

COUNTRY REPORT: MEXICO

Lessons learned from a constitutional controversy on the Mexican water management

Gabriel Lopez Porras & Jakub Ciesielczuk

ABSTRACT

Between March and May 2020, fourteen municipalities in Chihuahua, Mexico, initiated a jurisdictional process called ‘constitutional controversy’ at Mexico's Supreme Court of Justice, against the Congress, the President, the Commander of the National Guard, and the National Water Commission. These municipalities sued for the unconstitutionality of the Federal Government's actions regarding the water extraction in the "La Boquilla" dam, in the light of water legislation unsuitable to foster public participation in water management. Moreover, the lack of public participation in the 'La Boquilla' dam water management have resulted in several clashes between water users and the National Guard. Amid the current drafting process of the General Water Law for Mexico, it is important to understand how the Mexican water legal framework has failed as an institutional tool to achieve sustainable water management. This report discusses the “La Boquilla” dam case to highlight the inability of the current Mexican water legal framework to address water-related problems. In doing so, some of the main problems in Mexican water laws’ structure are analysed to show why those laws are hardly complied with and weakly enforced, which has resulted in conflicts and water mismanagement. Finally, it discusses the potential of stakeholder engagement and local water policies for strengthening the rule of law with respect to water for the upcoming General Water Law for Mexico.

Introduction

The Mexican water law framework is mainly composed of three laws: the National Water Law, the Regulation of the National Water Law, and the Interior Regulation of the National Water Commission published.¹ The National Water Law establishes all the guidelines for national water

¹ The National Water Law, published on 1st December 1992, the Regulation of the National Water Law published on 12th January 1994, and the Interior Regulation of the National Water Commission published in 30th November 2006. Also, there are other instruments related to water management, such as Mexican official standards related to water quality, water quantity and water exploitation, watershed management programmes, restricted-access decrees, and water plans that make

management to achieve water sustainability. Its effectiveness in conserving and protecting water quantity and quality, as well as the human right to water access has always been questionable.² The main criticism of the National Water Law refers to its ineffective institutional setting for enabling public participation in water management, hindering democratic decision-making processes.³ As a result (and regardless of government water mismanagement) state and non-state actors have identified the law's inability to foster stakeholder engagement⁴ in water management, as the main

up the water legal framework in Mexico. Research Fellow in Earth System Law, Lincoln Centre for Ecological Justice, University of Lincoln, Brayford Way, Brayford Pool, Lincoln LN6 7TS, UK (glopezporras@lincoln.ac.uk). Postgraduate Researcher, Lincoln Centre for Ecological Justice, University of Lincoln, Brayford Way, Brayford Pool, Lincoln LN6 7TS, UK (jciesielczuk@lincoln.ac.uk)

² OECD, 'Making Water Reform Happen in Mexico, OECD Studies on Water, OECD Publishing' (OECD, 2013) <<http://dx.doi.org/10.1787/9789264187894-en>> accessed 10 November 2018; Daniel Murillo-Licea and Denise Soares-Moraes, 'El Péndulo de La Gobernabilidad Y La Gobernanza Del Agua En México' (2013) 4 *Tecnología y Ciencias del Agua* 149 <http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S2007-24222013000300009> accessed 7 November 2018; Kamel Athie, *El Agua, Ayer Y Hoy* (Centro de Estudios Sociales y de Opinion Publica ed, Camara de Diputados LXIII Legislatura 2016) <<http://www5.diputados.gob.mx/index.php/camara/Centros-de-Estudio/CESOP/Estudios-e-Investigaciones/Libros/El-Agua-Ayer-y-Hoy>> accessed 3 December 2018. For practical examples see Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, 'Corruption and Conflicts as Barriers to Adaptive Governance: Water Governance in Dryland Systems in the Rio Del Carmen Watershed' (2019) 660 *Science of The Total Environment* 519 <<https://www.sciencedirect.com/science/article/pii/S0048969719300361>> accessed 11 January 2019; José Luis Martínez Ruiz, Daniel Murillo Licea and Luisa Paré, *Conflictos Por El Agua Y Alternativas En Los Territorios Indígenas de México* (Instituto Mexicano de Tecnología del Agua 2017) <www.imta.gob.mx> accessed 1 February 2020.

³ Paula Mussetta, 'Participación Y Gobernanza . El Modelo de Gobierno Del Agua En México' (2009) 12 *Espacios Públicos* 66 <<http://www.redalyc.org/html/676/67611350005/>> accessed 7 November 2018; Victor Manuel Quintana, 'Nuevo Orden Alimentario Y Disputa Por El Agua En El Norte de México' (2013) 40 *Apuntes: Revista de Ciencias Sociales* 175.

⁴ Here, public participation is defined as any of formal mechanisms intentionally instituted to involve public or their representatives in the environmental decision-making process. Definition obtained from: Mark S Reed, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 *Biological Conservation* 2417. On the other hand, stakeholder engagement is defined as "The process by which any person or group who has an interest or stake in a water-related topic is involved in the related activities and decision-making and implementation processes", stakeholder engagement includes public participation in water management and decision-making, therefore, this concept is used throughout the report since is more comprehensive. Definition of stakeholder engagement was obtained from: Aziza

barrier to address water overexploitation and avoid conflicts over its access.⁵ For this reason, the need for a new legislation (a General Water Law for Mexico)⁶ has been discussed for a long time.⁷ Nevertheless, because we are still in the development process of the General Water Law for Mexico, reporting about one of the main legal disputes related to the law's failure to foster stakeholder engagement in water management is important. This country report discusses the 'La Boquilla' case to explore how the General Water Law should overcome this legal flaw.

'La Boquilla' case

In 2020 at least three violent conflicts occurred between farmers from various municipalities of Chihuahua, Mexico on the one hand, and the National Guard⁸ and government officials from the National Water Commission (CONAGUA)⁹ on the other. Those conflicts erupted when the National Guard and CONAGUA opened the sluice gates of the 'La Boquilla' dam. This was done to comply with the 1944 International Treaty for the “Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande” between Mexico and the United States of America.¹⁰ However, farmers argued that, given climate conditions and the dam's high silt levels, transferring water from the dam was a threat to this year's agricultural cycle, and there were other ways to comply with that treaty without affecting local agricultural livelihoods.¹¹ Considering the negative impacts that this situation could have on the economic activity of the area, mayors from different municipalities in the region defended the farmers' rights to water access from the Federal government and its National Guard. The main (non-violent) action of this water conflict, consisted of a constitutional controversy that fourteen municipalities initiated between March and May 2020, at the Supreme Court of Justice of

Akhmouch and Delphine Clavreul, 'Stakeholder Engagement for Inclusive Water Governance: "Practicing What We Preach" with the OECD Water Governance Initiative' (2016) 8 Water (Switzerland) 1, 4 <<http://www.mdpi.com/2073-4441/8/5/204>> accessed 7 November 2018.

⁵ Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, 'Seeking Common Ground in Dryland Systems: Steps Towards Adaptive Water Governance' (2020) 12 Water 2020, Vol. 12, Page 498 498; Athie (n 2).

⁶ The main difference between a national and a general law, is that a general law focuses on distributing competences (in this case regarding water) between the federation, states and municipalities, while the national law establishes guidelines only at the federal level.

⁷ Athie (n 2).

⁸ The National Guard is Mexican military police that the current Federal government created to combat organised crime.

⁹ CONAGUA is the acronym in Spanish for the National Water Commission.

¹⁰ "United States-Mexico Treaty on Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande" (adopted 3 February 1944, entered into force 8 November 1945), 59 Stat. 1219 (1946), T.S. No. 994.

¹¹ J Estrada and R Villalpando, 'Agricultores de Chihuahua "Toman" La Presa La Boquilla; Rechazan Traspase' (*La Jornada*, 5 February 2020) <<https://www.jornada.com.mx/ultimas/estados/2020/02/05/agricultores-de-chihuahua-toman-la-presa-la-boquilla-rechazan-traspase-9067.html>> accessed 27 July 2020.

the Nation (SCJN) against the Federal government and the Congress. That legal action against Mexican government was premised on the lack of participation (especially of the municipal authorities and farmers) in the decision-making processes regarding the water management in the ‘La Boquilla’ dam.

The constitutional controversy

A constitutional controversy is a process that local, state or federal governments can initiate at the SCJN in order to resolve whether some acts of authority are being carried out according to what the Mexican Constitution has established.¹² Unlike other judicial processes from other legal systems that could be considered similar, such as the ‘judicial review’ process, the constitutional controversy can only be initiated by a governmental body, whose sphere of competence is being affected by another government body, in light of what is established by the Constitution. Consequently, this jurisdictional process is a tool for solving potential controversy related to the actions and omissions of one sphere of government with respect to another, in order to respect the provisions embedded in the Constitution. According to the recent agreement issued by the SCJN,¹³ the main argument challenging the federal government’s actions (and omissions) in the ‘La Boquilla’ case, is the violation of the principle of democratic deliberation that must be guaranteed as a part of the human right of water access foreseen in the Mexican Constitution. From there, other arguments were derived, such as:

- The legislative and administrative omission to properly regulate the participation of municipalities and farmers in the dam’s water management.
- The issuance of orders to transfer water from ‘La Boquilla’ dam without any water planning that has considered the participation of municipal authorities and farmers.
- The use of public force to evacuate the water from the 'La Boquilla' dam without a democratic and participatory decision-making process over the dam’s water.¹⁴

¹² José Ovalle Favela, ‘Las Controversias Constitucionales Y Los Órganos Autónomos’ (2011) 25 Cuestiones Constitucionales <http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-91932011000200004> accessed 27 July 2020.

¹³ Presidente de la Suprema Corte de Justicia de la Nación, ‘Acuerdo Que Establece La Conexidad de Las Controversias Constitucionales 47/2020, 48/2020, 49/2020, 50/2020, 56/2020, 59/2020, 60/2020, 61/2020, 62/2020, 67/2020, 68/2020, 70/2020, 77/2020, 78/2020 Y 79/2020 de Fecha 18 de Mayo de 2020’ 3.

¹⁴ *ibid.*

The National Water Law and public participation

The National Water Law and its regulation establish the river basin councils as the public spaces for coordination, collaboration and participation between the three governmental levels (federal, state and municipal) and the citizens in water decision-making. Yet, collaboration and public participation has not been achieved, principally, because these councils do not match with the required scale for water management (e.g. watershed, dam, or aquifer level), where most water problems arise.¹⁵ In the ‘La Boquilla’ case, farmers and municipal authorities would need to travel almost 700 km² to be able to participate in any council session.¹⁶ Moreover, the Mexican water legal framework¹⁷ does not define very clearly what the regulatory functions are for CONAGUA's administrative units (including the river basin councils). Responsibilities within CONAGUA's structure¹⁸ tend to overlap and many times it is not clear who is responsible for regulated activities.¹⁹ Given this lack of clarity, water management and all decision-making processes are highly centralised, hindering CONAGUA's ability to achieve stakeholder engagement.²⁰ As a result of this centralised water management, the lack of coordination and cooperation between the CONAGUA and water users has created an “unmanageability” context, especially in northern drylands²¹ where the ‘La Boquilla dam’ is located. This has created several water-related problems, such as illegal water access and conflicts over its access, leading to poor law compliance since water users (farmers in this case) are not involved or engaged in any water planning or management process. As a result, the constant conflicts, centralised water management, and lack of stakeholder engagement hinder water law enforcement and the CONAGUA's presence in the area.

¹⁵ Murillo-Licea and Soares-Moraes (n 2).

¹⁶ There is no information about if other alternatives of participation have been explored, such as online meetings; yet, since literature and reports suggest that farmers do not participate in council sessions, it is understood that there is no participation of any kind.

¹⁷ The National Water Law and the other regulations.

¹⁸ Established in the Regulation of the National Water Commission, which has been identified as part of the Mexican water legal framework.

¹⁹ OECD (n 2).

²⁰ Athie (n 2); Mussetta; Murillo-Licea and Soares-Moraes (n2).

²¹ Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, ‘Unravelling Stakeholder Perceptions to Enable Adaptive Water Governance in Dryland Systems’ (2018) 32 *Water Resources Management* 1 <<http://link.springer.com/10.1007/s11269-018-1991-8>> accessed 17 May 2018; Quintana (n 3).

The constitutional controversies and the Mexican water legal framework

The article 105 of the Mexican Constitution establishes the cases in which the SCJN rulings will have general effects.²² These fourteen constitutional controversies are not within those cases, so the SCJN rulings will only have effects with respect to these municipalities. The controversies' main claims are the lack of participation of the municipal authorities and farmers in water management and decision-making processes on water transfer. Therefore, if the SCJN issues the ruling in favour of the fourteen constitutional controversies, the administrative and legislative authorities should issue, at minimum, a comprehensive water programme for the "La Boquilla" dam, where farmers and municipal authorities could engage in water management. Hence, although the impact on the Mexican water legal framework is likely to be limited due to the rulings' implications being local rather than national (and reform the National Water Law would be out of the scope), these constitutional controversies can establish a significant precedent. Afterwards, other municipalities in Mexico could follow the same path to strengthen their participation in water management, until a new law, for instance, the General Water Law, establishes an institutional setting that can effectively achieve stakeholder engagement in water management.

Lessons for a General Water Law

It is currently understood that public–private coordination and stakeholder engagement is key for improving water management, achieving water sustainability and strengthening the rule of water law.²³ In Mexico, it has been highlighted through several case studies that, even though there are some spaces for public participation, they are not suitable for achieving stakeholder engagement.²⁴ In the 'La Boquilla' case, decisions made by the federal government without consideration and participation of local stakeholders are negatively impacting the livelihoods of citizens in fourteen

²² General effects mean that the court ruling aims to rectify the unconstitutionality so that the act or omission of authority regarding law enforcement does not happen again. Conversely, the effects of the court ruling can also solve only the particular issue involving the parties.

²³ Peter Rogers and others, *Effective Water Governance Global Water Partnership Technical Committee (TEC)*, vol 21 (2003) <<http://dx.doi.org/10.1016/j.gloenvcha.2011.04.003%5Cnwww.gwpforum.org>>; Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, 'Building Dryland Resilience: Three Principles to Support Adaptive Water Governance' (2020) 177 *Ecological Economics* 106770; Akhmouch and Clavreul (n 4).

²⁴ Martínez Ruiz, Murillo Licea and Paré (n 2); Lopez Porras, Stringer and Quinn, 'Unravelling Stakeholder Perceptions to Enable Adaptive Water Governance in Dryland Systems' (n 21); Quintana (n 3).

municipalities.²⁵ This has resulted in armed clashes between farmers and soldiers from the National Guard (some encounters have resulted in fatalities) as well as the destruction of public buildings.²⁶

Stakeholder engagement is key for not only improving sustainable water management, but also for overcoming the societal stressors²⁷ that hinder collaboration and increase the enmity between local authorities, farmers and the federal government.²⁸ A General Water Law cannot overlook the key role that public participation plays in addressing water-related problems, such as overexploitation and social conflicts. Accordingly, creating suitable institutional conditions for successfully enabling stakeholder engagement should be of paramount importance in the current law's developing stage²⁹. From what is observed in the 'La Boquilla' case, there are some aspects in terms of public participation that the General Water Law should consider. First, local water users need to actively engage in water decision-making processes, since they can provide useful insights and knowledge of local conditions and dynamics that will be affected in any water-related decision. Moreover, local authorities should also be engaged in any water-related decision and implementation process so they can provide institutional support to CONAGUA at the local level. This will facilitate cross-level coordination, increase the government's presence regarding water-related issues at the local level, and strength water democratisation. Finally, to ensure the sustainability of stakeholder engagement, the General Water Law must foresee peacebuilding tools (e.g. mediation, negotiation or conflict resolution) to manage opposing and conflictive perceptions on water decisions.³⁰ If the General Water Law integrates these considerations, then a sustainable stakeholder engagement can potentially be achieved.

²⁵ According to municipal authorities and farmers; please see Salud Ochoa, 'La Boquilla No Puede Usarse Para Pagar Deuda' *El Diario de Chihuahua* (Chihuahua, 7 February 2020) <<https://diario.mx/estado/la-boquilla-no-puede-usarse-para-pagar-deuda-20200206-1624739.html>> accessed 4 March 2020; Estrada and Villalpando.

²⁶ Emma Alejandra, 'Caen 17 Por Disturbios Tras Protesta de Agricultores En Chihuahua' *El Heraldo de Mexico* (Chihuahua, 31 July 2020) <<https://heraldodemexico.com.mx/estados/detenidos-disturbios-chihuahua-quema-camionetas-agricultores-protestas-tratado-aguas-conagua-desinformacion-javier-corrall-declaraciones/>> accessed 4 August 2020.

²⁷ Societal stressors are trends or disturbances, such as human rights violations, conflicts and social inequalities, which affect social conditions, undermine human well-being and fragment the social function of governance of natural resources. In the 'La Boquilla' case, the societal stressors are the constant conflicts between farmers and soldiers, as well as the transgression of farmers' rights regarding public participation. For more information on societal stressors see Lopez Porras, Stringer and Quinn, 'Building Dryland Resilience: Three Principles to Support Adaptive Water Governance' (n 23).

²⁸ Akhmouch and Clavreul (n 4).

²⁹ An official version of the National Water Law's draft still pending.

³⁰ For more information on peacebuilding processes within water management see Lopez Porras, Stringer and Quinn, 'Seeking Common Ground in Dryland Systems: Steps Towards Adaptive Water Governance' (n 5).

Conclusion

Fostering public participation is more than just creating an institutional construct where state and non-state actors should gather and discuss. That has been observed in the ‘La Boquilla’ case, where the Mexican water legal framework establishes the river basin councils as the spaces for participation, yet, problems in their operation (e.g. their inability to reach local stakeholders) hinder the required coordination and collaboration between water users and the CONAGUA. As a result, local perceptions and needs are not considered in water management. In effect, the decisions regarding the water management in the region (e.g. decision on a water transfer from the dam) very often lead to violent conflicts between farmers and the federal government. Public participation requires a stakeholder engagement to avoid centralised water management, strength its democratisation, and move towards water sustainability. Hopefully, lessons learned from those constitutional controversies will improve the provisions established by the new General Water Law for Mexico on public participation in water management.