

# WHERE THERE IS A WILL, THERE IS A WAY: COMMENTS ON ENVIRONMENTAL ACTIVISM IN THE MATANZA-RIACHUELO BASIN CASE BASED ON SABRINA'S FRYDMAN ANALYSIS

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The Fulbright-Jose Siderman Human Rights Fellowship for Argentine Lawyers of 2017-2018 brought Sabrina Frydman to Southwestern Law School.<sup>1</sup> Through the lenses of a legal practitioner, scholar, educator, and civil activist, Frydman drew the international community's attention to the Matanza-Riachuelo Basin case and the role that environmental activism played in addressing it.<sup>2</sup> The title case is famous because the Matanza-Riachuelo Basin is one of the most polluted rivers in the world,<sup>3</sup> and it was

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1. Sabrina Frydman received her law degree with a specialization in Public International Law from the University of Buenos Aires. As Siderman-Fullbright Fellow (2017-2018), she earned an LL.M. in Human Rights and Civil Liberties from Southwestern Law School. Frydman is an activist and educator of human rights, as well as a well-versed lecturer on international law. Most pertinent to this comment, Sabrina currently works as the head of the General Secretariat for the Matanza-Riachuelo Basin Authority (ACUMAR).

2. See Sabrina Frydman, *The Matanza-Riachuelo Basin Case: Lessons in Environmental Activism from the Argentine Supreme Court and Civil Society Organizations*, 28 SW. J. INT'L L. 47, 48-49 (2022).

3. Bryan Walsh, *Urban Wastelands: The World's 10 Most Polluted Places—Matanza-Riachuelo, Argentina*, TIME (Nov. 04, 2013), <https://science.time.com/2013/11/04/urban-wastelands-the-worlds-10-most-polluted-places/slide/matanza-riachuelo-argentina/>; *Riachuelo: Cleaning up Argentina's Most Polluted River*, WE BUILD VALUE (Jul. 25, 2018), <https://www.webuildvalue.com/en/stories-behind-projects/riachuelo-cleaning-up-argentina-s-most-polluted-river.html>; Luis Francisco Magni et al., *Evaluation of Heavy Metal Contamination Levels in River Sediments and Their Risk to Human Health in Urban Areas: A Case Study in the Matanza-Riachuelo Basin, Argentina*, 197 ENV'T RCSH. 1, 1 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S0013935121002735>.

the subject of a landmark decision by the Argentinian Supreme Court of Justice in *Mendoza, Beatriz Silvia c/ Estado Nacional*.<sup>4</sup> In *The Matanza-Riachuelo Basin Case: Lessons in Environmental Activism from the Argentine Supreme Court and Civil Society Organizations*, Frydman describes the environmental deterioration of the basin, the complexity of the legal, administrative, and civic responses to 200 years' worth of pollution, and the infringement upon the human rights of people who live on the bank of the Matanza-Riachuelo River. The background of the case, the role of the parties and stakeholders, and the unique characteristics of the judicial process, led to and secured the creation of an interjurisdictional Basin Authority, a unique participatory process during public hearings, and institutional space for civil society participation to monitor the sanitation plan's implementation, are thought-provoking and at the same time inspirational.

The vulnerability of the environment against industrial, chemical, and human waste worsens when it faces governmental ambivalence, skepticism, and weak political will to effectuate systemic changes. Because of the high cost and the scale of the required reforms, solutions to major environmental problems cannot happen overnight. It is almost impossible to remediate the ecological damage, improve living conditions for affected residents, and gain substantial political credit during one or even a few political terms that are based on the electoral calendar. Yet, given the design of the modern state and the matrix of international relations, public authorities are the best suited to resolve or coordinate the environmental efforts of private and private-public entities. Some major impediments to environmental protection include the need to provide opportunities for the community and its residents to ensure compliance and access to the judicial mechanisms to protect environmental human rights. The right to monitor and apply legal remedies to address the problem of environmental hazard threats to health is reflected in the concept of environmental justice. Because environmental harm generally affects the most vulnerable populations, much of the scholarship on this subject focuses on the redress of discriminatory actions.<sup>5</sup>

Frydman, in her analysis of the legal, administrative, and environmental development of the Matanza-Riachuelo Basin Case, describes the

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4. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1622); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/6/2006, "Mendoza, Beatriz c. Estado Nacional," Fallos (2006-329-2316).

5. Gilbert P. Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENV'T. L.J. 321 (1998) (addressing the regulations that implement Title VI of the Civil Rights Act of 1964, which had attempted to redress U.S.-funded discrimination having a disparate impact on people of color).

momentum leading up to the Court's historic decision. Analysis of that momentum requires us to look at the problem retrospectively and allows us to assess prospectively the outcomes of the litigation and the lessons we can learn from it. In assessing the temporal characteristics that help to appreciate the connections and interdependencies of the chosen priorities, the responses—international and domestic—and the main actors that ultimately shaped the human-rights approach to environmental conflicts, we can see that that momentum requires a certain level of readiness and activism.

Frydman emphasizes activism that transcends the Argentinian borders and that is broader than a national civil society movement. At first, she refers to the globalization of the environmental agenda back in 1972, particularly to the UN Conference on the Human Environment (the Stockholm Declaration),<sup>6</sup> and later, to the 1992 Earth Summit in Rio de Janeiro.<sup>7</sup> The principles and recommendations adopted at these conferences paved the road for civil society activism to defend environmental rights. They also established a trajectory for states to implement environmental legislation and to establish governmental agencies for environmental protection.

The early 1990s were significant in Argentina because of the institutionalization of the Secretariat for Natural Resources and Human Development<sup>8</sup> and more importantly, because of the constitutional reform in 1994.<sup>9</sup> Since then, the Argentinian Constitution has formally protected and guaranteed the rights of all people to a healthy and balanced environment by imposing relevant duties on public authorities, as well as introducing a new legal mechanism called the summary proceeding, *accion de amparo*.<sup>10</sup> Finally, the General Law for the Environment (2002)<sup>11</sup> introduced the judicial procedure for seeking environmental damages and granted injured parties, the Office of Ombudsman, and environmental NGOs rights to sue while also giving broad jurisdictional functions to the judges. Eventually, the concept of judicial activism was coined by the Supreme Court in 2006 and 2008.<sup>12</sup>

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6. U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/ Rev.1 (June 16, 1972).

7. *Conferences / Environment and Sustainable Development*, UNITED NATIONS, <https://www.un.org/en/conferences/environment> (last visited Jan. 28, 2022); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/ Rev.1 (Vol. I), annex I (Aug. 12, 1992).

8. Decree No. 2419/1991, Nov. 12, 1991, [27265] B.O. 3.

9. Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

10. *Id.* art. 41, 43.

11. Law No. 25675, Ley General del Ambiente [LGA] Nov. 27, 2002, [30036] B.O. 2.

12. Frydman, *supra* note 2, at 53.

As much as our generation could be justifiably dissatisfied with the current state of the environment, it is worth noting that formal recognition of the right to a healthy environment at the international level only began a half-century ago. The history of judicial protection of environmental human rights worldwide is even more short-lived. It took much longer for sovereign authorities worldwide to take responsibility and to recognize that the damages caused by pollution and environmental harm should be vindicated or compensated. Not until the 1990s did European courts come to recognize that human rights include environmental rights.<sup>13</sup> Historically and even today, international efforts to protect the environment depend on public awareness and have been furthered by environmental activism. As it was half a century ago, today public awareness and activism are the engine for environmental protection and sustainable development both domestically and internationally, given the often slow-paced consensual nature of international law.<sup>14</sup> Such awareness raises the value of democracy. Democratic societies can, at least theoretically, keep the governments accountable, and the judiciary independent. In the environmental context, these can be lifesaving functions.

According to Frydman, successful social mobilization in Argentina was possible because of existing law, governmental institutions, a new Supreme Court, and the rise of environmental conflicts and Matanza-Riachuelo Basin degradation. Although almost six million people make up the basin population, it only took a group of seventeen neighbors, professionals, and the named petitioner, Beatriz Mendoza, to bring major changes to a jurisdiction comprised of fourteen municipalities of the Buenos Aires Province and part of the city of Buenos Aires covering 2,240 square kilometers.<sup>15</sup> The petitioner sued the federal government, the Province of Buenos Aires, the City of Buenos Aires, and forty-four companies for collective incidental damage and personal damages resulting from the basin contamination.<sup>16</sup>

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13. See Svitlana Kravchenko & John E. Bonine, *Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights*, 25 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 245 (2012).

14. A state has an international obligation only if it voluntarily commits to it by signing a treaty or agreement. Even then, in states that predicate judicial enforceability on whether the international instrument is self-executing or has legal effect because of implementing domestic legislation, such treaties are often not worth the paper on which they are written. See generally *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).

15. Frydman, *supra* note 2, at 56; Magni et al., *supra* note 3, at 1.

16. Frydman, *supra* note 2, at 77-78.

In 2016, the Court decided that it had jurisdiction to hear the case and created the basin authority.<sup>17</sup> Ultimately, Congress passed a law on the Authority for the Matanza Riachuelo Basin (ACUMAR for its Spanish acronym).<sup>18</sup> The basin authority had the power to “regulate, control and promote industrial activities, the rendering of public services, and any other activity with the environmental impact on the basin . . . .”<sup>19</sup> It also had the capacity to “intervene administratively in matters of prevention, sanitation, restoration, and rational use of natural resources.”<sup>20</sup> The Court also set three simultaneous objectives for the basin sanitation program: “improving the quality of life of the basin’s inhabitants; restoring the basin’s environment in all its components (water, air, and soil); and preventing damage with a sufficient and reasonable degree of predictability.”<sup>21</sup> To accomplish these objectives, the Court created a complex network of governmental institutions and non-governmental organizations, along with a unique monitoring system and new standards for public information exchange.<sup>22</sup> The judicial process also included recognition of the Federal Trial Court of Quilmes’ jurisdiction over all matters associated with compliance and collective environmental damage in the Matanza-Riachuelo basin.<sup>23</sup> Frydman describes the institutional mechanisms and their purposes in her article very well. She also refers to the accountability of the established institutions, which civil society demanded and the judiciary secured, and which was necessary to bring about change. The article teaches various lessons. Some of them are unique for Argentina, and others relate to many other states.

Observing the lessons of the Matanza-Riachuelo Basin Case from an educator’s perspective, the leadership, professionalism, and integrity, as well as the power of civil society, were essential components of its success.

First, the role of individual initiative is important, and the power of one person to bring about meaningful change is inspirational. Frydman begins her paper with an introduction of Beatriz Mendoza.<sup>24</sup> When the case began, Beatriz Mendoza had started to work as a social psychologist at the Health Center in Villa Inflammable, a neighborhood in the municipality of

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17. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/6/2006, “Mendoza, Beatriz c. Estado Nacional,” Fallos (2006-329-2316, 2328).

18. Law No. 26168, Dec. 4, 2006, [CXIV] B.O. 31047 (Arg.).

19. *Id.* art. 5.

20. *Id.*

21. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, “Mendoza, Beatriz c. Estado Nacional,” Fallos (2008-331-1622, 1635-36).

22. Frydman, *supra* note 2, at 70-74.

23. *Id.* at 74.

24. *Id.* at 48.

Avellaneda, in the Province of Buenos Aires.<sup>25</sup> Her name eventually became legendary in Argentinian Supreme Court jurisprudence because of the Matanza-Riachuelo Basin case.<sup>26</sup> Frydman's article focuses on the concept of activism: civic, professional, and judicial. Putting aside shortcomings and inefficiencies in the execution and implementation of the Court's decision, professional activism was just as essential as civic activism. The Ombudsman's office played a crucial role in maintaining and channeling basin-related claims after 2002.<sup>27</sup> Supreme Court Justices were proactive in finding a way to adjudicate the case and creative in developing a complex network of specialized institutions and a monitoring system. Personal efforts and the activism of the professionals, as well as of the citizens, cannot be underestimated. Conversely, when an opportunity is missed, or the institutions are not efficient because of the human factor, the influence of a single person, especially on the managerial level, can be devastating to the purpose, goal, and the process of the action. For example, we have learned about the turnover in the leadership of ACUMAR: three Presidents succeeded one another in just eighteen months.<sup>28</sup> We have also learned the Court needed to impose a daily fine on one of the ACUMAR Presidents, and about the inertia of the Social Participation Commission.<sup>29</sup> A lack of good management, and in some instances a lack of good leadership, slowed down the transformation processes and decreased their efficiency. A successful case, apart from integrity and leadership, requires the activism of public and private actors.

Non-governmental organizations historically have defended human rights violated by environmental devastation. The power of civil society should hold the government accountable to increase its efficiency.

As a Ukrainian, I have a full appreciation for civic activism. Ukrainian civil society was essential to the very existence of the State of Ukraine, especially during the war with Russia that began with the annexation of the Crimea peninsula in 2014.<sup>30</sup> I can also relate to the Argentinian case, as it demonstrates transitional changes that Argentina underwent after 1983 when

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25. *Id.*

26. *Id.* at 48-49.

27. Andrés Scharager, *Conflicto social, ambientalización y crisis política: judicialización en la cuenca Matanza-Riachuelo, Argentina*, 20 *ECONOMÍA, SOCIEDAD Y TERRITORIO* 693, 710-11 (2020).

28. Frydman, *supra* note 2, at 81.

29. Frydman, *supra* note 2, at 71, 76.

30. See Iryna Zaverukha, *Terra Incognita on the Map of Europe: Crimea and the Donetsk and Luhansk Regions*, EUROPE UPDATE: UKRAINE SPECIAL EDITION (Am. Bar Ass'n, Section of Int'l L., Europe Comm.) June 2017, at 3.

it reestablished its democracy.<sup>31</sup> The Matanza-Riachuelo Basin case also demonstrates the complexities of decentralizing administrative power. Both the transition to democracy and the decentralization of power depends mainly on the readiness of society. The experience of Central and Eastern European countries, in their transition from Soviet rule, demonstrates that both processes depend on how fast and how well society can reorganize itself in a free, yet untested, framework. Local authorities and non-governmental organizations must be capable of identifying the need for change and the means of implementing that change. The delegation of power must be secure, otherwise, it will be chaos. The whole idea is that the delegated functions must be performed more efficiently, and civil participation must be more accessible and more satisfactory. In the Matanza-Riachuelo Basin case, this meant the involvement of a wide variety of actors, including both governmental and non-governmental organizations. It was also important to establish social participation and access to public information.

In Ukraine, the efforts of Svitlana Kravchenko<sup>32</sup> and John Bonine<sup>33</sup> provide an exemplar of environmental activism which shaped itself through

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31. *See generally* ARGENTINE DEMOCRACY: THE POLITICS OF INSTITUTIONAL WEAKNESS (Steven Levitsky & María Victoria Murillo eds., 2006).

32. Professor Svitlana Kravchenko (1949 - 2012), Ph.D., LL.D., was a professor at the School of Law, University of Oregon. She was the Founder and the Director of Oregon's LL.M. Program in Environmental and Natural Resources Law. Before moving to Oregon in 2001, Dr. Kravchenko was a faculty member at L'viv National University in Ukraine for twenty-nine years. Her academic record lists nearly 200 articles and a dozen books (in English, Ukrainian, and Russian). She acted as a role model for lawyers and citizen activists throughout Eastern Europe, the Caucasus, and Central Asia. She was the founder and the president of Environment-People-Law, the first public interest environmental law firm in Ukraine. She was also the co-founder and co-director of the Association of Environmental Law of Central and Eastern Europe, and an elected Regional Governor of the International Council of Environmental Law (ICEL). She served as a vice chair of the IUCN Commission of Environmental Law and as an advisor for the Ministry of Environment and the Parliament of Ukraine. She received the Senior Scholarship Prize from the International Union for Conservation of Nature (IUCN) Academy of Environmental Law. She was the longest serving member of the quasi-adjudicatory Compliance Committee of the U.N. Aarhus Convention in Geneva, Switzerland, and was its elected vice-chair. She also worked as a "citizen diplomat" in the international negotiation of the Aarhus Public Participation Convention. *Our Team: Svitlana Kravchenko*, ENVIRONMENT PEOPLE LAW, <http://epl.org.ua/en/nash-kolektyv/> (last visited Feb. 3, 2021); Kravchenko & Bonine, *supra* note 13, at 245.

33. John Bonine, LL.B., is the B.B. Kliks Professor at the School of Law, University of Oregon. He is one of the pioneers of environmental law not only in Ukraine, where he serves as a Chair of the Board of Directors for the Ukrainian public interest environmental law firm Environment-People-Law, but also in the United States. He co-founded the world's first Environmental Law Clinic (at the University of Oregon) in 1978, which now works through the Western Environmental Law Center in Eugene. Professor Bonine is a co-founder of the Environmental Law Alliance Worldwide (ELAW), which is a network of 300 environmental lawyers in seventy countries. He is also the founder of the world-renowned Public Interest

a non-governmental organization. They are, respectively, Ukrainian and American educators and law practitioners, who played an essential role in the introduction of environmental law to post-Soviet-era Ukraine. They were among the first lawyers to bring environmental law cases to the courts. They codified the legacy of international and national jurisprudence in environmental law. In their casebook *Human Rights and the Environment: Cases, Law and Policy*, they showed how the courts in Europe, Africa, Asia, and the Americas have begun to interpret treaties, national constitutions, and human rights legislation to protect the environment through the recognition of rights.<sup>34</sup> But most importantly, with a group of students, they established the first environmental law non-governmental organization in Ukraine: Environment-People-Law (EPL).<sup>35</sup> Back in the 1990s, the post-totalitarian mentality of the general population was still state-oriented. The inertia that followed soviet socialist ideology held the majority of people paralyzed. They continued to expect the fulfillment of public functions and needs exclusively from the central government; they could not recognize the value of non-governmental organizations or fully appreciate local self-government institutions. It took some time for most of the people to understand how democracy works. Thankfully, people like Professor Kravchenko realized that the only way to pursue environmental justice in Ukraine was through a non-governmental organization. There are no other alternatives not only because governmental bureaucracy and inertia often do not reach the most vulnerable communities, but also because of corruption.

The problem of corruption arose also in the Matanza-Riachuelo Basin case.<sup>36</sup> According to the *Earth Island Journal*, six presidents of ACUMAR resigned under suspicion of corruption and because the public lost confidence

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Environmental Law Conferences at the University of Oregon. He founded ENVLAWPROFESSORS, a discussion list used by 500 professors around the world, and of a network of U.S. public interest environmental lawyers. *John Bonine*, UNIV. OR. SCH. L., <https://law.uoregon.edu/people/directory/jbonine> (last visited Feb. 3, 2022); W. ENV'T L. CTR., <https://westernlaw.org> (last visited Feb. 3, 2022); PUB. INT. ENV'T L. CONF., <http://pielc.org> (last visited Feb. 3, 2022).

34. SVITLANA KRAVCHENKO & JOHN BONINE, *HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY* (2008).

35. Environment-People-Law (EPL) was the first environmental non-governmental organization in Ukraine. Kravchenko and a couple of her students founded the organization in 1994. The EPL's lawyers have worked on 590 cases, provided 4023 consultations, submitted 102 comments on laws, and worked on drafting some of the most significant environmental legislation. EPL won the first environmental lawsuit in the European Court of Human Rights. Today, the leader of EPL in Ukraine is Olena Kravchenko, who carries the legacy of her aunt in the fight for environmental rights and clean environment. ENVIRONMENT PEOPLE LAW, <http://epl.org.ua/en/> (last visited Feb. 3, 2022); see also *Our Team: Olena Kravchenko*, ENVIRONMENT PEOPLE LAW, <http://epl.org.ua/en/nash-kolektyv/> (last visited Feb. 3, 2022).

36. Frydman, *supra* note 2, at 77.



in them.<sup>37</sup> The cases of corruption ranged “from conflicts of interest and misappropriation of public funds to irregularities in the acquisition and public reporting of environmental data.”<sup>38</sup> In one case, an environmental legal adviser within ACUMAR used her position to benefit private clients.<sup>39</sup> Ultimately, professionalism and leadership can only effect positive change if they are accompanied by integrity and dedication to the cause of justice.

The success of the Matanza-Riachuelo Basin case was possible mainly because of the common efforts of governmental agencies, the non-governmental sector, and the judiciary. It was important that the system of checks and balances was respected. The complexity of environmental crises and the socio-economic problems of affected populations includes housing, health care, access to potable water, sewage services, and sanitation, all of which test the system of overall governance. The voice of the community must be heard and affected communities must have the opportunity to be a part of the decision-making process. Opportunities for a community to make environmental decisions for themselves and the ultimate response to environmental crisis by the public authorities continue to be the battleground for U.S. human rights lawyers as well. The problem of community disenfranchisement in environmental decisions has various predicates.<sup>40</sup>

In her work, Frydman records the history of a collaborative effort to solve the Matanza-Riachuelo Basin’s problems and the lessons that can be learned from this journey. It is predictable that Sabrina Frydman will have a significant impact on the further development of the case’s legacy. As a hard-working legal practitioner, activist, and educator, she carries on the legacy of the fight for human rights and for the restoration of a degraded environment. She implements her knowledge in her daily work at the site and in the classroom, passing her experiences along to new generations.

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37. Forest Ray, *Life Along the Banks of One of Latin America’s Most Polluted Waterways*, EARTH ISLAND J. (Jan. 16, 2019), <https://www.earthisland.org/journal/index.php/articles/entry/banks-latin-america-most-polluted-waterways/>.

38. *Id.*

39. *Id.*

40. Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENV’T L. & LITIG. 37 (1998); Eileen Gauna, *The Environmental Justice Misfits: Public Participation and the Paradigm Paradox*, 17 STAN. ENV’T L.J. 3 (1998); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 811-26 (1998).