competent criminal court for further action if warranted. He added that administrative sanctions, provided for in the provincial statute, could also be eventually imposed on the plaintiff whatever the outcome of the case. In concurring, Judge Campoamor stressed that the polluting effects of the effluent (as opposed to their non-treated condition), which constituted the core of the alleged violation of the provincial statute, had been ascertained only at the insistence of the district attorney, well after the defendant had filed its defense.

In a pioneering minority opinion, Judge Sosa voted to affirm the decision of the lower court. He held that the plaintiff's acknowledgment that its effluent were channeled without treatment into the Río de la Plata was an integral part of its factual allegations. Judge Sosa then relied on undisputed expert testimony that described the effects of the plaintiff's behavior on the Río de la Plata waters as highly polluting and severely damaging to the environment, and concluded that the plaintiff's untreated effluent posed a high health risk to the dense population concentrated along its banks. In concluding, he held that the courts are empowered to provide substantial protection to the environment, and that, in performing such task, they are not bound by the allegations of the parties.

In the landmark case of *Kattan, A.E. y otro v. Gobierno Nacional (Poder Ejecutivo)*,¹² decided in 1983 by Federal Judge Garzón Funes, the plaintiff, an environmental lawyer, challenged certain licenses granted by the defendant, the Federal Government, to two Japanese corporations. The licenses allowed them to capture and export 14 cetaceans ("Commersonii") found in the Argentine South Atlantic, off the coast of the province of Chubut. Judge Garzón Funes first issued a temporary restraining order, suspending the effectiveness of the licenses for a fixed period of time pending final adjudication of the case. Following a very expeditious trial, dictated by plaintiff's choice of an exceptional type of procedural remedy against flagrant constitutional violations, the judge ruled for the plaintiff, and the Government chose not to appeal.

In his complaint, the plaintiff had gone so far as to seek a court ruling barring the granting of any future analogous licenses until thorough research by competent governmental bodies could ascertain, beyond a doubt, the innocuousness of the intended captures. The judge, however, confined himself to striking down the licenses at bar. In the course of his remarkable decision, Judge Garzón Funes highlighted several crucial facts established by the

¹² 1983-D L.L. 568, 576 (1983).

evidence: a) the federal government had failed to conduct a comprehensive technical study that would support a conclusion as to the environmental impact of the captures. Even the size of the existing population of cetaceans targeted by the licensees was unknown to the government; b) when similar licenses had been granted previously, the mortality among the animals captured had been almost total; c) in 1979, one of the same Japanese corporations had captured 4 dolphins in Argentina under a similar license. Two of them had died before arriving in Japan, and the remaining pair had been impounded by U.S. authorities; and d) the federal government had granted the licenses over the strong opposition of the state government of Chubut.

Judge Garzón Funes then addressed the question of whether the plaintiff had standing to sue, which constituted the most arduous issue in the case. He ruled on it twice - first when decreeing the restraining order, and later when entering his final judgment. Each approach was slightly different. In his first ruling, Judge Garzón reasoned that the plaintiff was entitled to be heard since he was acting as a representative of the community. Then, in his final judgment, he found that the plaintiff was directly and individually entitled to sue in defense of his own rights. He traced those rights to a series of legal provisions: 1) the preamble to the 1853 Constitution declaring the Framers' intent to ensure and guarantee general welfare and prosperity to future generations. The judge construed the declaration as a mandate to all branches of government, including the judiciary, to adequately protect the environment; 2) Art.33 of the Constitution providing that beyond the expressly enumerated rights, the Constitution also guarantees other implied rights and liberties. The judge read the right to ecological protection among those implied rights; 3) Law 22.421 for the protection of wildlife. This statute declares that protection and conservation of wildlife are in the public interest. It also states that "all inhabitants are under a duty to protect wildlife"; and 4) Law 22.344, ratifying the "1973 Washington Convention on International Trade of Endangered Species of Wild Flora and Fauna."

In another cornerstone of his decision, Judge Garzón Funes ruled that the granting of a license such as the one at bar should always be preceded by a thorough, in-depth environmental impact assessment study. Failure to conduct such a study would allow the courts to declare the licenses null and void. Additionally, he ruled that it was not the plaintiff who should bear the burden of proof as to the absence of such an assessment, but rather, that it fell upon the Government to provide the court with the relevant studies and conclusions. These two aspects of the opinion were extremely innovative, since they amounted to setting new substantial and procedural standards in a wholly unprecedented area of the law. Yet, Judge Garzón Funes' decision sparked a passionate debate among distinguished scholars. Professor Cano, from a Natural Resources law perspective, praised Judge Garzón Funes for his bold decision,

which he hailed as a landmark in Argentine law,¹³ while professor Marienhoff, an authoritative Administrative Law scholar, blasted the precedent as a subversion of well-established legal principles.¹⁴

In 1987, another case followed the path opened by *Kattan*. In *Altamirano Elsa v. Cerámica Martín S.A. y otros*,¹⁵ a 16-year old boy living in a slum in the outskirts of Buenos Aires drowned while playing on a tract of land owned by the defendant. The defendant was in the business of manufacturing ceramics. It extracted clay from the premises by digging deep pits. Rainwater, as well as water flowing from adjoining plots, had filled many of those pits turning them into a treacherous attraction for the neighboring slum-dwellers. The defendant had recklessly failed to provide for the draining of its plot - a duty imposed by relevant statutory provisions. It had also obstructed the course of a streamlet across its tract, thereby adding to the flooding of the mining pits. Finally, the defendant had failed to comply with a statutory duty to adequately fence its property.

The plaintiff was the deceased boy's mother. She sued to recover damages caused by her son's death but did not attempt to have the Court order any measures to prevent similar occurrences. The action seemed clearly based in tort law. Judge Iribarne, however, hearing the case at first instance, and after awarding damages on the basis of the defendant's tort liability, pointed out that defendant's mining operation was regulated by the Mining Code. Turning to Art. 289 of the statute that empowers the court, upon the occurrence of accidents, to order the adoption of whatever measures are necessary or conducive to avoid future mishaps, he held that this provision not only empowered but also compelled the courts to adopt preventive measures where the "diffuse rights" of a community - for the preservation of health and life - are put at risk by the operation of a mine. Consequently, he directed the defendant to cease obstructing the free flow of the stream that ran across its tract, to take all measures necessary to properly drain excessive waters out of the land, and to fence the premises.

On appeal, the court reversed this most innovative portion of Judge Iribarne's decision. The Court based its reversal on several grounds: a) it adopted a narrow reading of Art. 289, holding that the provision only allowed the adoption of preventive measures where the victim of the accident was a worker of the mining business; b) it held that the lower court had acted without jurisdiction (*ultra petita*) insofar as plaintiff's complaint had not sought the adoption of preventive measures; and thus it held that c) Judge Iribarne had infringed on the defendant's constitutionally guaranteed due process of law.

¹³ G. Cano, *Un Hito en la Historia del Derecho Ambiental Argentino*, 1983-D L.L. 568 (1983).

¹⁴ See M. Marienhoff, 105 EL DERECHO (E.D.) 244.

¹⁵ 1987-D L.L. 373, 390 (1987-D).

The Court concluded that preventive measures belonged to the exclusive administrative jurisdiction of the municipal government; therefore, it ordered that the government be notified of the judgment. Judge Iribarne had found the same defendant liable for the death of a 10-year old boy, as had another judge of first instance in the same territorial jurisdiction, in a case where yet another minor had died. All three victims drowned in the defendant's flooded mining pits. In each of the two cases, the same Court of Appeals reversed Judge Iribarne with respect to the adoption of preventive measures, deferring to the local government.¹⁶

In 1987, the Federal Supreme Court, in an interlocutory decision,¹⁷ hinted at the full recognition of the "diffuse rights" theory that supports the existence of an individual right of action where environmental violations seriously threaten the ecosystem. Criminal proceedings had been jointly instituted by plaintiffs in their capacity as residents in an area located on the shores of the Tigre and Reconquista rivers. They sought the conviction of all persons engaged in the contamination and poisoning of these rivers. Plaintiffs cited legislation that made such contamination and poisoning a criminal offense. In the course of their initial filing, they acknowledged the existence of National Decree 2125/78, which only subjected the polluter of waterways to the payment of a periodic fee, but challenged its constitutionality.

The criminal judge of first instance ordered that the issue of constitutionality be dealt with separately, and later went on to hold the Decree unconstitutional. The appellate court affirmed. At this stage, *Obras Sanitarias de la Nación* (OSN), the federal entity charged with collecting and administering the polluter's fees, joined the case and filed a motion to have the proceedings nullified on the grounds that it had been deprived of its right to be heard. The appellate court dismissed the motion, and OSN appealed to the Federal Supreme Court.

The Supreme Court ruled for the petitioner. It held that the plaintiffs' constitutional challenge established an admissible independent proceeding, but that failure to allow the timely intervention of OSN as the proper adversary had violated its due process guarantee under the Constitution. The ruling of the Supreme Court was read in a later judicial opinion as standing for the proposition that individual plaintiffs have standing to institute legal proceedings based on the alleged violation of environmental legislation. The decision would thus import the recognition of the "diffuse rights" concept. The argument contends that, by holding that the intervention of OSN was inexcusable to validate the proceedings, the Court implicitly accepted that these had been

¹⁶ See Carrizo, Maria I. y otro v. Cerámica Martín S.A. y otros, 1988-III J.A. 316 (1988).

¹⁷ *Recurso de Hecho Deducido por Obras Sanitarias de la Nación en el Incidente de Inconstitucionalidad del Decreto 2125 del P.E.N. Corte Suprema de Justicia de la Nación*, 1988-I J.A. 509 (1988).

properly instituted by the plaintiffs, which, in turn, implied the recognition of their individual right of action to defend their "diffuse rights."¹⁸

Inasmuch, the "OSN" case is important from yet another standpoint. In his brief to the Court, the Attorney General announced that he had submitted a petition to the Executive Branch demanding the revocation of Decree 2125/78 (the polluter's fee statute). In his submission, he contended that the system instituted by the Decree was invalid and unconstitutional. He argued that it ran afoul of valid norms of higher hierarchical status from which it could not derogate. Among these norms he cited: a) certain old statutes whose effectiveness was uncontroverted and which clearly prohibited the contamination of rivers; b) Law 20.645, passed in 1974, ratifying the "Treaty of the Rio de la Plata," signed by Argentina and Uruguay, under which Argentina is obligated to protect and preserve the waterways;¹⁹ c) Article 33 of the Constitution guaranteeing implied rights; and d) the provisions of law 13.577 (as amended by law 20.324) creating OSN, which charges the organization with cleaning the waterways and reservoirs it uses as sources for water supply, as well as with sanctioning contamination by third parties.

In response to the submission, President Alfonsín finally enacted Decree 674 on May 24, 1989,²⁰ whereby he revoked Decree 2125/78 and set forth a whole new regulatory scheme. The new system retains the fees, but totally modifies their concept and effects. Payment of the fees no longer operates to legalize contamination by immunizing the polluter. They are now but a small part in a series of comprehensive and escalating measures that Decree 674 invokes in its aim to effectively deter and punish pollution and contamination. Stiff monetary penalties are now combined with closing noncomplying sewers and draining systems, and with publicly exposing the infractors' names. New industrial facilities are now required to secure governmental approval of the quality of their effluent as a prerequisite for starting operations. The new system also provides for the right of any citizen to report violations to the competent federal agencies (OSN and the Secretariat of Water Resources) and to monitor the ensuing proceedings (e.g. by attending on-site inspections).

¹⁸ See *G.D. y otra v. Gobierno Nacional*, 1988-III J.A. 112 (1988) (Schiffrin, J.). We should note, however, that in principle any citizen has standing to report a criminal offense and institute judicial proceedings against the offenders under Argentine penal law. This later case involved the allegation of precisely such criminal conduct, consisting of the pollution and contamination of waterways, which is an actionable criminal offense under the statutes cited in the initial pleading. Therefore, we would caution against reading the decision as clear authority in a case involving a noncriminal type of conduct.

¹⁹ In this regard, Article 49 of the Treaty stated: "The parties undertake not to diminish in their respective internal legal regimes: a) the technical requirements now in effect to prevent contamination of waterways; and b) the severity of the sanctions now existing to punish infractions." In light of this international obligation, the Attorney General argued that the system of fees set forth in Decree 2125, as enacted in 1978, had amounted to an invalid departure from the absolute prohibition of contamination and severe criminal sanctions established by the statutes that constituted the regime in effect at the time the Treaty entered into force.

²⁰ 49-B ANALES DE LEGISLACIÓN ARGENTINA 1560 (L.L. ed. 1989).

In 1988, the case of *G.D. v. Gobierno Nacional*²¹ offered an opportunity to reexamine the issues discussed in *Altamirano*.²² Plaintiffs' 13-year old daughter had drowned in a deep water-flooded crater dug by the defendant company while operating its mining business on a tract of land belonging to the Army. The plaintiffs sued the company and the federal government as the ultimate owner of the premises. The Federal Court of Appeals of La Plata entered a judgment for the plaintiffs affirming the ruling of the court of first instance. As in *Altamirano*, the decision of the lower court had gone beyond plaintiffs' petition of monetary compensation. By resorting to Art. 289 of the Mining Code, the judge had ordered that preventive measures be peremptorily taken by the defendants.

Writing for a unanimous Court, Judge Schiffrin validated the first instance judge's approach. Relying heavily on Judge Iribarne's construction in *Altamirano*, Judge Schiffrin reviewed the most recent local developments in the field of environmental protection and "diffuse rights" theory. He read the Supreme Court ruling in "OSN" as standing for a truly revolutionary proposition: i.e. that private citizens have an individual right of action to enjoin contaminating activities, even where these activities interfere with a right common to the general public, such as public health. His holding, however, was more narrowly based on the construction of Art. 289 that Judge Iribarne had propounded. He reasoned that the court could not be said to act *ultra petita* where a statute expressly empowers it to adopt preventive measures, even in the absence of a motion by either party.

B. The Difficult Role of Civil Law Judges

One underlying theme running through the case law we have discussed is the conscious or unconscious efforts of the courts to properly define their institutional role. Faced with the problems posed by bureaucratic insensitivity (or connivance) and the lack of adequate administrative resources to monitor compliance with existing environmental law, should they confine themselves to providing monetary awards for past bereavements whose repetition is certain? By daring to go one step further, would they be engaging in environmental policy decision-making? If so, would that be a sound course or are these matters better left to the other branches of government?

At any rate, even the most audacious courts have to surmount the weight of a long, procedural civil law tradition. It has been noted that what we are witnessing is not a redefinition of old procedural notions but rather a revolution.²³ Local scholars under the leadership of Professor Morello, and

²¹ See *supra* note 18.

²² See *supra* note 15.

²³ *Id.* (quoting professor Mauro Cappelletti).

inspired by Italian jurist Mauro Cappelletti, have advocated what they term the "social commitment of Justice" through a more active involvement of the courts in the process of guaranteeing human rights - among them the so-called "diffuse rights" relating to protection against environmental damage.²⁴

V. CONSTITUTIONAL RECOGNITION OF THE NEW ENVIRONMENTAL LAW

In the same vein, since 1983, several Argentine provinces have passed new constitutions embodying the recognition of a right to a safe and clean environment and affording to all affected citizens effective access to the courts²⁵.

In 1990, the Supreme Court of the Province of Salta decided the case of *Barrancos, H. y otros v. Hoyos, Simón*, interpreting the new State Constitution.²⁶ In *Barrancos*, the plaintiffs sued to have the defendant enjoined from continuing the operation of his boric acid manufacturing plant. The plant was located in an urban area, right across from the central square of a small town in Salta. The plaintiffs alleged that the defendant had begun his operations without the requisite administrative license, and that they had filed their complaints with the city's administrative government to no avail. They further stated that the defendant had pressured local councilmen into issuing an ordinance exempting his business from compliance with existing regulations that barred the operation of plants like his in urban areas. Plaintiffs cited Art. 88 of the Constitution of 1986, providing that the legislature shall statutorily implement a right of action to afford judicial protection for diffuse interests. At the time the case was decided, no such legislation had passed.

The Court, however, relied on another provision in the Constitution which required public officials to defend and preserve the environment, to prevent environmental pollution, and to sanction infractions (Art. 30, 2nd paragraph). Quoting from *G.D. v. Gobierno Nacional*, and taking into account the administrative passivity established in the record, the Court held that diffuse rights deserved judicial protection, even in the absence of implemented legislation. Therefore, the court entered its judgment barring operation of the defendant's business until such time as the defendant could secure proper certifications by competent state agencies as to the innocuousness of its activities.

²⁴ A. Morello & G. Stiglitz, *Responsabilidad Civil y Prevención de Daños. Los Intereses Difusos y el Compromiso Social de la Justicia*, 1987-D L.L. 364 (1987); *La Legitimación para la Tutela de los Intereses Colectivos*, 119 E.D. 593; A. Morello, J. Hitters & R. Berizonce, *La Defensa de los Intereses Difusos*, 1982-IV J.A. 700 (1982).

²⁵ See e.g., Salta Const. arts. 30 & 88, *inter alia*; San Juan Const. art. 58; Córdoba Const. art. 11.

²⁶ 1990-IV J.A. 42 (1990).

VI. CONCLUSION

Finally, mention must be made of a bill passed by the Argentine House of Representatives, which is now awaiting consideration by Committees in the Senate. The bill introduces deep reforms into Argentine private law, unifying the traditionally diverse civil and commercial laws. The legislation proposes to introduce as Art. 2619 of the unified body, that would still be entitled "Civil Code," a provision extending the rule of nuisance law, now found in Article 2618, to all individuals, even if they are not neighbors of the defendant. The drafters of the provision have claimed that their intent is to provide an effective tool for the protection of the environment.

Yet, however commendable the goal may be, it cannot be achieved by simply ruling a blanket extension of the mechanism of Article 2618. The rule it embodies is common to the main areas of European civil law tradition. As it is construed by European and local scholars, and by the Argentine courts, its applicability is warranted only where the defendant's conduct interferes with the plaintiff's use, possession or enjoyment of land in the vicinity of the plaintiff.²⁷ It does not in itself embody a right of action against activities posing a threat to the general public. Nevertheless, the bill has prompted and will undoubtedly continue to stimulate discussion and research. It thus signals the continuing commitment of the Argentine legal community to the democratic ideals of 1983.

²⁷ I. CHARTIER, *LA REPARATION DU PREJUDICE DANS LA RESONSABILITÉ CIVILE* § 96, at 129, § 100, at 132, and § 102, at 136/7 (Daloz, Fr. 1983); LE TOURNEAU, *LA RESPONSABILITÉ CIVILE* § 2001, at 643 (Daloz, Fr. 3d ed. 1983); M. COMPORTI, *DIRITTI REALI IN GENERALE* 192 (Giuffrè, Italy 1980).