THE MATANZA -RIACHUELO BASIN CASE: LESSONS IN ENVIRONMENTAL ACTIVISM FROM THE ARGENTINE SUPREME COURT

s/ daños y perjuicios (damages due to the environmental contamination of the Matanza Riachuelo River), commonly referred to as the Mendoza case.[6]

The Mendoza case judgment served as a turning point not only for the sanitation of the basin, but also a decisive step in the development of a transformative public policy.[7] However, the decision alone did not build public policy. This article argues that the stakeholders, authorities, and civil society organizations (or CSOs), should continue to foster institutional participation mechanisms for activists that set human rights standards and keep authorities accountable. The Matanza Riachuelo Basin case illustrates how, when civil society actors have mechanisms to contribute and coordinate plans, a holistic and transformative environmental policy is possible. CSOs successfully formulated the basin cleanup demand as a human rights issue, employing expert knowledge and diagnosis reports, and harnessed the political and public opinion on environmental issues. They also helped create an interjurisdictional basin authority and attained an institutional monitoring role for public policy implementation. The activism by the Supreme Court and CSOs was crucial in turning a collective damage claim into the most translating the legal duty established in the Constitution and ratified by the Mendoza case into a set of intertwined activism strategies for the protection of human rights. Lessons in environmental activism from the Matanza Riachuelo Basin case[8] are brought forward to identify their strengths and weaknesses, evaluate their effectiveness, and ultimately determine which ones can be used in the future.

While the legal basis for human rights protection is robust and judicial mechanisms are constitutionally warranted in Argentina, experts agree that this case presented special challenges since the legal protection was insufficient. According to the Center for Legal and Social Studies, one of the reasons why the intervention of the Supreme Court was crucial was the

6. Fallos (2008:331-1622).

7. Carolina Fairstein & Diego Morales, En busca de soluciones judiciales para mejorar la calidad de vida de los habitantes de la cuenca Matanza Riachuelo, in

sustainable environment.[11] The global dispute regarding the strategies to confront the environmental crisis focuses on the way that authorities deal with it.[12] The global environmental agenda emerged through a process of institutions, treaties, and legal frameworks establishing obligations on governments.[13] This process was uneven amongst countries and regions.

protection of the rights formulated in Section 41 by constitutionally granting

views of the public into account in every decision-making process.[39] Every citizen has a right to be consulted and informed on procedures related to the preservation and protection of the environment,[40] and authorities should institutionalize procedures for mandatory consultations or public hearings. While public opinions are not binding, the authorities should justify publicly if the final decision is against those opinions.[41]

The implementation of these tools requires access to effective remedies for violations of human rights, domestic laws re>(t)5Whia02ng25( )-22(t)5(o)-22(t)e5(c)-10( )-26(e

institutionalization, where an increasing number of activities that exploit natural resources and directly impact local communities result in the emergence of environmental conflicts starting in 2003.

representation, and creating procedures for civil contribution to the process.[73] After three justices resigned and two others were removed, three new members of the Court were sworn in following the participatory procedure.[74]

With its new composition, the Court established transparency and participation mechanisms for itself. Some of them were specifically demanded by civil society organizations in An Court for Democracy.[75] The Court, during this stage, took on the challenge to reduce the number of cases

courts.[76] The Court rebuilt itself, assuming a new role, based on a hybrid between the U.S. judicial review model and the European constitutional tribunal system.[77] In 2005, Ricardo Lorenzzeti, an expert in Argentinean environmental law, was appointed to the Court.[78] In 2006, the government reduced th to five.[79]

By 2006 the weight of the environmental cause on the public agenda was undisputed. While the pump mill conflict exhibited exemplary results of social mobilization, the Matanza-Riachuelo Basin was a portrayal of policy failure,[80] the Court saw the opportunity and seized it.

B. Behind the Scenes: Social Activism

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Riachuelo Basin claim can be traced back to 2002, when the Association of Neighbors of La Boca filed several claims before the Federal Ombudsman Office.[81] The Federal Ombudsman created a special investigation unit

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73. Decree No. 222/2003, Jun. 19, 2003, [30175] B.O. 2; Art. 99(4), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). The Senate also regulated its own procedure to give the two-third consent to presidential nominations for Justices.

74. Eugenio Raúl Zaffaroni, Elena Highton de Nolasco, and Carmen Argibay were the individuals who were sworn in.

75. See 2004 HUMAN RIGHTS REPORT, supra note 67, at 80; Ruibal, supra note 67, at 735; see also Barrera, supra note 69. Among the most noteworthy measures, the Court established the eedings, as well as budgetary and personnel information, and regulated the amicus curiae and public hearings procedure.

76. Esain, supra note 52, at 300-01.

77. Id. at 299-300. According to Esain, the new composition broadened the democratic footing of the Tribunal. Id. at 300-01.

78. Scharager, supra note 12, at 714.

79. Law No. 26183, Dec. 15, 2006, [31055] B.O. 1

80. Scharager, supra

devoted to monitoring and systematizing the multiple claims on the same issue as a strategy to take on a deeper analysis of this basin case.[82] Under the leadership of the Ombudsman Office, the 2003 Special Report on the Matanza-Riachuelo Basin was developed together with a group of organizations that were already involved in the Matanza-Riachuelo cause.[83] The main goals of this initiative were to diagnose the state of the Basin in all aspects; to prepare a report to reaffirm the seriousness of this problem and to reiterate the need for concrete measures by the competent authorities; and to suggest actions related to these urgent measures to restore the environment of the basin and thus, to preserve the health of the population through an adequate management of the natural resources.[84] The report also aimed to provide a useful resource of expert knowledge with the most up to date information in order to facilitate the future planning of concrete actions for the environmental recovery of the basin, analyze the legal consequences of judicial intervention if [85]

Interestingly, even though the 2003 report considered litigation as a strategy, there was no agreement to resort to the Supreme Court amongst the civil society organizations and actors involved.[86] The report had a wide coverage by the media, but its impact on competent authorities was poor.[87]

more actors including those organizations that collaborated on the report joined the case as third parties.

damage.[94] It left the individual monetary compensation claims to lower courts.[95] The decision to take on the case, as noted above, was deliberate. The Court brought the 2002 General Law for the Environment (Ley General Ambiente or LGA) to life, by issuing the first ruling, and instating itself as [96] [97]

Sub-section 1 describes the creation of an interjurisdictional Basin Authority, -section 2 focuses on the 2006 decision and subsequent public hearings that constitute a unique participatory process of public policy design, sub-section 3 reviews the final 2008 sentence that creates an institutional space for civil society participation to monitor the

activism transformed an initial damage claim into a transformative intervention to establish a public policy of sanitation.

1. The Basin Authority is Born

Jurisdictional fragmentation, regulatory dispersion, and lack of coordination are highlighted by most studies as the biggest obstacles that hinder a comprehensive approach to the basin territory.[98] Civil society organizations, especially those that presented the Special Report on the Matanza-Riachuelo Basin in 2003 and its update in 2005,[99] expressly demanded a basin authority to be created.[100] The CSOs knew that the jurisdictional fragmentation could only be confronted with an interjurisdictional entity; one that facilitated coordination amongst the seventeen jurisdictions and twenty-nine organisms with subject-matter

competence on the basin territory.[101] The proposal for a basin authority identified key characteristics necessary for a successful policy implementation. It should have a legal form of an interjurisdictional treaty between all jurisdictions, including municipalities. Further, it should guarantee effective participation and representation of citizens, ensure autonomy for decision-making and the capability of exercising police powers. Finally, the authority should involve local level and civil society organizations, including municipalities, in decision-making processes.[102] The

President, three representatives of the Federal Executive Power, two representatives of the Buenos Aires Province, and two representatives of the Autonomous City of Buenos Aires.[109] A Municipal Council, made up of a representative of each Municipality of the fourteen jurisdictions, was created to assist and advise the new authority.[110] Following the demand for civil society involvement, the law also created a Social Participation Commission with advisory functions.[111] Further, the law ensured, unlike previous institutions and programs created for the basin sanitation,[112] that the basin

industrial activities, the rendering of public services and any other activity wit
damage.[113]

Some of the NGOs involved in the Mendoza case criticized the choice to position the basin authority under the executive power orbit by law, instead

Commissi[117] after a participative process for regulatory development.[118]

However, it is not clear if the Commission fulfilled its mandate. In its lac the -mentioned regulation, ACUMAR has not carried out practically any type of activity[119]

basis of essential aspects of the personal injury claim. The introduction of [124] was not based on updated studies, but on journalistic publications or reports submitted by various organizations several years ago.

Instead of rejecting the petition entirely, the Court adopted a proactive role and used the broad jurisdictional faculties, vested in it by the LGA,[125] to order sued companies to inform the Court of the liquids discharged into the river, their waste treatment systems, and the insurance employed.[126] It ordered the federal government, the Province of Buenos Aires, the City of Buenos Aires, and the COFEMA to present an integrated progressive plan,[127] with a schedule of interim and long-term goals. The plan was to consider

(CELS), and Asociación Vecinos de la Boca became third parties to the Mendoza case.[135]

A fifth non-governmental organization, Asociación Ciudadana por los Derechos Humanos [Citizen Association for Human Rights], was accepted as a third party on March 20, 2007, and a group of seventy Lomas de Zamora neighbors obtained the last third-party authorization by the Court.[136] Finally, the intervening parties in the case were completed with the incorporation of the fourteen municipalities as defendants, but only after a request to broaden the original petition was filed by the plaintiffs.[137]

Public Hearings

In that same decision, the Court adopted regulations for public hearings. Between the first June 20, 2006, decision and the final July 8, 2008, judgment, the Supreme Court developed a two-year participatory process of judicial public policy design. The first day of the first public hearing was devoted to the presentation of the Integral Plan for the Sanitation of the Matanza Riachuelo Basin, by the Environment and Sustainable Development Secretary Romina Picolotti, and a short presentation by the plaintiffs.[138] On the second day of the first public hearing, the sued companies argued they had no responsibility for the basin contamination in providing simple services or innocuous activities, which was later rebutted during the NGO representative exposition (Andrés Napoli, representing FARN, CELS, and Greenpeace).[139]

When the Sanitation Plan was presented, the Court took on the challenge to produce further expert knowledge, inviting experts from the University of companies[140] and government authorities after their poor presentation of the social and health aspects of the Sanitation Plan, as well as the strategies[141]

135. Francisco Verbic, *El remedio estructural en la causa "Mendoza." Antecedentes, principales características* ln7(í)13(s)-22(t)13(i)1792 rst á #á G 2*&q qr> á!ƒ " b > !<aÅ…'8") r¡8"Ñ#8 ' a"ëò ñ q< ¢•>'L©¬ åg

Buenos Aires (UBA) to evaluate it.[142] The development of expert reports is a key tool for environmental claims, where a combination of social and economic determinants is in place simultaneously, and multiple systemic human rights violations are present. An interdisciplinary group of professors from multiple UBA schools developed a very critical report. The Plan lacked information on feasibility, its
relocations would be implemented, especially noting that there was no space for the affected communities to voice their demands and desires.[143] Some of the criticism focused on the lack of participation of basin citizens in the hearings and ignoring individual narratives of plaintiffs or others similarly situated, giving preference to an elevated legal discussion.[144]

The second public hearing, held in February 2007, was devoted to the advancement of the Sanitation Plan implementation by Secretary Picolotti. The presentation was strongly influenced by the recent landmark creation of ACUMAR, which included the novel establishment of an institutional space for civil society participation.[145]

During the third public hearing, the Sanitation Plan was reviewed in light of the observations done by UBA experts in their report. Justices expressed

given the impossibility to ensure budgetary allocations beyond the yearly resources determined by Congress.[146]

water supply network; rainfall drainage; sewage sanitation; and the emergency health plan.[149]

The fourth and final public hearing was held in November of 2007. Several stakeholders presented their conclusions, including Secretary Piccoloti, the National Treasury Attorney, and representatives for the City of Buenos Aires, the municipalities, and the sued companies.[150]

supply network,[168] rainfall drainage,[169] and sewage sanitation,[170] and the Emergency Sanitary Plan.[171]

A Mixed Monitoring System

The mixed monitoring system for the judgment execution, also [172] is the result of the challenge created by fulfilling judicial orders,[173] especially when multiple human rights violations are intertwined and affect millions of people. The monitoring main objective is to clean up and restore the Matanza [174] In light of the foreseeable difficulties, the Court built this system to guarantee compliance with its order, the involvement of the public administration offices, the federal judicial power, in collaboration with non-governmental organizations.[175]

Three components make up the monitoring system. First, the National [176] The Court affirmed that the case warranted this specific transparency effort and demanded ACUMAR secure budget items related to the sanitation program

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168. Id. at 1638. The program description informed on the expansion plan of the collection, treatment and distribution of water supply carried out by the water sanitation and hydric development authorities, including foreseen programs until 2015.

169. Id. The program description informed on the rainfall drainage plan, its current state, including foreseen programs until 2015.

170. -331-1622, 1639) (reporting water h regard to the Berazategui and Riachuelo treatment plants).

171. Id. (carrying out socio-demographic maps and surveying environmental risk factors to determine health risk factors, population at risk, and baseline diagnosis for diseases in basin; using follow-up system to distinguish between diseases caused by different types of pollution and analysis; developing health programs according to diagnosis).

172. Cafferatta, supra note 156, at 149.

173. Nápoli, supra note 101 ximo tribunal parte de reconocer las dificultades que frecuentemente impiden el cumplimiento efectivo de las obligaciones ordenadas a los poderes públicos en las sentencias, y que terminan por convertir a los

the highest court starts from recognizing the difficulties that frequently prevent the effectiv fulfillment of the obligations ordered to the public powers in the sentences, and that end up

174. Id.

175. Id. at 183.

176. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Fallos (2008-331- translation).

oblivion again.[183] Indeed, in complex cases like this, where the solution to structural problems requires a profound transformation to ensure sustainable long-term state action, the judgment is a turning point that breaks the cycle

In its 2009 report,[190] the monitoring committee reviewed each element of the sanitation plan ordered by the Supreme Court, reporting on its

While Judge Armella showed strong activist initiative, using his vested powers to demand governmental action, he was also involved in a corruption case related to ACUMAR contracts,[202] which resulted in his removal.[203] This incident caused an impasse in the sanitation plan implementation,[204]

violations [that] are processed in an incidental manner with little connection [211]

Sixteen years after the claim was filed, the Court remains silent on the legal responsibility of the companies that throw polluting discharges into the basin daily. When the Supreme Court decided to prioritize the development of the public policy through political institutions, it also decided to postpone the definition of private entity responsibility, which enables their lack of involvement and commitment to technically reconvert and ensure treatment of discharges.[212] Furthermore, the consultative and relegated role of municipalities, observed by stakeholders when ACUMAR was created, is another limiting factor to the success of the sanitation plan.[213] If ACUMAR fails to act as a coordinating body amongst responsible jurisdictions, the entity becomes a shield for the federal, provincial, and municipal powers, receiving judicial orders and demands from the affected population instead of the respective government authorities.[214]

B. The Limits *of Civil Society Organizations' Activism*

One of the main limits of the CSO activism in the case is a result of the

[215] This

true, the decision of the Court to give priority to the overall sanitation program instead of the individual monetary compensation is a novel approach for a complex case where the rights of millions throughout the basin are at stake.[216] Bibiloni, former President of ACUMAR, also questioned the non-territorial nature of these organizations, which impacted the space he gave the monitoring committee during his term.[217]

211. Cané, *supra* note 208

NGOs also face a structural problem to guarantee their continuous work in the area, given their budgetary restraints.[218] Their agendas may shift according to the funding sources that determine the funds allocation.[219] Furthermore, the Federal Ombdusman Office has not have an Ombdusman designated since 2009,[220] and while an adjunct was appointed and the monitoring committee continues to work on the case, the legal structure remains fragility.

By 2015, a new monitoring committee report presented the achievements and shortfalls of the *Mendoza* judgment execution.[225] The report recognized advancements in the sanitation plan, but still observed a lack of overall planning with an environmental perspective and an

of the basin. The monitoring committee reported being an active participant during the implementation of the *Mendoza* judgment, filing more than 250 briefs with opinions and demands before the courts, assisting with 110 hearings, and conducting 320 meetings.[226] It actively promoted access to public information and social participation that impacted the development of the judicial procedure and the overall sanitation plan.[227] Amongst its achievements, the demand for a more active social participation commission observed during the first years resulted in a shift of policy at ACUMAR. It began implementing its regulations by calling for local-level meetings during 2010,[228] which would slowly consolidate in the following years, in the form of roundtables.[229] Participation of grassroots initiatives and citizens in spaces for social deliberation and information has been an ongoing practice, especially regarding the slow housing development and the impact of long-term sanitation works.[230]

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225. DEFENSOR DEL PUEBLO DE LA NACIÓN ET AL., INFORME ESPECIAL A SIETE AÑOS DEL FALLO DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN QUE PERSIGUE MEJORAR LA CALIDAD DE VIDA DE LA POBLACIÓN, RECOMPONER EL AMBIENTE Y PREVENIR NUEVOS DAÑOS EN LA CUENCA MATANZA RIACHUELO (2015), http://www.dpn.gob.ar/documentos/20160304_30775_556677.pdf.

226. Id. at 3-4.

227. Id.

228. Nápoli & Espil, *supra* note 181, at 204.

229. -level civil society organizations and affected citizens, with the relevant authorities to discuss, get information, approach their demands and suggestions for the implementation of public policy. See Comisión de Participación Social [Social Participation Commission], ACUMAR, https://www.acumar.gob.ar/participacion-

2012;[243] 2016;[244] and 2018.[245] The Court indicated the shortfalls in the implementation of the *Mendoza* judgment, highlighting the persistent underspending of the assigned budget reported by the National Audit Office for 2016

participation and access to public information.[250] In 2017, a public hearing was held in the municipality of Almirante Brown to promote participation in the drafting of a Protocol for the development of relocation and reurbanization processes of slums and precarious settlements in the basin.[251] In 2019, the public hearing called for participants to contribute to three lines of action in relation to the main contamination sources of the basin: industry, sewage, and solid urban waste.[252] Recently, a new public hearing was held to

[265] on a pig farm project that was not open to citizen discussion, and whose revelation led the government authorities to delay the initiative.[266]

When public institutions create participation mechanisms to channel public demands, they invite the society to contribute to the development of a more accurate and efficient public policy, as long as there is an authority ready to listen. The Supreme Court, back in 2006, was ready. More than a decade after that milestone, the ongoing participation of civil society, judicial

accountable, have undoubtedly contributed to keeping the Mendoza Riachuelo cause alive. Beatriz Mendoza, now public official at the Municipality of Avellaneda,[267] is a living proof of the everlasting commitment of those who fight for (environmental) justice.

265. Sobre la Audiencia, AUDIENCIAS PUBLICAS, https://audienciaspublicas.com/sobre-la-audiencia/ (last visited Mar. 6, 2022).

266. Agustina Grasso, Cancilleria Atraso el Acuerdo de Producción Procina Para China Hasta Noviembre [Foreign Ministry Delays the Pork Prodcution Agreement for China Until November], PERFIL (Aug. 31, 2020), https://www.perfil.com/noticias/ecologia/cancilleria-atraso-acuerdo-produccion-porcina-para-china-hasta-noviembre-2020.phtml; see also Claudia Regina Martinez, Acuerdo Porcino con China: Cientos de Personas Participaron en Una Audiencia Publica Autoconvocada [Pork Agreement with China: Hundreds of People Participated in a Self-Convened Public Hearing], EL DIARIO AR (Sept. 17, 2021, 1:16 PM), https://www.eldiarioar.com/sociedad/medio-ambiente/acuerdo-porcino-china-cientos-personas-participaron-audiencia-publica-autoconvocada_1_8312717.html.

267. Drovetto, supra note 3.