

COUNTRY REPORT: MEXICO

Giving Effect to the Human Right to Water

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On 28 July 2010, the United Nations General Assembly passed a Resolution titled *Human Right to Water and Sanitation*,¹ in which the importance of 'equitable access to safe and clean drinking water and sanitation as an integral component of the realization of all human rights'² is acknowledged. The Resolution also reaffirms that States have a responsibility to promote and protect 'all human rights, which are universal, indivisible, interdependent and interrelated'³.

Since 2012, when the Political Constitution of the United Mexican States was reformed in light of the above Resolution, a number of legal initiatives related to the right to water have been developed. These initiatives aim to implement the human right to water, which was introduced in Article 4 paragraph 6⁴ by the Carta Magna and reads:

Every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. The state will guarantee this right and the Law will define the bases, support, and modalities to the access and the equitable and sustainable usage of the water resources, establishing the participation of the Federation, the states, and the municipalities, as well as the citizen participation in order to achieve the aforementioned purposes.

Since the introduction of this right, and from different sectors (academia, industry, business, civil society), there has been a recognized need to adopt legislation capable of guaranteeing all that is established in the Constitution in relation to water. As we can see, this legal need

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¹ United Nations, *The Human Right to Water and Sanitation*, Resolution adopted by the General Assembly on 28 July 2010 (A/64/L.63/Rev.1 and Add.1) A/RES/64/292.

² Ibid.

³ Ibid.

⁴ *Political Constitution of the United Mexican States*, Official Journal of the Federation, February 5th, 1917. Amendment, Official Journal of the Federation, February 8th, 2012.

is about guaranteeing the right to water in the entire country, regardless of the availability of this resource in each part of its states.⁵ In this way, it is a provision entirely based on the principle of solidarity.

The sixth paragraph of Article 4 in the Constitution guarantees not only the right to water, but also the right to sanitation. This is of primary importance to those states of the Country whose main problems with this resource are focused not only on the availability of water but on its mismanagement and poor quality.

Currently however, only 47.5% of water is treated inside the country, according to the National Development Plan 2013-2018 (NDP)⁶ and the Environment and Natural Resources Program for that same period (ENRP).⁷ The NDP points out that ‘there are around 60 million people who live in towns provided with water by some of the 101 over-exploited aquifers of the country’⁸. Moreover, this Plan recognizes that ‘wastewater treatment must be increased to more than the current 47.5%.⁹

The ENRP adds that ‘the water pressure, along with an inadequate use policy, has led to the unsustainable usage of its sources in the country’.¹⁰ Additionally, according to the same Program, ‘even if the increase of the treated wastewater volume has been significant in the recent years, it still would not suffice. In 2012, only 47.5% of the collected municipal wastewater was nationally treated, which means that 52.5% of this collected municipal wastewater plus another volume of non-collected waste-water were discharged into dams, rivers, lakes, and seas with no previous treatment’.¹¹

The wastewater treatment capacity shows remarkable differences among the states: In 2011, Nuevo León, Baja California, and Aguascalientes treated more than 90% of their wastewater, whereas Campeche and Yucatán did not go beyond 5%. Given these notable differences as regards the management, availability and treatment of water among states in the country the principle of solidarity is particularly relevant in the subject of adopting legislation that ensures the human right to water across the country.

⁵ See García López, Tania, ‘Opportunities for the use of economic instruments in water in Mexico’ (2014) , (Original version, Oportunidades para el uso de instrumentos económicos en materia de aguas en México), *International Congress of Codes and Challenges to face Water Crisis, la Plata, Argentina*, at 235-241.

⁶ National Development Plan 2013-2018, *Official Journal of the Federation*, Mexico, May 20th 2013.

⁷ Environment and Natural Resources Program 2013-2018, *Official Journal of the Federation*, December 12th, 2013.

⁸ National Development Plan 2013-2018, op. cit.

⁹ Ibid.

¹⁰ Environment and Natural Resources Program 2013-2018, op. cit.

¹¹ Ibid.

Mexico's National Water Law (NWL hereinafter) was adopted in 1992.¹² Despite several reforms (especially one in 2004) and the inclusion of some articles based on the solidarity principle, the NWL's language is not as ambitious as paragraph 6 Article 4 and does not guarantee the rights set out therein.¹³ As for the NWL's Regulation,¹⁴ it does not follow Article 4 either since, like the NWL, it is rather outdated. Both legal instruments therefore need to be amended taking into account various fundamental aspects that cannot be found in them or are not sufficiently developed.

Additionally, both legal instruments predate the Environmental Responsibilities Law,¹⁵ the Transparency and Access to Governmental Public Information Act,¹⁶ and the Climate Change General Law¹⁷ and they do not include fundamental factors provided for in those laws, such as: the right to prior consultation or audience in case of potential damage to third-parties in water management; the process to the water delivery or assignation contest does not include environmental aspects; for water usage, the '*other productive activities usage*' does not consider activities of the utmost importance such as aquaculture, livestock, tourism, and other –mines; and the possibility to use economic tools such as fiscal, financial, and market instruments at the service of water management.

At the beginning of 2015, three years after the right to water was adopted into the Mexican Constitution, a new General Water Law was officially proposed. On 5 March 2015 the Drinking Water, Sanitation and Water Resources United Commission of the Chamber of Deputies Verdict on the Draft Decree was published.¹⁸ The verdict recognises the need to make progress in the country 'towards an efficient and modern management composed by water resources that allow the compliance of the human right to water and that is inclusive and participative altogether'¹⁹. The verdict also states that the policy objectives of the proposed General Water Law are 'adequate and consistent' with this need.²⁰ Moreover, the

¹² National Water Law. *Official Journal of the Federation*, Mexico, December 1st 1992.

¹³ García López, Tania and Travieso Bello, Ana Cecilia, *Law and Water Management* (Original version: *Derecho y Gestión del Agua*) (2015), Ed. Ubijus, México, at 14.

¹⁴ Regulation of the National Water Law. *Official Journal of the Federation*, January 12th, 1994.

¹⁵ *Official Journal of the Federation*, Mexico, June 7th 2013.

¹⁶ *Official Journal of the Federation*, Mexico, June 11th 2002.

¹⁷ *Official Journal of the Federation*, Mexico, June 6th 2012.

¹⁸ Chamber of Deputies Parliamentary Gazette 4228-II edition.

'Drinking Water, Sanitation and Water Resources United Commission' (March 5th 2015)

<http://gaceta.diputados.gob.mx/PDF/62/2015/mar/20150305-II.pdf>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

verdict appreciates that the proposed Law establishes ‘the national goods and water to which provisions can be applied, later on, mention which are subject to law and, among these, which are authorities’.²¹ The verdict recognizes, as well, that in terms of ‘concessions to national water exploitation, usage or benefit, it is fundamental to redefine the rules to its consent, extension, transmission, rights, and obligations of the licensees, cancellation, extinction, and revocation of the concession titles, as well as to order the regulation in the field and avoid dispersion in the legislation. In addition to the aforementioned, it is warned that the concession granting system is aimed to protect and preserve the water resources by establishing measures designed to avoid monopolization, such as the prohibition to transmit rights that protect the concession during the first five years of its validity’²² In short, it is a positive verdict that fully recommends the passing of this Law.

The project and the verdict have given rise to a chorus of criticism which led to the end of its discussion and consequently the law has not been approved to date. In Parliament the proposed law was rejected by left-wing parties, who claimed that the verdict aimed to reinforce water privatization and that its only beneficiaries would be private enterprises. In the same vein it was pointed out that the ‘General Water Law discussed in the Chamber of Deputies has a ‘repressing and privatizing’ vision and it was created by the federal government to respond to the needs of big national and foreign enterprises that will exploit hydrocarbons, resulting in indigenous peoples’ land dispossession’.²³

Another major criticism²⁴ of the Project was that it

*required only 50 litres of water to be given to each citizen whereas the World Health Organization states that, as a universal right, it should be 100 litres. Besides, any community or person that opposes any hydroelectric project or dam will be dispossessed by the security forces. Finally, academic studies of water will not be allowed if there is no permission by the CONAGUA (Mexican National Water Commission).*²⁵

In addition to the above, the proposal was also criticized on the basis that fracking is encouraged; research is not allowed; water is concessioned; water pollution is ‘legalized’; sanitation is omitted; and enterprise interests are prioritized over those of the citizens.²⁶

²¹ Ibid.

²² Ibid.

²³ Becerril, ‘Expert opinions on the General Law of Water’, *La Jornada, México*, March 8th, 2015.

²⁴ WHO guidance actually refers to 50-100 litres and UN documents too.

²⁵ Ibid.

²⁶ ¿Qué pasa con la Ley de Aguas en México?, *Ecoosfera*, México, March 2015.

Available at <http://www.ecoosfera.com/2015/03/que-pasa-con-la-ley-de-aguas-en-mexico/>).

In my opinion, most of this criticism has no basis and, even if the proposed Law can be improved and does not include or explore very important aspects,²⁷ it cannot be criticized under the above mentioned arguments.²⁸ It can, however, be criticized based on the aspects that are not considered in it.

First of all, the current NWL in Articles 9 and those following it, explains clearly how the Commission will be organized to perform its duties at the national and regional level, through basin organizations. It also details, quite rightly, the competencies of each level. However, the internal organization of the CONAGUA seems to disregard this. It is important to delete references to water administrative regions in new regulations. One of the main purposes of the new regulations must be the management of the country's water resources through the river basin perspective, in theory and practice.

Secondly, it would be appropriate to allow and encourage payment of fines through investments in projects previously approved by CONAGUA, in order to improve water infrastructure in the country. As pointed out by Becerra Pedrote:

The importance of commutation is that, on one hand, [it] enables the implementation of measures to protect the environment on those that, at first instance, violated environmental regulations; but also balances the intervention of the administrative authority and provides a stimulus to the development of clean technologies in many companies' production processes, reducing costs involved with inspection and surveillance procedures for the local community.²⁹

The fine commutation figure appears in Article 173 of the General Law on Ecological Balance and Environmental Protection (LGEEPA in its Spanish acronym). Since 1996, this has provided an option for individuals to make equivalent investments in the acquisition and installation of equipment to prevent pollution or investments in protection, preservation or restoration of the environment and natural resources, provided that the offender's obligations are guaranteed, that it does not involve any of the cases provided for in Article 170 of the LGEEPA and that the authority fully justifies its decision.

Finally, despite of the emphasis recently placed on the subject, the NWL lacks the legal bases necessary to promote water reuse. This could be achieved through economic instruments, namely through fiscal stimuli. According to the NDP, '[o]ne factor that has

²⁷ Such as the ones related to economic instruments.

²⁸ See García López, Tania and Travieso Bello, Ana C., *Law and Water Management*, op. cit., at 18.

²⁹ Becerra Pedrote, J. (12 de agosto de 2014). La conmutación de multa: una alternativa para proteger al ambiente.

Available at <http://www2.ine.gob.mx/publicaciones/libros/444/cap3.html>.

significantly limited the development of the water sector is, undoubtedly, the under-investment and insufficient financing to expand, maintain and operate the country's water infrastructure and to carry out water governance functions.' Also, '[t]raditionally, taxation is a major funding source, which is clearly unsustainable and requires review of this scheme in order to increase financial flow and diversification of sources.'³⁰ Private and social investment in federal waterworks is critical to modernising the country's water infrastructure. Economic and financial instruments- such as bonds, warranties, deposits- are absolutely necessary in regulating these aspects.

It is indisputable that water, its management and the legal framework to govern its use and conservation are rather sensitive subjects and that public participation is a democratic and inevitable requirement. In the Mexican context, there is an urgent need to adopt regulations that replace the National Water Act and that allow water to be rationally managed in the country for the benefit of society.

³⁰ Diario Oficial de la Federación [Mexico Federal Official Gazette], April 8, 2014.