I. Introduction

The purpose of this paper is to introduce the readers to the basics of the Argentine legal system in relation to the environment and sustainability. The idea is not to describe the numerous and diverse legal instruments that address environmental issues; instead, the paper focuses on some of the most critical institutional issues of the Argentine legal system related to the environment.

The study of the development of environmental policy and law in Argentina shows that one of its main constraints is the absence of a clear institutional distribution of environmental competencies and the lack of effective enforcement. Government agencies in charge of environmental policies are weak, their competencies and responsibilities are fragmented and enforcement is lax in many areas. This institutional framework for environmental law and policy encompasses a net of overlapping federal, provincial and municipal agencies. As a result, there is a complex system of law, regulations and authorities which lead to a situation of uncertainty in formulating environmental policies and in the enforcement of regulations. This scenario allows polluters to evade compliance with environmental legislation, while at the same time discourages new investment, given the uncertainty regarding what environmental requirements have to be fulfilled and which authorities are in charge.

The governance of a model of development that seeks to encompass economic, environmental and social concerns lays, partially, in the strength of its institutional framework. The Argentine constitutional reform of 1994 sets the conceptual basis to overcome this situation of institutional uncertainty and fragmentation; however, many steps have to be taken to implement these constitutional mandates.

In this framework, this paper begins by briefly describing the evolution of Argentine environmental law and policy, focusing on the constitutional reform of 1994 and the concept of the right to a healthy environment. Second, it addresses the issue of distribution of environmental competence and analyses the basics set by the constitutional reform. Third, it refers to the institutional situation and identifies the different governmental agencies with competence on the elaboration and enforcement of environmental norms. Finally, it addresses the issue of access to environmental justice, given the importance this issue has in the protection of the environment and the enforcement of environmental laws.

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1 World Bank Document; "Argentina, Managing Environmental Pollution: Issues and Options"; volume II; Report Numero 14070-AR, octubre 1995; pag.5
II. Brief evolution of Argentine environmental law

In order to help the reader, who is perhaps not aware of Argentine law, we consider it necessary to briefly describe the evolution of the Argentine legal system in regard to the environment. Broadly, the evolution of the Argentine environmental legislation could be explained in three long periods, which even though they appear in a sequence, many aspects pointed out in the first two periods are absolutely in currency nowadays. In the first step, the legal treatment of the environment in Argentina is not substantially different from what was going on in other countries. The rules which nowadays we would classify as environmental mainly referred to problems related to relations among neighbours (bad smell, noise, etc), hygiene and labor security, or referred to the usage of natural resources; these first ones came out from the civil, penalty, administrative or labor law, and did not answer to common principles or criteria, the ones which nowadays we consider environmental law.

In a second step, an incipient environmental legislation is developed in the national and provincial field, of a sectoral character. In general, there is no legal framework which orders the different efforts which are carried out from a national and provincial level to the protection of the environment, which are in general focussed over specific resources or problems (legislation about water, air pollution, etc). Within this framework and during the eighties the provincial constitutions are modified, stating the right to a healthy environment and setting principles of the environmental policy and management within these provinces. This process of reform in the provincial field is giving way to the reception of the environmental issue in the 1994 national constitution reform.

The 1994 reform points out the beginning of the third period. The National Constitution passed in 1853, since it was a constitution of the last century, did not state the right to a healthy environment, (even it did not mention the protection of the environment, a great part of the doctrine and jurisprudence considered that such rights were set in section 33 which referred to the non enumerated rights). The 1994 reform takes the environmental protection to the national constitution and sets down the basis for the development of the environmental policy in Argentina.

III. The right to a healthy environment

According to the principles stated by the Conference of the United Nations about Human Environment held in Stockholm in 1972 and following the line adopted by all the constitutions passed from that date, the constitutional reform took the environmental issue in section 41 of the National Constitution. Therefore, this section states the right of each person to a healthy and stable environment in order to get a sustainable development, together with the correlative right to preserve it.

3 Complete text of section 41 of the National Constitution.

"All the inhabitants are entitled to a healthy, stable environment, qualified for the human development and so that the productive activities satisfy the present necessities without involving the future generations; and have the obligation to preserve it. The environmental damage will firstly generate the obligation of repairing, according to law.

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

The Nation shall enact the laws containing the minimum steps of protection and the provinces shall enact the necessary ones to complement them, without altering the local jurisdictions.

It is forbidden the entrance to the national territory of remainders which are or could be dangerous, and of
The reception of the principle of sustainable development or intergenerational law implies – according to Constitutional interpretation – the obligation to guarantee that those ones who will inherit the environment shall live in conditions, at least so good or better than the present ones in order to make easier its effective development. Likewise, the Constitution states clear rules, directed to the authorities, in order to fulfill the goals stated in the section, and different criteria are stated for the distribution of competence in the interior of the federal state. The procedures for this constitutional program about environmental and sustainable subject shall arise from the rules, the fixing of policies, the exercise of the police power, etc.

Section 41 mentioned in its first paragraph states the human right to the environment, to which it classifies as “healthy, stable, …”; through this adjectives it is determined characteristics which the environment must necessary have in order to get an adequate quality of life. At the same time, a goal in time is fixed – the satisfaction of the “needs (…) of future generations” which brings the incorporation of the notion of sustainable development that nowadays places the environment as necessary when taking decisions concerning the development of an organized community. Likewise, the Constitution refers to productive activities; in fact it is focussed to a model of development which makes viable life in planet nowadays and in the future. This is the sense given in the declaration of the United Nations and the strategy of the International Union for Nature.

IV. Distribution of environmental competence

The clearing up of competence between the National State and the Provincial States arises from the National Constitution. Section 21 states the general principle for the distribution of competence, through which the provinces keep the power that is not delegated to the National State. That is to say, the National State has a competence of exception, since it must arise from an expressed delegation. The provinces have a general competence, which consists of all the powers that have not been expressly delegated to the National State. As regards environmental issues, and since the 1853 Constitution did not state any reference to the environment, the provinces kept their legislative competence concerning this field. In this way, the provincial States could adhere to national laws, pass their own laws or simple not to rule on the subject. The environmental legislation passed by the National State was for the territories in which the National States had competence.

The 1994 Constitutional reform modifies the distributive model of competence as regards environment. The National State has competence to legislate on environmental issues passing rules that contain the “minimum steps of environmental protection”; this power is exclusive and excluding of the National State. The provinces, on other side, have competence to legislate in case of omission of the National State or to impose rules that establish levels of environmental protection higher than those ones foreseen by the National legislation on minimum steps.

A simple reading of section 41 may give the impression that the setting of this

5 Sabsay, Daniel Alberto, "Gobernabilidad, medio ambiente y el desarrollo sustentable", in International Relations, year 8, Nr. 14, December-May, 1998, pag. 90.
new way of distribution of environmental competence does not present any inconvenient. However, the experience shows us the difficulties that arise when defining the division lines between the national and provincial powers. The lack of agreement between the different levels of government over the scope of the “minimum steps” has become one of the main obstacles for the development of an environmental policy in Argentina.

The argentine public policy has been characterized, among other things, by the concentration of powers in national governments against provincial governments. Facing this situation, the 1994 Constitution reform has introduced a series of modifications and specifications in order to make stronger the federalism. As regards the environmental subject, the Constitution expressly acknowledges to the provinces the original ownership of the natural resources existing in their territories (section 124). In general, the holder of the ownership on any property, in this case the natural resources, is entitled to the exercise of the jurisdiction over the same one. As it was pointed out before, the provinces have delegated to the National State the determination of the minimum steps of environmental protection, which shall be necessarily applied in accordance with the uses of natural resources. From the interpretation of both these sections 41 and 124, it is known that the determination of the minimum steps shall not mean a lack of ownership that the provinces have over such resources. According to it, the determination of the scope of the national powers derived from the expression “minimum steps” must be done with a restrictive scope.

The National Supreme Court has already have the opportunity to give a sentence as regards it. (Case Roca, Magdalena against province of Buenos Aires over unconstitutionality. Case R 13 XXVIII). The plaintiff submits the unconstitutionality of a provincial rule that approves an agreement between the State of the Province of Buenos Aires and a private enterprise to make a construction. The Court resolved that the administrative and judicial authorities of the provincial state, and not the national ones, are in charge of checking if the project of the building affects aspects of the provincial law, as it is everything which belongs to the protection of the environment. The Court justifies its decision pointing out that even if the National Constitution states that the National State is in charge of passing the minimum rules of protection, the Constitution also expressly acknowledges the local jurisdictions in the subject, which can not be altered.

According to this, it is necessary to determine the scope of the term minimum steps in order to advance in the process of implementation of section 41. Most of the doctrine states that with the “minimum steps”, the Constitution refers to the essential principles in order to satisfy the goals stated in the Constitution. The objective is not to establish a uniform environmental tutorship, but the same minimum of environmental quality for all the country.

In this framework, we understand that the environmental clause of the Constitution requires a task in different times. In first place, a general law should be passed, which shall contain clauses mainly over the following issues: Argentine environmental policy. Instruments of the environmental national policy. Authority of application. Determination of competence. Procedures for the resolution of interjurisdictional conflicts.

We also consider of national importance everything related to environmental damage, responsibility and special insurance; but, because of their characteristics, we consider convenient that these aspects be objects of a particular rule. Anyway, it is

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7 Sabsay, Daniel Alberto, “El nuevo artículo 41 de la Constitución Nacional y la distribución de las competencias nación-provincias”; in Doctrina Judicial, 1997-2, pag. 785.
competence of the National Congress the penalty of environmental crimes, which should be part of a special chapter in the penalty code.

At last, after the general law mentioned hereinbefore has been made, it shall be possible to work over each special subject (quality of water, air, etc.). In this way, the “minimum steps” shall be determined for each one of the subjects in particular, which is not going to be difficult since the complications should be set down with the application of the criteria contained in the general law, which have been the object of an intrafederal concerted arragement that shall supply the necessary consensus in order to legitimate and make the rules passed thereafter applicable.

This strategy of implementation of section 41 of the National Constitution shall only be possible if there is a common base among the different levels of the government. We consider this necessity successful because it places us in a framework of federalism of “concerted” actions in favor of which we are, not only because of a problem of loyalty with certain convictions but mainly because we believe that this model assures better efficiency in the application and observance of environmental rules.

V. The institutional framework for environmental law and policy

According to what is stated in the National Constitution (section 41, third paragraph), the execution of the environmental legislation, is competence of the provincial authorities. This is justified because the provincial governments, different from the national government, have a closer relation with environmental problems. Notwithstanding this, the national administrative authority is competent in the application of the environmental legislation in the fields of competence of the National State (sailing and interprovincial rivers, interprovincial transport, etc).

The institutional body of the environmental policy in Argentina is complex due to its federal organization. Argentina has national, provincial and municipal administrative divisions with environmental competence; different mechanisms and steps of coordination among provincial and national levels, the same as among interprovincial and intermunicipal ones, should be added.

The Secretariat of Natural Resources and Sustainable Development is the division of the National State with competence in the environmental policy. The Secretariat has a cabinet level, directly depending from the Presidency of the Nation. However, the Secretariat is not the only agency involved in the environmental subject in the national field. Due to the transversal character of the environmental problem, there are many other divisions in the organigram of the National State which have responsibility over different aspects of the environment and the sustainable development. The National State has not known how to face in an adequate way this transversal character; the procedures of the drawing up of administrative policies or rules on environmental profile lack of counseling and/or inter-jurisdictional coordination. This fragmentation of efforts and the division of responsabilities and application of environmental public policies are one of the weakest aspects of the argentine institutional framework.

As regards the provinces, the capacity of execution of the environmental policy differs substantially. Some provincial governments have enough human, technological and financing resources, meanwhile others lack the minimum capacity to carry out an environmental policy.

Due to the federal organization of the Argentine State, the relations nation-

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8 Idem 5, pag.96-97
9 Idem 1, pag. 98.
provinces are a fundamental point in the drawing up and execution of the environmental policy. In this way, it is important to point out the importance of the Federal Council of Environment (COFEMA: Consejo Federal del Medio Ambiente)\(^\text{10}\). This Council has been created in order to assist the complex relations which are generated as regards environmental issues and which are extended over the provincial frontiers, acting as a permanent forum for the creation and coordination of environmental policies between the provincial governments and the national government; COFEMA has been an advance for the construction of a federalism of arrangement, but its effective influence in the process of drawing up and coordination of the environmental policy has been relative. In this way, the Environmental Federal Treaty (Pacto Federal Ambiental), signed in 1993 by the provincial governments and the national government can be mentioned. This Treaty, is another important background, but less effective, in the search of mechanisms for the arrangement and coordination of environmental policies among the different levels of government.

Likewise, there are other instances of interjurisdictional cooperation and coordination as regards certain environmental questions. Such is the case of the interprovincial agreement on the Colorado river (COIRCO) or the Regional Committee on the Bermejo river (COREBE: Comisión Regional del Río Bermejo)\(^\text{11}\). In such way, the 1994 Constitution (section 124) states the faculty of the provinces to create regions for economic and social development. The creation of regions is outlined as an institutional way ready to give an answer to the economical challenges that arise from the globalized world. The Region, in the argentine case, does not mean a new level of political power with a territorial base, but a formal instance of coordination of policies among many provincial governments, based on the common environmental, social, historical and/or economical characteristics that have among them. From 1994 up to date, the first interprovincial agreements have been made, creating the Regions. The Regional Agreement for the Environmental Protection signed by the argentine northeast provinces has a particular interest since the specific goal is the harmonization and coordination of the environmental policy in this region of Argentina.

Finally, and due to the local characteristic of a great part of the environmental problems, it is necessary to mention the importance of the municipal governments in this issue. In the argentine legal order, the municipality is the third level of government as regards the territory. The National Constitution states the autonomy of municipalities being the public law of each province in charge of defining the scope of attributions of the local governments in the area of environment and substantiality. In general the municipalities assist the environmental problems of urban character, such as noise, garbage, quality of air and water, green spaces, etc. Likewise, the processes of descentralization of the rendering of certain public services have given a greater participation of the municipal governments in the control and monitoring of the quality of the same ones, even when the descentralization has not been together with an effective transference of resources from the provincial or national governments in order to make stronger the capacity of the municipalities in such way.

### VI. Access to environmental justice

\(^{10}\) The Federal Council of Environment was created by the Articles of Incorporation 08/31/90, ratified by National decree Nr. 2878/90 and by the provincial governments. The Council is composed by the National State, the provincial States which ratified the Articles of Incorporation or which adhere after it and the autonomous government of the City of Buenos Aires.

\(^{11}\) The object of COREBE consists in the adoption of political decisions and the direction of the necessary actions in order to take integral, rational and multiple advantage of the hydric resources of the Bermejo river. In COIRCO case, it is referred to the Colorado river.
The constitutional acknowledgement of the right of any inhabitant of the argentine territory to a healthy environment an the obligation to preserve it, is a rule directly operative, even when the national State has not passed the rules prescribed by law or the complementary ones for its application. This means that in the case that the activities shall damage the right to enjoy a healthy environment, the jurisdictional protection of such right may be applied, even when the public authorities have not passed the necessary rules for its application as the Constitution requires it in section 41.

An important issue for the protection of the quality of the environment is the legal standing in order to start a legal action. The protection of the quality of the environment has a collective and supraindividual interest which corresponds to a plurality of individuals, belonging to a group or community; therefore, the lost of the biodiversity, the damage of the ecological processes, of the landscape, the irrational use of natural resources, etc., are torts to the right to a healthy environment which have a collective impact in general, but they do not, necessarily, have an individual or particular affected.

Section 43 of the National Constitution in its second paragraph, states legal standing to three different subjects for the filing of a summary proceeding for the protection of the environment and other rights of collective incidence in general.

Firstly, the Constitution legitimize the “affected”. This expression has brought different interpretations. On one hand, a restrictive interpretation, being an “affected” that one which is holder of a subjective right. On the other hand, the broad position, considers that the interpretation of both terms, “affected” and “rights of a collective incidence in general”, allows to suppose a legal standing for any affected claiming collective rights. The jurisprudence has been cautious as regards the interpretation of the scope of the term “affected” for the procedural legal standing in the environmental field. In different ways, the judicial decisions have identified the “affected” as the affected person, the defender of people and the associations with these goals, registered according to law. The law shall determine the requisites and ways of their organizations.

In this way, part of the doctrine considers that the affected is a person who has suffered a tort on his/her personal and direct interests; therefore, the rule has not stated a popular action that allows the legal standing of collective interests above the particular ones. Cassagne, Juan C.: “La acción de amparo en la Constitución reformada”. Buenos Aires. Argentina. La Ley, 1994-E; Sec. Doctrine; pag. 1043.

This part of the doctrine understand that the word “affected” means the legal standing to sue the protection of rights of general collective incidence, including the right to the environment. In this case, a minimum reasonable and enough interest should be added, according to similar figures of the Anglo-Saxon law, in order to become a defender of rights of general incidence or supraindividual ones. This current of interpretation expresses that the first paragraph of section 43 of the National Constitution refers to torts to rights or interests of particular or personal type; the second paragraph, instead, does not refer to aggressions or damage of personal or particular character, but it refers to supraindividual rights of collective incidence, that are the vague interests.

neighbor, who in spite of not suffering a personal and direct damage, keeps a certain relation which may be physical with the polluted source (Moro and others against Paraná Municipality), or because he/she is living in the place where the risky construction is being carried out, even when there is no physical proximity (Schroder, Juan against National State).

Secondly, the Constitution refers to the “ombudsman”. The legal standing of this institution is a result of its role as a public defender of the general interest of the community. As a result, there is a strong consensus regarding the legal standing of the ombudsman for the filing of summary proceedings for the protection of the environment and other rights of collective incidence.

Finally, section 43 mentions the “…. Registered associations … registered according to law, which shall determine the requisites and ways of organization ....”. In this point, the bill with half approval from the Senate, ruling of the new constitutional clauses, stated criteria so restrictive that was against the Fundamental Law. The exclusions of unions and political parties were added to the formal limitations as regards the registration of the organizations. Besides, in order to appear before Court, an association should have as an objective the defense of only one collective interest. Fortunately, the Deputy Chamber has modified such decision with broader criteria for our legal figure.

One of the most innovative aspects of the 1994 constitutional reform has been the entering of the summary proceeding for the protection of collective rights, including the rights which protect the quality of the environment. In fact, the characteristics of the rights to be protected, as well as the consequences that it brings as regards legal standing for the access to the justice, modify the traditional ideas in this field. Being on the contrary, the objectives pretended with its institutionalization could not be achieved, which would mean that the constitutional rules have not been created in order to be fulfilled.

VII. Conclusion

As it has been mentioned hereinbefore, the managing of a model of development which pretends to harmonize the economic field with the environmental and the social one, depends, in part, of the strength of the institutional framework. The right to a healthy environment, the acknowledgement of the legal standing in order to sue in defense of this right, are positive steps for the managing of the sustainable development in Argentina.

However, the difficulties in order to deal with the problem of the distribution and coordination of competence as regards environment between the national State and the provinces, is still one of the main obstacles for the drawing up and application of the environmental legislation. The possible alternatives to succeed this situation shall be frame in a federalism of arrangement, to be based in the consensus, cooperation and coordination between the different levels of government. Only a model with these characteristics may assure a better efficiency in the application and observation of the environmental rules.

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