

---

## **ENVIRONMENTAL AGONY: MY EXPERIENCE AS AN ARGENTINIAN JUDGE**

LLERMANOS, DANIEL HUGO

Judge, Juzgado de Primera Instancia en lo Criminal y Correccional No. 10 del Departamento Judicial de Lomas de Zamora, Talcahuano 278, Banfield - Provincia de Buenos Aires (1828), Argentina

### **SUMMARY**

This presentation intends to demonstrate that the agony of environment in Argentina is the product of impunity derived from the misapplication of laws in force by some functionaries who were in charge of environmental protection.

It describes the environmental policy enforced by the author as a penal judge in the Province of Buenos Aires, and how it was possible to carry it out through a judiciary system which lacked sufficient technical elements and economic support.

Finally, it details the jurisprudential advances that were made in favor of public health that helped Argentina's society to become aware of the problem.

### **1 INTRODUCTION**

"Somebody must do it. Why me?"

"Somebody must do it. Why not me?" asked Miguel de Unamuno. The work of a forerunner is always rejected, he explained. It implies too many risks, and even the possibility of being called crazy. The fact is that being a forerunner is full of disadvantages. He is always followed by somebody who takes advantage of his efforts and uses them to be the only one to benefit from them.

I deliberately designed an environmental policy for modifying environmental damage accepting the risks of entering an uncontrolled field full of high-voltage economic interests. This plan was inspired by the conviction that a judge must be committed only to the Constitution and to the law of his/her country, obedience to which is a must for all citizens (Article 16, N.C.).

Art must rectify Nature, assured Victor Hugo. Today, Nature must be rectified by Law. The evident environmental agony, evidenced in most populated areas in air, water and ground contamination, and verified in food and medicine alteration, needs a new conception of judicial action. An Argentinian judge in the twentieth century must reveal these truths, investigate their causes, prevent their effects and spread these fundamental certitudes as a contribution to collective education. I started this work at the end of 1987 when I was appointed to head the then-named Court of Corrections No. 2 of the Judicial Department of Lomas de Zamora, Province of Buenos Aires.

### **2 PROBLEMS WITH ENFORCING ENVIRONMENTAL LAWS**

Law is a project of social harmony that does not work automatically. It is necessary to have action by the administrative officer demanding the functioning of the Law (when it is a matter of this area), and, lately, judicial action, as a suppressive body for punishing the offender and also the indolent functionary who does not fulfill his/her public obligations and enables the transgression of the law.

#### **2.1 Laws: Insufficient and unenforced**

Since 1921, Argentina's Penal Code contemplates, in an imperfect and insufficient way, some penal categories linked with crimes which may, directly or indirectly, affect public health. But, in fact,

they were unapplied laws. The project of social harmony outlined by the Law remained, obviously, unfinished; therefore, public health remained exposed to serious risks. The Law appeared to be doubly damaged: a) by polluters and b) by those who should prevent pollution and regulate those behaviours. It can be affirmed that a severe impunity existed in this matter.

The dogmatic ideas of Law must, for their correct application, be subject to the strength of reality. Reality in its exact magnitude stands in essential contradiction with the abstract text of juridic rule that orders but does not govern. The juridic idealism that ruled in those days satisfied itself. Autistic. Trapped in its own dealings. Unable to create a modification of the tangible world. It would be difficult to find clearer evidence of this autism in other fields. Today, a ruined environment is in front of everybody's eyes. Even a schoolchild can notice pollution and conclude that it is the work of daily environmental delinquency tolerated by those who ought to prevent it.

## 2.2 Limited resources

Now, to bring a suit based on environmental research demands the acquisition of factors - material and human - that are difficult to find. There is no specified justice in Argentina, and in the Law University the specific learning is almost zero. Also, the economic sources of judicial power are absolutely insufficient. In the Province of Buenos Aires it depends economically on the government, and the few funds received are designated for paying operation expenses and low salaries. There is no incorporation of technology or labs. There is no investment in academic improvement.

## 2.3 Protecting the environment and industry

But the problem does not end with these difficulties. The environment is a social good. So is industry. It was necessary not to use merely suppressive schemes limited to factory closings, because this would generate economic chaos and a labor supply crisis. Environmental fundamentalism would be an answer just as authoritarian as that of industrial fundamentalism, which sought development without caring about the environment. The just Aristotelian middle path could try to make it so that neither environment nor industry would turn into ashes.

Yet, the trial mechanism to be developed should be adjusted to an unexplored model that would respect the integrity of both great juridic goods. Unlike other crimes, in which there is only one victim and one victimizer, in environmental infringements there is a plurality of victims and a plurality of victimizers. Many times the former and the latter are unknown or impossible to identify. This set of biological, chemical, economic, labor and sociological complexities could not be resolved with mere willingness. As at a forge, I needed to patiently form technical teams, and design a trial procedure system that would adapt delicately to the needed equilibrium without losing juridical rigor. In brief: have excellence at the scientific level and perform preventative judicial actions that would tend to prevent community damage.

# 3 HISTORICAL RELUCTANCE TO SANCTION INDUSTRY

Since the Napoleonic Code, in the civil area, and since the appearance of liberal criminal law, and long before the environmental problem was discussed for the first time in a court, there was reticence to sanction factories causing victims by their activities. We can cite some cases such as "Heaven vs. Pender" (England, 1883) where the plaintiff - a ship painter who suffered injuries after the ropes that held his scaffold ripped - received compensation from the dock owner, but it was remarked that the victim, who used to work there, was simply invited to do the work. This finding had the obvious intention of dampening the businessman's responsibility.

A similar case, in regard to how slippery the power of judges can be, was "Winterbottom vs. Wright" (England 1842) where a coachman who became lame because of a break caused by a hidden defect of the car, was disqualified from receiving any compensation arguing that the

acceptance of his claim would lead to "absurd and unrighteous consequences." Examples like these could be invoked in large numbers. Starting from these precedents, it was very logical to assume that sanctions against infractors of environmental protection laws would not be applied.

#### **4 EDUCATION: A PROTECTIVE TOOL**

But social life is only possible with mutual respect and practice of justice. This sentence belongs to Protagoras. For how many centuries has man been asking for justice!

In that era of sofists they were already saying that the passage from "me" to "we" is accomplished through education. Most people suffering from pollution are the most uneducated people. It is the ignorance of those polluted, not the ignorance of the polluter, that causes pollution. Therefore, besides compiling registered excesses, it becomes necessary to reach society, to make justice as public and transparent as possible. This need, in countries like mine where there is no jury judgement - although that is what the Constitution of 1853 orders - turns the judge's labor into an invisible work, and, as Montesquieu would say, invisible justice - because of the lack of a jury - ends up being nonexistent. It is not a coincidence that less than 20% of the Argentinian People trust in Justice.

##### 4.1 Educating the Argentinian people

I planned an approach that contained, principally, the following points:

- Protection of animal species in danger of extinction,
- Supervision of food hygiene,
- Supervision of medicines and expired materials,
- Vigilance over sanitary aspects in hospitals,
- Tracking the final disposal of solid, semi-solid and gassy wastes.

Accompanied in the beginning by a few little radio broadcasts and local newspapers, I gradually drew the attention of citizens, and, fundamentally, I gained the confidence of many people who lived in polluted areas. My position as regards the press caused some reactions in the Forum. But I did not stop. I was sure that the diffusion of this approach would cause a multiplier effect in the environmental education of my people.

I used to receive threatening phone calls. My house was shot. The car I drove was intercepted by villains. The quick reply of police protection melted the risk. Public opinion answered favorably time and time again. People in the street used to support me, and journalists from different media made common cause with me. That fortified me. And in this way, slowly but without stopping, I kept on working in the direction I had chosen. The opinion rendered on each trial used to cause something like an impact; but the stronger, largest impact was caused by the inquiry itself. That it was done. To talk about environment is not as attractive as practicing environment.

##### 4.2 Creating an environmental workforce

I began selecting the most competent people from different state bodies. The police department of the Province of Buenos Aires created the Ecological Police. The scientists (all of them *ad honorem*) and policemen in the group were all first rate and trained for environmental work.

## 5 DISCOVERY OF ENVIRONMENTAL VIOLATIONS

The first actions sought to verify the bromotological condition of different kinds of food. The investigation that first became public knowledge was the contamination of mineral water. It was proven that 40% of the mineral water in the market was contaminated with bacteria or chemicals. Then, it was found that 50% of the mozzarella cheese was contaminated too. T.V. cameras and newspapers showed for weeks thousands of kilos of this product in a complete condition of putrefaction. The product was being sold contaminated by worms, flies, and other pollutants. In less than 60 days, we confiscated 550,000 kg of this cheese. The population was scared. Pizza shops were empty. Some of them closed forever, because of the poor sales.

Then there came numerous investigations that exposed the sale of adulterated milk, sick chickens, contaminated crackers, vanillas made with rotten eggs, careless breadmakers, factories that made stuffings with rotten meat, fruit juices made for children that contained no fruit (with artificial flavors and a coloring from a petroleum-based derivative), soft drinks made with contaminated water, farms that slaughtered, without any control, animals with tuberculosis or aphta. And we can continue.

Those investigations caused commotion in my country. We know that in underdeveloped countries, protein-energetic malnourishment in the children is one of the most critical problems. But in Argentina we are not talking about malnourishment because of a scarcity of food, but because of the poor quality of food. And we can say that in some social sectors hunger also exists.

How can we attain a developed world from this picture of a malnourished people? The first sign of poor food consumption is growth retardation. "Kwashiorkor," "Marasmus" and other diseases derived from hunger are also promoted by inadequate alimentation. Food poisoning can be deadly; 200 people died in Argentina in the last 2 years because of food poisoning. This number, which seems large, is deceptive. The lack of determining causes of deaths does not allow us to know the real number of victims, which must be in the thousands.

The caste of Argentinian industry has always been characterized by the planning of its activities without considering the generated wastes. With very few exceptions, the gas, liquid, solid and semi-solid wastes were excreted into the environment without any treatment at all. The effects of this attitude were devastating for the metropolitan and suburban areas. Air, ground and subterranean water are now in actual danger. Pollution has claimed its first fatal victims in my country. As an example, 50% of the children with gastric or intestinal diseases in the greater Buenos Aires area are victims of contaminated drinking water.

## 6 ACTIONS TAKEN TO ELIMINATE HEALTH RISKS

We outlined, with an expert team coordinated by the court, investigative ways for detecting factories that were affecting the river basins of "Riachuelo," "Arroyo del Rey" and "Arroyo Ortega." At the same time, we identified clandestine dump trucks that were littering the urban waste disposal areas. Some of those waste heaps had 90,000 rodents per hectare (2.17 acres), and had the potential capability of transmitting more than 20 diseases. We closed hundreds of factories of different sizes, even international ones.

Several suits, detentions, and confiscation of trucks that had been used in illegal dumping were the results of three years of struggle against environmental enemies. The environment was in an emergency status. At some spots in the above mentioned rivers, the drinking water quality was only 0.3 out of an ideal mark of 10.

Juridical work tried to cover other never-investigated aspects:

- Illegal work in hospitals,
- Poor use of expired material destined for medical use,
- Intervention in medical centers managed by people without a license or diploma,

- Abnormalities in the manufacture of medicine (under-doses, pollution, and clandestine factories),
- Neglect of old people in asylums.

In brief, I decided to promote a policy that would protect the juridical good touted by the "Penal Code" in its 200th and 208th articles: public health. That was the axis of an active approach where ecology was defined in terms of species, not genus. Environmental protection was derived directly from wanting to protect human life.

As a matter of jurisprudential progress in favor of people suffering from pollution, I can say that the "court of Alzada" has accepted new criteria of adjective and substantive law that I put forth in my opinions:

- The possibility of using action suits established by civil law in criminal trials, arguing that, because of what is mandated by the 16th and 18th articles of the Penal Code, their use in this field is legitimate. This point opened up the powers of the criminal judge and allowed him to act ex-officio in public action crimes, relegating to secondary status the discussion over scattered interests. Transferring these responsibilities to penal justice via a simple denunciation by anybody, injured or not, reduced the frequency of civil suits and of those seeking the protection of the court.
- Crimes would remain unattributable if pollution continues.
- The indictability of successive heads of polluting industries. We can then prevent the disclaimer of legal responsibility of each polluting company.
- The extension of the jurisdiction of the judge beyond his/her territory. We can, then, facilitate investigations and prevent contradictory statements.
- The indictment, in all pollution cases, of the heads of the polluting companies.

## **7 CONCLUSION**

Today, environmental protection is a part of Argentine legal culture. It is incorporated into the collective conscience. No leader in any sector in Argentina can publicly support an anti-environmental position. This is the most important thing. We did de-legitimate environmental pollution. As Camus would say, worse than homicide is the legitimation of homicide. There may be future polluters in Argentina, but they will no longer be legitimated. They know that they have to operate in a clandestine manner. As criminals. Not as honest and proud businesspeople. If I have made some contribution to my country, it was in helping to de-legitimate pollution.