COUNTRY REPORT: MEXICO

Recent Progress in the Development of Mexican Environmental law

IVETT MONTELONGO AND JOSÉ JUAN GONZALEZ*

Background

The history of Mexican environmental law can be divided into four stages. The first era of Mexican Environmental law began in 1972 – when the Federal *Act to Prevent and Combat Environmental Pollution*[1] was passed – and ended in 1982 when the Federal *Act of Environmental Protection*[2] repealed the law of 1972. Environmental legislation of those years shows the following characteristics:

1. The law was federal in nature.
2. The objective was to combat environmental pollution more than to protect the environment.
3. It was framed on command and control based approach.[3]

The second stage in the development of environmental law began in 1987 when the Constitution was amended to introduce both: the system of concurrent jurisdictions to legislate in environmental issues (article 73, section XXIX-G) and the concept of ecological balance as a subject of legal protection (article 27). Under this constitutional basis, in 1988 the Federal Congress passed the *General Act for Ecological Balance and Environmental Protection*.[4] For the first time local states adopted their own environmental legislation regulating those matters that the General Act defined as local issues. The environmental legal framework built during these times addressed the environmental problems from a more holistic perspective that considers the environment as a whole and not only as a set of

* Both of Metropolitan Autonomous University Mexico.

[1] Ley Federal para Prevenir y Controlar la Contaminación Ambiental.
[2] Ley Federal de Prevención al Ambiente
[3] In 1982 an Under Ministry of Ecology was created into the Ministry of Urban Development and Ecology. That Under Ministry was empowered to enforce environmental legislation by imposing administrative fines in cases of non-compliance.
[4] Ley General del Equilibrio Ecológico y Protección al Ambiente.

natural resources. Both the Federal law and local environmental laws addressed environmental problems from the perspective of environmental balance but as was the case with the laws of 1972 and 1982, the laws in this era were built on the command-and-control based approach without introducing any innovative instruments of legal protection. In the same way, general and local environmental laws stressed the preventive objective of environmental law and failed to include any provision in regard to the rehabilitation of the environmental pursuant to environmental damage.

Notwithstanding that, during these years and under the influence of the North American Free Trade agreement negotiations, the Mexican government started to enforce environmental laws more rigorously than during the previous years. In 1992 the Attorney General's Office for Environmental Protection was created as the main agency in charge of enforcing environmental laws. This second era drew to a close in 1996 when the *General Act for Ecological Balance and Environmental Protection* was amended for the first time. This amendment also meant that 32 local laws required amendment.

The third period of Mexican environmental law (1996 to 2010) is the era of multiplication of environmental legal bodies. It is characterized by: a) the promulgation of a number of new environmental general laws and their corresponding local laws such as the *General Wildlife Law* of 2000;[5] the *General Act for Sustainable Forest Development* of 2003;[6] the *General Act of Prevention and Integral Management of Waste* of 2003;[7] and the *General Climate Change Act*;[8] b) the introduction of economic instruments for environmental protection; and c) the recognition of a right to information, public participation, and in a limited way, the right to access environmental justice.

Finally, a fourth era of Mexican environmental law started in 2010 with a series of constitutional amendments addressed to facilitate access to environmental justice as well as a number of modifications to secondary legislation implementing such constitutional reforms. In this last stage the emphasis focused on both access to environmental justice and restoration of environmental damage. A legal regime governing environmental liability was implemented in 2013 when the Federal *Environmental Liability Act*[9] was passed by the Federal Congress.

---

[5] Published into the Diario Oficial de la Federación 3 July 2000.
[6] Published into the Diario Oficial de la Federación 7 July 2003.
[7] Published into the Diario Oficial de la Federación 8 October 2003.
[8] Published into the Diario Oficial de la Federación 6 Jun 2012.
[9] Ley Federal de responsabilidad Ambiental. Published into the Diario Oficial de la Federación 7 July 2013.

This paper seeks to analyse the last of the four stages. The analysis is divided into three sections. The first part discusses constitutional reforms regarding access to environmental justice. The second part analyses secondary legislation reforms aimed at implementing those constitutional reforms, and finally, part three briefly explains the content of the Federal *Law of Environmental Liability* of 2013.

Constitutional Reforms

Constitutional amendments passed during the period of analysis had the aim of making possible access to environmental justice. In that regard, as explained below, the constitutional basis of a human right to a healthy environment was strengthened by reforming articles 4, 17, 94, 103, 104 and 107 of the *Mexican Federal Constitution*.

The first constitutional reform was passed in July 2010. This amendment added a third paragraph to article 17 of the Constitution.[10] As explained in the next section, the new provision obliged the Federal Congress to pass a law regulating collective actions, including judicial procedures and a mechanism for the restoration of environmental damage. According to this Constitutional reform, jurisdiction to decide on these matters is vested in federal judges.

A second constitutional reform, which modified articles 94, 103, 104 and 107 of the Federal Constitution, was passed in 2011. These articles regulate one of the most important instruments for human rights protection in Mexico: the *Amparo* Trial (injunction).[11] However, these provisions were crafted to protect only individual interests. The reform to article 107 means that for the first time an *amparo* action may be filed not only to protect individual and direct interests, as the original text of the Constitution provided, but also in defence of the so-called 'indirect and collective' legal interests, such as the collective interest in protecting the environment. Article 107 as amended reads as follows:

[10] Published into the Diario Oficial de la Federación 29 July 2010.
[11] Published into the Diario Oficial de la Federación 6 Jun 2011.

> ***Article 107****. All dispute considered under Article 103 shall be subject of the proceeding and formalities established by the law, in accordance with the following bases':*
>
> *I. 'The amparo trial must always be initiated at instance of injury party, having this character those who argument to have a right or individual or collective legitimate interest, under the condition that the act claimed violets a right recognized by this Constitution and with that it its juridical interest directly or because its especial legal situation.*

The third constitutional reform was passed also in 2011.[12] According to this reform, all individual warranties protected by the Constitution are now considered as human rights. This includes the human right to a healthy environment, which had been already introduced into the Federal Constitution in 1999 as an individual warranty. This is a fundamental change. Individual warranties are those fundamental rights granted by the Constitution to individuals that cannot be affected by any administrative authority; whereas human rights are the fundamental right inherent to persons, including those recognized by international treaties, that the legal order must recognize.

In 2012 article 4o of the Federal Constitution was amended to include two new principles: a) the principle of environmental liability as mechanism to make effective the human right to a healthy environment and b) the principle of access to clean water.[13]
The relevant provisions read as follows:

> *Article 4o, paragraph four: Any person has the right to a healthy environment for his/her own development and wellbeing. The State will guarantee the respect to such right. Environmental damage and deterioration will generate a liability for whoever provokes them in terms of the provisions by the law.*
>
> *Article 4o, paragraph six - Any person has the right of access, provision, and drainage of water for personal and domestic consumption in a sufficient, healthy, acceptable, and affordable manner. The State will guarantee such right and the law will define the bases, supports and modality for the equitable and sustainable Access and use of the freshwater resources, establishing the participation of the Federation, federal entities and municipalities, as well as the participation of the citizens for the achievement of such purposes. Any family has the right to enjoy a decent and respectable house. The law will set the instruments and supports necessary to achieve such objective.*

[12] Published into the Diario Oficial de la Federación 10 Jun 2011.
[13] Published into the Diario Oficial de la Federación 8 February 2012.

Finally, in 2013 the Federal Constitution was amended to include new rules governing the energy sector and its possible negative impacts on the environment. This reform includes amendments to articles 25, 26 and 28 of the Constitution.[14] The main objective of this last constitutional reform is to open up opportunities for private, national and foreign investment into the energy sector, but environmental considerations were also included. In this way, article 25 as amended stresses the principle of sustainability as the cornerstone of economic development. In the same vein, the transitory provisions[15] of this Constitutional reform refer to the environmental effects of energy reform and oblige Federal Congress to pass legal reform in regard to environmental issues associated with the energy sector. For instance, Transitory Article number XIX holds that: "within the period established by transitional quarter of this Decree, the Federal Congress will modify the legal framework in order to create the National Agency of Industrial Security and of Environmental Protection for Hydrocarbons Sector." According to the same provision, the Agency is empowered to regulate and to supervise the activities of the hydrocarbon sector in regard to industrial security and environmental protection. In the same vein, Transitory Article number XVII also provides that the Federal Congress will modify the legal framework in order to establish the basis to protect the environment in all processes related to the hydrocarbon sector. Consequentially, it seems that new laws establishing a specific environmental legal regime for the energy sector must soon be passed by federal Congress, but overall the sector will be regulated by the environmental laws that regulate other economic sectors.

Protection of Environmental Legal Collective Interests by Secondary Legislation

Based on the above Constitutional reforms, a series of amendments to secondary legislation were passed by Federal Congress with the aim of protecting collective interests in environmental issues.

In January 2011 the Federal Congress passed a reform to article 180 of the *General Act of Ecological Balance and Environmental Protection* to grant communities affected by an environmental authority decision legal standing to file a nullification action before the Federal Court of Tax and Administrative Justice. Article 180 as amended states that:[16]

---

[14] Published into the Diario Oficial de la Federación 20 December 2013.
[15] Transitory Provisions are those legal provisions whose objective is to clarify how compliance with a new law or with a specific amendment may be achieved. Normally they establish the date a specific provision came into force, but in the case of constitutional reforms they can oblige the Legislature to pass the necessary laws to comply with that reform.
[16] Published into the Diario Oficial de la Federacion on 28 January 2011.

> *ARTICLE 180 – In the case of works or activities that violate provisions of this Act and those to which it is supplementary applied and regulations and NOMs arising therefrom, ecological management programmes, the declarations of protected natural areas or regulations and official Mexican norms derived from it, the individuals and entities with a legitimate interest has the right to challenge administrative acts relating thereto and the requirement to carry out the necessary actions to be observed applicable legal provisions, provided that they prove in the process that those works or activities cause or may cause damage to the environment, natural resources, wildlife or public health.*

This provision adds that all individuals or groups of individuals from the communities that could be affected by work or activities illegally authorized are able to file a petition for revision under the Ministry of Environment, or for the nullification of action before the Federal Court of Fiscal and Administrative Justice.

Further, in August 2011 article 1 of the Federal Code of Civil Procedures[17] was modified to establish that the traditional rule, under which legal standing is granted to file actions for damages to those persons directly affected by environmental harm, is not applicable in cases of protecting diffuse or collective legal interests.[18]

Based on the Constitutional reform of 2010, in August 2011 further reforms were passed with a view to introducing so called collective actions into Mexican law. These reforms have the objective of widening the scope of legal standing in cases of environmental issues.[19] With that aim, among other modifications, this reform introduced a new section into the Federal Code of Civil Procedure (the new Book Five) that governs "Collective Actions" and modified article 202 of the *General Act on Ecological Balance and Environmental Protection* to harmonize its content with the new provision of the Federal *Code of Civil Procedure*.

The new "Book Five" of the *Federal Code of Civil Procedure* is comprised of articles 578 to 626 that are addressed to establish the procedural rules to protect collective rights and interests. According to the new provisions of the Federal *Code of Civil Procedure*, collective rights and interest are:

---

[17] Código Federal de Procedimientos Civiles.
[18] Published into the Diario Oficial de la Federación 30-08-2011.
[19] Laws amended by the reform were: Federal Act of Economic Competition; Federal Law of Consumers Protecction; Organic Act of Judiciary Power; General Law of Ecological Balance and Environmental Protection; Law of Protection and defense of Financial Services Users; Federal Code of Civil Procedures and Federal Civil Code.

a) Collective or diffuse rights and interests, or
b) Individual rights or interest with collective incidence.

Those collective interests can be protected through filling a: i) collective diffuse action; ii) collective action in the strict sense or iii) homogenous individual action.

"Book Five" of *Federal Code of Civil Procedure* regulates legal standing, the procedure to file such actions, the scope of the ruling, precautionary measures, the connection between collective and individual actions and the creation of a fund that is sourced from compensation orders made pursuant to collective actions.

On the other hand, Article 202 of *General Act of Ecological Balance and Environmental Protection* as amended holds:

> *Article 202: The Federal Attorney Office for Environmental Protection, in accordance to the scope of its competence, is empowered to file those legal actions, before the competent authorities, when it knows acts, facts or omissions that constitute violations to administrative or criminal legislation.*
>
> *In cases of acts, facts or omissions that affect rights or interests of a collectivity, the General Attorney Office for Environmental Protection, as well as any other legitimate party mentioned by article 585 of Federal Code of Civil Procedure, are allowed to file the collective action in accordance with provisions of Book Five of the mentioned Code.*
>
> *The previous rule is applicable in regard those acts, facts or omissions that violate environmental legislation of local governments.*

Finally, in accordance with the Second Transitory Article of the reform to articles 103 and 107 of the Federal Constitution, a new *Amparo* Law was passed in 2013.[20] This new Law recognizes legal standing to file *Amparo* actions by all those holding an individual, collective or even simple legal interest.

[20] Published into the Diario Oficial de la Federación 2-04-2013.

The New Federal Environmental Liability Act

The Federal *Environmental Liability Act* came into force in 2013.[21] According to article 1(1), this Law regulates liability that arises from damage to the environment. The new law obliges those causing environmental damages to conduct restoration when it is impossible to pay monetary compensation. However, this law regulates environmental liability only in the following cases:

- when restoration or compensation are required by filing any collective actions established in Article 17 of the Constitution;
- when restoration or compensation is required through the alternative dispute resolution mechanisms regulated by the law; or
- when environmental damages result from a criminal behavior.

Article 4 of this law recognizes that environmental damage is different from civil damage caused to owners of natural resources. This type of damage is governed by the Civil Codes. The Federal *Environmental Liability Act* also points out that environmental liability is different from administrative and criminal responsibility.

The Federal *Environmental Liability Act* is comprised of 56 provisions organized into three sections. The first section refers to environmental liability and includes three chapters that govern issues such as: defining the scope of the concept of environmental damage; legal consequences of environmental damage; restoration of environmental damage; judicial procedure to channel environmental liability, including legal standing, precautionary measures, burden of proof and scope of the ruling. This section also creates an Environmental Fund for Restoration. In general, this section introduces a series of modifications to traditional civil liability principles providing for restoration of and compensation for environmental damage.

The second section governs alternative mechanisms for conflicts resolution whereas the third section contains provisions which are intended to complement criminal liability. According to this new law, administrative responsibility is a matter of other environmental general laws. However the Federal *Environmental Liability Act* includes a few provisions which complement regulation the of economic fines (which are provided by other

[21] Published into the Diario Oficial de la Federación 7-07-2013.

environmental laws such as the *General Act of Ecological Balance* and *Environmental Protection or the General Act of Wild Life*).

The analysis of the Federal *Environmental Liability Act* shows that there are a number of reasons to consider it as a regressive law. For instance, it defines environmental damage in article 2º, section III as follows:

> *An adverse and measurable loss, change, detriment, reduction, affectation or modification of a) habitats, b) ecosystems, or c) natural elements and resources and their chemical, physical or biological conditions, interactions among them and the environmental services they provide.*

However, this concept is not so clear given that it does not clarify at which point the adverse change, detriment, reduction, affectation or modification becomes damage. The lack of certainty in this regard could make it difficult to enforce the provisions of the Act.

According to the Constitution, environmental law is ruled by the principle of shared jurisdictions, but in spite of this the new *Liability Act* is a federal law. This means that local governments are not permitted to pass local laws regarding this matter and in consequence the new law could produce results contrary to the Federal Constitution. In the same way, despite the fact that a comparative analysis of environmental liability regimes in other jurisdictions shows a trend of fashioning environmental liability as strict liability, the Federal *Environmental Liability Act* states in article 11 that "Liability for environmental damage shall not be strict liability and it arises from illegal acts or omissions with the exemptions established by this Title". However, notwithstanding this assertion the Act then establishes four exemptions under article 12:

- *Environmental liability will be strict when the damage directly or indirectly arises from:*
- *Any action or omission related to hazardous materials or wastes;*
- *Use and operation of ships in coral reefs*
- *the undertaking of hazardous activities, and*
- *In cases or conduct mentioned by article 1913 of the Federal Civil Code.*

The objective of article 12 is somewhat unclear. In the first instance it seems like sections I, II and III attempt to limit the cases where environmental liability will be considered strict. Nevertheless, *the Federal Liability Act* excludes from the principle of non-strict liability those cases established in article 1913 of *the Federal Civil Code* as well. This provision holds that:

> *Those persons using mechanisms, instruments, devices or substances that are dangerous because of the speed they develop, its explosive or inflammable nature, the energy of power they transmit or analogous causes, are liable for the damage caused even when they do not act illegally except where they demonstrate that the damages is a result of the negligence of the victim.*

The analysis of the above provision shows that it includes all the cases mentioned by paragraphs I, II and II of article 12 of the *Liability Act* and many others because the scope of article 1913 of the Federal *Civil Code* is very wide. It is reasonable to conclude that according to the new *Liability Act*, environmental liability lacks clarity.

Similarly, whereas modern liability regimes around the world have inverted the burden of proof in order to promote environmental justice, article 36 of the Federal *Liability Act* holds that:

> *The link of causation between the damage and the conduct attributed to the defendant must be proven in the trial proceedings.*

The Federal *Environmental Liability Act* gives priority to restoration over economic compensation. Article 13 holds in that regard that restoration of environmental damage will consist of rehabilitating habitats, ecosystems, natural elements and resources to their base line chemical, physical or biological conditions as well as the relationships among them and the environmental services they provide. However, this law does not define any criteria to determine when the damaged environment has been restored.

According to article 14, economic compensation is allowed when restoration is material or technically impossible which is coherent with the trend show by environmental comparative law. However, this provision adds a number of cases where restoration can be substituted by economic compensation which is not straightforward. The cases are described by section II of article 14 which basically holds that damage resulting from activities conducted without having environmental impact authorization or without having land use change authorization can be compensated in order to obtain such authorizations. This is another reason to conclude that the Federal *Environmental Liability Act* is regressive.

Finally, the Federal *Environmental Liability Act* does not modify the provisions of the Federal *Code of Civil Procedure* in regard the scope of ruling.

Conclusions

Despite the series of constitutional and legal reforms aimed at promoting access to environmental justice and in spite of the promulgation of a specific law on environmental liability, Mexican environmental law still has a more preventive rather than restorative character. Even though a law has now been promulgated to regulate rehabilitation of environmental damage, the series of weaknesses of that law means that it has a regressive effect.