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Constitution and Environment in Relation to Sustainable Development

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1. Development as Viewed by the Constitutional Assembly of 1994

The introduction of the expression of human development in the Argentine National Constitution¹ is a clear statement by the constitutional assembly as to the parameters to be considered when making decisions in government, when what is at stake are the conditions for human life: dignity, quality and equality. From the wording of the constitution it is clear that those responsible for applying and interpreting it should be fully aware of the fact that their actions must constantly be seen to involve those elements that allow for the creation of the conditions that bring improvement in the existence of individuals in those three areas. This makes for a program containing both a new notion of equity in its intergenerational version, and “guaranteeism,” which must be administered by means of the most modern instruments that accompany the evolution of constitutionalism in its social aspect and give full recognition of the rights of collective incidence.

As expressed in a previous paper,² human development acts as a sort of convergence point—several different components should be present for its vitality to be guaranteed. In fact, this presence is achieved when certain objective and subjective notes apply, which together make existence in a framework of equality and dignity possible. Now, how can we be sure that in a certain place, in a certain situation, this value prevails either for a com-

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1. CONSTITUCIÓN ARGENTINA.

2. GERMÁN J. BIDART CAMPOS & ANDRÉS GIL DOMÍNGUEZ, *LOS VALORES EN LA CONSTITUCIÓN ARGENTINA* (Ediar ed., 1999).

munity or for a person as a “lighthouse” of existential conditions? In theory, it seems to be an impossible task because, as we see it, the elements required to be able to evaluate such a situation would vary according to temporal and spatial circumstances. Of course, given those particularities, in the case under consideration it is necessary to establish whether the dynamics that specifically allow for the clear observation of all that the term human development implies are being created.

Human development brings with it an idea of evolution, of progression towards a “ceiling” of living conditions. That ceiling is becoming ever higher and, for our observation, must reflect more and more a growing trend towards satisfying those needs that make for equality and dignity in human existence without ignoring the quality of life which will be given by the environment in which the individual lives. The reformed constitution uses the expression “human development” in sections 17, 19, and 23 of article 75,³ while the constituent assembly does so when it sets out the rights of “the indigenous peoples of Argentina.” There, the term acts as a yardstick for determining the *quantum* of lands to be granted to the indigenous communities. In the other two clauses it acts as a yardstick that must be present in shaping those government actions designed to assure the progress of the community.

In the dogmatic part, our expression only appears in one of the articles of the second chapter, added by the reform under the title “new rights and guarantees.”⁴ Article 41 consecrates the right of all inhabitants “to a healthy, balanced environment fit for human development and for productive activities which can satisfy present needs without compromising those of future generations.”⁵ That is to say that as far as the assembly is concerned, human development would appear to be the equivalent of sustainable development. We believe it is in this part of the constitution that the conception of a model of development in which environmental, economic, social, and cultural variable convergence appears most forcefully. It is a transverse theme derived from joint consideration of the issue of the environment and environmental protection, and of all that concerns production in the development of a community.

3. CONST. ARG. pt. II, arts. 75(17), (19), (23).

4. CONST. ARG. pt. II.

5. CONST. ARG. pt. I, art. 41.

More than eight years after the reform of the constitution, Congress sanctioned the General Environmental Law⁶ by virtue of the mandate expressed in the third paragraph of article 41 of the National Constitution.⁷ This marked the beginning of a new cycle in the treatment of the question with the aim of achieving sustainability of our country's model of development. It sought to make the constitution a reality inasmuch as the environment should be "fit for human development so that productive activities may meet present needs without compromising those of future generations."⁸ The new General Environmental Law covers basic aspects of national environmental policy, in accordance with contributions made by the legal community and by society in general.⁹

2. The Sustainability of Development

The significance of the sustainability of development makes a very detailed analysis necessary. The preservation of the environment only becomes a real possibility when it is linked to the concept of development. By incorporating the environment into development, a new concept is born with the introduction of the environmental variable. The limit on any action of development should be the point at which damage is caused to the environment as measured against previously established parameters. This position gives rise to the notion of sustainable development.

The phenomenon is apparently easily explained and quickly understood. However, putting it into practice demands tremendous effort. Its application forces governments and societies, and the different sectors that make up those societies, to work together in an attempt to correct errors, change activities, and adjust courses of action. None of this can be spontaneously generated. It requires concessions and revisions by all sectors involved in the various processes of production, creation, education, consumption, etc. In order for these changes to be made, it is necessary to win acceptance and, prior to that, understanding of the complete phenomenon by those who will have to observe and pur-

6. Law No. 25.675, Nov. 27, 2002.

7. CONST. ARG. pt. I, art. 41.

8. *Id.*

9. See Daniel A. Sabsay & María Eugenia Di Paola, *El Federalismo y la Nueva Ley General del Ambiente*, 32 ANNALS OF ARGENTINE LEGISLATION, INFORMATION GAZETTE (DOCTRINE) 47 (2002) [hereinafter Sabsay & Di Paola, *El Federalismo*].

sue the transformations. Thus we will achieve consensus on this reality, and on the measures to be adopted.

We are in a situation that demands renunciations; each one of us needs to give something. For an industrialist, that something could be controlling manufacturing processes in such a way that the activity does not cause contamination; for a forestry producer, it could entail replanting trees in exactly the same proportion as those he has felled; for a hunter, deciding not to trap certain species; for a common citizen, contributing in every action to avoid contamination.

We must ensure that each act, activity, and action that is undertaken is carried out in such a way as to produce no negative consequences for the environment. These consequences are not restricted to our present reality alone but might also be felt by the future inhabitants of the planet. The protection of the planet is a debt we all have with future generations. The intergenerational character, or inter-generationality, is one of the characteristics of environmental protection and, in particular, its link with development. It poses one of the most pressing dilemmas of the present day, that of guaranteeing survival for our descendants. To that end, the World Commission on the Environment and Development, created by the United Nations (Brundtland Commission), said in its 1987 report entitled *Our Common Future*,¹⁰ that in order to be sustainable, development must be geared to meeting the "needs of the present without compromising the ability of future generations to meet their own needs."¹¹ According to the ideas we are presenting, it is our responsibility to preserve the environment for future generations in such a way as to ensure them a decent standard of living. To do that it is necessary to confront the excesses of uncontrolled technological advance and to protect the vegetative growth of the population. The United Nations Conference on the Environment held in Stockholm in 1972 addressed these concepts.¹²

The United Nations Conference on the Environment (Stockholm 1972) further defined the right of all human beings to a suitable environment as follows: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being; and

10. WORLD COMM'N ON ENV'T AND DEV., *OUR COMMON FUTURE* (1987).

11. *Id.* at 43.

12. *Report of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Corr. 1 (1972), 11 I.L.M. 1416, 1418.

he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹³

Among its twenty-seven principles, the 1992 Rio Declaration on the Environment and Development stated:

Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.¹⁴

Principle 10: The best way to deal with environmental issues is with the participation of all interested citizens at the corresponding level.¹⁵

Ten years after the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro, the World Summit on Sustainable Development was held in Johannesburg. The Summit produced a Declaration that describes the steps taken since Stockholm 1972 in tackling the problem of environmental deterioration.¹⁶ The representatives of the world's peoples recognized the serious problems to be resolved, and as part of their commitment to sustainable development agreed on an Application Plan for the decisions taken during the Summit, with the aim of promoting human development and achieving universal prosperity and peace.¹⁷

Nationally, every person should have adequate access to any information on the environment held by the public authorities, including information on materials and activities that pose a danger in their communities, as well as the opportunity to participate in decision-making processes. States should facilitate and foster sensitization and the participation of the population by making information available to all.

Effective access to judicial and administrative proceedings, including compensation for damage and relevant resources should be provided. Shared treatment is a guarantee of more appropriate measures. In short, in order to achieve consensus it is necessary

13. *Id.* at 1417-18.

14. U.N. Dep't of Econ. & Soc. Affairs: *Report of the U.N. Conference on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last modified Jan. 12, 2000).

15. *See id.*

16. U.N. Division for Sustainable Development, *Johannesburg Declaration on Sustainable Development* (2002), available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm (last modified Mar. 24, 2003).

17. *See id.*

to find the way to share discussion on these issues by establishing the most adequate channels of participation. Over the last decades citizens have had ever-greater presence in decision-making on environmental issues and the management of natural resources. Legislation and practices in the most developed democracies are proof of this, and it has been made possible thanks to the very active role played by independent sectors, and the work undertaken by non-governmental organizations. Likewise, the participation of citizens has occurred through mechanisms such as public hearings and co-participation in administration, among others, which have sought to create public spaces favorable to such acts.

3. Appropriate Institutions to Ensure Sustainability of Development

Quality of life as a legally protected right has meant a vast expansion in the sphere of fundamental freedoms protected by law. Its scope not only extends to the formulation of new human rights but also makes interesting contributions to the organization of power, particularly concerning the relationship between the ruled and the ruling. The impact of the new institutions is felt in most branches of law beginning with a remarkable reformulation of many of the more solid principles of its classic postulates.

These characteristics deserve a transverse interdisciplinary vision that brings together specialists both in law and in other social sciences with the aim of achieving a holistic vision of the subject. This joint effort will produce solutions to the tremendous challenges presented by the need to ensure a decent quality of life for the inhabitants of the different politically organized communities on the planet.

As we have seen in the previous point, this is in conformity with declarations fostering development from a perspective that combines economic, social, environmental, and cultural variables. From this perspective, the question becomes a factor that stimulates the reformulation of many of the institutions of the State of Law. The contributions incline towards the definition of a new constitutionalism and include both the dogmatic and the organic parts of the fundamental law.

We shall attempt to highlight the very special contribution that the legal treatment of the environmental question brings to the law of human rights. We will begin by observing the relationship between environment and law, with a brief exposition on the

evolution of constitutionalism from the incorporation of different generations of rights, links with other elements of the State of Law, and their effects.

3.1. Environment and Law

Declaring the environment the common heritage of mankind has brought with it the need to determine its legal form of protection, both nationally and internationally. The consideration of a fundamental law of the human being, which has as its purpose access to a suitable environment, has as a logical consequence the need for the State to carry out all those actions capable of ensuring man the effective enjoyment of this new fundamental freedom.

This law first appears internationally as one of the basic contents of the 1972 Stockholm Declaration of the United Nations Conference on the Environment.¹⁸ In the thirty years since it was proclaimed, the subject has undergone enormous changes, but the most fundamental elements of the issue are concentrated in this general declaration. Its analysis is a departure point for the formulation of the different problems posed by the consecration of the right to a suitable environment. As we understand them, these definitions and their logical consequences are a good introduction to the constitutionalization of environmental protection. This has occurred in different latitudes. Constitutions sanctioned since the international recognition of this new law have consecrated the protection of the environment without exception, taking as their precedent the work begun in Stockholm.

The contents are completed with the World Charter on Nature,¹⁹ an international document detailing the obligations of states and various other authorities, groups and individuals.²⁰ However, the obligatory nature of these principles is accompanied by regional instruments, of which I wish to highlight the following:

- The African Charter on the Rights of Man and Peoples (1981), whose article 24 expresses that: "All peoples shall have the right to a general satisfactory environment favorable to their development."²¹

18. *Report of the U.N. Conference on the Human Environment*, *supra* note 12.

19. *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., U.N. Doc. A/37/L.4 & Add.1 (1982).

20. *See id.*

21. Organization of African Unity: *Banjul Charter on Human and Peoples' Rights*, CAB/LEG/6713/Rev. 5 (Jan. 7-19, 1981), 21 I.L.M. 59, 63 (1982).

- The Additional Protocol to the American Convention on Human Rights, whose article 11 reads: "Right to a healthy environment. 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment."²²

3.2. Concept of Environment from a Legal Viewpoint

In defining the normative field that includes this subject, it is worth considering that its object is difficult to specify since it varies in time and place. We are not dealing with a specific sphere of substantive issues. Rather, the environmental question refers to complementary forms of activity that, along with specific fields of competence in other disciplines or subjects, seek to achieve particular objectives. The fundamental objective is ensuring a decent or adequate quality of life for the inhabitants of a particular community of variable dimensions, ranging from the international sphere to the smallest neighborhood.

To appreciate the immensity of the issue, we shall undertake to observe the scope of certain concepts, and the direction of certain relationships. By referring to a particular quality that helps achieve what specialists consider being adequate in guaranteeing the members of a particular community a decent life, it becomes necessary to define what is understood by the terms environment, ecosystem, and ecology.

An environment is a set of natural, artificial, or man-made, physical, chemical, and biological elements that make the existence, transformation and development of living organisms possible. An ecosystem is a basic unit of interaction of living organisms with each other and with the environment in a particular space. Natural resources are riches found in nature which serve man and have not yet been transformed by him. They constitute essential elements in the environment, and therefore all ecosystems, and received legal regulation in the law of natural resources, which organized them individually according to the uses that could be made of them. The later appearance of the environmental law arose from the need to conserve the environment in order to avoid

22. Org. of Am. States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (2003), available at <http://www.oas.org/juridico/english/Treaties/a-52.html> (last visited Nov. 20, 2003).

its destruction and, as a result, the danger that an adequate quality of life might disappear. By conservation we understand all those measures that are necessary to preserve the environment and natural resources.

4. Constitutionalism and Laws

4.1. Classic Constitutionalism

Each of the stages in the evolution of constitutionalism has been characterized by the recognition of a generation of rights. This has led to a particular form of exercising control and a model of State, with consequences in the relationship between the ruled and the ruling. The classic constitutionalism of the dawn of the Illuminist movement consecrates individual rights; to life, to intimacy, to personal safety, freedom of expression, freedom of religion, etc. They are freedoms that protect individual aspects of the human being, *i.e.*, they refer to what “a person is,” in terms of legal rights such as life, thought, religion, exercise of trade, etc.

Man is conceived as being isolated, directly related to those who rule him, without intermediaries, since intermediate associations are not recognized. Let us recall that even the *Le Chapelier* law, dictated during the French Revolution, produced the abolition of all forms of corporation that might intervene between the citizens and their authorities. In this framework, control is ensured exclusively by the institutions. They are responsible for “power checking power” (to paraphrase Montesquieu). Belief in the force of law as a sort of balm to guarantee legality removed any possibility of creating controls outside the triad of powers.

Lastly, the type of state corresponding with this institutional model is called a “gendarme state,” a structure of minimal government whose functions are restricted to the defense and security of its inhabitants and to international relations. To this must be added as the principal mandate that of protecting the effective validity of a range of freedoms that are contemplated in the constitution. Freedom is the great value which is pursued on a permanent basis, and alongside which equality in law must be upheld.

4.2. Social Constitutionalism

The second stage of constitutionalism is characterized by the recognition of social rights. The time during which the preceding scheme was valid pointed out the need to protect different spaces

of human activity, not only those that are significant to the attributes of the person as an individual. It is a question of being able to protect the circumstances that surround what "people do" (that is man in his relationship with others in the field of work), and also the consideration of certain vicissitudes liable to affect his existence, which also deserve to be contemplated.

As a result, labor law and social security are born. The state expands its obligations and, under the model of a welfare or "providential state," attempts to reestablish social equations so as to ensure a reinforced concept of equality: that of opportunities. Control is intensified through the recognition of individual guarantees, in such a way as to make it easier for the holder of a right, when faced with some sort of attack on it, or threat of such, to take legal action to prevent it from happening or to cause the threatening situation to cease. Also, specific control agents are created and are added to the jurisdiction of the three powers that constitute government. Thus trusteeships, auditorships, ombudsmen, and other specific institutions appear.

4.3. The Laws of Collective Incidence and a New Phase of Constitutionalism

With the consecration in the 1960s of the right to a healthy environment, the third generation of rights was born in coexistence with the two previous ones—individual and social. These are third generation rights, or "collective incidence," as designated in article 43 of the Argentine Constitution.²³

This new wave has its standpoint in the environment in which human life unfolds, starting from an *ad infinitum* projection that obliges every person alike with the purpose of attaining intergenerational equity. Consumer and customer laws appear together with environmental law, and the ideal of a decent quality of life broadens to guarantee genuine competition to give people true freedom of choice of goods and services, within the framework of a policy that ensures their participation and the provision of adequate information.

This new category of rights is more solidly consecrated in the post-privatization state. The phenomenon marks a turning point in the growth of government faculties. The modification is based on the inefficiency of the welfare state, as well as on the lack of incentive that this model implies for private initiative. As a result

23. CONST. ARG. pt. I, art. 43.

of this new reality, the exercise of public functions spreads over to other agents outside the state. For the latter, it also implies greater control in ensuring that the new situation produces benefits in the standard of living for all, and not just the accumulation of profit in the hands of a few.

Today, the prevailing state of affairs reveals a different scenario to the one described above. The world is witnessing a process of globalization, with concentration of wealth in the hands of a few very powerful groups, which implies a growing loss of decision-making power for the state. Therefore, the continuation of this phenomenon can only augur gloomy results not only for individuals, but also for national and social realities. A reversal of this reality is necessary, and for that reason we think it is worth considering new economic orientations on the subject.²⁴ We believe that tools such as the ones we will describe below, and which refer to this new institution derived from the acknowledgement of third generation rights, make an interesting contribution to achieving important changes, which will ensure a decent quality of life for the inhabitants of our planet.

5. The Right to a Healthy Environment

5.1. National Constitution

The Constitutional Reform of 1994 introduces the concept of the environment into the fundamental law of Argentina. To that end, article 41 addresses the issue in a new chapter in the dogmatic part entitled "New rights and guarantees."²⁵ The first paragraph of this new resolution consecrates the right of all humans to an environment defined as "healthy (and) balanced,"²⁶ and these adjectives comprise the characteristics we mentioned previously. Concurrently, it establishes an objective in time: to meet the "needs . . . of future generations," and speaks of incorporating the notion of sustainable development.²⁷ This means that nowadays the environmental variable is a necessary element in all decision-making on the development of an organized community. The constituent assembly refers to "productive activity," an expression used for a model of development that makes life on the planet pos-

24. See Joseph E. Stiglitz, *Towards a New Paradigm for Development: Strategies, Policies and Processes*, Prebisch Lecture at UNCTAD, Geneva (Oct. 19, 1998).

25. CONST. ARG. pt. II.

26. CONST. ARG. pt. I, art. 41.

27. *Id.*

sible, both now and in the future.²⁸ This is the meaning that both the aforementioned United Nations declaration and the strategy of the International Union for Nature give to that expression.

Finally, it expresses the duty of every citizen to watch over the preservation of the environment, and the obligation to repair damages. The verb "recompose", a word without precedents in Argentine law, has been used to force judges to make an effort of interpretation to determine its real scope.²⁹

The second paragraph contains those obligations of the state that require a great deal of legislative and administrative work.³⁰ However, in order to take on these challenges it is not enough to issue rules, despite being numerous. The difficulties arise mainly in their application, which may be seriously affected if there is a superposition of authorities and legislations in this field, as happens in our country. The third paragraph of this clause aims at finding a solution to the first problem and discusses in detail the demarcation of competences between the Nation and the provinces.³¹

The resolution seeks to find a solution to this very important aspect through an attribution of competences based on a criterion of magnitude or importance. For the Nation, "minimum assumptions" may be understood to be basic guidelines, while the provinces continue to be responsible for the remaining competence. Although this rule seems sensible *prima facie*, it is, however, also subject to interpretation. Let us not forget what we said about the scope of the environmental problem. That will give us an idea of how difficult it is, in certain situations, to determine when we are faced with a minimum content and under what circumstances provincial competences are being invaded.

In this matter, certain rules of interpretation that allow the attribution of competences in practice stand out. This tends to facilitate decentralization, a successful mechanism in the countries where most work has been done on the issue of environmental problems. The first of such rules indicates that jurisdiction in environmental issues is local. We should consider that when the nature of the issue exceeds local jurisdiction, whether it is a province or a municipality, the more senior national or provincial jurisdiction, according to the issue, intervenes. It is in a case such as this

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

that criteria must be found to allow for the division of faculties between the different government levels affected by the issue. For example, the fact that the promulgation of regulations governing the degree of contamination of inter-provincial waters is in the hands of the federal government does not imply that those regulations can be applied by a national authority; it should be either a provincial or municipal authority, depending on the case.

In that sense, it is important to consider the Federal Environmental System created by the General Environmental Law³² with the aim of coordinating policies between jurisdictions, as mentioned in subheading 6.5 below.

5.2. Provincial Constitutions and the Environment

In the first instance, it is important to mention that this issue has been addressed in new constitutional policies passed since 1986 in most provinces³³ and in the autonomous city of Buenos Aires.³⁴ The general structure under which it is treated in the constitutions responds to a practically identical scheme. First, in the dogmatic part, on principles, rights, and guarantees, the common right of all persons to a healthy and balanced environment is recognized. Concomitant with this resolution, and as a sort of correlation, the obligation or duty of every citizen to work towards the achievement of such an objective is established.³⁵ Second, and generally in the organic part on government powers, a series of services for which the state is responsible are defined to make possible the fundamental human right acknowledged in the first part.³⁶ These actions are measures of a legislative as well as an administrative nature. The reform included both aspects in the same resolution, making use of a rather uncommon legislative technique.

On the other hand, the new provincial public law, and that of Buenos Aires, make clear that such a structure presents shades of differentiation. Some constitutions contain an exhaustive list of acts for which the government is responsible, *e.g.*, Formosa³⁷ or Tierra del Fuego;³⁸ others, such as Catamarca,³⁹ are happy with a

32. Law No. 25.675, *supra* note 6.

33. *See* CONSTITUCIÓN DE LA PROVINCIA DE BUENOS AIRES; CONSTITUCIÓN DE LA PROVINCIA DE SANTIAGO DEL ESTERO; CONSTITUCIÓN DE LA PROVINCIA DE FORMOSA.

34. CONSTITUCIÓN, BUENOS AIRES.

35. CONSTITUCIÓN, BUENOS AIRES pt. I.

36. CONSTITUCIÓN, BUENOS AIRES pt. II.

37. CONSTITUCIÓN, FORMOSA.

38. CONSTITUCIÓN DE LA PROVINCIA DE TIERRA DEL FUEGO pt. II.

more general formula. In three constitutions, those of Córdoba,⁴⁰ Río Negro,⁴¹ and Tierra del Fuego,⁴² a special chapter is devoted to the question. The assemblies of San Juan, La Rioja, and San Luis have gone even further in the protection of the new law, and it is guaranteed by means of special acts of protection.⁴³ Likewise, Río Negro recognizes the defense of collective or diffuse interests, thus breaking with the traditional rules of procedural law.⁴⁴ In recognition of the inter-jurisdictional character of the question, Formosa makes special mention of the possibility of signing treaties with other jurisdictions.⁴⁵ Río Negro speaks specifically of environmental policing powers and vindicates its local nature.⁴⁶ There is often a question of programmatic resolutions, that is to say that in order to become operative they need further laws to regulate them. So in many cases this need is specifically mentioned.⁴⁷ The constitution of the city of Buenos Aires⁴⁸ is remarkable for its contemplation of a broad regime of participation by its citizens in the processes of formation of governmental intentions.⁴⁹

The relationship with the municipalities is reserved for the particular chapter that the constitutions dedicate to them. Policing powers are revealed as a complement to ensure compliance with the objectives sought in other subjects of a substantive nature. As regards the municipalities, it should be remembered that their regime varies according to the institutional profile granted by the secondary constituent power in each province. However, an important modification of the last national reform touches on the legal nature of the municipalities. In fact, article 123 determines that the provincial constitutions should ensure "*municipal autonomy, regulating its scope and content in the institutional, political, administrative, economic and financial order.*"⁵⁰ Previously, the

39. CONSTITUCIÓN DE LA PROVINCIA DE CATAMARCA.

40. CONSTITUCIÓN DE LA PROVINCIA DE CORDOBA pt. II.

41. CONSTITUCIÓN DE LA PROVINCIA DE RIO NEGRO pt. II.

42. CONSTITUCIÓN, TIERRA DEL FUEGO.

43. See CONSTITUCIÓN DE LA PROVINCIA DE SAN JUAN; CONSTITUCIÓN DE LA PROVINCIA DE LA RIOJA; CONSTITUCIÓN DE LA PROVINCIA DE SAN LUIS.

44. CONSTITUCIÓN, RIO NEGRO pt. II.

45. CONSTITUCIÓN, FORMOSA pt. II, art. 120.

46. CONSTITUCIÓN, RIO NEGRO pt. II, art. 84.

47. CONSTITUCIÓN, CORDOBA pt. I, art. 59.

48. CONSTITUCIÓN, BUENOS AIRES.

49. See DANIEL A. SABSAY & JOSÉ M. ONAINDIA, LA CONSTITUCIÓN DE LOS PORTEÑOS 85 & ss (Errepar ed., 1997).

50. CONST. ARG. pt. II, art. 123 (emphasis added).

question had not been defined, since article 5 only required that the constitutional power of the provinces organize a municipal regime.⁵¹ The trend in new provincial public law, as regards the attribution of autonomy to the municipalities, is to do away with the autarchic municipality. However, it should be pointed out that several provinces have not yet adapted their fundamental laws to this demand expressed in the national constitution.⁵²

As regards the subject of this paper, the delegation to the municipalities of competences in natural resources and environment has been remarkable. The provinces and municipalities share the exercise of policing powers as part of their respective competences. The scope of their authority varies from province to province and is directly related to the magnitude of attributions entrusted to the municipalities in one regime or another. This power is particularly important at present when as a consequence of the decentralization of services the municipal scope of action has undergone considerable expansion, with a large number of prerogatives that allow it to carry out its new commitments adequately.

5.3. Important Topics Resulting from the Reforms of Argentine Public Law

Important topics resulting from the reforms of Argentine public law include:

- Constitutional acknowledgement of environmental protection;
- Incorporation of the concept of sustainable development;
- Defense of diffuse interests under different modalities;
- Acknowledgement of the right of free access to public information;
- New techniques for the division of national and provincial competences in the National Constitution;
- Explicit recognition that the original domain of natural resources corresponds to the provinces in which they are located;
- Incorporation of institutions inherent to a participative democracy;

51. CONST. ARG. pt. I, art. 5.

52. See CONSTITUCIÓN, BUENOS AIRES; CONSTITUCIÓN DE LA PROVINCIA DE SANTA FE; CONSTITUCIÓN DE LA PROVINCIA DE ENTRE RÍOS; CONSTITUCIÓN DE LA PROVINCIA DE MENDOZA; CONSTITUCIÓN DE LA PROVINCIA DE TUCUMÁN.

- Modification of the hierarchy of international treaties within the legal pyramid of Argentine law;
- Special regime for integration treaties;
- New provincial faculties in questions of regionalization and celebration of international treaties;
- Strengthening of territorial decentralization at the municipal level;
- Promotion of the so-called chartered or convention municipalities in several provincial constitutions;
- Incorporation of institutes inherent to participative democracy, such as public hearings, strategic planning, etc., in many provincial constitutions;
- Diffusion of the process of environmental impact assessment (E.I.A.) as a prior step to the realization of certain productive undertakings;
- Intensification of a model of federalism of "coordination" as a tool for the construction of inter-jurisdictional consensus in questions of environment and sustainable development.

6. Governability for Sustainable Development

6.1. General Framework

The subject of the environment and its application in a framework of sustainable development demands certain institutional requirements to be set in motion. The choice of the institutional mechanisms that allow for the effective adoption of a model of sustainable development is particularly relevant. The appropriate institutional "trappings" should fit the guidelines of a participative democracy. This demands special work on different planes in order to achieve a conciliation of interests geared to the construction of a different way of managing the relations of power within politically organized communities.

Achieving such ambitious goals requires the organization of appropriate structures of government. This implies tackling the special interdisciplinary and multi-related nature of environmental issues linked with the concept of sustainable development. For the community, the process must be seen to be accompanied by participation of the population, unlike what occurs in traditional representative democracies. That is exactly why institutions appear and make it possible for the governed to intervene in the making of decisions liable to alter the environment. When devised

for a country in which several territorial power centers coexist, a structure such as this demands the creation of forms of coordination which prevent superposition of functions, or the anarchic conduct of different authorities.

Governability is a necessary condition that must prevail within a politically organized community so that decisions that have been legitimately made are observed. It would also help achieve efficient administration of general interests. That is to say that compliance with a rule of socially accepted conduct by the majority of the members of a community rests on the conviction of those who observe that it is legitimate, that it compels, and that its application will result in some type of benefit to society.

6.2. Participation

Now, for all this to be possible, appropriate institutional channels must be organized so that people may demonstrate, be heard, or take part in the public decision-making process. This is participation.

Modern democratic life requires ever more active intervention by the population; participation by members of the community is indeed necessary. The idea that the governed only act at election time, when they find themselves governed by others without any possibility of interacting with their governors, is exhausted. Today the adjective "participative" is added to the concept of representative democracy.

Participation transforms the democratic system, making it dynamic. It provides a channel for a permanent relationship between the governors and the governed. Joint action allows for better thought-out decisions, the product of greater consensus. The problems afflicting a society are more widely known and solutions are sought jointly. Participation allows for transparency in the acts of government, effectively preventing a considerable amount of corruption. Likewise, at the appearance of reproachable conduct, the assumption of guilt and the eventual application of sanctions are facilitated. Appropriate channels to guarantee that the destruction of ecosystems does not eventually make the planet uninhabitable must be found. The evolution of the concept of defense of the environment has revealed that the solution is not limited to the attitude of conservation at any price. Mere conservation may bring quietism, not development, which means that subsistence would otherwise become impossible for large segments of the population.

In conclusion, in order to find solutions in these areas, broad consensus must be found, and that depends on the establishment of appropriate channels of participation. The issues of the environment and the management of natural resources have allowed, over the last decades, an ever more important presence of the citizens in all decisions pertaining to the two issues. That is what the legislation and the practices of developed democracies show. And this has only been possible because of the active role of civil society, mostly led by non-governmental organizations. Certain mechanisms, such as public hearings and joint administration, among others, have also made this possible since favorable spaces have been created to achieve different sorts of participation.

The General Environmental Law⁵³ presents ample opportunity for civic participation, since its provisions are part of an all-encompassing system of an array of possible appropriate institutions that could contribute to that end. Among them, access to environmental information, consultation, and public hearings are contemplated; one of the objectives of national environmental policy being the promotion of social participation in decision-making processes.⁵⁴ This is a wonderful opportunity, at the national level, to establish an advanced participative model.

6.3. Access to Information

Together with participation, access to information is a vital element in making participation actually effective and fair for all. Publicizing the acts of government is one of the keystones of the State of Law. Since the dawn of constitutionalism there have been significant failings in carrying out that principle by those who are required to provide information. Making public certain acts of government, and the grounds for such acts, has been considered, in practice, a kind of gratuitous power within the sphere of discretion of those responsible for supplying that information.

Such an interpretation ignores a basic fact of life, that of determining who owns public information. Its definition leaves no room for alternatives. We are faced with knowledge that belongs to the ruled since it is of a public nature, but which under no circumstances can continue to be unjustifiably exclusive to the ruling

53. Law No. 25.675, *supra* note 6.

54. See Daniel A. Sabsay & María Eugenia Di Paola, *La Participación Pública y la Nueva Ley General del Ambiente*, 14 ANNALS OF ARGENTINE LEGISLATION, INFORMATION GAZETTE (DOCTRINE) 29 (2003) [hereinafter Sabsay & Di Paola, *La Participación*].

parties. Greater control over the acts of the ruling parties is made possible by this mechanism. But also, within this framework of participative democracy, holding appropriate information is a *sine qua non* condition for society's intervening in government. The maxim "the people want to know what's going on" acquires a different magnitude here, since only those who know can participate in an effective watchful manner. The right of free access to information dates from far back in time.

The recent General Environmental Law⁵⁵ dedicates much space to environmental information. Above all, in the objectives of national environmental policy, it establishes the need to organize and integrate environmental information and guarantee the population unrestricted access.⁵⁶ In this way, environmental information becomes one of the fundamental elements in any plan of national environmental policies. The law recognizes the right of every citizen to have access to such information and lays out the obligation for the enforcement authority to develop a National Integrated System of Information.⁵⁷

Therefore, the authority is responsible for the periodic and systematic storing of information, and also has the obligation to organize it in such a way as to facilitate public access.⁵⁸ It is important to point out that regulation will necessarily mean that other aspects directly related to it must be studied in depth. We therefore consider it necessary to establish the principles that information should be free of charge, that any request should be informal, and that there should be a time limit within which public officials must inform. It must also be considered that the public official who unjustifiably denies access to information has committed a serious misdemeanor and is therefore liable to a sanction that should be contemplated in each of the regulations governing the activity of each function. Moreover, the path to filing a request for protection for anyone whose application for information was not satisfied in the time limits and conditions guaranteed in the ruling must be unobstructed.

Article 18 of the regulation emphasizes the obligation of the authorities to report on the state of the environment independently of any personal request, and the release of this information is a duty for any authority connected with the environment, or any

55. Law No. 25.675, *supra* note 6.

56. *See* Law No. 25.675, *supra* note 6, art. 16.

57. *See* Law No. 25.675, *supra* note 6, art. 17.

58. *See* Law No. 25.675, *supra* note 6, art. 18.

area related to it.⁵⁹ Moreover, the report on the state of the environment becomes an instrument that has, like its main precedent, United States legislation, an instrument stating that apart from making the situation of this governmental area known, objectives and deadlines are set, obliging the authorities to account for any action taken.⁶⁰ In these matters, the way in which it is regulated will be of the utmost importance.⁶¹

6.4. Access to Justice

To the items already discussed we must add an extension of the legitimacy required to take legal action. Constitutional law provides answers to a wide range of general, public, fractioned but legitimate, and hierarchical interests requiring protection of a strong preventive character. This is common in environmental law and everything related to the quality of life of the citizens, including the right to health and medical services. As it is a collective co-participation of interests, how is it possible to protect collective assets from damage? The need to extend the classic trilogy formed by the concepts of subjective law, legitimate interest, and simple interest becomes apparent.

Diffuse interests must have a place in constitutional hierarchy. As humans, we participate in a collective and supra-individual interest; the subjective aspect of the issue. This means that although it may not be possible to demonstrate personal or real damage, the person taking part in this kind of associated relationship made up of real or potential victims can invoke a sort of "fair share," granting the right of appeal in a court of law.

Since the 1994 Constitutional Reform, the action for protection⁶² has a new institutional profile with an extension of its legal definition. It now comprises both an individual and a collective profile, the latter being one of the most innovative aspects of the reform *per se*. The characteristics of the laws whose protection is

59. *Id.*

60. *Id.*

61. See Sabsay & Di Paola, *La Participación*, *supra* note 54; Daniel A. Sabsay & Pedro Tarak, *La Participación Vecinal y la Gestión del Medio Ambiente*, Fundación Ambiente y Recursos Naturales (FARN) (1995); *Audiencias Públicas y Libre Acceso a la Información*, FARN & FORNIS (2001); *Audiencias Públicas en los Municipios Patagónicos*, FARN & Fundación Patagonia Natural (1999); *Nuevas Herramientas para la Acción Ciudadana en Defensa de los Derechos del Medio Ambiente*, Programa de Participación y Fiscalización Ciudadana, Fundación Poder Ciudadano (1997); *Participación Pública y Autonomía Municipal—Provincia de Buenos Aires*, FARN (2001).

62. CONST. ARG. pt. I, art. 43.

sought when an appeal is filed, as well as the consequences it has in legitimate access to justice, lead to a modification in traditional views on the matter. Otherwise, the planned objectives could not be obtained by institutionalization since we would be accepting the fact that constitutional regulations have not been created to be complied with.

The Constitutional Reform of 1994 granted broad active legitimacy to “[t]he affected party, the ombudsman and the associations that tend towards these ends, registered according to the law”⁶³ to file appeals for protection in the defense of rights of collective incidence. Among them is the right to a healthy environment.

The recognition of this extensive legitimacy is an important step in the protection of the environment. The experience of recent years, through the protection appeals brought by the Program of Civic Control of the Environment and Natural Resources Foundation⁶⁴ as related jurisprudence in the matter, indicates the relevance of the judicial system as an instance of control over environmental management and application of environmental policies. The General Environmental Law⁶⁵ has taken a similar position on access to justice in the case of collective environmental damage adding the national, provincial and municipal states as legitimate, although it includes the impossibility of joint litigation, which is admissible in the appeal for protection.

6.5. The Delimitation of Competences

Another element in the system is the relationship between different levels of government. Environmental problems oriented towards achieving sustainable development require special articulation at all levels. Nationally, it is difficult to comply with the constitutional mandate contained in article 41, paragraph 3.⁶⁶ It seems easy to formulate a theoretical exposition of the question, which will then be obstructed when transforming the constitutional program into regulations. Where will the dividing line between national and provincial powers be? This is the million-dollar question. It seems difficult to give an answer without prior consensus between the different levels of government. It is an

63. *Id.*

64. See *El Ambiente en la Justicia—Seis Casos Patrocinados por el Programa Control Ciudadano del Medio Ambiente*, FARN (2002).

65. See Law No. 25.675, *supra* note 6, arts. 30 & 31.

66. CONST. ARG. pt. I, art. 41.

auspicious need in that it sets us within the framework of a federalism of "reconciliation," which we applaud, not only as a question of loyalty to certain convictions but mainly because we believe that this is the model that guarantees greater efficiency in the application and observance of environmental laws.

The General Environmental Law institutes a federal environmental system. Its objective is the coordination of environmental policies on both a regional and national scale with the aim of securing sustainable development. It considers the Federal Council of the Environment (COFEMA) the *sine qua non* sphere for legal action.⁶⁷ The regulation not only names this council as the basic context for policy coordination but also instructs the National Executive Power to propose to the COFEMA Assembly that it issue recommendations or resolutions, according to the case, "*for the adequate operation and application of the law of minimum assumptions, complementary provincial laws and their regulation in different jurisdictions.*"⁶⁸

The Executive Power must interact with the COFEMA in all aspects of the regulation of minimum assumptions, their implementation, and the coordination of inter-jurisdictional policies. Sanctioning the General Environmental Law brings with it the need to change the criterion of "imposed federalism" to one of "coordinated federalism"; designing the basic stage upon which the sectoral regulations of minimum assumptions must be sanctioned, interpreted, and implemented, as well as regulating the role of the COFEMA. Regarding the latter, it is a serious challenge for the provincial and national authorities, as well as for the city of Buenos Aires. In spite of the national ratification of the agreement and its ratification by seven basic jurisdictions, allowing it to function, it is not implied that it can pass resolutions for the nation as a whole. They will only be obligatory in those jurisdictions that specifically ratified the inter-provincial treaty.⁶⁹

67. Law No. 25.675, *supra* note 6, arts. 23 & 24.

68. CONST. ARG. pt. I, art. 24 (emphasis added).

69. It is worth mentioning that in Argentine public law there is still no instrument to determine the legal regime of the so-called partial treaties referred to in article 125 of the national constitution. Thus, in the present day, no clear decision has been taken on subjects as important as, among others, the hierarchical order of those agreements in relation to rules of provincial origin, and responsibility for non-compliance. Since the COFEMA originates as the result of an agreement of this type, we hope that this comment will act as an incentive to pass the laws we are referring to since, as a result, both the organism and the resolutions passed by it will enjoy a more solid legal basis.

Compared experience indicates the benefits of inter-jurisdictional coordination mechanisms, and especially those bodies grouping environmental authorities similar to COFEMA. Therefore, the provinces and city of Buenos Aires face a double challenge. The first is related to inter-jurisdictional relationships, which will clearly find their appropriate sphere in the COFEMA. The second is the sanctioning of complementary regulations whenever necessary, since the evolution of environmental regulations in the different jurisdictions offers variations throughout the country.⁷⁰

Up to this point the discussion leads us to state that the problem of sustainable development in our country will only be consolidated by the search for models in which elements oriented towards reconciliation and construction of basic consensus come together. Likewise, it is feasible to highlight the importance of the institutions and the modification of the modalities they currently present to start making progress in the mentioned direction. A joint effort must therefore be undertaken by the different sectors, both of the government and of society in their different components, in order to engage them in the fight to achieve an objective on which the subsistence of the human species on the planet depends.

70. See Sabsay & Di Paola, *El Federalismo*, *supra* note 9.