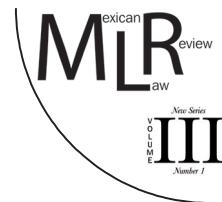




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## ENVIRONMENTAL LAW IN MEXICO: A NEW PARADIGM

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**ABSTRACT.** *This article proposes a new paradigm for the design and effective implementation of environmental law in Mexico. After briefly reviewing the current status of environmental law, as well as the academic boundaries, the article puts forward a new three-sided paradigm. First, rights and collective actions must be recognized constitutionally as fundamental principles that truly validate a far-reaching legitimacy that transcends personal interests and thus validates collective access to legal environmental protection. Second, a legal procedural framework—procedural network—must be outlined to enforce any related legal action. Third, a series of correlative public policies is needed to promote effective administrative collaboration and to allocate financial resources. The balanced co-existence of the three sides of our paradigm is the key for the successful implementation of an effective environmental law in Mexico and presents a public challenge within the Mexican arena of our times.*

**KEY WORDS:** *Environment, public policy, human rights, procedural network.*

**RESUMEN.** *El presente artículo plantea un nuevo paradigma sobre la concepción y efectiva aplicación de la ley ambiental en México. Después de revisar brevemente la situación actual de la ley ambiental, así como de las fronteras académicas, el artículo plantea un nuevo modelo de paradigma tipo triangular, con tres aristas. En primer lugar, se requiere el reconocimiento constitucional de los derechos y acciones colectivas de naturaleza difusa. Ello como principio fundamental que permita una amplia legitimidad—más allá del interés individual—para acceder a la defensa del medio ambiente. En segundo lugar, se debe estructurar un marco legal procedural—una red procesal—que permita en la práctica jurídica accionar diversas vías. En tercer lugar, es necesaria una serie de políticas públicas correlativas que faciliten la colaboración administrativa institucional y la transferencia de recursos finan-*

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*cieros. La existencia y armonización de las tres aristas del paradigma son elementos indispensables para la exitosa implementación de la ley ambiental y, consecuentemente, constituyen un reto contemporáneo en el caso mexicano.*

PALABRAS CLAVE: *Medio ambiente, políticas públicas, derechos humanos, red procesal.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	130
II. THE CURRENT SITUATION OF ENVIRONMENTAL LAW IN MEXICO .....	131
III. ACADEMIC LITERATURE IN MEXICO .....	132
IV. THE MODEL .....	135
V. THE PARADIGM.....	137
1. Collective Constitutional Rights .....	138
2. The Procedural Network .....	141
3. Related Public Policies.....	144
VI. CONCLUSIONS.....	148

## I. INTRODUCTION

Environmental problems are a growing global concern. Issues such as the destruction of the ozone layer, global warming and pollution know no geographical boundaries. That is why having a broad international perspective on this issue becomes so important when trying to assess the current status of this problem in different parts of the world. It is of critical importance to know how each country locally deals with its own environmental concerns in its own constitutional and regulatory mechanisms, as well as the public policies observed in each country. Furthermore, awareness on the matter will enable us to share insights and make proposals on the subject, thus enhancing the unification of international policy criteria, and in this way, empower sustainable national and local actions. Think globally, act locally.

This article discusses the inadequacy of Mexican judicial mechanisms for the protection of collective environmental rights in the country. Furthermore, it goes on to point out—from a public policy perspective—how it is necessary not only to acknowledge the problem, but more importantly, to develop adequate solutions within the constitutional and legal arena for the most pressing problems, in addition to creating policy enforcement mechanisms and establishing an official public policy.

Successful enforcement of environmental laws has been one of the biggest challenges for governments everywhere. In Mexico, it has been no different, especially at the beginning of the 21st century. Even though Mexico's environmental law-making and the enforcement of these laws have shown some improvement in recent years, the Mexican legal framework is still inefficient in successfully dealing with the drawbacks of pressing environmental problems along with their collective and dispersed implications.

This article offers a multidimensional approach to effectively protect collective environmental interests and rights. We can begin by saying that environmental jurisdiction requires pre-established, constitutionally based guarantees. It is also important to consider the unification of secondary and autonomous regulations and administrative mechanisms, as well as the public policies that can guarantee the successful implementation of the law.

To achieve this, we propose a new paradigm for the effective protection of the environment, based on recognizing three phases. First, it is necessary to have all the society's values and principles established in the Constitution as individual guarantees. Second, procedural mechanisms (rules that allow the practical application of legal processes) are needed. In Mexico specifically, it is extremely important to address the subject of standing—an obstacle that still exists for obtaining access to courts—and the legal defense of collective interests. Third, effective administrative actions or public policies are required. Once these phases have been completed, the law on fundamental rights can be managed successfully and can help prevent and repair environmental damage.

If a fundamental right, like the right to a healthy environment, has not fulfilled the three phases listed above, it becomes an obsolete right because there are no appropriate mechanisms to make it effective. Therefore, protecting the individuals and communities of this and future generations cannot be done.

In sum, this article uses this three-fold model to explore the main challenges to achieving effective environmental legislation in Mexico, the first step for the successful collective protection of such a fundamental right.

## II. THE CURRENT SITUATION OF ENVIRONMENTAL LAW IN MEXICO

Legislating environmental problems in Mexico has taken place rather gradually and quite recently. The first law on environmental issues, "Federal Law to Prevent and Control Pollution," dates back to 1971. Unfortunately, this law did not address environmental problems in depth, but rather focused on the effects of pollution on people's health. Basically, it was concerned with public health and not with environmental protection.

Subsequent steps towards attaining environmental rights in Mexico have mainly resulted from the international treaties the country has signed. Two

examples are the 1972 Stockholm Conference on Human Environment and the Kyoto Protocol.

It was not until 1988 that the General Law on Ecological Equilibrium and Protection of the Environment passed. This law aimed at protecting the environment and Mexico's natural resources. It is considered the core of environmental legislation in Mexico and was largely amended in 1996. To better understand recent environmental legislation in Mexico, we can mention the Wildlife Law, which was passed in July 2000. There is also a federal law for handling and preventing waste, which was published in the Federal Official Gazette in October 2003. The General Law for Sustainable Forest Development was passed in February 2003; the Biosecurity Law for Genetically Modified Organisms dates back to 2005, and the General Law for Sustainable Fishing and Aquaculture was made in July 2007.

In addition to these laws, environmental legislation is currently in the process of being created because in Mexico, once a law has been officially voted on and passed by the legislative branch, it must undergo a pre-enforcement process, which requires not only legal structure, but also administrative actions and budgets.

In Mexico, the lack of an effective environmental public policy that unifies both legal and administrative aspects is apparent. What Mexico has to date is an incomplete, segmented legislation aimed at protecting the environment, but lacking efficiency. Collective rights are not yet recognized at a constitutional level. Secondary legal mechanisms, such as civil and administrative procedures, as well as amendments to the criminal code and the *amparo* trial, have proved inefficient.

Because of this, the legal aspect of environmental protection in Mexico has been precariously enforced in practice. Some of these factors can be attributed to how difficult or literally impossible it is to obtain access to the courts to advocate collective rights, and the poorly trained administrative staff in government ministries that cannot effectively enforce all the legal powers that have been vested on them. Another factor is the lack of sufficient funds earmarked for implementing environmental legislation and public policies.

Therefore, in response to the current situation, this article proposes an updated concept of an effective environmental policy for Mexico. It is paramount to ensure it is complied with so as not to violate collective rights. Its main objective is to attain better and tangible results in abiding by the law and in preserving and protecting Mexico's natural resources.

### III. ACADEMIC LITERATURE IN MEXICO

The development of environmental law in Mexico is a relatively new concern. In a little more than two decades, the issue has changed profoundly

and evolved not only in terms of the legal framework, but also in academic studies.<sup>1</sup> This field is still in the process of exploration and expansion. In order to establish a theoretical framework on environmental law, some of the most important studies should be mentioned. While this is not intended as a thorough review, it comments on some of the most relevant studies to get a perspective of the academic literature.

Raul Brañes was a pioneer in the study of environmental law. Since his first book in 1987, he has updated his work to include all the changes that have gradually and progressively have taken place in Mexican law. The work of Brañes<sup>2</sup> provides an overview of environmental law in Mexico, both in law and in its administrative structure. In his efficacy and efficiency analysis, he identifies the need to include the fundamental right to a decent environment at a constitutional level,<sup>3</sup> but he does not identify collective actions as aspects that should also be incorporated. Nevertheless, the contribution of Brañes and other colleagues is an important foundation upon which theoretical and pragmatic proposals like this model can be built.

Raquel Gutiérrez's work has also contributed to place environmental law in Mexico as an important issue, not only as an academic study, but also as a new branch of law that should be addressed by legislators and politicians. In her study, Gutiérrez<sup>4</sup> describes and interprets the existing law, raising the importance of natural resources and environmental problems. She depicts the responsibilities various public offices have in environmental matters, as well as some institutions and environmental policy processes. She then reviews the various systems that have had some bearing on environmental protection and describes the procedures that existed at that time to conclude her study by examining environmental crimes. Without a doubt, this is a rich text that attempts to cover an entire perspective didactically.

Carla Aceves<sup>5</sup> also contributed with a study of the main topics of environmental law in a masterpiece that is now used as a textbook for the subject. She focuses on the legal framework of the time and describes the institutions and procedures related to the environment, among other issues.

Antonio Azuela's view<sup>6</sup> from an unconventional perspective presents ideas and observations on the inadequacies of the right itself and raises the

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<sup>1</sup> This was largely the result of peer pressure and Mexico's international commitments.

<sup>2</sup> RAÚL BRAÑES, *MANUAL DE DERECHO AMBIENTAL MEXICANO* (Fondo de Cultura Económica, 2000).

<sup>3</sup> Probably due in part to his influence, a Constitutional reform was added to the Article 4 on June 28, 1999.

<sup>4</sup> RAQUEL GUTIÉRREZ NÁJERA, *INTRODUCCIÓN AL ESTUDIO DE DERECHO AMBIENTAL* (Porrúa, 2001).

<sup>5</sup> CARLA ACEVES ÁVILA, *BASES FUNDAMENTALES DE DERECHO AMBIENTAL MEXICANO* (Porrúa, 2003).

<sup>6</sup> ANTONIO AZUELA, *VISIONARIOS Y PRAGMÁTICOS. UNA APROXIMACIÓN SOCIO-LÓGICA AL DERECHO AMBIENTAL* (UNAM, 2006).

need for appropriate political and cultural contexts for the law to have compliance, efficacy and success. Azuela identifies social participation as a necessary part in social change.<sup>7</sup> He rightly points out that environmental law in itself is not enough to solve environmental problems. Thus, his approach goes beyond the strictly legal sphere to delve into the social sphere, opening up the possibility of thinking about multidisciplinary perspectives that offer a holistic approach to environmental law.

Emilio Rabasa<sup>8</sup> provides a collection of articles by well-known academics that explore environmental law from a constitutional perspective and contribute to understanding the genesis of environmental law in the Constitution. These articles explore the international perspective and even address issues of particular importance in the Mexican legal order. However, these studies do not embark on the legal perspective of collective rights to create a connection between constitutional principles, legal framework and public policies or administrative decisions.

Ricardo Luis Lorenzetti<sup>9</sup> offers a very current view of the nature of environmental law. He clearly identifies the structural constraints of Roman-Germanic law to better understand and address the new environmental paradigm of collective interest and its implications. His vision of environmental paradigm identifies: 1) collective well-being in the social sphere, 2) responsibilities, limitations and fundamental rights, 3) the concept of the environment, and 4) the causal system. This point of view is interesting, but its impact is unfortunately diluted in the generality and the broad scope of the subject. The author himself acknowledges that due to this it is not possible to construct a theory and therefore the approach simply identifies a set of principles and values. Based on Argentina's experience, his position has some nuances worth considering. Even when it makes valuable and critical contributions that consider specific points, Lorenzetti's paradigm does not attempt to ground the issues or place them in the context of Mexico.

It should be noted that neither Brañes,<sup>10</sup> Gutiérrez,<sup>11</sup> Aceves,<sup>12</sup> Azuela<sup>13</sup> or Rabasa<sup>14</sup> address or discuss environmental law as a collective right of a diffuse nature nor do they raise the need for its constitutional anchorage.

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<sup>7</sup> He states that "...legal statements are processed socially, and therefore modified, both in their origin and their reception. Above all, their appropriation by individuals and their use in specific situations are mediated by the positions and the provisions of these individuals...". Azuela, *supra* note 6, at 15.

<sup>8</sup> LA CONSTITUCIÓN Y EL MEDIO AMBIENTE (Emilio O. Rabasa coord., UNAM-IIJ, 2007).

<sup>9</sup> RICARDO LUIS LORENZETTI, TEORÍA DEL DERECHO AMBIENTAL (Porrúa, 2008).

<sup>10</sup> Brañes, *supra* note 2.

<sup>11</sup> Gutiérrez, *supra* note 4.

<sup>12</sup> Aceves, *supra* note 5.

<sup>13</sup> Azuela, *supra* note 6.

<sup>14</sup> Rabasa, *supra* note 8.

Thus, the discussion provided by the present text is an approach that emerges from the fundamental importance of shaping a legal framework that effectively protects the environmental rights we all have. I am convinced that we must start from the protection of environmental collective rights at a constitutional level to then develop a consistent procedural network that must be accompanied by sound public policies.

The constraints found over the years in the administrative, civil, criminal and *amparo* trials have highlighted the need for a much broader vision, and even for legal and procedural reengineering of environmental rights to ensure their effective protection. This article offers an updated view that emerges from the perspective of environmental law as a collective and diffuse right with all its implications. It also proposes a model that is possible now that the Mexican Congress has approved a Constitutional amendment to Article 17 that recognizes collective actions.<sup>15</sup>

I believe that the multidisciplinary approach—even though it is essential to the spectrum of public policies—has not been clearly identified by the main authors of environmental law in Mexico; such an approach can greatly contribute to the study of environmental law in Mexico, from a legal and public policy perspective.

#### IV. THE MODEL

We have developed a triangular model that allows us to more easily understand the complex network of legislative procedures required to successfully implement environmental law in Mexico.

It is not enough to formally create a law, even at a constitutional level, and assume it will be effective. Implementing a law is neither simple nor causal. Constitutional principles require that certain processes be followed and an administrative framework, as well as public policies are established for their execution, observance and effectiveness to be set in place. Only then can it be successfully enforced.

In reality, this assertion takes us away from the strict surroundings of the law and places us within the territory of public policies. Along that line, Aguilar<sup>16</sup> states: “Public matters mean that meta-individual issues, but not

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<sup>15</sup> This decree inserts a new third paragraph to Article 17 of the Constitution of the United Mexican States and was published in the *Gaceta Parlamentaria*, Chamber of Deputies No. 2976-IV (March 25, 2010). It states: “The laws shall regulate those actions and procedures for adequate protection of collective rights and interests, as well as measures that allow individuals their organization for itself defends.” This addition is a significant advance. However, a hard work must be done to establish the secondary legal framework.

<sup>16</sup> LUIS F. AGUILAR VILLANUEVA, EL ESTUDIO DE LAS POLÍTICAS PÚBLICAS 29 (Miguel Ángel Porruá, 1992).

the disappearance of individuals in a collective entelechy of some kind, such as a nation, society, class or mass..."<sup>17</sup> In this sense, it could be argued that any governmental issue is public, but public issues can go beyond government walls. Therefore, a public policy is a government decision that also includes public opinion and the participation of the citizens themselves.

A public policy can be expressed in a variety of ways. As Aguilar states,<sup>18</sup>

A policy can be a regulation here, the distribution of different types of resources (incentives or subsidies, in cash or in kind, present or future, free or conditioned) there, the intervention that takes the form of direct redistribution over there and leaving citizens to themselves beyond that. Precisely due to their public nature, analyzing and designing public policies open up a wide range of action plans shared by the government and society.

It is important to note that the contemporary literature is not precise in indicating the characteristics of the type of policy, that is, the ways in which a policy is or could be made public. Moreover, some scholars speak of administrative decisions, plans or programs while others hold that a statute or law is the main element of a policy.<sup>19</sup>

Within this great range of possibilities, we should take into account the fact that a law seems to be the most durable mechanism. As I have written elsewhere,<sup>20</sup>

Political decisions change over time influenced by political actors and in countries such as Mexico certainly according to the perception of different political administrations. The political bargaining could be expressed in a variety of ways. Nevertheless, it seems that some governments prefer to create laws in order to increase the possibility of the policy enduring over time. The statute or law is then the most formal legal instrument for shaping and channeling the political decision. Among the different types of policy, the law has the most formal construction. Consequently, the law acts as the primary instrument used by contemporary governments to influence social behavior.<sup>21</sup>

When we think of a State policy, we see it as a general policy that contains different courses of action on public policies, which can cover the three events stated above: a constitutional base, a procedural network (a regulatory legal framework) and administrative actions or related public policies.

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<sup>17</sup> *Id.* Author's translation.

<sup>18</sup> *Id.* at 32.

<sup>19</sup> See Benjamín Revuelta Vaquero, *The Process of Rule Implementation in Mexico: Presidentialism and the Rural Sector in the 1980's*, VDM (USA-UK, Verlag Dr. Müller Aktiengesellschaft & Co. KG).

<sup>20</sup> *Id.* at 33.

<sup>21</sup> This is because congressional approval of a law gives it more permanence.

To give an example of this perspective, in the early 1990s, the executive branch conceived a new macro policy that would open up and increase the productivity of Mexico's rural sector to modernize Mexico and open it up to global economy. This idea was consistent with the North American Free Trade Agreement (NAFTA) negotiations with the United States and Canada, which would be signed a couple of years later.<sup>22</sup> The political elite saw the amendment of Article 27 of the Mexican Constitution, which involved modifying the "*ejido-system*," then considered one of the taboos of Mexico's social system, as the first step. The Constitutional reform was approved in December 1991, and was published in the Federal Official Gazette on January 28, 1992. As a part of this policy, a new procedural network was issued, centering on the new Agrarian Law (published on February 26, 1992), as well as the subsequent approval of other laws, such as the National Water and Forest Law. The macro policy for the rural sector also included a series of administrative decisions linked to public policies that would reinforce the constitutional reform and make it effective. These decisions included establishing Agrarian Courts and the Commission for Regularizing Land Ownership (CORETT), as well as re-designing the National Trustee Fund for the Support of the "*Ejido System*" (FIFONAFE), among other measures.

Regardless of the success or failure of this policy, this example shows that a macro policy—or a major policy as referred to here—not only requires amendments to the constitution, but also secondary regulation or a procedural network to implement these principles. Moreover, new administrative institutions need to be set up and decisions must be taken regarding established structures, plans, programs, actions and the public policies needed to enforce the main principles. The proper operation of these instruments will largely depend on the effectiveness of the constitutional principle and the success of public policies.

This initial idea allows us to build a triangular model for effective environmental policies. At first glance, it comes across like a simple plan; however, it entails a series of multiple interconnected relationships and involves citizen participation, which in itself is very complex. Just within the government, extensive participation between the executive, legislative and judicial branches can be seen. And the involvement of federal, state and city or municipal jurisdictions is also important, but complicated none the less.

## V. THE PARADIGM

To elaborate on this model, we will describe each of these perspectives in further detail. We will begin by defending the incorporation of collective

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<sup>22</sup> The North American Free Trade Agreement was signed on December 17, 1992, and entered into effect on January 1, 1994.

environmental rights on a constitutional level. Then, we will suggest the re-engineering or creation of a new procedural network. Finally, we will comment on related public policies, including mechanisms for repairing existing damage.

### 1. *Collective Constitutional Rights*

The subject of the environment and the repercussions of the damage it has suffered not only takes into account collective rights, but also acknowledges these rights in basic legislation. This is a fundamental starting point for a legal system that emanated from the Roman-Germanic tradition of private law.<sup>23</sup>

The right to a decent environment for all citizens of a society has recently been established in the Mexican Constitution.<sup>24</sup> The fourth paragraph of Article 4 of the Constitution states that “Every person has the right to a decent environment for his or her development and well-being.”<sup>25</sup> Nevertheless, it should be noted that neither this specific article nor any other emphasizes or even considers the existence of collective rights with a diffuse nature as a main principle to establish that the environment belongs to everybody, and therefore, anyone can demand environmental protection or defend its interests and rights. An adequate constitutional protection is, in consequence, a pending matter in the Mexican legal system.

Collective rights are widely acknowledged in different Latin American legislations.<sup>26</sup> Despite their differences, they follow the same line established

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<sup>23</sup> “For centuries, private law has been the only Law in Continental Europe (and in systems that follow this tradition). Only in the sphere of private law could institutionalized or State recognized jurisdictions fulfill their duty and give an impartial solution to disputes. If one party of the dispute was the Administration, the entire system would be corrupt, in theory and in practice; in theory, because the public interest and personal interests were in different scenarios and cannot be measured in the same way; and in practice, because it becomes a serious problem to give an impartial and independent resolution in a litigation in which the State and an individual are confronting each other.

...In every country in the Roman-Germanic family, public law has only achieved a certain level of development and perfection much lower than that of private law. This has caught neither jurists nor public opinion by surprise. On the contrary, they are quite content with what has been achieved and do not believe much more can be done without risking the relative good order that reigns over society.” RENÉ DAVID, LOS GRANDES SISTEMAS JURÍDICOS CONTEMPORÁNEOS, DERECHO COMPARADO 62-64 (Aguilar, 1968; author’s translation).

<sup>24</sup> As of June 28, 1999.

<sup>25</sup> Author’s translation.

<sup>26</sup> Among them, we can cite the cases of Brazil, Colombia, Uruguay, Chile, Venezuela and Costa Rica.

in the Brazilian Code of the Consumer's Defense Bill, which classifies rights as collective rights, diffuse rights and homogeneous, individual rights.<sup>27</sup>

After analyzing this bill, we hold that environmental rights are *collective rights of a diffuse nature* because indivisible and trans-individual rights belong to a group of people, that are not easily identifiable, with no prior legal ties (outside of sharing citizenship or neighborhood) and that can identify themselves with a specific event (and in some cases even this is not possible).<sup>28</sup>

We do not only refer to collective rights since that implies that members of a group are joined by a previous legal relationship. This condition would make them a legal entity, which is not the case.

Nor can we speak of homogeneous individual rights since this is a procedural figure that allows a set of unitary actions to be included in a single collective action. This is not fitting because in considering cases of environmental damage, only privileged citizens can afford to legally defend their case. The vast majority of marginalized or low-income citizens could certainly not do so. So, the question is: what happens to the rights of all the people who have been left out, and those who cannot pay for their defense in a court of law?<sup>29</sup>

By using the term "*collective rights of a diffuse nature*," we want to stress that interests and rights belong to people from all levels of society, that is, not only people from the community, town, state, region or country, but to everyone on the planet. Moreover, we must accept that environmental rights belong not only to present generations, but also to futures ones.<sup>30</sup>

Some Mexican authors<sup>31</sup> believe it is not necessary to discuss diffuse interests regarding natural resources in Mexican law, arguing that the consti-

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<sup>27</sup> See, e.g., ANTONIO GIDI, LAS ACCIONES COLECTIVAS Y LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES EN BRASIL. UN MODELO PARA PAÍSES DE DERECHO CIVIL (UNAM, 2004) and JOSÉ OVALLE FAVELA, LAS ACCIONES PARA LA TUTELA DE LOS INTERESES COLECTIVOS Y DE GRUPO (UNAM, 2004).

<sup>28</sup> We do not say they interact with each other because they often do not interact directly because they do not even get to meet each other.

<sup>29</sup> Luis Paulo Da Silva (*in* LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES HOMOGENEOUS. HACIA UN CÓDIGO MODELO PARA IBEROAMÉRICA [Antonio Gidi & Eduardo Ferrer coords., Porrúa, 2nd ed., 2004]) mentions that these rights are individual and divisible but that they can assume, in certain circumstances, collective nature only in the way they are safeguarded.

<sup>30</sup> Therefore, we do not accept Kazuo Watanabe's criticism stating that in practice, interests or diffuse rights and collective ones are fragmented, related to just one section of society, like the citizens of a town or a state, because this statement goes against its indivisible nature. LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES HOMOGENEOUS. HACIA UN CÓDIGO MODELO PARA IBEROAMÉRICA (Antonio Gidi & Eduardo Ferrer coords., Porrúa, 2nd ed., 2004).

<sup>31</sup> Among them, see María del Carmen Carmona Lara, International Conference on Environmental Law, Puerto Vallarta, Jalisco, Mexico, October 2008.

tutional Article 27 outlines national assets' ownership. Therefore, its defense corresponds to the nation at all times. The article states: "Ownership of the lands and waters within the boundaries of national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property." It even highlights that

The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible to appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth, as well as safeguarding its conservation, sustaining the country's development and improvement in the standards of living in rural and urban areas.<sup>32</sup>

According to these authors, most judges have not given the proper interpretation of this article when referring to national assets, their ownership and safekeeping, and do not usually take into consideration that they form part of the nation's assets.

Two alternatives emerge from this discussion. The first one centers on the need to break through the courts' interpretation of this concept to fortify the criteria and the thesis presented above. This would make it possible to solve collective conflicts on a social basis. The second possibility is to continue with legislative reform that clarifies the interpretation of what the environment is and its components according to its collective nature. This explicit reference would allow the effective enforcement of such a law.

Because of the complexity of the first alternative and the time required to implement it, the second alternative becomes more attractive. In this sense, we agree with all the authors, professors, environmental activists and judges who believe in the importance of defining and establishing collective rights based primarily on the constitution, like our new model has established.<sup>33</sup> This would allow the subsequent creation of a complete procedural network, which would detail its exercise, defense and broad regulation, and include an adequate means for repairing environmental damage. It is paramount to establish actions, institutions and procedures that are compatible with the collective spirit and its related public policies.

Having said that, it should be mentioned that a bill was introduced in the Senate in February 2008. This proposal aims at modifying Article 17 of the Constitution by adding a fifth paragraph which would state: "The law shall regulate those actions and procedures for the protection of collec-

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<sup>32</sup> Author's translation.

<sup>33</sup> Understood as collective diffuse rights, collective in strict sense of the word and the individual as having collective incidence.

tive rights and interests, in the same way it regulates mechanisms that grant individuals the right to request legal defense.”<sup>34</sup>

From the experience of Colombia and other Latin American countries, we can say that this constitutional reform would allow legislators from federal and state jurisdictions to implement the procedural and operational networks through easy, flexible and simple procedures that would in turn effectively protect collective rights and interests, not only for environmental issues, but also for those in need of this kind of regulation.<sup>35</sup>

This proposal requires further analysis to determine its viability.<sup>36</sup> In any case, we strongly see the need to gradually incorporate the principle of protection of collective rights in the constitution as the first step toward achieving its effectiveness.

## 2. *The Procedural Network*

Once the constitutional foundations have been laid, it is necessary to create secondary regulations, like a procedural network, to promote the mechanisms or procedures that will establish the legal basis, which will in turn make collective rights functional. The second part of our model deals with this issue.

Various speeches, seminars and academic studies have pointed at the insufficiency of procedural instruments to effectively protect environmental rights. Existing mechanisms, such as popular denunciation in an administrative field, civil trial and protection, reforms to the criminal code, or the so-called *amparo* trial, have apparently not been enough to effectively protect environmental interests and collective rights.<sup>37</sup> In view of this, scholars, ecologists and even judges call for new legislative answers and alternatives.

Many good ideas and proposals have been put forth at different academic meetings and forums, many of which have unfortunately been left aside as isolated suggestions. Even then, some ecologists, scholars, experts and judges

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<sup>34</sup> Author’s translation. The bill —presented by Senator Jesús Murillo Karam— gathers the opinions and proposals of a group of scholars, judges and non governmental organizations discussed in a forum held in 2007, available at <http://www.senado.gob.mx/gace.php?sesion=2008/02/07/1&documento=21>.

<sup>35</sup> The reform touches upon the environment, ecological equilibrium, development, use of public spaces, use and protection of public property, access to public services, rights of consumers, moral values in the administration and in general all collective rights stated in laws and international treaties.

<sup>36</sup> Without a doubt, this is necessary, but at this time it is beyond the scope of this article.

<sup>37</sup> Obtaining an updated vision was the result of holding several forums arranged by Judges Rubén Minutti Zanatta and Neofito López Ramos, like Professor Rafael Coello Zetina’s at the 1st Encounter of Environmental Jurisdiction/Law in Puerto Vallarta in October 2008.

have shared the common goal of reaching a consensus on some of those proposals. Nevertheless, the importance of the issue and its urgency demand a greater effort to create a better and more complete initiative.

By the last quarter of 2009, we can see two main groups of proposals: those that defend the need to re-engineer procedural instruments, and those that advocate the need to create a completely new system of environmental laws. It seems that both sets of proposals can and should be compatible. Re-engineering the existing procedural instruments could lead us to the creation of a new legal framework that would allow adequate, agile and effective access to environmental protection. On the other hand, those who defend the idea of environmental jurisdiction have presented a proposal for establishing an environmental court, which also seems to be a very good idea. However, it must be studied further to justify and identify the alternatives that may be found in existing procedural structures to address some of the main issues. Therefore, a specific environmental procedure enhances the idea of re-engineering the process so that both proposals are compatible.

An analysis of environmental procedural networks inevitably brings up the discussion on the standing to enforce collective rights precisely because of their complexity.

On this issue, Gidi<sup>38</sup> says that courts should abandon the orthodox and individual principles of the civil process since a process like this involves personal interests. Who then has collective standing? To answer this question, we can consider the experiences of other countries when designing the best mechanisms for Mexico. It has been said that Mexico has fallen behind in the regulation and legislation of collective rights. This is an undeniable truth, but it also has some advantages if seen from a comparative perspective.

According to Brazilian legislation, bodies with the proper standing can initiate collective lawsuits that represent the interests of a certain group. The Office of the Public Prosecutor, the Federal Republic of Brazil, states, city councils and municipalities, governmental organizations and private associations are some of the accepted bodies. However, standing is restricted to individual citizens, even when the concern is collective.

There are several proposals for determining who can file a lawsuit to defend collective rights, ranging from the standing of any member of an affected group and the standing of associations or private groups, according to the Brazilian Law (the legitimacy and recognition of government bodies named above). Each of these solutions has its strengths and weaknesses.

For instance, in the case of determining the standing of representing public bodies, there is a risk of being partial or manipulated by politics. The issue of standing can be turned into a monopoly or tyranny if there are no additional control mechanisms. On the other hand, if standing is granted to

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<sup>38</sup> Gidi, *supra* note 27.

any member of the community, some checks and balances must be implemented to avoid political misuse, such as harming other individuals or governments. Even when standing is granted to private associations, they must present a series of proposals to be properly represented.<sup>39</sup> On this issue, Gidi states that according to Brazilian legislation, associations “are considered the natural representatives of group rights, not because these rights are expressed in their bylaws, but because of the responsibility that exists between the trans-individual nature of the law required in the court and the need for a trans-individual representative.”<sup>40</sup> Nevertheless, he also admits that there is a hidden element to this rule because “not all associations represent social interests. Second, the legal requirements to establish an association are minimal... Third, the law does not require that the association receive prior authorization from a general assembly of its members to promote a collective lawsuit.”<sup>41</sup>

Moreover, environmental affairs hardly ever involve all the people affected. By definition, any association —or group of associations— will always be partial. In addition to this shortcoming, we should also consider how the use of certain procedural instruments can obstruct lawsuits filed by future claimants. These are key issues that should be reviewed from different points of view to find the best alternatives for Mexico.

Gidi-Ferrer discuss three theories. The first is defended by Barbosa Moreira, who states that the legal guardianship of individual rights must be completely separate from the authorization expressed in procedural law. Thus, he agrees with “extraordinary standing” from what is established by law. The second theory is held by Kazuo Watanabe and is based on the flexible Brazilian law: *an ordinary standing from the bodies created in society for the purpose of protecting supra-individual rights.*<sup>42</sup> A third theory is endorsed by Nelson Nery Jr., who states the need for *autonomous standing to drive the process*. In the concept of “autonomous standing,” procedural standing must be set apart from the main body of the given law. On this issue, Gidi, quoting Rodolfo de Camargo Mancuso, says “the criteria the law uses to grant standing to file collective lawsuits is not based on the ownership of the material law invoked, but on the possibility the collective author has to become the indicated person to become the spokesperson of the community’s interests.”<sup>43</sup>

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<sup>39</sup> *Id.* Gidi states that associations must have a well defined action program. This means that association must be essentially related to the topics established in its statutes. For example, an environmental association only should have the standing to file collective lawsuits on environmental issues. This could be a check, but further analysis of this is needed.

<sup>40</sup> *Id.* at 82. (Author’s translation.)

<sup>41</sup> *Id.* Author’s translation.

<sup>42</sup> Gidi, *supra* note 27, at 111. (Author’s translation.)

<sup>43</sup> *Id.* at 112. (Author’s translation.)

This last topic has been the object of constant analysis because with environmental issues —as with collective diffuse goods, public goods and social values— it is practically impossible to find out who has legitimacy to file a collective lawsuit to promote acts that could implement the removal of material rights.

Even though the mechanisms for the protection of collective rights still do not exist in Mexico, the Supreme Court has issued some statements on the subject, like the thesis that states: AN INDIRECT *AMPARO* IS OF AN INADMISSIBLE NATURE WHEN THE LACK OF IT IS ADDUCED AS A RESULT OF A POPULAR COMPLAINT AS SET FORTH IN THE GENERAL ENVIRONMENTAL PROTECTION LAW (IN APPPLICATION OF JURISPRUDENCE P./J. 4/2001 OF THE SUPREME COURT OF JUSTICE OF THE NATION).<sup>44</sup> This opinion clearly states that the remedy of an indirect *amparo* does not proceed when there is a claim regarding the lack of plaintiff's standing since the procedure of popular complaint possesses all the characteristics of a real collective lawsuit. Therefore, the identity of the person promoting the lawsuit is irrelevant.

This criterion is a good starting point for the effective protection of collective rights of a diffuse nature in the procedural network, which needs to be developed and elaborated on. By now, the convenience of analyzing standing within the scope of the issue of repairing damage should be discussed so as not to overlook the fact that adequate appropriation rules for repairing environmental damage could limit excessive and improper uses of standing.

### 3. Related Public Policies

The third element of our model is related to public policies. These are the decisions, actions, plans, programs or administrative structures that should accompany the secondary regulations, as well as the procedural instruments to guarantee successful policy implementation. It is a fact that many initiatives come to a halt precisely due to the lack of effective administrative framework needed to enforce the legislation.

The universe of the relevant public policies on environmental issues is immense and would take up several books and manuals. Since a review of the possibilities falls outside the scope of this article, we will only mention a few cases and list some general ideas that help understand the importance related public policies have in the model.

The first case deals with the powers of a city government. These powers are set forth in Article 115 of the Mexican Constitution. Among the changes

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<sup>44</sup> It should be noted that the opinion is under registration number 170469, dated January 2008, which shows that this important topic has recently been discussed in the Mexican Supreme Court.

implemented in March 2000, the Congress gave more authority to city councils in two areas: water and waste disposal. Section III, part a), not only includes the responsibility of “potable water and the sewer system” as it did before, but in the latest version it now says “potable water, sewer systems, wastewater treatment and disposal.” And, in part c), the term “cleaning” was added to read “the cleaning, collection, transfer, treatment and final disposal of waste.”<sup>45</sup>

Perhaps legislators thought city councils would become stronger if given more legal power in these two areas, but it seems they did not consider the implications these actions would have. Legislators did not set a general policy for funding or a way to direct resources to back city council resolutions. Water treatment is extremely expensive and in most cases city councils lack the economic resources to pay for it. Therefore, only some city councils —those in larger cities and with trained personal to carry out such projects— are able to treat their wastewater. Most of the smaller cities in Mexico find it practically impossible to run these programs. The national water agency, CONAGUA, has enforced some operational norms, but they have not been successful because most of the burden has been placed on the poorest city councils. As a result, instead of promoting a supportive policy, CONAGUA has levied millions of pesos in tax obligations on city councils for not having implemented water treatment projects, which is absurd in my opinion.

Almost the same thing happens with waste handling and disposal. The financial support needed to carry out these actions is scarce, and for small city councils, it is almost impossible to address this problem. Thus, more and more garbage and solid waste end up in streets and in open spaces.

Facing the lack of support in public policies for both issues, the constitutional reform, which originally aimed at strengthening city councils, has not been very successful. What is worse, if a constitutional reform that allowed citizens to demand that city councils enforce the legal provisions for environmental protection were passed today, thousands of city councils all over the country would probably be under legal threat without the possibility of solving the problem because they lack the financial resources.<sup>46</sup> This example clearly shows how the good intentions behind the law cannot possibly materialize without having adequate public policies in place.

The second example deals with repairing environmental damage. People now realize that repairing environmental damage encompasses a series of complex underlying issues, not only because of the difficulty of quantifying and repairing the existing damage, but also because the damage is irreparable in some cases.

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<sup>45</sup> Author's translation.

<sup>46</sup> In this scenario, more than 2,000 municipalities all over Mexico would face conditions of severe poverty.

García<sup>47</sup> stated that environmental damage is autonomous and not the same as personal damage. Therefore, it is necessary to differentiate between acts that cause damage to the environment and those that cause damage to individuals. Repairing the existing environmental damage would benefit the entire society while repairing the damage done to individuals could be taken care of by compensating the affected citizens.

This comment makes it possible to identify the two-fold nature of repairing environmental damage: for the good of a group and for the good of individuals. To better understand this, imagine that a person is flushing waste from his paint manufacturing factory into a river. This directly affects the eight people who harvest vegetables and irrigate their farms with water from this particular river. These individuals (and possibly others who can be clearly identified) need to be in conditions to demand redress for the damage done directly to their farms. But if we consider that this waste also affects the flora and fauna in and around the river, as well as the surrounding area –and possibly for several years, this clearly shows that the action is causing collective damage that must also be repaired. Thus, the same act can have a two-fold effect.

In the case of remediation, Article 203 of the Mexican Law on Ecological Equilibrium and Protection of the Environment states: “Without prejudice to the criminal or administrative sanctions that may apply, whosoever contaminates or harms the environment or affects natural resources or the biodiversity shall be held responsible and shall be compelled to repair the damage caused according to that set forth in the corresponding civil law.”<sup>48</sup> Mexican environmental legislation leaves the responsibility of regulating the environment in the hands of civil legislation as if it only were a matter between individuals and ignoring the collective nature of the environment. On this, González Márquez<sup>49</sup> says: “From the point of view of damage repair, the legal systems of many countries have ended up with civil, legal and administrative laws, but there are only a few countries that have specific provisions regarding assuming responsibility and repairing environmental damage.”<sup>50</sup>

The collective dimension of the environment requires that remediation be directed at leaving things as they were before, and if this were not possible, then a fine would be imposed to compensate for the damage caused. In other words, action must be taken to benefit the environment, or resources will be appropriated or divided among the affected individuals.<sup>51</sup>

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<sup>47</sup> Tania García López, *El principio de la reparación del daño ambiental en el derecho internacional público. Una aproximación a su recepción por parte del derecho mexicano*, in VII ANUARIO MEXICANO DE DERECHO INTERNACIONAL 482-512 (2007).

<sup>48</sup> Author’s translation.

<sup>49</sup> García, *supra* note 47, at 503.

<sup>50</sup> Author’s translation.

<sup>51</sup> The indirect implications can also be very serious. It would be unfair to appropriate

Nevertheless, in studying remediation mechanisms, we find these measures useless because there are no agile procedures or ways to quantify how much needs to be repaired. Specialists in the field are very few and their services are very expensive. Moreover, technical environmental remediation studies have not been promoted in Mexican universities.

In this sense, implementing an effective remediation procedure for environmental damage falls under the scope of public policies. But the issue does not end here. In determining the amount of damage to be repaired, another problem emerges: the destination of the collected fines. Article 175-Bis of the General Law on Ecological Equilibrium and Protection of the Environment and Article 130 from the General Wildlife Law establish a fund for programs, projects and activities linked to the conservation of the species, as well as for inspection and scrutiny of the regulations in place. However, this fund has not gone beyond being a good intention stranded in the network of legal instruments since Mexico lacks the administrative procedures that would allow the fund to be used accordingly. Unfortunately, the economic resources collected from fines go to current government expenditure, and are not channeled to repairing environmental damage. What is even more distressing is that the budget for environmental issues has not shown any significant growth in recent years.

This reality is forcing us to come up with an effective, redesigned system of bureaucratic framework to ensure that fines are effectively channeled to a fund for environmental actions. Even then, further analysis shows the benefits of creating a local fund in each state. This proposal is backed by the argument that state funds would be more effective if they are used to repair the environmental damage in the same place the damage was produced. Likewise, it can be argued that citizen participation and the opinion of universities over the destination of the funds should be encouraged to guarantee transparency and increase the success rate.<sup>52</sup> All these arguments also fall under the sphere of public policies.

These two examples are the foundations that unify policies so the model can work. People's participation in environmental issues seems to be an essential factor in the successful implementation of the law. Many public policies and actions could be designed with the active participation of the citizenry. Some policies would aim at creating environmental awareness among all levels of society; others would increase the quality of government perfor-

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or divide the redress of damages only among the individuals who went to court because it would be unfair to those who did not get the chance to go to trial. These people are generally the poor and the marginalized who do not have the resources to take part in these lawsuits. And then there are those who also suffer from the effects of environmental damage, as well as future generations.

<sup>52</sup> Serious and positive social participation systems, like the Environmental State Council in Michoacán, are good examples of the positive effects of having resources channeled for environmental remediation.

mance in environmental issues; and others would help in the complex work of estimating environmental damage and the mechanisms for repairing said damage in a practical, fast and effective way; some policies would introduce compensatory systems; others would instrument environmental services as preventive measures; others would strive to attain institutional collaboration, and so on. Numerous policies are needed to supplement the constitutional principles and the procedural network for them to be effective.

## VI. CONCLUSIONS

This article has discussed the insufficiency and inefficacy of the Mexican legal system for the protection of collective environmental rights. It has also emphasized Mexico's need to follow international parameters to implement and strengthen its vision within the guidelines of this new model so that collective environmental rights can be protected effectively. Accomplishing this would be the starting point to pave the way for implementing public actions and policies that would ensure the proper protection and preservation of Mexico's natural resources.

A multidimensional focus that goes beyond a legal standpoint would allow us to have a broader and more in-depth view of what environmental protection is and what needs to be done to ensure public awareness. An effective model for environmental policies can become a useful tool to better understand the need of combining the different efforts, not only from the government or from a legal perspective, but also through administrative actions that involve open public participation. This is, precisely, the principle of public politics.

Environmental law in Mexico —conceived as a part of a larger policy— must be redesigned according to the elements of the model presented here, that is, fundamental principles at the constitutional level, a procedural network and a series of related public policies to respond to the wide range of environmental needs. Understanding this complex idea goes beyond any single effort made by legislators, ministers or judges, and implies the need to understand, produce and build collective collaboration systems in which the general population and universities have much to contribute. A great task to be carried out in the years to come.