

## COLLECTIVE AND CLASS ACTIONS IN ARGENTINA

### 1. Introduction

In order to explain how collective and class actions can function in Argentina, a brief explanation of its constitutional and jurisdictional regimes should first be provided. Because of the influence that different legal systems have had on Argentine public law, reference to the legal regimes of several countries is inevitable.

Argentina's 1853 Constitution, still in force today albeit amended several times,<sup>1</sup> is modelled after the U.S. Constitution. The sections on the Judicial Power are almost a literal translation of the relevant sections of the U.S. Constitution. As construed by the courts, it allows judicial review of the constitutionality of laws and of the constitutionality and legality of Executive action.<sup>2</sup> The Constitution provides for a bill of rights which includes, *inter alia*, due process.<sup>3</sup> It also creates a federal regime in which each of the "Provinces" (i.e. States) have their own constitutions with the three powers.

From the point of view of private law, Argentina is a civil law country. Private and criminal laws are of national scope, while administrative and procedure laws can be either national or provincial.

Thus, there is a federal court system (headed by a federal Supreme Court) which applies federal and national laws and follows a federal procedure code, as well as provincial court systems (headed by the respective provincial Supreme Courts) that apply national

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\* Full professor of administrative law, National University of Buenos Aires. Partner, Marval, O'Farrell & Mairal, Buenos Aires, Argentina.

<sup>1</sup> The main amendments were those of 1860, 1958 and 1994.

<sup>2</sup> CSJN, *Ríos, Gómez y Ríos*, 1 Fallos de la Corte Suprema de Justicia de la Nación 32 (1863); *Tomkinson*, 1 Fallos 62 (1864); and *Municipalidad v. Elortondo*, 33 Fallos 162 (1888).

<sup>3</sup> Article 18.

laws and follow provincial procedure codes.<sup>4</sup> Class actions, being a matter of procedure law, could thus be introduced either at the federal level, or at the level of any of the Provinces.

Decisions of the highest provincial courts can be appealed before the federal Supreme Court through a remedy akin to certiorari when constitutional or federal issues have been raised in the litigation.<sup>5</sup>

The first laws on federal jurisdiction that were enacted in the second half of the XIX Century, important parts of which are still in force, are similar to the U.S. Judiciary Act of 1789.<sup>6</sup> The Argentine federal Supreme Court has traditionally followed U.S. precedents, mainly in the construction of the constitutional rules on the Judicial Power.<sup>7</sup> This is particularly true with respect to the requirement that the Judicial Power can only consider “cases and controversies” which, in turn, requires that plaintiff show an actual grievance that can be solved through the legal action she attempts. Judicial cases, has said the Supreme Court, are “those in which it is sought the determination of rights debated between adverse parties who hold such rights.”<sup>8</sup>

Argentina has not enacted a law providing for class actions yet, although there is a bill pending in Congress on the subject. However, the constitutional reform of 1994 created the possibility of bringing legal actions to defend “rights with a collective impact”. Because no laws have yet been passed regulating such actions either, the applicable rules are being developed by the courts. As Argentine courts do not follow the principle of *stare decisis*, there is still uncertainty on the types of situations that allow collective actions and on the effects of the judgment.

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<sup>4</sup> Private and criminal laws are considered “national”, and can be applied both by the federal as well as by the provincial courts and those of the City of Buenos Aires (the federal district), while federal law is applied only by the federal courts. The federal civil procedure code (Código Procesal Civil y Comercial de la Nación) is also applied by the courts of the City of Buenos Aires, which has a legal status similar, but not equal, to that of a Province.

<sup>5</sup> Law 48, art. 14.

<sup>6</sup> Law 27 of 1862, and law 47 of 1863.

<sup>7</sup> See, e.g., CSJN, *Prodelco v. Poder Ejecutivo Nacional*, 321 Fallos 1252 (1998), *Gómez Diez v. Poder Ejecutivo Nacional*, 322 Fallos 528 (1999). Jonathan Miller has studied this influence: see *The authority of a foreign talisman: a study of U.S. constitutional practice as authority in nineteenth century Argentina and the Argentine elite’s leap of faith*, 46 American Univ. L. R. 1483; and *Judicial Review and Constitutional Stability: a Sociology of the U.S. Model and its Collapse in Argentina*, 21 Hastings Int. and Comp. L. R. 77.

<sup>8</sup> CSJN, *Polino Héctor y otro v. Poder Ejecutivo*, 317 Fallos 335 (1994).

This paper will therefore analyse the rules on standing as they existed prior to the 1994 constitutional reform, the consequences of such reform, and the bill on class actions pending in Congress.

## 2. Standing

### a) The traditional rules

Due to its U.S. constitutional model, the requirement of standing is also in Argentina considered to be implied in existence of the “case or controversy” which allows judicial jurisdiction to arise.<sup>9</sup>

However, in defining when standing exists, Argentine authors, and then the courts, have followed European models. This is because Argentine administrative law has been deeply influenced by French and Italian, and more recently by Spanish, administrative laws. This curious juxtaposition of a Constitution that follows the U.S. model of a Judicial Power with broad jurisdiction, with the administrative laws of countries, such as France and Italy, that prevent the judicial courts from examining the actions of the Executive, has been noted.<sup>10</sup> It is not, however, an argument which carries much weight in Argentine legal circles.

In matters of standing, Argentine authors have mainly adopted the Italian distinction between “subjective rights” and “legitimate interests”. In addition, there are the so called “simple interests” which is the general interest of any individual that legal rules be obeyed.<sup>11</sup> In Italy, both before and after the 1949 Constitution which is in force today, the protection of rights was entrusted to the judicial courts, while that of legitimate interests belonged to the administrative courts and simple interests lack jurisdictional protection.<sup>12</sup> Therefore, it has been necessary to distinguish between the first two concepts and many theories have been advanced by Italian authors and courts

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<sup>9</sup> See, e.g. CSJN, *Defensor del Pueblo de la Nación v. Estado Nacional*, 6/26/07, L.L. 10/11/07.

<sup>10</sup> See HÉCTOR A. MAIRAL, 1 CONTROL JUDICIAL DE LA ADMINISTRACIÓN PÚBLICA 107-110.

<sup>11</sup> AGUSTÍN GORDILLO, 2 TRATADO DE DERECHO ADMINISTRATIVO (6th ed., 2003, Fundación de Derecho Administrativo) II-29.

<sup>12</sup> This dates back to a law enacted in 1865 (law Nr. 2248, Annex E). See also the 1949 Italian Constitution, arts. 103 and 113.

to effect such distinction. While a full treatment of this matter would exceed the scope of this paper, it may suffice to say that one of the main theories advanced to distinguish both concepts was proposed by the Italian author Enrico Guicciardi. According to Guicciardi, legal rules can be divided among “rules of relation”, which govern the relations between the administration and the individuals, and “rules of action” which govern the conduct of the administration in order to protect the public interest. Violation of a rule of relation would infringe a right, while violation of a rule of action would infringe only a legitimate interest.<sup>13</sup> A leading Argentine author follows this theory.<sup>14</sup>

The distinction between rights and legitimate interests is, in Italy, constitutionally required. Its effect is to allocate all controversies involving legitimate interests to the administrative tribunals, which are –at least today– just as independent as the judicial courts. The application of the theory in Argentina has very different results, since the country has no administrative tribunals with general jurisdiction. Therefore, to hold that a given claimant has only a legitimate interest, and that legitimate interests cannot be invoked before the judicial courts, deprives the claimant from any effective legal protection *vis a vis* certain administrative actions. Thus, a bus line which challenged the revocation of its permit was denied access to the judicial courts on the grounds that it was only invoking a legitimate interest: the court distinguished between permits, which may be terminated at the discretion of the authorities without compensation, and concessions which give rise to a right and thus entitle the concessionaire to compensation when terminated for reasons of public convenience.<sup>15</sup> This decision may have been correct (and, anyway, without serious consequences) in Italy, but in Argentina resulted effectively in a denial of justice.

For many years Argentine federal courts applied this distinction to deny standing to those invoking only legitimate interests.<sup>16</sup> In some Provinces, however, from the middle of the XX Century, procedure codes for administrative actions were introduced which incorporated the French distinction between the “*recours de pleine juridiction*” and the

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<sup>13</sup> ENRICO GUICCIARDI, *LA GIUSTIZIA AMMINISTRATIVA* 33 (3rd. ed. Padova, 1954).

<sup>14</sup> MIGUEL S. MARIENHOFF, *5 TRATADO DE DERECHO ADMINISTRATIVO* 532 (2d ed. Abeledo-Perrot).

<sup>15</sup> Federal Court of Appeals for Administrative Matters, Chamber III, *in re Línea 20 S.A. LIVESA v. S.E.T.O.P., s. amparo*, 24/3/1981.

<sup>16</sup> CSJN, *Dopazo de Martínez*, 295 Fallos 671(1976); Federal Court of Appeals, *Partido Comunista*, 1957-IV J.A. 120.

“*recours pour excess de pouvoir*”.<sup>17</sup> The first one gives rise to “subjective” litigation, i.e. actions which defend a subjective situation of the claimant, in other words a subjective right. The second gives rise to “objective” litigation, i.e. actions that allege a legal violation and which can be brought invoking an interest, but can only seek the annulment of an administrative decision.<sup>18</sup> Thus, for many years, some Argentine Provinces had an expanded concept of standing, while the federal courts continued with the restrictive traditional theory.

It is interesting to note that in the United States, instead, the expansion of standing was carried out without reference to foreign legal theories but on the basis of the social need to expand judicial protection to situations that merited it but keeping the Judiciary within the constitutional limits as construed by the Supreme Court.<sup>19</sup> Since the leading case of *Data Processing*,<sup>20</sup> standing in the United States is broad enough to cover many cases that in Argentina would have been traditionally considered to affect a legitimate interest and in some cases only a simple interest. Such is the case of competitors, neighbours, consumers, persons affected by the degradation of the environment and users of historic buildings.

b) The initial expansion of standing in the federal courts

During the 1980’s some federal Argentine courts began to expand the concept of standing to protect situations that, under the traditional theory, would have been legitimate interests or even simple interests, although the applicable procedure rules did not grant expressly protection to such interests. The mechanism used to arrive at this result was to consider that the claimant was invoking a “right”. Thus, a court found that all persons had a “right” to a balanced environment and therefore accepted the standing of a well known environmental expert to challenge an administrative decision that had authorized a Japanese company to catch a given number of dolphins in Argentine coastal waters.<sup>21</sup> On similar grounds, another court recognized standing to a person who challenged an administrative decision ordering that certain trees surrounding a historical

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<sup>17</sup> Such as the Province of Córdoba, with law 3897 (1941).

<sup>18</sup> See RENE CHAPUS, *DROIT DU CONTENTIEUX ADMINISTRATIF* 153-156 (5<sup>th</sup> ed. Montchrestien).

<sup>19</sup> See BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 495-519 (3<sup>rd</sup> ed. Aspen).

<sup>20</sup> *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

<sup>21</sup> Federal First Instance Court for Administrative Matters No. 2., *Kattan v. Gobierno Nacional*, 1983-D L.L. 576.

building in the City of Buenos Aires be cut down.<sup>22</sup> Both of these situations would have been considered simple interests under the traditional three-part distinction. Finally, another court allowed a newspaper that wanted to participate in a competitive bidding for a broadcasting license, to challenge the bidding conditions that prevented newspapers from acquiring such licenses.<sup>23</sup> Again, under the traditional theory, persons who participated or attempted to participate in a competitive bidding for a Government award were held to invoke only a legitimate interest.

However, these decisions remained as exceptions and could be explained by their media repercussions more than on strictly legal grounds.

c) The Consumer Defense Law

The Consumer Defense Law enacted in 1993 granted standing to associations of consumers to defend the interests of consumers when these were threatened or affected.<sup>24</sup> They had to meet certain requirements: they should be formed as a legal entity, not participate in party politics, be independent from professional or commercial interests, not receive contributions from business companies and carry no advertising in their publications.<sup>25</sup> A section effectively granting *erga omnes* effects to judgments that accept the claim, if general interests were at stake, was vetoed by the Executive.<sup>26</sup>

3. The 1994 constitutional reform

a) The impact of the new rights on standing

In 1994 a constitutional convention amended the 1853 Constitution and, *inter alia*, incorporated three articles that recognized new rights, the so called “third generation rights”. Article 41 provides that “all inhabitants enjoy the right to a healthy environment.” Article 42 grants to all consumers of goods and users of public utilities

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<sup>22</sup> Court of Appeals for Civil Matters, Chamber D, *Quesada Ricardo*, L.L. 1980-D-130: the lower court admitted plaintiff’s standing and ruled in his favour, while the Court of Appeal vacated the judgement on the merits but without going into the standing issue.

<sup>23</sup> Federal Court of Appeals of Tucuman Province, *La Gaceta S.A. v. Comité Federal de Radiodifusión*, 106 E.D. 271 (1984)

<sup>24</sup> Law 24,240, arts. 52, 55.

<sup>25</sup> Law 24,240, art. 57.

<sup>26</sup> Law 24, 240, art. 54, vetoed by Executive Decree 2089/93.

the right to the protection of their health, safety and economic interests. Article 43 allows a summary action (*amparo*) in the event of “all forms of discrimination and for the protection of the environment, competition, users and consumers, and rights of collective impact in general”. This action can be brought by the affected party, by the Ombudsman and by associations that defend such rights and that are registered in accordance with a law that will determine what requirements must be met for such purpose.<sup>27</sup>

By categorising as “rights” what before were interests, legitimate or simple, the 1994 constitutional reform has diluted the three traditional categories of rights, legitimate interests and simple interests. This effect has been strengthened by the incorporation in the Constitution –by way of treaties which are expressly recognised to have “constitutional level”- of other new “rights”, such as the right to housing or to an adequate living standard.<sup>28</sup> These new rights pose problems which lie outside the scope of this paper, but also reinforce the trend to define as “rights” any interest that a person may allege.

#### b) Collective rights

Collective rights, or rights with collective impact, called also by some “diffuse rights”, are those which protect the indivisible interests of an indeterminate number of persons. Some authors distinguish collective rights, which are those that correspond to a given group of persons united by a common link (such as the rights of the clients of a public utility), and diffuse rights which are those that correspond to an indeterminate sector of the population which lack such link (such as the right to a healthy environment).<sup>29</sup> Thus, general challenges to utility rates, requests for the extension of medical treatment to sufferers of a given illness or for the construction of special access for handicapped persons, or challenges to the installation of a factory which pollutes the environment, would fit the above description.

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<sup>27</sup> See Alberto B. Bianchi, *La legitimación colectiva en el amparo*, 6 Estudios de Derecho Administrativo (El amparo contra la actividad pública) 87 (Ed. Instituto de Estudios de Derecho Administrativo, 2001).

<sup>28</sup> Constitution, art. 75. In its parag. 22 it includes, *inter alia*, the Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations in 1948) which recognises to every person a “right” to an adequate living standard (sec. 25).

<sup>29</sup> See Osvaldo A. Gozáñi, *Tutela de los derechos de incidencia colectiva*, 2005-B L.L. 1393

The Supreme Court has been restrictive in recognizing standing when property rights are invoked. It has distinguished between collective rights and patrimonial rights of a group of persons. The former are inseparable and not capable of single remedies, while the latter, even if homogeneous, can, and should, be defended by each holder by means of an individual action, since they are not included among the rights contemplated by article 43 of the Constitution.

On these grounds, the Supreme Court rejected an action brought by the Ombudsman and revoked the Court of Appeal's decision that had recognised the standing of the Ombudsman and had declared the illegality of several administrative decisions that had effectively frozen and converted into pesos at a lower-than-market rate of exchange of all bank deposits (the Court of Appeals had also ruled that individual depositors were required to sue separately to obtain the reimbursement of their deposits).<sup>30</sup> On similar grounds the Supreme Court rejected *amparo* actions brought by associations that sought to defend the property rights of their members.<sup>31</sup> It has also been held that associations cannot bring damage claims as collective actions.<sup>32</sup>

Other courts have been more generous in recognising standing when homogeneous property rights are involved. Thus, in 2005, an association purporting to represent all account holders of a provincial bank, was recognized standing by a Commercial Court of Appeals in a claim seeking reimbursement of amounts debited by the bank to pay for the cost of insurance against fraud in cash dispensers and loss of credit cards, on the basis that the maximum prejudice suffered by each depositor had been 25 pesos (about 9 U.S. dollars at the rate of exchange then in force) so it was unrealistic to expect depositors to seek individual legal remedies. The court went on first, to grant a preliminary injunction ordering the bank to stop the practice, and then to accept the claim with respect to all depositors who had not benefited from the insurance on the

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<sup>30</sup> CSJN, *Defensor del Pueblo de la Nación v. Estado Nacional*, 26/6/07, L.L. 11/10/07.

<sup>31</sup> CSJN, *Asociación de Generadores de Energía Eléctrica de la República Argentina*, 4/9/07; *Cámara de Comercio, Industria y Producción de Resistencia v. A.F.I.P.*, 326 Fallos 3007 (2003); *Colegio de Fonoaudiólogos de Entre Ríos v. Nación Argentina*, 326 Fallos 2998 (2003). See also Esteban Laguinge, *Límite de las Acciones Colectivas*, L.L. 11/10/07.

<sup>32</sup> Federal Court of Appeals for Civil and Commercial Matters, Chamber I, *Unión de Usuarios y Consumidores v. Edesur*, 2005-A L.L. 93.

grounds that for the bank to construe the silence of the bank's clients as acquiescence of such debits implied a violation of the Consumer Law.<sup>33</sup>

c) Standing of persons

By granting standing to the "affected" person it has been argued that the Constitution has done something more than recognise the obvious, i.e. that a person can act in court to defend his own interests.<sup>34</sup> Therefore, when "affected persons" invoke this rule, they are recognised standing to seek redress that would benefit all those persons similarly aggrieved by the challenge conduct. Thus, neighbours have been recognised standing to challenge the privatisation of a radio station belonging to the city,<sup>35</sup> and a person entitled to health services to challenge a clause in the specifications for competitive bidding for health service providers that allowed exorbitant damages in the event of early termination of the contract.<sup>36</sup> However, this does not mean that citizen actions are allowed, as "affected" means someone specially injured as compared to those that only defend general interests.<sup>37</sup> Neither have legislators been recognised standing as such.<sup>38</sup>

d) Ombudsman standing

The office of Ombudsman ("Defensor del Pueblo") was created in 1993 by law 24,284 and then confirmed by the constitutional reform of 1994.<sup>39</sup> Since then, many actions have been brought by this officer, and in several of them his standing has been recognised.<sup>40</sup> Similar offices were created by provincial constitutions and by that of the City of Buenos Aires.

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<sup>33</sup> Court of Appeals for Commercial Matters, Chamber C, *Unión de Usuarios y Consumidores v. Banco de la Provincia de Buenos Aires*, 2006-B L.L. 375.

<sup>34</sup> MARÍA ANGÉLICA GELLI, CONSTITUCIÓN DE LA NACIÓN ARGENTINA COMENTADA Y CONCORDADA 397 (2d. ed. La Ley).

<sup>35</sup> Federal First Instance Court for Administrative Matters No. 9, 23/6/95, *La Porta, Norberto Luis v. Poder Ejecutivo Nacional*.

<sup>36</sup> Federal Court of Appeals for Administrative Matters, Chamber I, *Torello, Susana T. v. Instituto Nacional de Servicios Sociales para Jubilados y Pensionados*. 2000-B L.L. 275.

<sup>37</sup> CSJN, *Consumidores Libres Coop. Ltda. de Provisión de Servicios de Acción Comunitaria*, 321 Fallos 1352 (1998).

<sup>38</sup> *Polino, Héctor y otro v. Poder Ejecutivo*, 317 Fallos 317:335 (1994); *Rodríguez, Jorge en Nieva Alejandro y otros v. Poder Ejecutivo Nacional*, 320 Fallos 2851 (1997).

<sup>39</sup> New article 86 of the Constitution.

<sup>40</sup> Federal Court of Appeals for Administrative Matters, Chamber IV, *Youssefian Martín v. Secretaría de Comunicaciones*, 1998-D L.L. 712; Federal Court of Appeals for Administrative Matters, Chamber IV,

Thus, in 1999 there was a black-out in the City of Buenos Aires which left a significant part of the town without electricity for three weeks. The City Ombudsman brought an action to have the electricity distribution company declared responsible due to negligence. The court accepted the claim and declared the company liable in general *vis a vis* the users. This decision was to have *res iudicata* effects for all users, and thus those that suffered damages had to bring individual claims proving only the amount thereof, but without need to re-litigate the negligence issue.<sup>41</sup>

However, the standing of the Ombudsman has been rejected in several cases in which no true collective rights were being invoked.<sup>42</sup> Based on art. 21 of law 24,284 that orders the Ombudsman to suspend her intervention when a private party brings an administrative appeal or a judicial action with respect to the same controversy, the Supreme Court has held that the role of the Ombudsman is of a subsidiary nature, so it cannot bring an action to protect a given collective interest when an association has already brought such action.<sup>43</sup>

e) Standing of associations

Associations have been very active in bringing actions to protect the interests of their members.<sup>44</sup> Thus, an association of users and consumers was recognized standing to sue in order to stop a bank from using the data of its clients data for advertising purposes and from assigning such data to third parties unless the client had sent a specific request

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*Defensor del Pueblo de la Nación v. Ministerio de Economía y Obras y Servicios Públicos*, 2000-C L.L. 162.

<sup>41</sup> Court of Appeals for Civil and Commercial Matters, Chamber I, *Defensoría del Pueblo de la Ciudad de Buenos Aires v. Edesur*, 2000-C L.L. 399.

<sup>42</sup> See, e.g. *Defensor del Pueblo*, *supra* note 30.

<sup>43</sup> CSJN, *Defensor del Pueblo de la Nación v. Ministerio de Economía y Obras y Servicios Públicos*, 326 Fallos 2777 (2003).

<sup>44</sup> See e.g. CSJN, *Asociación de Esclerosis Múltiple de Salta v. Estado Nacional*, 326 Fallos 4931 (2003); *Asociación Benghalensis v. Ministerio de Salud y Acción Social*, 323 Fallos 1339 (2000); Federal Court of Appeals for Administrative Matters, Chamber IV, *ADECUA v. ENARGAS*, 1998-F L.L. 338; *Asociación de Grandes Usuarios de Energía de la República Argentina v. Provincia de Buenos Aires*, 1997-C L.L. 322.

to be excluded.<sup>45</sup> Labour unions have also been recognised standing to defend the collective rights of their members.<sup>46</sup>

The law that new section 43 of the Constitution required for associations to be registered and thus obtain standing, has not been enacted yet. This has resulted in standing being recognized to all associations, whatever their date of incorporation, the broadness of their purposes or their lack of track record in the furtherance thereof. Only their registration as a legal entity is required.<sup>47</sup>

However, the courts have limited the scope of the claim in some cases, considering that it exceeded the standing of the plaintiff association. In one case the court accepted the standing of an association whose purpose was the protection of natural resources and the environment and which has requested the court to order that the causes of pollution of subterranean waters in the county be investigated, but rejected it with respect to the claim of the supply of drinkable water for the county inhabitants on the grounds that this had to be claimed separately by the individuals themselves<sup>48</sup>. On similar grounds, another court rejected the claim filed by an association of users and consumers for a fixed amount of damages in favour of all those persons affected by a power cut.<sup>49</sup> A special case was that of an association that requested that the so called “pill of the day after” be banned, on the grounds that it produced abortions, a claim which had as many supporters as contradictors (the latter, obviously, not members of the plaintiff association) but which was accepted by the Supreme Court.<sup>50</sup>

f) Available procedures

The new constitutional rule allows *amparo* actions to defend collective rights. This is a summary action that defends rights affected by clearly illegal or arbitrary administrative

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<sup>45</sup> Court of Appeals for Commercial Matters, Chamber E, *Unión de Usuarios y Consumidores v. Citibank N.A.*, 12/05/06, 2006-D L.L. 226.

<sup>46</sup> *Sindicato Argentino de Docentes Particulares v. Poder Ejecutivo Nacional*, 2003-F L.L. 770.

<sup>47</sup> *ADECUA*, *supra* note 44.

<sup>48</sup> Court of Appeals for Civil and Commercial Matters of San Isidro, *Fundación Pro Tigre y Cuenca del Plata v. Municipalidad de Tigre*, 178 E.D. 753 (1998).

<sup>49</sup> Federal Court of Appeals for Civil and Commercial Matters, *Unión de Usuarios y Consumidores v. Edesur*, 2005-A L.L. 93

<sup>50</sup> CSJN, *Portal de Belén v. M.S. y A.S.*, 2002-B L.L. 520.

action. Created in 1957/8 by two Supreme Court precedents,<sup>51</sup> it was subsequently regulated (and limited) in 1966 by law 16,986. In the 1994 constitutional reform it obtained express recognition.

*Amparo* actions cannot be used when the issues are complex or require ample evidence.<sup>52</sup> This rule has been applied to reject *amparo* actions that challenged administrative decisions that posed complex factual issues and could not be considered thus to be clearly illegal or arbitrary.<sup>53</sup>

As provided by law 16,986 *amparo* actions could not be used to challenge the constitutionality of congressional statutes or administrative regulations, but this restriction was declared unconstitutional by many courts and is now expressly excluded by the constitutional text.

Although the Constitution mentions only *amparo* actions for the defense of collective rights, the courts have gradually expanded the rule to include all types of action, whether summary or ordinary, as well as declaratory actions.<sup>54</sup> A concurring opinion of three Supreme Court Justices so has stated with respect to the Ombudsman on the basis of the debates of the constitutional convention and of the Spanish model followed in respect of this officer.<sup>55</sup>

g) Effects of the court decision in collective actions

Another problem raised by the expansion of standing is that of the *res iudicata* effects of the judgment. Traditionally, the effects of a judgment were limited to the parties thereof (the so called “relative effect” of the judgment).<sup>56</sup> Administrative law scholars - again following the French model- favoured *erga omnes* effects in cases such as the

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<sup>51</sup> CSJN, *Siri*, 239 Fallos 459 (1957); *Kot*, 241 Fallos 291 (1958).

<sup>52</sup> Law 16,986, art. 2, parag. (d).

<sup>53</sup> CSJN, *Intendente de Ituzaingó v. Entidad Binacional Yaciretá*, 23/11/04.

<sup>54</sup> GORDILLO, *supra* note 11, at II-20/22.

<sup>55</sup> Opinion of Justices Petracchi, Zaffaroni and Lorenzetti in *Defensor del Pueblo v. Estado Nacional*, 328 Fallos 1652 (2005).

<sup>56</sup> Emilio José Daneri Conte-Grand, *Alcance de las sentencias dictadas en las causas promovidas por el defensor del pueblo y las asociaciones de consumidores*, 4 Estudios de Derecho Administrativo 207 (2000).

declaration of the voidness of a regulation,<sup>57</sup> but the Supreme Court has adhered to the rule of the relative effect<sup>58</sup>, which allows only the indirect expansion of such effect through the respect that its judgments deserve in the lower courts. By recognising standing to the Ombudsman and to associations, the 1994 constitutional reform has changed this model.

The general view is that the decision in a collective action should have *erga omnes* effects (i.e. against all parties allegedly being represented by the Ombudsman or relevant association) if the law suit is won and thus all parties can benefit from it.<sup>59</sup> If the suit is lost, there are differing views. According to some, such decision would only bar a new collective action but would not be *res iudicata* even with respect to the persons represented in the action but who did not participate therein, who could thus pursue their individual claims. According to others, who follow the rules of the Model Code for Collective Actions for Iberoamerica, *res iudicata* would not be available as a defense if the action is rejected by lack of evidence and new evidence is alleged to have appeared in the meantime.

One of the problems posed by the expansion of the effects of the judgment can be seen in the *Unión de Usuarios* case described above.<sup>60</sup> There the court solved the issue of those account holders who had benefited from the insurance because they had suffered losses that were thereby covered, simply by excluding them from the effects of the judgment, i.e. by not requiring the bank to include them among those clients who were to receive a refund of the premiums that had been debited from their accounts. The court thus assumed, without further investigation, that all account holders other than those above who had benefited from it, had rejected the insurance. It can be discussed whether such assumption was correct and also if the economic sanction thus suffered by the bank (and who benefited its clients, albeit by a very small amount) was more appropriate than a fine applied pursuant to the Consumer Protection Law which can

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<sup>57</sup> Juan Carlos Cassagne, *La impugnación de reglamentos en el orden nacional*, 1979-C L.L. 721; *Acerca de la eficacia erga omnes de las sentencias anulatorias de los reglamentos*, 185 E.D. 703 (1999).

<sup>58</sup> See, e.g., Gómez Díez *supra* note 7, at 549. See also Héctor A. Mairal, *Los efectos de las sentencias de la Corte Suprema de Justicia de la Nación*, 177 ED 795.

<sup>59</sup> Estela Robles, *Los efectos de la cosa juzgada en las acciones de clase*, 1999-B L.L. 999; María Jeanneret de Pérez Cortés, *La legitimación del afectado, del defensor del pueblo y de las asociaciones*, 2003-B L.L. 1333.

<sup>60</sup> *Supra*, note 32.

reach three times the benefit obtained from the infringing conduct (and which would not have benefited the bank's clients).<sup>61</sup>

h) New laws

No specific procedure laws have been enacted at the federal level to implement the constitutional rules on collective actions. Therefore, many doubts remain concerning the standing of the different parties who can bring actions to protect the new rights, the nature of these actions and the effects of the court decisions.

However, laws dealing with substantive issues raised by the new rights have been enacted and they include some procedural rules. Thus the 2002 Environment Act grants standing to the affected parties, environmental associations, the Ombudsman and national, provincial and municipal authorities, but only the affected parties can seek damages. The judgment has *erga omnes* effect unless the action is rejected –totally or partially- for lack of evidence.<sup>62</sup>

As explained above, actions that defend collective rights may be introduced also at the provincial level. The Province of Buenos Aires, enacted in 1995 a law for the protection and improvement of natural resources and the environment.<sup>63</sup> This law grants standing to the affected persons, the Ombudsman and the associations organised to protect the environment. This same Province enacted in 2003 a Provincial Code for the Defense of the Rights of Consumers and Users.<sup>64</sup> This law grants standing to consumers and users, as well as to associations of consumers registered in the Province. It regulates the effects of the judgment as follows: if the claim is accepted or settled, all affected consumers and users may seek damages by way of an ancillary action (*incidente*). If the claim is rejected, those consumers and users who did not take part in the procedures may bring an individual action. If the rejection was based on lack of evidence, any party with standing –other than the failed claimant- may bring an action alleging new evidence.

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<sup>61</sup> Law 24,240, art. 47, parag. (b).

<sup>62</sup> Law 25,675, arts. 30, 33.

<sup>63</sup> Law 11,723.

<sup>64</sup> Law 13,133.

Another relevant legislation is the Constitutional Procedure Code of the Province of Tucumán which came into force in 1999 that regulates also the collective “*amparo*”.<sup>65</sup> This action protects public health, the ecological balance, the environment, the archaeological, historical, artistic, cultural and landscape values of the province, fair trade, consumer interests and other community interests. Two types of collective *amparo* are provided. One is for the protection of collective interests and the other for the remediation of the environment or the correction of deceitful advertising. Standing is granted to the State representative, the Ombudsman and private associations that defend collective interests. The latter may be admitted as plaintiffs by the court taking into account the prejudice suffered by their members, their statutory purposes, the territorial correction with the source of the damage, the number of members, the seniority of the association and all other circumstances that show its seriousness and responsibility. The judgment that accepts the claim must determine the conduct that should be followed by defendant. Nothing is said concerning the effect of the judgment that rejects the claim.

#### 4. Class actions

##### a) The introduction of class actions

The difference between the legal remedies available to defend the new rights, and class actions organized on the United States Rule 23 model has been noted.<sup>66</sup> No rules exist with respect to certification of the class, notice to class members either at the outset of the litigation or upon an impending settlement, or effects of the court decision. The current regime, recognising broadly the standing of associations without any need of seniority, and effectively allowing successive collective actions against the same defendant, may be criticized. On the other hand, if Supreme Court precedents are followed, collective actions would not be available to defend individual property rights, even if such rights are homogeneous and of little individual value.

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<sup>65</sup> Law 6,944, arts. 71-86.

<sup>66</sup> See Julio César Rivera and Julio César Rivera (h), *La Tutela de los derechos de incidencia colectiva. La legitimación del defensor del pueblo y de las asociaciones del artículo 43 segundo párrafo de la Constitución Nacional*, 2005 L.L. Doctrina 1054.

The introduction of class actions has therefore been proposed by many procedure and civil law professors.<sup>67</sup> It has also been requested in speeches and opinions of the President of the federal Supreme Court.<sup>68</sup> Among legal scholars, the works of Brazilian professor Ada Pellegrini Grinover and the draft of a Model Code for Collective Actions for Iberoamerica, are well known.<sup>69</sup> Others have urged caution in taking such a step.<sup>70</sup>

b) The Class Action Bill

Several bills introducing class actions at the federal level have been introduced but only one has kept congressional status.<sup>71</sup> This draft follows closely the United States Rule 23 model.

The Bill sets the following conditions for one or more members of a class to be allowed to sue or be sued as representatives of all the persons that comprise the class:

- (1) That the class be so numerous that joinder be unfeasible.
- (2) That the issues of law or of fact involved be common to all the class.
- (3) That the claims or defenses to be sustained by the representatives of the class be typical of the claims or defenses of the whole class.
- (4) That the class representatives protect fairly and adequately the interests of the class.

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<sup>67</sup> See Julio C. Cueto Rúa, *La acción por clase de personas*, 1988-C L.L. 952; Alberto Bianchi, *Las acciones de clase como medio de solución de los problemas de la legitimación colectiva a gran escala*, Revista Argentina del Régimen de la Administración Pública, year XX, No. 235, ps. 13/35 (1998).

<sup>68</sup> Dissenting opinion of Chief Justice Lorenzetti in *Mujeres por la Vida – Asociación Civil sin Fines de Lucro -filial Córdoba- v. Ministerio de Salud y Acción Social de la Nación*, 2006-F.L.L. 464.

<sup>69</sup> See, e.g., Leandro J. Giannini, *Legitimación en las acciones de clase*, L.L. 23/08/2005.

<sup>70</sup> ALBERTO BIANCHI, LAS ACCIONES DE CLASE (Ábaco) 109-10.

<sup>71</sup> Bill presented by representative Juan Manuel Urtubey, 33 Trámite Parlamentario 19/4/07 (“the Bill”). Its English translation is attached as Schedule A.

A class action will be admissible if the above conditions are met and also the following ones:

(1) That the initiation of separate lawsuits create the risk of court decisions that (i) are incompatible or inconsistent for the individual members of the class, or (ii) have practical consequences for other members of the class or for those who are not party to the litigation, or (iii) limit or prevent them from protecting their own rights.

(2) That the court considers that the common issues of law or fact common to the members of the class predominate over other issues that concern only individual members, and that the class action is better than any other method for the fair and efficient solution of the controversy.

In order to reach such a decision the court shall take into account:

(1) The interest of the members of the class to control individually the lawsuit.

(2) The extension and features of any lawsuit concerning the controversy.

(3) The wish that the members of the class may have in concentrating the litigation in a particular forum.

(4) The difficulties that can arise in managing the class action.

In addition to the aforementioned situations, actions that defend rights with a collective impact against conduct that infringes free competition, the right to a healthy environment or the rights of the users of public utilities, can be brought as class actions. Actions concerning individual legal situations that have no collective impact cannot be brought as class actions.

Settlement of a class action requires the consent of the court, who must ensure that the settlement be communicated to all members of the class.

After the claim is filed and served on defendant, the court shall determine if it admits the existence of the class. This decision can be appealed. According to the message that accompanies the bill, these rules would effectively reproduce the U.S. certification procedure.

The decision to admit the class action shall be communicated, by the means determined by the court, to members of the class informing them that only those members requesting to be excluded will not participate and that the decision, whether favourable or unfavourable to the class, shall be effective against all members of the class who have not requested exclusion. While the Bill, as its U.S. model, leaves to the discretion of the court the means by which such communication shall be carried out, it specifically mentions publication and authorises the court to use the mass media. These rules may remove an important filter for class actions, since Argentine commentators have remarked that in the U.S. personal notice is normally required and the ability to defray such cost is one of the conditions that the class representative must meet.<sup>72</sup> However, considering the favourable attitude of the courts towards litigants without means or associations without material net worth, it would be surprising if a court ever requires costly individual notices to be sent to all class members.<sup>73</sup>

The decisions that admit a class action must include a description of the class. Persons who do not wish to participate in the class may so indicate in writing prior to the issuance of the judgment. The court decision may also provide for the division of a class into sub-classes, each one to be considered a separate class for purposes of the litigation.

The lawyers who bring a class action can request the court to appoint them as the provisional representatives of the class. However, when the court appoints the final representatives of the class it must ensure that they have adequate means to represent the class. This appointment shall not prevent the Ombudsman from being a necessary party to the litigation.

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<sup>72</sup> See Bernardo Saravia Frías and Lucas Perés, *Acciones de Clase*, L.L. 13/9/07.

<sup>73</sup> A public fund to support unsuccessful litigants in actions that defend diffuse rights has been proposed: Eduardo Fernández, *Costas en el proceso colectivo*, 2006-2 Doctrina Judicial 835.

A national registry of class actions is to be created. When the class includes members domiciled in different jurisdictions, the class action shall be brought before the federal court in whose jurisdiction the greater number of class members are domiciled.

Class members cannot be called to depose. This rule should be evaluated in light of Argentine general procedural rules according to which parties to an action can be called to depose but do not appear technically as witnesses. Thus, although under oath, no perjury can be committed by a person declaring in a litigation to which it is a party.

Preliminary injunctions shall be granted, albeit exceptionally, when the delay of the litigation may cause irreparable damages.

The judgment must describe the class and will include, and be effective in relation to, all persons who have not requested being excluded.

#### 5. Other relevant factors

The adoption of class actions must be analysed also in the light of several legal and even sociological factors that may influence their practical consequences. We mention some of them below.

##### a) Legal costs

Because the cost of litigation can operate as a deterrent to bring legal actions, or as an inducement to settle an ongoing litigation, a brief explanation of some local rules on legal costs is relevant in the present context.

The traditional rule in Argentine litigation is that the loser pays the legal fees of counsel for the winner. Only in exceptional cases, when the court considers that the controversy was sufficiently complex to justify the decision of the loser to litigate, are counsel's fees borne by each party<sup>74</sup>.

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<sup>74</sup> Federal Civil Procedure Code, art. 68.

Counsel's fees are determined by federal and by local (i.e. provincial) laws, generally as a percentage of the amount of the controversy. Thus, in federal courts counsel for the winner receives, in the aggregate, from 14% to 28 % of said amount for lower court work. Work at each appellate level entitles said counsel to receive an additional 25% to 35% of the amount set for lower court work.<sup>75</sup> Fees for expert witnesses are fixed also on a percentage basis, normally between 2 to 4% of the amount involved. However, total fees for lower court work, including counsel for the winner and all expert witnesses, cannot exceed 25% of the amount of the judgment.<sup>76</sup> Thus, assuming a federal case goes up to the Supreme Court (two appellate levels), the total fee for the winner's counsel can exceed 40% of the amount of the controversy.

Contingency fees are allowed provided they do not exceed 40% of the economic benefit obtained by the party.<sup>77</sup> Such an arrangement does not exclude the right of counsel to collect whatever legal fees must be paid by the losing party.

In federal courts plaintiffs must pay, at the outset, a court tax equal to three per cent of the amount of the claim.<sup>78</sup> If there is no amount expressly stated, it must be estimated by plaintiff in order to pay the tax on such estimate. If plaintiff wins, the amount of the tax must be reimbursed by defendant.

The rules on counsel fees and on court tax do not apply when a litigant receives authorization to litigate *in forma pauperis*. In this case, it is relieved from the payment of the court tax and of the fees of counsel for the other party should such litigant lose.<sup>79</sup> This benefit is granted by the courts taking into account only the lack of resources of the litigant, generally without any consideration being given to the seriousness of the claim.<sup>80</sup> It has been argued that actions that defend collective rights can be brought *in forma pauperis* and cases are known where such benefit was granted by the court.<sup>81</sup>

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<sup>75</sup> Law 21, 839 (1978), arts. 7, 14.

<sup>76</sup> Civil Code, art. 505, as amended.

<sup>77</sup> Law 21,839, art. 4.

<sup>78</sup> Law 23,898, as amended, art. 2.

<sup>79</sup> National Code of Civil Procedure, arts. 78-86.

<sup>80</sup> See Facundo Viel Temperley, *El equilibrio en la concesión del beneficio de litigar sin gastos*, 2004-E L.L. 1151.

<sup>81</sup> See Giannini, *supra* note 69; *see also* note 90 below.

b) The legal profession

The legal profession in Argentina has expanded considerably in the last decades. At present, there are over 65,000 practicing attorneys in the City of Buenos Aires. The law school of the National University of Buenos Aires, the biggest but not the only one in the City of Buenos Aires, has 24,000 law students. As a result, the legal profession as a whole has become “proletarianised”.

Litigation is mostly carried out in writing, with few hearings. Witness depositions are taken by a clerk, without the judge being present. Other than complying with short terms to answer the briefs filed by the other side, or prepare closing and appellate briefs, seldom does a case require the full time involvement of counsel as would be the case in a common law jurisdiction at the time of the main hearing. It is enough to request the court every six months to take further steps in the dossier to avoid laches for plaintiff<sup>82</sup> (defendant, in principle, is not subject to this rule). Thus, lawsuits normally take four or more years to be decided by the lower court. At least one appeal, and often two, are possible. But it is also cheap to litigate as lawyers can handle many cases at the same time with minimal attention being paid to each of them.

A theory developed in the last decades has changed the traditional rule that plaintiff bears the main burden of proof. According to it, the party required to prove or disprove a given fact is the one which is in a better situation to do so.<sup>83</sup> On these grounds, important companies who are defendants are often placed in the need to prove their defenses, while individual plaintiffs may offer little or no evidence (and are not subject to perjury sanctions when they lie).

All these features make litigation by private parties without substantial means, or by associations with little net worth, very cheap and accessible.<sup>84</sup> The lure of high fee awards against substantial defendants is also strong. To the contrary, a “deep pocket” litigating against a plaintiff pursuing a big claim *in forma pauperis* faces high risks of

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<sup>82</sup> Federal Procedure Code, art. 310.

<sup>83</sup> JORGE W. PEYRANO (Director) and INÉS LEPORI WHITE (Coordinator), *CARGAS PROBATORIAS DINÁMICAS* (Rubinzal-Culzoni), *passim*.

<sup>84</sup> A public fund to support unsuccessful litigants in actions that defend diffuse rights has been proposed: Eduardo Fernández, *Costas en el proceso colectivo*, Doctrina Judicial 2006-2-835.

losing a substantial amount of money even if it wins the lawsuit. This is because ancillary motions during the process (e.g. a demurrer based on lack of jurisdiction of the court or on the statute of limitations) also carry an award of fees in favour of the winner of such motion,<sup>85</sup> so it is not unheard of that the lawyer for the losing party still collects a high fee from the winning party as a consequence of ancillary motions decided in favour of the former. Also, even if defendant wins the action, if plaintiff is insolvent the winner must pay one half of the fees of expert witnesses, which are also set as a percentage of the amount of the controversy.<sup>86</sup> Only if defendant waives all interest in the expert witness's evidence, and thus foregoes the possibility of participating in its production, can this cost be avoided.<sup>87</sup>

### c) Punitive damages

Punitive damages do not exist yet in Argentine law. "Moral" damages (i.e. pain and suffering) may be awarded in tort cases,<sup>88</sup> but the awards are usually very low.

The discussion on the general introduction of punitive damages is very much alive. Civil law scholars are predominantly in favour, while minority views argue constitutional reasons against it: the imposition of sanctions requires that the infringing action be described with precision and the principle of *non bis in idem* prevent multiple awards of punitive damages.<sup>89</sup>

A draft of a new Civil Code which was introduced in Congress in 1999 but was never adopted, included a section allowing the court to require defendant to pay punitive damages whenever its actions had been reckless or in bad faith. The amount that set was not to be paid to plaintiff but to the entity indicated by the court. This draft has lost congressional status and there appear to be no current moves to reinstate before Congress.

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<sup>85</sup> Law 21,839, art. 33 (as amended); Federal Civil Procedure Code, art. 69.

<sup>86</sup> Federal Civil Procedure Code, art. 77.

<sup>87</sup> Federal Civil Procedure Code, art. 478.

<sup>88</sup> Civil Code, art. 1078.

<sup>89</sup> See Sebastián Picasso, *Sobre los denominados "daños punitivos"*, L.L. 13/11/07.

However, a recent draft of an amendment of the Consumer Law, which still has not been passed into law, also provides for punitive damages up to a maximum of 5,000,000 pesos (about US\$ 1,560,000 at the current rate of exchange). They would be payable to plaintiff. No special standard of conduct is required by the draft to award punitive damages, nor is there any limit to the number of such awards that may be decided against a given defendant. This draft has strong chances of being enacted into law.

## 6 Conclusion

The factors described above, among others, should be taken into account when devising new legal remedies for the new rights. The rules on legal costs applied to an action claiming remediation of past environmental damages, if these are taken as a measure of the amount of the controversy,<sup>90</sup> can result in significant awards of legal fees to the lawyers for the winners, without the deterrent of high litigation costs that exist in the United States. The abundance of badly paid lawyers makes this a constant temptation. If punitive damages are introduced, the same rules on fees can act also as a strong inducement to bring legal actions against deep pockets. It is ironical, however, that multinational companies -even if they do not always comply with the strict environmental standards imposed by the new legislation- are much more respectful of these standards than the myriad of small and medium sized local companies that run their operations in total violation of them. However, it can be expected that the bulk of the new litigation will be aimed at the big companies.

Moreover, the courts are understaffed and already overwhelmed by existing litigation. Complaints on the exorbitant duration of lawsuits are frequent, even coming from the judges themselves: 10 years was given in a recent judicial conference as an average duration for lawsuits dealing with administrative law matters.

In addition, Argentines do not trust their courts. Several recent polls indicate that over 80% of the Argentine lawyers do not consider them independent. Many federal courts

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<sup>90</sup> The oil industry has recently been sued by an association of land owners formed in 1997 who seeks remediation of damages caused by oil spills effectively occurred after 1991. This was the year when the State Oil Company YPF was turned into a private corporation. It was chosen as a cut-off date in order to avoid suing the Government, although the main acts of pollution had reportedly taken place before. The claim helpfully estimated that the prejudice caused by the oil industry exceed 100 million dollars. The plaintiff is acting *in forma pauperis*.

are currently manned by judges who lack Senate approval and thus have no assurance of stability. A recent amendment of the law that governs the Council of Magistrates, a body that oversees the Judiciary, has strengthened the proportion therein of politicians to the detriment of lawyers and academics.<sup>91</sup> This factor is relevant as in many cases collective actions are brought in cases which have ideological connotations.<sup>92</sup> Media attention with respect to collective actions or to actions with a strong human interest can always be counted on. Thus, lawsuits with a political or media impact receive preferential treatment, while those involving individual property rights -unless they affect a considerable number of persons alike- are delayed. This does not seem to be a propitious background to introduce ambitious new legal remedies in a system that lacks the constraints existing in the countries that gave rise to them.

The incorporation of new legal protections taken from more economically advanced countries should not be to the detriment of the traditional role of the Judiciary and on which the whole economic system rests. Yet such may be the effect of the novelties if no additional funding is provided to support the expansion of the role of the judges.

Class actions can exacerbate the defects of a legal system. Proper care should be taken so that local circumstances are taken into account when introducing foreign legal institutions. While a new law on class actions may be passed soon, it should be accompanied by adequate funding and should also include proper safeguards, such as rules on certification, on notice to class members and on the effect of the judgments, so as to avoid it being an inducement to legal adventures filed without any basis merely for harassment purposes.

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<sup>91</sup> Law 26,080 of 2006.

<sup>92</sup> It has been mentioned that the Ombudsman brought an action to challenge the forced conversion of bank deposits into pesos at a lower than market rates, but not to challenge the same measure taken with respect to holders of Government bonds: *See* Julio César Rivera and Julio César Rivera (h). *Supra* note 66.

*Bill*

submitted by Lower House representatives Graciela Camaño and Juan Manuel Urtubey\*;

*The Senate and the Chamber of Representatives of the Argentine Nation, etc.*

**Article 1:**

**Prerequisites to a class action**

One or more members of a class may sue or be sued as representatives of all the persons belonging to the class only if:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact to be resolved in the proceedings common to the class;
3. the claims or defenses of the class representatives are typical of the claims or defenses of the class;
4. the class representatives will fairly and adequately protect the interests of the class.

**Article 2:**

**Class actions maintainable**

An action may be maintained as a class action if the prerequisites listed above are satisfied, and in addition:

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\* This bill, is almost identical to a prior bill submitted jointly by representatives Graciela Camaño and Juan Manuel Urtubey that had lost congressional status for not having been passed within the allotted time period.

1. the prosecution of separate actions by or against individual members of the class would create a risk of
  - a. inconsistent or varying adjudications with respect to individual members of the class which would establish different answers for the party opposing the class, or
  - b. adjudications with respect to individual members of the class which would as a practical matter have consequences on the interests of the other members of the class or of those who are not parties to the action or substantially impair, or
  - c. impede their ability to protect their own interests.
2. the court finds that the questions of law or fact common to the members of the class predominate over other questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In order to render a decision the court will take into account:
  - a. the interest of members of the class in individually controlling the development of the complaint and the answer thereof, by means of different actions;
  - b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
  - c. the desirability of concentrating the litigations in a particular forum;
  - d. the difficulties likely to be encountered in the management of a class action.

### **Article 3:**

#### **Collective incidence rights and class actions**

Together with the situations mentioned above, the actions brought in order to defend collective incidence rights against acts contrary to the rights to a healthy environment, to the defense of competition or the right of public utility users may be subject to the procedure of this law. The actions concerning individual legal situations that do not have collective incidence are excluded from these proceedings.

**Article 4:**

**Procedure for class actions.**

Class actions will be prosecuted as ordinary proceedings. If actions that should be prosecuted as *amparo* proceedings are concerned, the courts will adapt the resources of this law to the summary nature of the procedures.

If a class action has been brought through an *amparo* proceeding, the courts may turn the same into an ordinary proceeding, in case that the circumstances of the case render it advisable.

**Article 5:**

**Mediation and class actions.**

The compulsory mediation proceedings set forth in Law 24,573 will not be applicable to class actions. The mediators who are appointed to act in disputes that may result in class actions will inform to the parties that they have to appear before the acting court in order to resolve under which proceedings the dispute will be prosecuted pursuant to this law.

**Article 6:**

**Settlement of class actions.**

Class actions cannot be settled without court's approval. The court must be certain that the confirmed settlement has been informed to all the class members. The court will establish the manner in which this communication will be served upon all the members of the class.

**Article 7:**

**Certification of class actions.**

In the first procedural act, after the complaint is brought and notice thereof is given to the defendant, the court will analyze whether to certify the existence of the appearing

class. The decision about the certification of a class action may be conditional and may be altered or amended before final judgment.

If the action is openly reckless the court may deny its certification *in limine*.

The order granting or denying class action certification is appealable.

**Article 8:**

**Notice of class actions.**

For the purpose of protecting the members of the class, the court may order the publication of its decisions through any such means as it considers most suitable for informing all or some of the members of the class. These notices may propose the members to state if they consider that their procedural representative is suitable or if they wish to file claims or defenses or to have any other role in the proceedings.

The court that has certified a class action will make a public communication of its decision. In the case of members of the class who can be identified through reasonable effort, the court will give notice thereupon of the commencement of the proceedings through the means considered more suitable under the circumstances.

This notice will inform the following to the members of the class:

1. That the court will exclude from the class any member who requests exclusion within a certain term;
2. That the ruling, whether or not favourable to the class, will bind all the members of the class who did not expressly request exclusion, and
3. That the members of the class who failed to request exclusion may, if they so desire, be represented by a special attorney. If this right is not exercised, they will be represented by the attorney or attorneys that represent the class.

The court will be authorized to use mass media to communicate class certification.

**Article 9:**

**Effects of certification of a class action.**

The order certifying a class action shall include and describe those whom the court finds to be members of the class. Once the court has certified the class, all the persons that were described as members of the class shall be deemed admitted to the same. Those persons who, in spite of being members of the class, are unwilling to participate in the proceedings will express so in writing. They may express their desire not to be a party to a class action at any stage before judgment is rendered.

The court may order that a class of persons be divided into subclasses and, in this case, each subclass will be treated as a separate class for the purposes of the proceedings.

**Article 10:**

**Representation of class actions.**

The counsel who brings a class action may seek their appointment as interim representatives of the class by the court. However, at the moment of appointing the attorney or attorneys who will become permanent representatives of the class, the acting court will make sure that the legal counsel have the resources that are required to comply with the duties inherent in the representation of the class.

The appointment of the permanent class representative will not prevent the Ombudsman from continuing to take part as necessary party to the proceedings.

For the purposes of prosecuting the proceedings, the class will be treated as a single party and the authority to that end will be centralized in its permanent representative.

**Article 11:**

**Registry of class actions.**

The Registry of Class Actions is hereby created, which will operate as a division of the Registry of Universal Actions of the National Judicial Branch. All the actions certified as class actions will be registered therein. The following minimum data will be

included: i) identification of the person that starts the proceedings, ii) description of the nature of the class, iii) identification of defendant, iv) purpose of the proceedings and v) identification of the attorneys that represent the class and their *ad-litem* domiciles.

The Registry of Class Actions will inform the requesting courts about the existence of class actions already brought which are similar to those that it attempts to certify. In this case, the requesting court will ask for any such reports as it considers necessary from the court that heard the previous proceedings in order to analyze the dispute. The Registry of Class Actions may also provide information to individuals who evidence a lawful interest in the action brought.

#### **Article 12:**

##### **Federal Jurisdiction**

If the domiciles of the class members are located in different jurisdictions, the action will be heard in the federal jurisdiction. In case of conflict, the federal court of the jurisdiction where most of class members are domiciled will hear the proceedings.

#### **Article 13:**

##### **Rules on evidence**

No hearing designed for the members of the class or their representatives to answer interrogatories will be admitted. The Court may increase the number of admitted witnesses according to the circumstances of the case.

#### **Article 14:**

##### **Precautionary remedies**

The parties that bring a class action may apply for the adoption of precautionary measures in their complaint, which can be sustained regardless of the procedure for certification of the class action when the delay of the process would cause irreparable damage. These remedies will be granted only on exceptional cases. If there is a class representative, the adoption of precautionary remedies will only be requested by him or her.

**Article 15:**

**Judgment in a class action.**

The judgment in an action maintained as a class action, whether it sustains or dismisses the complaint, shall include and describe those whom the court finds to be members of the class.

This description will include all the persons that have not requested to be excluded from the action, but which the court finds to be members of the class.

If the members of the class are individualized, the judgment will include their personal data.

The judgment will identify the name of the persons who, in spite of being members of the class, expressed that they were unwilling to participate in the proceedings.

All the members of the class, except for those who requested their exclusion from the proceedings in due time, are bound by the judgment.

**Article 16:** Let these presents be informed to the Executive Branch.

## GROUNDS

Mr. President:

The addition in the reform of 1994 of the “right to a healthy environment” and of the rights of consumers and users<sup>93</sup> has brought about a debate about the addition of collective incidence rights in the Constitution. In this debate, the usefulness of class actions for an effective defense of said rights has been discussed. At the same time, the large number of complaints arising as a consequence of the restrictions on bank deposits and the translation of deposits in foreign currency with which the courts were stuffed, have drawn the attention towards proceedings that could simplify the administration of justice and guarantee swift enforcement of constitutional rights. Class actions can be useful to resolve some of these situations.

A “class action” is mainly the consolidation of different related lawsuits in a single one. Not all the cases may be turned into class actions; only a minority of them may be certified as belonging to the same class. However, if there is a high number of plaintiffs or, which is less usual, of defendants, with similar matters to be resolved in a lawsuit, the court may allow that they become joined into a class. This action becomes an effective alternative for several individual lawsuits, hundreds or even thousands of complaints are concentrated in a single lawsuit, in a manner that plaintiffs can afford the costs of suit. At the same time, the defendants have the possibility of knowing the extent of the costs of the judgment since, given that all the complaints are concentrated in only one, they may know the limits of a settlement or a judgment. If there are several individual lawsuits, the uncertainty is greater. For the administration of justice, class actions avoid that courts get blocked with similar complaints and with the possibility of producing different results, therefore introducing a significant improvement in the level of legal certainty.

Class actions are one of the most important innovations in the field of civil liability. The reason for their widespread use lies in their versatility. They are essentially a procedure that makes it possible to join separate claims that due to their

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<sup>93</sup> Articles 41 and 42 of the Constitution.

own characteristics are not joined by any substantive theory. In theory, they allow to join large numbers of claims of separate individuals regardless of their subject-matter. They are mainly associated to matters such as defense of competition, corporate law, capital markets law, rights of users of public utilities and mainly civil liability. In the United States they were also used in discrimination matters, either due to race or sex. As litigations become more complex, individual plaintiffs are ever less able to afford litigation costs.

The theory of the class action is to take a weak signal and amplify it by adding several small claims that would not otherwise be individually sought. In this way the costs of each individual claim are reduced.

### **Autonomy or compelled participation**

In constitutional terms, the principle of free will is always considered. Each person may decide whether to enter into any kind of agreement. The individual autonomy grants each individual some kind of immunity against external attacks. In this way, individuals are allowed to dispose of and use their property and to sell their work as they consider satisfactory. A basic example of free will is contractual freedom. This freedom is evident when other persons fail to perform or hinder the performance of the obligation assumed by themselves or by another. Now then, the class action is an exception to the rule of free will of contractual freedom since it shows a situation which is similar to an adhesion contract.

Why something that is unthinkable, an imposed proceeding, seems to be possible due to a change in circumstances? In general terms, it is when there appear three basic situations: the first one is that the number of individuals similarly situated with respect to a common cause of action must be very large, i.e.: there is a large number of plaintiffs. The second element is that the loss suffered by each plaintiff must be relatively small. The third element is that the costs, both administrative and legal, for each individual action must be relatively high.

In these circumstances we can observe the consequences of a rule that enables each injured party to bring their complaints individually. The probable plaintiffs will simply abstain from starting a lawsuit if the costs of suit are higher than the amount

that they seek to recover. This is perfectly conceivable due to the high costs to be paid to attorneys and for the production of evidence. In this case, the solution to this is that all the individuals who are in that situation may join their claims so that they can benefit from what would be economies of scale. This would be the solution given by the joinder of actions, but after a brief analysis we find that it is not easy for this joinder of claims to be successful. The hope of the parties in a joinder of claims is that the cost of the lawsuit will grow less rapidly than the value of all the claims together, in this way if they are united they will succeed. But regularly the negotiations to achieve a joinder of claims with several plaintiffs are troublesome, since it is extremely difficult to reach an agreement as to the distribution of costs and of the result obtained in order to know how much each of the plaintiffs must contribute and how much they will receive if they succeed. Some persons may not accept their share in the costs and in the possible benefits. Some individuals, due to an opportunist behaviour, are likely to extort the others in order to obtain a larger share in the profits or a lower cost at the beginning of the proceedings. Some plaintiffs may have a different valuation of their damages with respect to the others and therefore they cannot reach an agreement with respect to the cost of the process and the distribution of any possible benefits. Once the lawsuit has been started and the evidence has been produced there may be other persons who wish to join in the same proceedings, making things easier for them. In these circumstances, negotiations are very likely to fail.

We can also think about the defendant. A defendant might wish to have certainty, once and for all, of the chances it has of being sued for a given damage and to have a final idea of the costs that it might incur in the proceedings. Otherwise, it might be sued over and over again by the new plaintiffs, and any calculations of what would be the price to be paid for a final solution of the problem would be very important or delayed in time (sic).

The failure of the joinder of claims is what leads to explain the existence of class actions.

The practice in the United States indicates that there have been certifications of very ambitious class actions, in a very wide range of cases, including matters concerning blood transfusion to damages caused by smoking and suggests how

the rule about the certification of these actions has gone from a cautious initial situation to a more aggressive one. These examples show how difficult it is to decide at the beginning of litigation if the common matters in a class action are sufficient to control matters that are different or separate. We usually wish to know if plaintiffs are in a similar position before being able to determine the relevant legal basis in their case.

### **Organization of a class action**

Class actions have a class representative who is generally the main counsel of the complaint. He represents the interests of all the class members even without having a power of attorney granted by them. All the persons having similar claims against a defendant belong to the class. The determination of the similarity of claims must be considered by the court that certifies the class, a duty that is not so simple if we consider that the extent of the damage may vary from plaintiff to plaintiff. All the class members are bound by the decision, even if they are not party to the proceedings. Generally, only a reduced number of plaintiffs are joined in the complaint, the specialized lawyers seek the most representative cases or the cases that have all the varieties possible that exist in the case. The other class members passively wait for the result of the proceedings and are bound by the same. The persons who are unwilling to be class members must appear before the acting court and expressly exclude themselves from the proceedings. This usually happens in the case of persons whose claim is greater than or different to the rest of the claims of the class members and who prefer to bring an individual action.

This kind of actions require an important previous organization and court certification. The arrangements are generally very expensive for the attorneys that organize the actions, as preparation of the evidence is a complex job, because the number of participants is usually large and the damage suffered by each of them is small. In a typical action there are many class members, even thousands in certain cases, who have suffered a relatively small damage. The damage requires a kind of evidence on the defendant's liability that is difficult to obtain because it generally constitutes a damage suffered during several years.

In the class action, the litigants represent the absentees. The absentees are bound by the decision and the *res judicata* rule is applicable to them; therefore, the

matter cannot be raised in a new action. The participants in a class action have neither control nor strict knowledge of the action and therefore the courts must exercise control over the attorneys so that they keep the class members informed.

The attitude of a class member is different from the attitude of an individual plaintiff since the former does not participate in the process, the lawyer who represents the class offers evidence and legal counsel with a generally short number of plaintiffs that participate in the process and can negotiate a settlement on behalf of the class. The traditional elements of adversative process and due process of law have a different application in the case of class actions since somebody may be bound by a court decision for belonging to a class and without having a personal participation in the proceedings.

#### **Advantages and disadvantages of class actions.**

The main advantage of class actions is that they actually join separate actions about the same matters that, due to the high procedural costs, would be unfeasible if litigated individually. Class actions allow the amplification of actions for a small amount and that require a complex and expensive production of evidence. It reduces the costs of suit and enables the parties to bring more resources and a specialized and top level legal counsel. At the same time, the class action strengthens the negotiating position of plaintiff. In this kind of actions, the individual plaintiff is generally weaker than the defendant, whether it be an insurance company in the case of mass accidents, a polluting company or a bank. Given that the class action extends the case to all the affected parties, it balances the parties to the proceedings. This is required in order to avoid opportunist tricks in the negotiation and also to assume the costs for the production of evidence. They also avoid negotiations for the constitution of a joinder of claims and holding of meetings with probable plaintiffs. The unification of the participation in the complaint entails a cost which is many times insurmountable. The individual actions render impossible to prosecute a lawsuit where there are many injured parties for small amounts and extremely powerful defendants.

The great advantage for the defendants is that all the complaints are concentrated in one action and they are allowed to assume all the financial consequences in a single lawsuit. It also enables them to offer broader settlement basis

since it is not required to make provisions for future lawsuits with respect to the same matter. It also reduces the procedural costs for defendants since they are not required to hire attorneys to represent them in several jurisdictions and in different cases, all of which require the production of evidence and legal analysis.

The main inconvenient of class actions is their procedural complexity. The certification of a class is the main difficulty. The admittance of individuals in a class is somewhat arbitrary in nature, both with respect to the members included and the members excluded. It is very unlikely that all persons who suffered discrimination at work for race or sex reasons had experienced the same things, therefore there is an unavoidable gradation. The same happens in the cases of damages caused by pollution. Therefore, it is the responsibility of the court to establish a strict criterion for the determination of the class. The costs required to evidence the existence of a class also increase the costs of the proceedings. A way of reducing costs when the class members live in different provinces is to resort to the federal jurisdiction.

The class action also requires an additional effort from the court to control the acts of the attorneys so that they respect the interests of the class members that are absent in the proceedings.

### **Regulations about class actions**

Class actions in the United States are governed by Rule 23 of the Federal Rules of Civil Procedure.

The first matter that a court must resolve in a class action is to determine the level of heterogeneity among the probable class members, considering the substantive law applicable as it is rather than as it could be after the application of the case. If the differences are very important, the class action fails, either because it is not a typical claim that meets all the main requirements of a class action rule or because it fails to comply with the requirement of predominance.

In the federal prerequisites to a class action it is set forth that one or more members of a class may sue or be sued as representative parties only if (i) the class is so numerous that joinder of all members is impracticable, (ii) there are questions of law or

fact common to the class, (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (iv) the representative parties will fairly and adequately protect the interests of the class.

In order to be maintained as a class action, the court will consider several alternative items. To begin with, the action must avoid that other actions by or against individual members would create a risk of inconsistent adjudications which would establish incompatible standards of conduct for the party opposing the class, or that these individual actions dispose of the interests of other members or substantially impede their ability to protect their interests. The class action will not be maintained if the complaint has granted a relief to the class as a whole.

In order to maintain the class action, the court must establish that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (i) the interest of members of the class in controlling the claim or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the difficulties likely to be encountered in the management of a class action.

During the prosecution, if the court finds that the interests of the class predominate over the interests of individual members, it must inform individually, as it is practicable under the circumstances, to all members of the class who can be identified. The notice must explain that the court will exclude from the class any individual member who is unwilling to belong to the class and who informs so within the term stipulated to that end, that the judgment will bind all class members, except for those that have excluded themselves, and that class members may participate in the proceedings through counsel if they so desire.

The judgment in a class action shall include and describe those whom the court finds to be members of the class. A class action may also be maintained with

respect to particular issues or may be divided into subclasses and each subclass treated as a class.

Among the measures that the court make take in class actions, the following are included (i) to prevent undue repetition in the presentation of evidence or arguments; (2) to require for the protection of the members of the class, including an inquiry to the class members to know if they are treated fairly and adequately. The court may also eliminate allegations as to absent persons.

The class action may not be abandoned or settled without the court's approval and the proposed settlement must be informed to all the members of the class.

The court may in its discretion permit an appeal from an order granting or denying class action certification. An appeal does not stay the proceedings if the certification has been granted, unless the court so orders.

The federal rules on class actions mainly revised and adopted in 1966 have had a broad effect in the United States. The four requirements that unify all the class actions were determined therein, to wit: a large number of parties in the lawsuit that render the individual resolution impracticable, common questions of law or fact, that the claims are typical and an adequate representation. On these bases, the proceedings are generally started with a notice to all the class members whenever possible and the exclusion of those that request so in time.

**Case Amchem products, Inc. vs. Windsor 521 U.S. 591.**

The Supreme Court of Justice of the United States stated that the core purpose of the class action

*“is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labour.”*

*The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather*

*than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.*

*The interest in individual control can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable. Each plaintiff in an action involving claims for personal injury and death has a significant interest in individually controlling the prosecution of his case; each has a substantial stake in making individual decisions on whether and when to settle.*

*In the decades since the 1966 revision of Rule 23, class action practice has become ever more adventuresome as a means of coping with claims too numerous to secure their just, speedy, and inexpensive determination one by one. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue.*

Justice Breyer mentioned the importance of a settlement in a class action that included millions of persons. He stated:

*“I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace-over the past 40 or 50 years-... **when approving the settlement... it improved the plaintiffs’ chances of compensation and reduced total legal fees and other transaction costs by a significant amount.** Under the previous system (without class actions) the sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease.*

Class actions do not have the exclusive duty of defending constitutional rights but rather they are a useful tool in those cases where the same violation of said rights affects many persons that due to the costs of the proceedings cannot file their claims at court. In this way, costs of evidence, attorneys’ fees, efforts in different complaints and finally the prosecution in multiple courts are reduced. The drafters of the Constitution of 1953 were not acquainted with class actions, but we can adopt the same in their honour in order to definitively bring into effect the rights that they created.

For these reasons, I hereby request the approval of this project.

*/s/*

*Juan Manuel Urtubey*  
*Lower House Representative*