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Environmental Protection in the Argentinian Supreme Court Case Law

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ABSTRACT: According to Article 41 of the Argentinian Constitution, all inhabitants have a right to environmental protection. Citizens have a right to a healthy and balanced environment, suitable for human development and productive activities to satisfy present needs without compromising those of future generations. The paper aims to analyze the tensions implicit in applying this constitutional norm by the Federal Supreme Court using the methodology of public law and legal theory. Indeed, the constitutional provision is broad, and its interpretation can lead to different solutions in a specific case. There are three main issues of legal interest discussed here. First, there is a delicate balance of protecting the environment against private property and economic activity, which the latter also being assured by the constitution. The point is particularly acute in Argentina, whose economy strongly depends on the primary sector. Second, there are tensions between the political branches (legislative/executive) and the judiciary. Environmental standards established by the judiciary are usually higher than those decided by the legislative branch. However, giving the judges the possibility to determine those standards in the absence of any previous legal norm (or even, sometimes, against that norm) could be a source of legal uncertainty. Finally, due to the federal nature of the Argentinian political system, the distribution of legislative and jurisdictional powers between the federal and local governments is disputed. In this equation, leaning towards the federal government may favor more homogeneity in environmental standards, which would simultaneously reduce local autonomy. This paper shows that the Supreme Court tries to balance different constitutional values in resolving these tensions. The difficulty of finding an adequate constitutional balance is usually added to the legal and factual complexity of environmental issues, and the result is not always completely satisfactory.

KEYWORDS: Argentina, Environmental Protection, Supreme Court Case Law.

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I. INTRODUCTION

The safeguard of the environment has attracted legal attention in Argentina since the 1960s. However, only in 1994 an explicit mention of the issue was introduced in the formal constitution.[1] In 2002, Act 25675 on the National Environmental Policy was passed, becoming the main instrument of federal legislation. Many works devoted to studying environmental law in Argentina generally adopt a strictly legal point of view to comment on legislative documents and judicial precedents.[2] They have a prominently practical purpose of guiding legal practitioners in their professional tasks, but they rarely delve into broader matters, such as the political causes and consequences of legal rules. For this, a distinctive feature of this branch of law is still insufficiently considered in Argentina: the substantially controversial nature of its political background.

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1 Since the 1994 constitutional reform, the environment has had the character of a constitutionally protected collective good. According to Article 41 of the Argentinian Constitution incorporated in 1994, all inhabitants of the country have a right to protect the environment, including the right to a healthy and balanced environment, and public authorities have to guarantee it. The authorities must provide for the protection of environmental rights, the rational use of natural resources, the preservation of natural and cultural heritage and biological diversity, and environmental information and education. While Article 41 establishes the basis of the distribution of competences between the federal and local governments, the federal government must adopt the norms that contain the minimum protection standards and the provinces those necessary to complement them. This rule does not change the general principles on the distribution of jurisdictional powers between the federal and local governments.

2 Néstor Cafferata, "Ley 25.675 General del Ambiente. Comentada, interpretada y concordada" (2003) 2003-A Antecedentes Parlamentarios; Daniel Sabsay & María Eugenia Di Paola, *El daño ambiental colectivo y la nueva Ley General del Ambiente* (Anales de Legislación Argentina, 2003); Ricardo Lorenzetti, "La nueva ley ambiental argentina" (2003) 2003–C Revista Juridica Argentina La Ley 1332; Daniel Sabsay, "La protección del medio ambiente en la constitución nacional" (2005) 29 Revista CEJ at 14–20; Aída Kemelmajer, "Estado de la jurisprudencia nacional en el ámbito relativo al daño ambiental colectivo después de la sanción de la Ley 25.675, Ley General del Ambiente (LGA)" (2006) 1 Anales de la Academia Nacional de Derecho; Ricardo Lorenzetti, ed, *Derecho ambiental y daño* (Buenos Aires: La Ley, 2011); Marcelo López Alfonsín & Adriana Martínez, "Una mirada constitucional a la responsabilidad por daño ambiental en el Nuevo Código Civil argentino" (2015) 13:16 Lex: Revista de la Facultad de Derecho y Ciencia Política de la Universidad Alas Peruanas at 55–89.

Controversies over natural resources have been considered from a sociological and political point of view,[3] whereas legal scholars rarely take into account these studies and confine themselves to the analysis of positive law.

It is important to note that not only decisions on the use of natural resources are intrinsically controversial but also are legal concepts that refer to the environment.[4] As the debates on international environmental law have shown, the previous conceptions of justice and solidarity have directly shaped the foundations of any legal regulation of the environment.[5] The basis of environmental law is essentially conflictive, as it involves acute issues of power and resource distribution. First, there is a delicate balance of protecting the environment against private property and economic activity. The protection of the environment involves sharp decisions about the distribution of burdens (generally translated in terms of economic cost) among the actors involved. The issue is particularly acute in Argentina, whose economy strongly depends on the primary sector.[6] Second, there is tension between the political branches (legislative/executive bodies) and the judiciary. Environmental standards established by the judiciary are usually higher than those decided by the legislative and executive branches. However, giving the judges the possibility to determine those standards in the absence of any previous legal norm could be a source of legal

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[3] See, for instance, Facundo Martin, *Cartografías del conflicto ambiental en Argentina II*, Gabriela Merlinsky, ed (Buenos Aires: CICCUS, 2016). Gabriela Merlinsky, "Conflictos ambientales y arenas públicas de deliberación en torno a la cuestión ambiental en Argentina" (2017) 20:2 Ambiente & Sociedade 123–140.

[4] See the classic work by Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (United States: Clarendon Press, 1984). See also Peter Cleary Yeager, *The Limits of Law: The Public Regulation of Private Pollution* (Cambridge: Cambridge University Press, 1993).

[5] Alexandre Kiss & Dinah Shelton, *International Environmental Law* (New York: Transnational Publishers, 2004) at 11-38. Ulrich Beyerlin & Thilo Marauhn, *International Environmental Law* (Portland: Hart Publishing, 2011) at 31-84.

[6] Andrés Wainer & Paula Belloni, "Lo que el viento se llevó? La restricción externa en el kirchnerismo" in *Entre la década ganada y la década perdida: la Argentina kirchnerista* (Buenos Aires: Batalla de ideas, 2017) at 51-81.

uncertainty.[7] Finally, due to the federal nature of the Argentinian political system, the distribution of powers between the federal and local governments is disputed. In this equation, leaning toward the federal government may favor environmental standards homogeneity that simultaneously reduces local autonomy.

This paper did not aim to determine the acceptable level of impact of economic activities on the environment. It points out tension between economic development and environmental protection. Therefore, this paper aims to analyze how these tensions are present in the Federal Supreme Court of Justice case law. The paper is structured following the three aspects mentioned in the previous paragraph. After explaining the methodology, this paper discusses some general ideas about the controversial nature of environmental law, the tensions between the environment and economy, those between the political branches and the judiciary, and those derived from the federal nature of the political system.

II. METHODS

This paper was built on public law and the legal theory approach. Its point of departure was the text of the Argentinian Federal Constitution. The legal analysis mainly relied on the Federal Supreme Court case law dealing with Article 41 of the Federal Constitution. Other courts' precedents and legal and regulatory sources were also mentioned as appropriate. The more profound consideration of judgments was given to directly related to the core issues of environmental law to find the controversial aspect on which courts were called to decide and the political values and interests at stake.

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[7] For a general overview on environmental jurisprudence see Eduardo Pigretti, *Derecho ambiental; biodiversidad, cambio climático, residuos, presupuestos mínimos ambientales, casos de jurisprudencia* (Buenos Aires: Gráfica del Sur, 2004). José A Esain, "Breve reseña de la jurisprudencia ambiental histórica en el derecho ambiental argentino" in *Informe ambiental anual* (Buenos Aires: FARN, 2015) at 69-91.

III. THE CONTROVERSIAL NATURE OF ENVIRONMENTAL LAW IN ARGENTINA

The idea of the environment as a collective good had appeared in the literature since the 1970s when environmental ethics started developing as an independent discipline.[8] The idea itself was, of course, not completely new. The concept of *collective good* was already known in the Antiquity and the Middle Ages. It refers to those goods from whose enjoyment it is impossible or complicated to exclude a user and whose utilization by one user affects the portion of that resource available to another user (such as in the case of a communal forest).[9] Contemporary international law employs the concept of *global commons* with very similar meanings.[10]

Mainstream environmental ethics poses a challenge to traditional anthropocentrism to the extent that it questions the moral superiority of human beings over members of other species.[11] A possible legal translation of this position is to recognize legal personality and legal standing to natural objects.[12] In Argentinian law, natural objects are not such legal persons, and they do not have legal standing. Nevertheless, courts have repeatedly recognized the collective character of nature: the environment is a collective good to which all community members have a right (a diffuse

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8 Andrew Brennan & Norva YS Lo, "Environmental Ethics" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2021).

9 See the classic text by Garrett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243–1248.

10 Susan J Buck, *The Global Commons* (London: Routledge, 1998); Erin A Clancy, "The Tragedy of the Global Commons" (1998) 5:2 Indiana Journal of Global Legal Studies at 601–619; John Vogler, "Global Commons Revisited" (2012) 3:1 Global Policy at 61–71; Surabhi Ranganathan, "Global Commons" (2016) 27:3 European Journal of International Law at 693–717.

11 Not all trends in environmental ethics reject anthropocentrism. Some theorists have developed prudential or moderate anthropocentrism that advocates the protection of the environment as the derivation of our duties to our fellow human beings.

12 See the classic text by Christopher D Stone, "Should Trees Have Standing?" (1972) 45 Southern California Law Review at 450–501. For a contemporary discussion, see Hope M Babcock, "A Brook with Legal Rights: The Rights of Nature in Court" (2016) 43:1 Ecology Law Quarterly at 1–51.

right, precisely because the ownership of the good is distributed throughout the community).[13]

The incorporation of the environmental paradigm into the constitution entailed a radical change in the approach to using natural resources. It evidences a new constitutional conception, sometimes called the *ecological rule of law*.[14] This new conception permeates the interpretation of all constitutional clauses, serving as a hermeneutical criterion of constitutional rights since the environment presupposes the exercise of any right.[15] The ecological rule of law includes the idea of equilibrium between natural resources and biological diversity and the rational use of those resources.[16] The change of focus can be clearly understood when studying the conflict that opposed the Provinces of La Pampa and Mendoza over the rights on the Atuel River, shared by them. In 1987 the Supreme Court issued the first of its two judgments. The government of the province of La Pampa had alleged that the province of Mendoza used the river's waters in an abusive manner and had demanded a regulation on equitable terms. The Court stated that no such abusive use existed and closed the case. However, it also said that the provincial governments should agree on the future use of the river under the principle of reasonable and equitable use. The negotiations to be carried out for this purpose had to be done in good faith and taking into account the criterion of good neighborhood.[17] The matter was raised in strictly economic terms: one province sued another to obtain a

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13 Cámara Primera Civil y Comercial de La Plata, sala III, *Sagarduy c/Copetro*, 15/11/1994, published in (1995) *La Ley Buenos Aires* 935. Suprema Corte de Justicia de la Provincia de Buenos Aires, *Almada, Hugo c/Copetro S.A. y otros*, 19/05/1998, published in (1998) *La Ley Buenos Aires* 943, opinion of justice Pettigiani.

14 Luciano Parejo Alfonso, "La fuerza transformadora de la Ecología y el Derecho: ¿Hacia el Estado Ecológico de Derecho" (1994) 2:100–101 Ciudad y territorio at 219–232.

15 Corte Suprema de Justicia de la Nación (hereinafter, CJSN), *Louzán*, Fallos 317:1658, 1994, dissenting opinions of justices Levene, Fayt and López.

16 Humberto Quiroga Lavié, "El estado ecológico de derecho en la Constitución nacional" (1996) 1996-B Revista Juridica Argentina La Ley at 950. José A Esain, "El Estado ambiental de derecho en la jurisprudencia de la Corte Suprema de Justicia de la Nación" (2017) 213 Revista Digital de la Asociación Argentina de Derecho Constitucional at 13–62.

17 CSJN, *La Pampa c/Mendoza*, Fallos 310:2478, 1987.

better position regarding the use of the watercourse. The Court ruled that the first did not have reasons to complain under the law applicable to natural resources.

Thirty years later, the matter was back in the hands of the Supreme Court. The Court then considered that the force of *res judicata* of the 1987 sentence did not prevent a new decision since the *thema decidendum* of the cases was different. Even if the dispute was over the same river, the 1987 matter had been decided as a dispute between opposing economic interests, without regard to environmental aspects. In 2017, on the contrary, the Government of La Pampa raised the *environmental issue*, demanding the establishment of a minimum flow of water that would guarantee the subsistence of the ecosystems in its territory. The Court decided that an inter-provincial commission should set this minimum flow.[18]

In recent pronouncements, the Supreme Court of Justice clearly moved away from the anthropocentric perspective that had dominated the regulation of natural resources before 1994. According to the Court, the environment "is not for the Federal Constitution an object destined to the exclusive service of man, appropriable according to his needs and available technology." It is not "an object which responds to the will of a person who is its owner."[19]

The shift in the constitutional paradigm expressed by the Supreme Court case law and the emphasis put on the duties of citizens and authorities to protect the environment contrasts with the lack of a deep analysis of the controversial nature of political principles underlying environmental law. The Supreme Court has said that "the improvement or degradation of the environmental benefits or harms the entire population because it is a good that belongs to the social and trans-individual sphere."[20] Of course, in general terms, that approach is correct. There is no doubt that environmental protection is essential for the continuity of life on Earth.

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[18] CSJN, *La Pampa c/Mendoza*, Fallos 340:1695, 2017.

[19] CSJN, *La Pampa c/Mendoza*, Fallos 340:1695, 2017. CSJN, *Barrick Exploraciones Argentinas*, Fallos 342:917, 2019. See also CSJN, *Kersich*, Fallos 337:1361, 2014.

[20] CSJN, *Mendoza*, Fallos 329:2316, 2006.

Since all human actions affect the environment to a greater or lesser extent, we must all contribute to this protection.

The core of the matter lies in the expression "to a greater or lesser extent": the problem is precisely how the burdens created by environmental standards are distributed and who decides on that distribution. To protect the environment, it is necessary to decide which activities are intolerably harmful or risky and should therefore be prohibited (deciding, for example, who is left without a job due to the prohibition of those activities). It is also necessary to decide which preventive measures will be implemented (and who will pay for them). If the damage has already occurred, it is necessary to decide who will pay to repair it and what will be done if it is irreversible. Ultimately, the issue is about solving basic questions of environmental justice because all environmental issues are political issues.[21]

IV. ENVIRONMENT VS. ECONOMY

A. Environmental Damage and Risky Activities

The Argentinian economy is heavily dependent on the primary sector. According to the National Statistics Office, animal origin, vegetable origin, fats, and oils represented 37% of the exports for January-September 2021. Mineral products amounted to 6%, while foodstuffs, beverages, and tobacco (products with a low level of industrialization) amounted to 21%. In all, these categories summed up 64% of Argentinian exports.[22] Specialized studies infer from the evolution of the gross domestic product

[21] Maristella Svampa & Claudia Aboaf, "Todo lo ambiental es político", *El Diario AR* (9 September 2021), online: <https://www.eldiarioar.com/politica/ambiental-politico_129_8287226.html>.

[22] *Argentine Foreign Trade Statistics Preliminary data for the first nine months of 2021*, by Instituto Nacional de Estadísticas y Censos (National Statistics Office) (Instituto Nacional de Estadísticas y Censos (National Statistics Office), 2021).

and other economic indicators that the national economy's *primarization* (or *re-primarization*) has been in progress during the last two decades.[23]

Argentina is not an exception in the region. Indeed, in the first decade of the 21st century, the boom in international prices of commodities has been a key factor in the economic performance of Latin-American countries.[24] Despite the fall in international prices in the following years, the primary sector continued to be crucial in the regional economy. This strong dependence on the primary sector has been qualified as a form of *extractivism*. In this context, the expansion of agribusiness, large-scale mining, and hydrocarbon activities with the development of unconventional reservoirs is a vital part of the Argentinian national economy.[25] This development model strongly impacts the environment: the expansion of the agricultural frontier affects native forests, large-scale mining and hydrocarbon exploitation is usually performed through fracking techniques, and the use of hydrocarbon energies impacts climate change.

A key political precondition of environmental law is determining acceptable levels of impact on the environment. Any human activity inevitably affects the environment. The core of any environmental protection regime lies precisely in determining which forms of environmental impact are acceptable and which other forms of impact are unacceptable (and must, consequently, be prevented or repaired). The question is not *if* native forests can be chopped down to permit agriculture, but *how much* felling is acceptable.

Under Argentinian law, environmental liability depends on the existence of environmental damage. In this paper, we understand *damage* as any ecological impact considered unacceptable. In Argentina, this threshold has

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[23] Miguel Teubal & Tomás Palmisano, "¿Hacia la reprimarización de la economía? En torno del modelo extractivo en la posconvertibilidad" (2015) 296 Realidad Económica at 55–75.

[24] James Cypher, "¿Vuelta al siglo XIX? el auge de las materias primas y el proceso de primarización en América Latina" (2009) 49:1 Foro Internacional at 119–162.

[25] Silvia Gorenstein, Graciela Landriscini, & Ricardo Ortíz, "Re-primarización y disputas territoriales. Casos paradigmáticos en la Argentina reciente" (2019) 327 Realidad Económica at 9–34.

been defined in a very generic way by the legislative branch (Article 27 of the National Environmental Policy Act). More specific acts or other applicable regulations define *damage* more precisely for particular sectors of activity. The determination of the acceptable level of environmental impact is not a purely technical issue. It is a political one. Biologists and geographers can tell us that the expansion of the agricultural frontier from here to there would probably have this or that impact. However, it is a fundamentally political question to decide whether that impact is acceptable or unacceptable to our society. In other words, we have to decide whether we prefer some economic advantages at the cost of that environmental impact or, on the contrary, we give up the possibility of economic development to preserve the environment to a larger extent.

The concept of environmental damage is linked to another one: that of *risky activity*. *Risk*, in this context, is the anticipation of the damage. A risky activity is that which can produce an unacceptable environmental impact. Modern societies are *risk societies* because they spend more and more time managing the risks they create.[26] Assuming that environmental damage must be prevented, risk management necessitates the regulation of risky activities. Similar to what happens with the concept of damage, the question arises about the threshold of this regulation. On the one hand, it must be decided when preventive measures become enforceable. In other words, how much to anticipate the occurrence of the damage. On the other hand, it is necessary to resolve how demanding those preventative measures will be. That is, how much will be required in terms of prevention.

In 2000, INVAP (a company of the Argentine State dedicated to high technology production) signed an agreement to sell a nuclear reactor to the Australian Organization for Science and Technology. This agreement included a clause whereby, if the Australian organization so requested, Argentina had to take charge of the disposal of the *burned fuel* generated by the reactor and keep it in storage for a certain time before it could be returned to Australia.

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[26] Ulrich Beck, *World at Risk* (London: Polity Press, 2007).

Among the provisions incorporated into Article 41 of the Constitution is the one that prohibits dangerous and radioactive waste from entering the country. Could the *burned fuel* from the reactor be classified as *dangerous* or *radioactive* waste in terms of Article 41 of the Constitution? The Court that intervened before the case reached the Supreme Court declared that burned fuel had to be considered radioactive waste. Consequently, the respective clause of the agreement between Argentina and Australia was null.[27] On the other hand, the Supreme Court interpreted the concept of *dangerous* or *radioactive* waste more loosely and said that burned fuel could not be included in it. The Supreme Court's decision delayed the requirements of the principle of prevention: for the Court, burned fuel was not *yet* one of the constitutionally prohibited wastes.[28]

B. The Attribution Factor

The question of the acceptable level of protection is intrinsically related to the definition of the criteria used to attribute legal responsibility for environmental damages. To determine that someone is responsible, it is necessary, in the first place, to decide that certain environmental impacts can be defined as *environmental damage* in the legal sense of the expression. After this, it is also necessary to attribute that damage to that particular person based on the criteria established by law.

The National Environmental Policy Act established an objective type of liability (Article 28). *Objective liability* means that fault is not required. Consequently, it is impossible to avoid liability by demonstrating that all the necessary measures to prevent the damage have been adopted according to reasonable diligence standards. Exemption from liability is possible only if the agent demonstrates a break in the nexus of imputation so that the damage is entirely attributable to the activity of a third party (Article 29).

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[27] Cámara Federal de Bahía Blanca, *Schröder Juan c/INVAP S.E. y E.N.*, 19/10/2006, published in *Lexis Nexis* 25004321.

[28] CSJN, *Schröder*, Fallos 333:570, 2010.

To be an exemption from liability, breaking the imputation nexus must be total. If the damage is attributable to more than one agent, all are responsible. Furthermore, if the proportion in which each one contributed to that damage cannot be determined, the liability is joint and several (Article 31 of the Act). Thus, an agent can be liable for the harm caused by others. It could even happen that some of the agents that contributed to the damage cannot be identified. In a case involving the calcination of petroleum coke, the defendant (a company located in an industrial center surrounded by many other industrial establishments) claimed that it should not be obligated to compensate for the whole damage, which had been caused only in part by their emissions. Doing this would mean holding the company responsible for the damage caused by someone else's activity. According to the defendant, such broad responsibility would violate its constitutional right to property (Article 17 of the Constitution). The Supreme Court of Justice of the Province of Buenos Aires generically excluded the defendant's arguments.[29] The Federal Supreme Court of Justice also rejected the allegation, partly for procedural reasons and partly because it considered that the alleged constitutional damages were merely hypothetical.[30]

Beyond the particularities of the case above, it is evident that environmental responsibility regulation has difficulties being embedded in a liberal conception of property rights. There seems to be a certain redefinition of the contours of this right in light of the demands of the environmental paradigm. This new *environmental function* of property, similar to the well-known *social function* of property proclaimed by social constitutionalism, could lead to new limits on individual rights.[31] Nonetheless, just as the social function of property does not completely eliminate property rights, even if it modifies its contours, neither does the environmental function of the property make the right totally disappear.

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[29] Suprema Corte de Justicia de la Provincia de Buenos Aires, *Almada, Hugo c/Copetro S.A. y otros*, 19/05/1998, published in (1998) 943 *La Ley Buenos Aires*.

[30] CSJN, *Almada c/Copetro*, Fallos 324:436, 2001.

[31] Ricardo Lorenzetti, *Teoría del derecho ambiental* (Navarra: Aranzadi, 2010).

In the field of Labor Law (closely linked to the paradigm of the social state), the Supreme Court has accepted the constitutionality of joint and several liabilities that the law imposes on employers vis-à-vis workers in certain situations. However, the scope of the rule that establishes joint and several liabilities cannot be disproportionately extended because this would denaturalize it by attributing a content that unacceptably exceeds its purposes.[32] Concerning the environmental function of the property, the reciprocal limits of the constitutional clauses involved are, at least for the moment, less clear.

C. Preventative Measures and Acquired Rights

According to the National Environmental Policy Act, the person obliged to adopt preventive measures is the one who carries out an activity that entails the risk of generating degrading effects (Article 4). If the activity has not yet started, it is necessary to conduct an environmental impact assessment (Articles 11 and 12) to determine what measures should be taken to avoid the damage. If there is no way to avoid such damage, the planned activity should be canceled. When the risk of environmental damage comes from already underway activities, these activities should be adjusted to the necessary measures to avoid the damage or cease if this is not possible.

The obligation to cease polluting activities may have constitutional implications if it affects property rights. In the case of the petroleum coke plant, the defendant company alleged before the Supreme Court that, to the extent that the previous ruling had forced them to cease the emission of all polluting elements under warning of closure, a constitutional right was affected. The Supreme Court rejected the argument because the company could continue operating if it adjusted its activity to a plan to reduce the environmental impact to an acceptable level.[33]

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[32] CSJN, *Penta S.R.L.*, Fallos 242:501, 1958.
[33] CSJN, *Almada c/Copetro*, Fallos 324:436, 2001.

Sometimes the only way to prevent harm may be to stop the risky activity. Let us suppose that this activity is being carried out according to the applicable legal and regulatory norms and a new legal or regulatory provision orders its cessation. The jurisprudence of the Supreme Court on normative changes that affect constitutional rights oscillates between two poles. On the one hand, the Court has affirmed that no one has a constitutionally protected right to maintain a particular legal regime. While laws or regulations change, regulating or prohibiting certain activities, those who carry out those activities must adjust to the new legal order.[34] However, on the other hand, the Court itself has said that the change of a legal regime cannot impinge on acquired rights since this would mean a violation of property rights constitutionally protected.

Acquired right is an indeterminate legal concept. The Supreme Court has recognized, for example, that acquired rights can emerge from administrative acts, judgments, or contracts.[35] The Court has also said that there are acquired rights, at least in certain cases, if the legal requirements for the acquisition of a right have been met, even though there is no formal recognition by a judgment or an administrative decision.[36] Depending on

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[34] CSJN, *De Milo*, Fallos 267:247, 1967. CSJN, *Ford Motor Argentina S.A.*, Fallos 288:279, 1974. CSJN, *Cooperativa Ltda. de Enseñanza Instituto Lomas de Zamora*, Fallos 291:359, 1975. CSJN, *González, Juan Carlos*, Fallos 299:93, 1977. CSJN, *Ángel Moiso y Compañía S.R.L.*, Fallos 303:1835, 1981. CSJN, *Tinedo*, Fallos 308:199, 1986. CSJN, *Linares*, Fallos 315:839, 1992. CSJN, *Neumáticos Goodyear S.A.*, Fallos 323:3412, 2000. CSJN, *Grupo Clarín S.A. y otros*, Fallos 336:1374, 2013.

[35] CSJN, *Horta*, Fallos 137:47, 1922. CSJN, *Bourdieu*, Fallos 145:307, 1925. CSJN, *Empresa de los Ferrocarriles de Entre Ríos*, Fallos 176:363, 1936. CSJN, *Ferrocarril del Sud*, Fallos 183:116, 1939. CSJN, *Compañía de Aguas Corrientes*, Fallos 184:148, 1939. CSJN, *Compañía Suizo-Argentina de Electricidad*, Fallos 188:469, 1940. CSJN, *Compañía Dock Sud de Buenos Aires*, Fallos 201:385, 1942. CSJN, *Compañía Avellaneda de Transportes S.A.*, Fallos 289:462, 1974. CSJN, *Metalmecánica S.A.C.I.*, Fallos 296:672, 1976. CSJN, *Motor Once*, Fallos 310:950, 1987. CSJN, *Gaggiamo*, Fallos 314:1477, 1991.

[36] CSJN, *De Martín*, Fallos 296:723, 1976. CSJN, *Banco del Interior y Buenos Aires S.A.*, Fallos 298:472, 1977. CSJN, *Quinteros*, Fallos 304:871, 1982. CSJN, *Compañía Continental S.A.*, Fallos 306:2092, 1984. CSJN, *Fullana*, Fallos 307:305, 1985. CSJN, *Caja Nacional de Ahorro y Seguro*, Fallos 314:481, 1991. CSJN, *Guinot de Pereira*, Fallos 315:2584, 1992. CSJN, *Marozzi*, Fallos 316:2090, 1993. CSJN, *Jawetz*, Fallos 317:218, 1994. CSJN, *Cassin*, Fallos 317:1462, 1994. CSJN, *Digier*,

the circumstances, the Court has nullified the act or regulation that had infringed the acquired right or admitted it but declared that the injured party had to be compensated.

It is not clear how these provisions play out in Environmental Law. Since the well-known 1869 *Plaza de Toros* ruling, new legal acts or administrative regulations can oblige individuals to cease certain activities (in the case of bullfights) without generating a State obligation to compensate.[37] However, these prohibitions cannot be arbitrary: in the *Mate Larangeira Mendes* case, the Court described as arbitrary the prohibition, ordered by the executive branch, to raise an already planted *yerba mate* crop.[38] For the Court, the prohibition was arbitrary and amounted to violating an acquired right because the appellants had already incurred expenses for cultivating these plants.

In this context, the point is whether the conditions imposed by a new environmental regulation, which may even entail the obligation to cease a certain activity, could violate acquired rights. It does not seem easy to reach such a conclusion since the Supreme Court has recognized that the doctrine of acquired rights is not applicable against public order laws,[39] a category in which environmental protection acts and regulations undoubtedly fit. This was the conclusion in the classic *Saladeristas de Barracas* case regarding the cessation of activity due to a new regulation.[40] In the more recent *Barrick Exploraciones Argentinas* case, the Supreme Court reached the same conclusion. The fact that the mining company had already received a concession to exploit a geographical area did not prevent this area from being declared protected under the terms of the later Glaciers Protection Act.[41] However, the scope of this principle is not

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Fallos 318:1700, 1995. CSJN, *Francisco Costa e Hijos Agropecuaria*, Fallos 319:1915, 1996. CSJN, *Cantos*, Fallos 321:532, 1998. CSJN, *San Luis c/Estado Nacional*, Fallos 326:417, 2003.

37 CSJN, *Plaza de Toros*, Fallos 7:150, 1869.

38 CSJN, *Mate Larangeira Mendes*, Fallos 269:393, 1967.

39 CSJN, *Caffarena*, Fallos 10:427, 1922. CSJN, *Castellano*, Fallos 208:430, 1947. CJSN, *Roger Ballet*, Fallos 209:405, 1947. CSJN, *Vila*, Fallos 221:728, 1951.

40 CSJN, *Saladeristas de Barracas*, Fallos 31:273, 1887.

41 CSJN, *Barrick Exploraciones Argentinas*, Fallos 342:917, 2019.

completely clear. After all, the regulation that in the *Mate Larangeira Mendes* case had prohibited raising the harvest could also have been classified as a public order law.

The precautionary principle is, in some way, a complement to the obligation to prevent environmental damage. According to this principle, if there is a risk of serious or irreversible damage, the absence of information or scientific certainty should not be used to delay the adoption of effective prevention measures.[42] The principle is included in Article 4 of the National Environmental Policy Act. The most significant problem raised by applying this principle is how to measure the absence of certainty. Because for the principle to be applicable, it is required, on the one hand, that there be a "danger of serious or irreversible damage."[43] However, on the other hand, there must be no certainty regarding the production of that damage. No precautions would be necessary if certainty existed: in such a case, effective preventive measures would have to be adopted or, if they were not available, risky activities should be suspended. In other words, the precautionary principle applies when there is no certainty, but there are indications about the adverse effects of a particular activity.

The problem of the degree of certainty required is less pressing in the provisional than in the definitive suspension of risky activities. The Supreme Court of Justice has repeatedly applied the precautionary principle in cases where the temporary suspension of a certain activity was requested

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[42] The precautionary approach appears in the Rio Declaration. Principle 15 of the Declaration reads as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". *The Rio Declaration on Environment and Development*, 1992, A/CONF.151/5/Rev.1. The European Union Environmental Law has also adopted this approach. The precautionary principle is established in Article 191 of the Treaty on the Functioning of the European Union and different regulations, such as the regulatory framework for chemicals (Regulation 1907/2006) and the general regulation on food law (Regulation 178/2002).

[43] CSJN, *Schröder*, Fallos 333:570, 2010. See also, CSJN, *Salas*, Fallos 331:2925, 2008. CSJN, *Salas*, Fallos 332:663, 2009. CSJN, *Salas*, Fallos 333:1784, 2010.

until the clarification of its environmental impact.[44] On the contrary, if the precautionary principle requires a definitive suspension of risky activities, the constitutional problem is the one indicated above about prevention.

V. THE POLITICAL BRANCHES AND THE JUDICIARY

It has become clear that determining which environmental impacts should be considered harmful and to what extent the regulation of risky activities avoids such damage, far from being a purely technical decision, is a normative option that involves an ethical and political assessment. One way to provide democratic legitimacy to these normative decisions is to leave them in the hands of the legislature. The Supreme Court of Justice said that the legislative branch is the depository of the most significant sum of power and the most immediate representative of sovereignty in a representative regime.[45] In the legislative debate, the participation of all social voices and the fundamental idea of participation are consolidated.[46] Nonetheless, as legislative acts cannot establish detailed parameters of allowed and not allowed impacts and risks in each area, the executive must specify them through more specific regulations.

However, due to the frequent omission or insufficiency of legislative action, citizens turn to judges to make up for the lack of legal standards. Judicial intervention is easily justified because environmental protection is located in the first part of the Argentinian Constitution, referring to individual and collective rights. For the Supreme Court, the right to a healthy environment is directly operative. It does not need the *interpositio*

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[44] CSJN, *Salas*, Fallos: 332:663, 2009. CSJN, *Kersich*, Fallos 337:1361, 2012. CSJN, *Cruz*, Fallos: 339:142, 2016. CSJN, *Asociación Argentina de Abogados Ambientalistas de la Patagonia*, Fallos 339:515, 2016. CSJN, *Asociación Argentina de Abogados Ambientalistas de la Patagonia*, Fallos 339:1732, 2016.

[45] CSJN, *Gutiérrez*, Fallos 180:384, 1938. CSJN, *La Martona*, Fallos 182:411, 1938. CSJN, *Municipalidad de Buenos Aires c/Mayer*, Fallos 201:249, 1945. CSJN, *Videoclub Dreams*, Fallos 318:1154, 1995, opinion of justices Petracchi and Bossert. CSJN, *Simón*, Fallos 328:2056, 2005, opinion of justice Maqueda. CSJN, *Barrick Exploraciones Argentinas*, Fallos 342:917, 2019.

[46] CSJN, *Barrick Exploraciones Argentinas*, Fallos 342:917, 2019.

legislatoris, and judges must guarantee its effectiveness. The recognition of the right to enjoy a healthy environment does not constitute "a mere expression of good and desirable purposes for the generations to come, subject in their effectiveness to a discretionary activity of the federal or provincial public powers, but the precise and positive decision of the 1994 constitutional power to enumerate and place in the supreme rank a pre-existing right."[47]

Attributing to Article 41 of the Constitution a content independent of the legislature's decisions and the executive does not solve the problem of determining that content. It just changes it from one place to another. In other words, it means that judges must decide on the acceptability of a certain environmental impact or the conditions for a risky activity, regardless of any prior legal or regulatory standard.

To be sure, the problem of the distribution of powers to the regulation of fundamental rights exceeds the scope of the right to protect the environment. From a *hermeneutic* perspective, fundamental rights are out of the scope of the majority rule. Incorporating a right into a Constitution means that the sphere of behavior that the protects is expropriated from the control and decision of the majority. No majority, even unanimously, can decide the abolition or reduction of a constitutional right. Rights have their content incorporated into the Constitution, and judges are in charge of their interpretation and protection.[48]

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47 CSJN, *Mendoza*, Fallos 329:2316, 2006.

48 Ronald Dworkin, *Taking rights seriously* (London: Duckworth, 1977). Ernesto Garzón Valdés, "Representación y democracia" (1989) 6 Cuadernos electrónicos de Filosofía del Derecho at 143–163. Ernesto Garzón Valdés, "Algo más acerca del coto vedado" (1989) 6 Cuadernos electrónicos de Filosofía del Derecho at 209–213. Luigi Ferrajoli, "Fundamental Rights" (2001) 14 International Journal for the Semiotics of Law at 1–33. Ernesto Garzón Valdés, "Algunas consideraciones sobre la posibilidad de asegurar la vigencia del coto vedado a nivel internacional" (2003) 12 Derechos y libertades at 57–70. Luigi Ferrajoli, "Sobre los derechos fundamentales" (2006) 15 Cuestiones constitucionales at 113–136. Luigi Ferrajoli, "La esfera de lo indecidible y la división de poderes" (2008) 6:1 Estudios Constitucionales at 337–343. Ernesto Garzón Valdés, Michael Baurmann, & Bernd Lahno, "Dignity, Human Rights, and Democracy" in *Perspectives in Moral Science* (Frankfurt: Frankfurt School Verlag,

On the contrary, from a *deliberative* perspective, fundamental rights are not a limit to democracy but the product of the democratic debate. Their content and the conditions of their protection must be democratically *debated* and *decided* (and not just *mechanically interpreted* and *applied*). There is no reason to suppose that judges are in a better position than legislatures to accomplish this task (indeed, we could conjecture that the contrary is true because of the representative nature of legislative bodies).[49]

We will not discuss here this complex issue of legal philosophy. We will confine ourselves to analyzing judicial intervention that can raise environmental protection standards in cases of passivity of political powers. It must be clear that this shift in the choice of the deciding power entails the renunciation of certain doses of predictability in environmental management and, consequently, impact the economic calculations of those activities that exploit natural resources. Ultimately, it is a matter of finding an adequate balance between the environmental protection required by the Constitution and the principle of legal security, which also has constitutional status according to the jurisprudence of the Supreme Court.[50]

Let us see how the tension between the political powers and the judiciary works in environmental liability. As aforementioned, environmental liability depends on ecological damage. A general legal clause defines *environmental damage* (Article 27 of the National Environmental Policy

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2009) at 253-265. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011).

[49] Jeremy Waldron, "A rights-based critique of constitutional rights" (1993) 13:1 Oxford Journal of Legal Studies at 18–51; Carlos Nino, *The Constitution of deliberative democracy* (New Haven: Yale University Press, 1996); Jeremy Waldron & John Tasioulas, "Rights and Human Rights" in *The Cambridge Companion to the Philosophy of Law* (Cambridge: Cambridge University Press, 2020) at 152; Roberto Gargarella, "Los jueces frente al coto vedado" (2000) 1 Discusiones: Derechos y Justicia Constitucional at 53–64; Roberto Gargarella, *Pensar la democracia, discutir sobre los derechos* (Nueva Sociedad, 2017).

[50] CSJN, *Villate de Anchorena*, Fallos 220:5, 1951. CSJN, *Ottolagrano*, Fallos 243:465, 1959. CSJN, *Estévez*, Fallos 251:78, 1961. CSJN, *Iglesias*, Fallos 253:47, 1962. CSJN, *Ravaschano*, Fallos 254:62, 1962. CSJN, *SICOAR*, Fallos 311:2082, 1988. CSJN, *Tidone*, Fallos 316:3231, 1993. CSJN, *Jawetz*, Fallos 317:218, 1994. CSJN, *Cerro Vanguardia S.A.*, Fallos 332:1531, 2009.

Act). Other specific acts or regulations complement this definition. However, it is usually accepted that the content of environmental damage defined in Article 27 of the National Environmental Policy Act is not exhausted in the provisions of those specific acts and regulations. In other words, judges can determine that a certain environmental impact is harmful, even if no specific act or regulation defines it as such. Indeed, Article 27 of the General Environmental Law expressly provides for the possibility that the environmental damage that generates liability may arise from a lawful activity.

The issue has obvious constitutional and political implications. On the one hand, the obligation to repair environmental damage is expressly provided for in Article 41 of the Constitution, and the Supreme Court has repeatedly said that the general principle *alterum non laedere* (the basis of any system of liability for damages) is implicit in Article 19 of the Constitution.[51] On the other hand, that same constitutional article establishes the principle of legality, that is, that only the law can establish particular obligations.

In the balance of powers mentioned above, admitting liability for lawful acts entails expanding judicial powers to the detriment of the legislative and executive branches. A jurisprudential example can illustrate this point. An electricity company had been sued for installing a transformer plant that worked thanks to laying high and medium voltage cables. These cables produced electromagnetic fields with apparently harmful effects on human health. The electricity company alleged that it had respected the technical standards established by legal and regulatory norms, which the official electricity regulator department confirmed. Although the company had remained within the terms of the law and regulations, it was held liable.[52]

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[51] CSJN, *Ferrocarril Oeste*, Fallos 182:5, 1938. CSJN, *Gunther*, Fallos 308:1118, 1986. CSJN, *Cazarre*, Fallos 315:689, 1992. CSJN, *Santa Coloma*, Fallos 326:797, 2003. CSJN, *Aquino*, Fallos 327:3753, 2004. CSJN, *Estrada*, Fallos 328:651, 2005. CSJN, *Rodríguez Pereyra*, Fallos 335:2333, 2012.

[52] Cámara Federal de Apelaciones de La Plata, Sala II, *Asociación de consumidores y usuarios c/Ente Nacional Regulador de la Electricidad - Empresa EDESUR*, 08/07/2003.

The most interesting point here is that while the case was being discussed before the courts, Congress was dealing with a bill intended to prohibit the overhead laying of medium and high voltage lines in inhabited areas. The fact that the project was under treatment showed that the legislature understood that what the company had done was not outside the law: if a new act was needed to prohibit it, it was because, at the time the company had installed the plant, the overhead laying of medium and high voltage cables was not prohibited.

The dilemma is then unavoidable: accepting responsibility for legal activities expands judicial discretion (to the detriment of legal certainty). Reducing liability to cases of illicit activities may significantly reduce the level of environmental protection (or require enormous legislative and regulatory activity to classify each damage-producing activity as illegal specifically). The same that has just been said about liability applies to prevention. The prevention principle requires deciding which activities are considered risky and how extensively the preventive measures are adopted. However, given that the principle obliges to avoid all damage and not only the damage caused by illegal activities, it is not satisfied with the mere fulfillment of legal or regulatory obligations. In the case of the electromagnetic field cited above, the judges ordered the company to take preventive measures even beyond legal and regulatory requirements.[53]

Argentinian constitutional scholars generally consider a strong judicial control on political powers' activity (or omission) as a positive advancement of constitutional standards. The argument usually presented is that the right to the protection of the environment is not just a programmatic principle to be developed by the legislative and the executive branches but a directly operative right that judges must guarantee.[54] This might be true,

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[53] Cámara Federal de Apelaciones de La Plata, Sala II, *Asociación de consumidores y usuarios c/Ente Nacional Regulador de la Electricidad - Empresa EDESUR*, 08/07/2003.

[54] Augusto M Morello & Néstor A Cafferatta, *Visión procesal de cuestiones ambientales* (Santa Fe: Rubinzal Culzoni, 2004); Narciso J Lugones, "Dificultades para trazar un perfil viable del juez en materia ambiental" (2007) 12 Revista de Derecho Ambiental at 105–116; Néstor A Cafferatta, "El tiempo de las Cortes Verdes" (2007) 2007-B-423 Revista Juridica Argentina La Ley. See also the references included in note 1.

but this position treats the content of the right to protect the environment as if the constitution had entirely predetermined it. It proceeds as if the Constitution was an exhaustive environmental code from which the judge obtains the right answer for each case.

As we have already said, we will not controvert here the philosophical grounds of this position. However, it is quite hard to believe that this description conforms to the reality of judicial procedures. Judges do not simply *extract* the solution of the case from the constitutional text. Constitutional provisions are short, generic, and ambiguous. Judges *build* a solution based on legal materials, constitutional doctrine, and their own opinions and prejudices. The question is not if the right to the protection of the environment is directly operational or just programmatic. The true question is this: why should the judge decide the content of that right on a case-by-case basis and *a posteriori* instead of conferring that power to the legislature, which would decide on a general basis and *a priori*?

The problem is not necessarily about democratic legitimacy: the judiciary is not based on the democratic principle, but we accept the non-democratic nature of its decisions as a part of the rule of law. Moreover, even in courts, some doses of *democratic deliberation* can be injected through, for instance, public hearings with the participation of civil society organizations.[55] The problem is mainly about legal certainty: the clearer and more detailed the legislation, the more predictable judicial decisions.

VI. FEDERAL TENSIONS

A. Legislative and Executive Powers

[55] On hearings in environmental procedures see Alicia Morales Lamberti, "Derechos Humanos y debido proceso ambiental: ¿quo vadunt en materia de principio de no regresividad ambiental?" (2018) 10 Cuaderno de Derecho Ambiental at 26–54; Cristina Del Campo, "La participación ciudadana en el marco de los derechos humanos: ciudadanía ambiental" (2018) 10 Cuaderno de Derecho Ambiental at 107–126.

Argentina adopts a federal system where the legislative, executive and judicial powers are distributed between the federal government and local governments.[56] The expression *local governments* refer to the 23 provincial governments and the Government of Buenos Aires City (whose autonomy regime is similar, but not identical, to that of the provinces).

According to Article 41 of the Constitution, as incorporated by the 1994 reform, the federal government has legislative competence to adopt "standards containing the minimum conditions of protection [of the environment]" and local governments the competence to adopt "those which will be necessary to complement them […]." The article, therefore, distinguishes between standards relating to minimum conditions and additional standards. In Argentina's constitutional terminology, the article establishes the *concurrent* legislative competence of the federal and provincial governments in environmental matters in a mechanism known as *concerted federalism*.

Minimum conditions are of exclusive competence of the federal government. Local governments cannot legislate on them. The *additional standards* they adopt must abide by federal standards. The supremacy of federal law on minimum conditions over local legislation is a consequence of general principles established by the Constitution for the relationship between legal orders that exist within the federal state. According to these principles, federal legislation is binding on local powers (Article 31 of the Constitution). However, the supremacy of federal environmental law over local environmental law is different from the ordinary supremacy of federal law. *Additional standards* adopted by local governments must detail federal

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[56] On the distribution of competences on environmental matters, see Germán J Bidart Campos, "El artículo 41 de la Constitución nacional y el reparto de competencias entre el estado federal y las provincias" (1997) 3:28 Doctrina Judicial; Daniel Sabsay, "El nuevo artículo 41 de la Constitución nacional y la distribución de competencias nación-provinci" (1997) 3:28 Doctrina Judicial; José A Esain, "El federalismo ambiental. Reparto de competencias legislativas en materia ambiental en la constitución nacional y la ley general del ambiente 25.675" (2004) 2004–I Jurisprudencia Argentina at 776; José A Esain, *Competencias ambientales* (Buenos Aires: Abeledo Perrot, 2008); José A Esain, "La competencia judicial ambiental en el artículo 7 de la ley general del ambiente" (2012) 31 Revista de Derecho Ambiental.

law, but they may depart from federal principles provided that theirs are more protective. In other words, federal *minimum standards* are a threshold of protection that local governments can cross upwards (by adopting more protective rules) but never downwards.[57]

Local governments have legislative competence on *additional standards* for environmental protection. The federal government cannot legislate on these additional conditions; consequently, federal legislation must always be generic. Federal minimum conditions must be broad principles of environmental protection, the specification of which corresponds to local governments. A too detailed federal legislation would infringe on local legislative competences.

The Supreme Court could have had the opportunity to rule on the distribution of powers in two recent cases. It was alleged that a minimum condition act passed by the federal government (in both cases, the Glaciers Protection Act) infringed on the powers of the provinces. In the *Cámara Minera de Jujuy* case, the applicant was an association of mining companies; in *Barrick Exploraciones Argentinas SA*, the applicants were two mining companies and a provincial government. The Court decided that the applications should be rejected in both cases as the Act had not yet been applied in a concrete situation.[58] There was, therefore, no substantive clarification on the distribution of powers. While legislative competence is shared between the federal and local governments, the application of environmental policies corresponds, in principle, to the latter. The federal government exercises executive powers in environmental matters only in federal establishments placed in the territories of the provinces (for example, military units, over which the federal government can exercise all powers intended for the accomplishment of military objectives). The federal government can also exercise executive powers to the extent that

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[57] See Suprema Corte de Justicia de la Provincia de Buenos Aires, *COPETRO SA c/Municipalidad de Ensenada s/inconstitucionalidad de la ordenanza 1887/95*, 20/03/2002.

[58] CSJN, *Cámara Minera de Jujuy*, Fallos 337:1540, 2014. CSJN, *Barrick Exploraciones Argentinas SA*, Fallos 342:917, 2019.

there are interests beyond local institutions' limits (for example, in the case of a shared ecosystem).

The principles of federal good faith and federal loyalty govern relations between the federal and local governments and between the latter themselves. These principles prohibit any abusive exercise of powers constitutionally attributed to the federal and local governments.[59] This distribution of competences between the federal and local governments is highly problematic because administrative or political borders do not contain environmental problems. The constitutional distribution of powers has been designed to please local elites by protecting local autonomy rather than creating efficient environmental management procedures. The Argentinian administrative and political system lacks adequate mechanisms for coordinating different governmental levels.[60] This *unarticulated institutional pluralism*[61] tends to obstruct efficient environmental policies. Moreover, local governments resist any form of coordination, which they usually perceive as an interference of the federal government with local competences.[62]

B. Jurisdictional Powers

Different legal actions are possible for the protection of the environment. The main route is the action to prevent, restore or compensate for collective environmental damage. It can be exercised through the *amparo* procedure (the *amparo* is the primary means of protecting fundamental

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[59] CSJN, *La Pampa c/Mendoza*, Fallos 340:1695, 2017. CSJN, *Barrick Exploraciones Argentinas SA*, Fallos 342:917, 2019.

[60] Ricardo Gutiérrez, "Federalismo y políticas ambientales en la Región Metropolitana de Buenos Aires, Argentina" (2012) 38:114 EURE at 147–171.

[61] Jacint Jordana, *Relaciones intergubernamentales y descentralización en América Latina. Una perspectiva institucional* (Washington DC: Inter-American Development Bank, 2001).

[62] Maximiliano Rey, *Federalismo y políticas públicas. El funcionamiento de los consejosfederales en Argentina* (PhD thesis, Universidad Nacional de San Martín, 2011) [unpublished]; Daniel Sabsay & María Eugenia Di Paola, "Coordinación y armonización de normas ambientales en la República Argentina" (2008) 3 Revista de Derecho de Daños at 137–162.

rights recognized in the Constitution) or by the ordinary procedure. The exercise of the specific action for the collective protection of the environment (by the *amparo* procedure or by the ordinary procedure) does not prevent the exercise of the civil action for the prevention, the reconstitution, or the compensation of the individual damage. Civil actions can be brought by the person having standing under the classic terms of civil law. Finally, other judicial procedures are related to the environment, like the criminal action for environmental crimes.[63]

According to Article 41 of the Argentinian Constitution, minimum standards adopted by the federal government on environmental matters cannot interfere with "local judicial powers." That is to say, the competence of local judiciaries established by the ordinary rules on the judicial competence. In the context of the Argentinian federal regime, the judicial competence of local courts is the normal situation; federal judicial competence is exceptional. The National Environmental Policy Act assumed this principle. The Federal Congress passed the Act, but disputes that may arise in the environment are generally subject to ordinary (local) courts (Articles 7 and 32). Thus, federal courts will be competent only in the exceptional cases established by the common rules on judicial competence. These rules are very complex. Federal courts may be competent *ratione personae* (for example, when the federal government or a foreign state is a party to the proceedings if a trial involves two or more provinces); *ratione loci* (for example, if the trial relates to specific activities in places directly subject to federal jurisdiction, such as a military unit or a national university); and *ratione materiae* (if a specific law subjects the matter to the jurisdiction of the federal courts or if the case directly and primarily involves federal law).

The National Environmental Policy Act grants jurisdiction to federal courts *ratione materiae* if environmental resources shared by many provinces are involved (Article 7). According to the criterion established by the

[63] On environmental actions see Eduardo Pablo Jiménez, "El amparo colectivo" in *Derecho Procesal Constitucional* (Buenos Aires: Editorial Universidad, 2005); Marcelo López Alfonsín, "Las acciones ambientales" in *Derecho Procesal Constitucional* (Buenos Aires: Editorial Universidad, 2005).

Supreme Court in the *Mendoza* judgment, this rule applies only to actions for the prevention, recovery, and compensation of collective environmental damage but not to actions relating to individual damage. Local courts will have jurisdiction for the latter unless the federal judiciary has jurisdiction for another reason.[64] It is not clear how the rule in Article 7 of the National Environmental Policy Act can impact other actions like criminal actions.

According to the jurisprudence of the Supreme Court, for federal judges to be competent in the circumstances set out by the law, it is necessary to demonstrate "in a sufficiently probable manner" that the damage affects shared resources; therefore, the intervention of federal courts must be interpreted restrictively.[65] In addition, if there are inter-jurisdictional and local damages, the case should be divided between federal and local judges.[66] Federal jurisdiction can also derive from applying other rules of federal law beyond the provisions of the National Environmental Policy Act. Thus, for example, the application of the federal regime on electricity.[67] However, a purely indirect implication of a federal rule (for example, the constitutional rule on environmental protection or the protection of aboriginal peoples)[68] is not sufficient to trigger the jurisdiction of federal courts; otherwise, almost all cases would fall under federal jurisdiction. Procedural law to be applied will be federal or local, depending on the competent judge. However, procedural law cannot be interpreted in a manner contrary to substantive environmental law.[69]

This complex distribution of judicial powers, which was explained only in broad terms in the previous paragraphs, generates the same problems that we have pointed out in the distribution of legislative and executive powers.

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64 CSJN, *Mendoza*, Fallos 329:2316, 2006. CSJN, *Pla*, Fallos 331:1243, 2008.

65 CSJN, *Asociación Civil para la Defensa y Promoción del Cuidado del Medio Ambiente y Calidad de Vida*, Fallos 329:2469, 2006. CSJN, *Rivarola*, Fallos 334:476, 2011. CSJN, *Assupa*, 330:4234, 2007. CSJN, *Asociación Ecológica Social de Pesca, Caza y Náutica*, Fallos 331:1679, 2008.

66 CSJN, *Asociación de Superficiarios de la Patagonia c/ YPF*, A. 1274. XXXIX. IN2, 2014.

67 CSJN, *Edenor*, Fallos 327:5547, 2004.

68 CSJN, *Roca*, Fallos 318:992, 1995. CSJN, *Salas*, 334:1754, 2011.

69 CSJN, *Custet Llambi*, Fallos 339:1423, 2016.

First and foremost, it may produce the artificial fragmentation of an environmental issue that would be better dealt with under a more centralized judiciary system. Moreover, frequent discussions between federal and ordinary courts on competence issues produce significant losses of time and resources.

VI. CONCLUSION

The definition of any environmental agenda needs analysis of sharply controversial problems related to distributing the burdens created by environmental standards and who will decide on that distribution. Three aspects of this controversy have been considered through the Argentinian Supreme Court case law lens. First, which environmental impacts should be considered harmful and how to regulate risky activities to avoid such damages? The Supreme Court tries to balance different constitutional values in resolving these tensions. In the case of the first aspect, a tension exists between environmental protection and economic development, which are both constitutional values. Second, which branch(es) of the state (the judiciary branch or the legislative/executive branches) will have the power to determine which impacts and activities are acceptable and which are not? The distribution of powers between the judiciary and the political branches of government has consequences in terms of the level of environmental protection (judges tend to be more protective than the legislature or the executive) and in terms of legal certainty (which is another constitutional value). Third, how this power will be distributed in the context of a federal state? It relates to balancing uniform environmental protection and local autonomy. As the Supreme Court case law shows, the difficulty of finding an adequate constitutional balance in these three aspects is usually added to the legal and factual complexity of environmental issues. It sometimes results in ambiguity and a lack of clarity.

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The author declared that he has no conflict of interests.

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