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# Constitutional Framework for Water Regulation in Mexico

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## ABSTRACT

*Water regulation in Mexico rests on the Mexican Constitution and interpretation of that law by the Mexican Supreme Court. Mexican lawyers, on the other hand, tend to ignore those interpretations and look to the text of the Constitution itself. This article argues against that approach and points to the importance of new ways of making decisions.*


## I. INTRODUCTION

This article explains the constitutional framework for water regulation in Mexico. The general structure of the Mexican Constitution is analyzed to give the reader a background for a later, more detailed examination of the constitutional principles impacting water regulation. Because Mexican law is the basis for water regulation, and the Constitution is the supreme law of Mexico, it is necessary to fully analyze the Mexican constitutional framework as it undergirds the legal principles for water regulation in Mexico.

The Mexican Supreme Court has interpreted the constitutional principles which shape Mexican water law. However, the majority of Mexican lawyers ignore the interpretations of the Court, preferring to interpret the constitutional framework for Mexican water law solely from the text of the Constitution. This article adamantly rejects this approach and insists on the necessity of incorporating the decisions of the Mexican Supreme Court in this analysis of Mexican water law.

## II. GENERAL OVERVIEW OF MEXICAN CONSTITUTIONAL FRAMEWORK FOR WATER REGULATION

Of the five constitutional principles related to water resource regulation, four of the principles are found in the fifth paragraph of article 27 of the Political Constitution of the United States of Mexico:

> The national waters of Mexico are those in the territorial seas as determined by international law; internal marine waters, lagoons and estuaries that are permanently or intermittently connected with the sea; interior natural lakes that are connect-

> ed to water currents; rivers from their headwaters whether permanent, intermittent or torrential, to the river mouth at the sea, lake, lagoon or estuary within Mexico; the effluent of rivers that serve as the internal or national boundaries; the waters of lakes, lagoons and estuaries which are crossed by the borders of two or more states or which are crossed by international borders; springs discharging into maritime zones, riverbeds, shores of lakes, lagoons or estuaries within Mexican territory; mine drainage; and all water courses, riverbeds, shorelines of interior lakes and other currents as established by law. Groundwater may be discovered by artificial works and appropriated by the landowner but when unregulated pumping adversely affects the public interest or benefit, the Federal Executive may regulate groundwater extraction and use, and may, in extreme situations, establish areas within which groundwater extraction is prohibited in like manner to other prohibitions on use of national waters. Any waters not included in the prior listing, will be considered as appurtenant to the land but, if the land is owned by two or more owners, then the water will be considered as a public utility governed by state law.[1]

A distinction is drawn between interior fresh-water resources and brackish or territorial maritime waters in the first portions of the fifth paragraph of article 27.[2] While acknowledging the constitutional distinction, the following discussion will focus solely on interior fresh-water resources.

From the language of the fifth paragraph of article 27, there are four classifications of interior fresh-water resources: 1) national surface water; 2) national groundwater; 3) privately owned water; and 4) private water having a public utility. In addition, subsection VII (third paragraph) of article 27 contains a fifth water classification, water used by agricultural communities (ejidos).

The first two interior fresh-water classifications in the fifth paragraph of article 27 are for public water resources. The last two fresh-water classifications are for privately owned water resources. Finally, the classification scheme for ejidos or agricultural communities may be either public or private depending on the regulations impacting water held in common ownership. The classification of water resources as either public or private is critical in Mexico water law because public

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1. Article 27 of the Constitution was discussed and approved in the same session, without any trouble, by the Constitutional Congress on January 31, 1917. *See* 2 DIARIO DE LOS DEBATES DEL CONGRESO CONSTITUYENTE 787-88 (1917).

2. For a discussion concerning the distinction between international and interior waters, see LORETTA ORTÍZ AHLF, DERECHO INTERNACIONAL PÚBLICO 98-108 (1993); CÉSAR SEPÚLVEDA, DERECHO INTERNACIONAL 178-88 (16th ed. 1991).

water is neither alienable nor subject to ownership by prescription, whereas privately owned water may be appropriated by private persons.[3]

## III. CONSTITUTIONAL REGULATION OF NATIONAL SURFACE WATER

The waters comprising the national surface water classification are expressly listed in the first portion of paragraph five of article 27.[4] Many scholarly opinions exist regarding exactly which waters are encompassed by the text of article 27. For example, Professor Farías stated in a recent work that the text of article 27 is inclusive rather than exclusive because the classification includes "waters found in federal deposits or which flow through federal property irrespective of private or public ownership."[5] It is the author's opinion that Professor Farías unnecessarily confuses the issue of ownership. While it is true that the federal government can own either public or private assets, the relevant text of article 27 expressly states that this classification is for public water, therefore, the classification is exclusive of all other types of water resources. The logical argument that this classification is not exclusive because it includes private water resources completely ignores fundamental constitutional principles.

As early as the 1920s, the Supreme Court determined that in order for water resources to be considered as national water resources, all of the characteristics of national water listed in the fifth paragraph of article 27 had to be present.[6] The ruling of the Supreme Court stands today as the Court has recently established that: "as article 27 of the Constitution, in the relevant paragraph, provides the requirements needed to consider which waters are national waters, undoubtedly only waters having this character are national waters, and all other waters are considered private property."[7] Therefore, any water resource which lacks

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3. For a discussion concerning the distinction between public and private propriety in the Constitution, see OSCAR MORINEAU, LOS DERECHOS REALES Y EL SUBSUELO EN MÉXICO 199 (1948).

4. *See supra* text accompanying note 2. The long first sentence was adopted by the commission which wrote the LEY DE BIENES INMUEBLES DE LA FEDERACIÓN OF 1902. *See* PASTOR ROAUIX, GÉNESIS DE LOS ARTÍCULOS 27 Y 123 DE LA CONSTITUCIÓN POLÍTICA DE 1917 142 (1984).

5. URBANO FARÍAS, DERECHO MEXIANO DE AGUAS NACIONALES 45, 84 (1993).

6. For example, see Andrade y Nuñez Gustavo, T. XXXVII 1952, A.A.R. 391/28 (1993) (5 votes); Utah Tropical Fruit Co., T. XLV 2949, R 1117/29 (1935) (5 votes); Emilia Gusmán de Boo, T. XLV 5372, A.A.R. 65/31 (1935) (5 votes); P.J. Blackmon, S en C., T. XLV 2393, A.A.R. 769/30 (1935) (5 votes); Seijas Vda. de Prieto Jesus, T. XLVIII 3178, A.A.R. 4904/34 (1936).

7. Apéndice al Semanario Judicial de la Federación 1917-1981, pt. 2, thesis 118, at 190.

a constitutional characteristic of a national water resource is, by exclusive definition, a private water resource. In light of the Supreme Court's determination that national water resources must have the characteristics expressly listed in article 27, the argument that the text of article 27 is inclusive fails and the text must be considered exclusive of all other types of water resources.

The constitutional provision defining national surface water has complementary constitutional principles. It is only within the context of the greater constitutional framework that Mexican water law is established. The sixth paragraph of article 27 established the principle that national surface water is inalienable and not subject to private ownership by prescription so that private persons may not acquire a property interest in public water resources.[8] However, the same sixth paragraph of article 27 establishes that private persons may exploit, use, or profit from national surface water resources upon permission from the Federal Executive. Permission by the Federal Executive is constrained by three constitutional provisions.

The fifth paragraph of article 27 allows federal regulation or prohibition of public water usage, including national surface water, by the Federal Executive. Under this provision of the Constitution, the Federal Executive could regulate permitted uses of national surface water and revoke permission if, at a later date, the area surrounding the national surface water resource was included in a zone of prohibited water use.

The ninth paragraph of article 27 is divided into several subsections, some of which pertain to "ownership" of national surface water. Although the term "ownership" is used in the relevant subsection of paragraph nine, the term cannot be given its normal meaning. Ownership in the context of paragraph nine must be defined as a license, or permit to use national surface water. Otherwise, the constitutional principles of inalienability and impossibility of prescription would be rendered impotent.

Keeping in mind the constitutional requirements by which the Federal Executive may permit private persons to exploit, use, or profit from national surface water, subsection I of paragraph nine provides that Mexicans by birth or by naturalization, Mexican societies, and foreigners submitting to Mexican law may gain permission to use national surface water.[9] With regard to the use of national surface water by foreigners, subsection I bars such use within one hundred kilometers of the international boundary or fifty kilometers from the coastline.

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8. *See* Manuel Villaseñor, 5th term, T. XLVII 4481, A.A.R. 4091/31 (1936) (4 votes).

9. For the extent of this permission, see José Basurto, 5th term, T. XXXV 1925, A.A.R. 3484/28 (1932) (5 votes).

The eighth paragraph of article 28 of the Constitution also governs issues related to the permissive use of national assets. It provides that:

> The State, submitting to the law[,] may, in cases of general interest, grant concessions over public service of the exploitation, use[,] or profit from the Nation's assets, unless barred by exceptions in the law. The law will establish the methods and conditions that ensure the efficacy of lending services and the social utilization of assets and avoid monopolization contrary to general interest.[10]

The question remains whether the eighth paragraph of article 28 applies to Federal Executive permission for the exploitation, use, or profit from public water or whether the private use of public water is governed solely by the provisions in the fifth and sixth paragraphs and subsection I of the ninth paragraph of article 27. It appears to the author that the eighth paragraph of article 28 does indeed apply to concessions by the Federal Executive to private persons for the use of public water. To come to this conclusion, the terms "Federation's assets" and "Nation's assets" used respectively in articles 27 and 28 must be considered synonymous. This is a reasonable conclusion to reach. Likewise, it is reasonable to apply the provisions of article 28 to the process by which the Federal Executive permits private persons to exploit, use, or profit from national surface waters. The result of the application of article 28 to permissive private use of public water is that such use must be regulated according to the constitutional principles of general interest, social utilization of the assets, and the pursuit to avoid monopolization in national surface water.

In addition to the provisions related to Federal Executive permission for private use of public water, the Constitution has other principles related to surface water. Article 73 grants power to the Federal Congress that relate to surface waters.

Article 73, subsection XVII, establishes that Congress "may issue statutes over the use and profit from federal jurisdiction waters." Although this provision does not define "federal jurisdiction" waters, the provision is comparable to those found in the fifth paragraph of article 27. However, not all of the waters listed in the fifth paragraph are national waters and therefore, not within federal jurisdiction. On the contrary, only those classifications for surface and groundwater found in the first portion of the fifth paragraph may be considered as national waters.[11] As a result, when private water regulation is at issue, only the states can regulate private water use. This conclusion is based on the

10. CONST. art. 28, para. 8.

11. *See* Apéndice, *supra* note 7, pt. 1, thesis 7, at 11.

constitutional provisions found in articles 27 and 124 of the Constitution.[12]

The second paragraph of subsection XXIX of article 73 provides for congressional taxation "over the profit and exploitation of natural resources comprehended in the fourth and fifth paragraphs of article 27." This provision confers exclusive power over the profits accruing to the use or exploitation of natural resources. There is an apparent discrepancy between the tern "natural resources" used in article 73 and the tern "national water" used in article 27. This discrepancy is fundamental because if national waters are included within the meaning of natural resources, then the Federal Congress, rather than the states, has the sole power to tax national waters and possibly privately owned water because all water falls within the definition of natural resources.

There are no decisions from the Supreme Court directly on the point of whether only the Federal Congress has taxation power over natural resources. However, there is precedence in related matters suggesting that states maintain regulation and taxation power over some natural resources which fall under the provisions of article 124 of the Constitution.[13]

## IV. CONSTITUTIONAL FRAMEWORK FOR THE REGULATION OF GROUNDWATER

With respect to the second classification of national waters, groundwater, the fifth paragraph of article 27 of the Constitution, as amended on April 21, 1945, states that:

> Groundwater may be freely discovered by artificial works and appropriated by the owner of the land; but, when demanded by the public interest, or when other benefits are affected, the Federal Executive could regulate its extraction and utilization and even establish zones of prohibited use, in similar manner as for all other national waters.

While the first portion of the fifth paragraph of article 27 refers to national surface waters, the second portion of the paragraph refers to groundwater. The text of the Constitution does not provide a definition of what constitutes groundwater, so it is necessary to establish the principal characteristics of groundwater.

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12. Apéndice, *supra* note 7, pt. 2, thesis 119, at 191.

13. *See* Novacryl, S.A. y otras, A.R. 3616/85 (1986) (20 votes). However, in Vol. 2, 8th term, pt. 1, at 131, it was specifically stated that "it is an exclusive faculty of the federal congress to impose taxes over exploitation and profit of natural resources found in the fourth and fifth paragraphs of article 27 of the Constitution." In any case, it must be said that there is no court ruling concerning this matter.

The fifth paragraph of article 27 distinguishes the private right to benefit from groundwater by appropriation through artificial diversion works. Conversely, groundwater that naturally reaches the surface of the land cannot be privately appropriated unless by permission of the Federal Executive. The private right to artificially discovered and appropriated groundwater is a qualified right because the extraction of groundwater can be regulated or even prohibited when necessary to promote the public interest.

The constitutional principles enumerated in the fifth paragraph of article 27 are complemented by three constitutional principles. The sixth paragraph of article 27 of the Constitution establishes that national assets are inalienable and not subject to private ownership by prescription so that private appropriation is barred. There seems to be a discrepancy between the provision for private discovery and appropriation of groundwaters in the fifth paragraph and the inalienability and bar to prescriptive private ownership established under the sixth paragraph of article 27.

With respect to this seeming discrepancy, the Federal Supreme Court has determined that although private persons may discover and appropriate groundwaters through artificial diversion works, ownership of the groundwaters remains with the national government because the groundwaters are inalienable and not subject to prescriptive private ownership.[14] Irrespective of the constitutional provision for the inalienability and non-prescription of national waters, the Court's reasoning seems incorrect[15] because the logical conclusion is that only the Federal Executive can permit a private land owner to benefit from underlying groundwater while the Constitution in paragraph five of article 27 expressly provides for free private discovery and appropriation of groundwaters.

A correct interpretation of the Constitution would enable private landowners to freely appropriate groundwater that they discover and extract through artificial diversion works and at the same time rant to the Federal Executive the power to regulate the exploitation, use, and profit from groundwater that naturally discharges at the land surface through springs, seeps, or other natural discharges. This interpretation comports with the constitutional provisions found in the fifth and sixth paragraphs of article 27. In the fifth paragraph, the Federal Executive may regulate or prohibit the extraction of groundwater if demanded by the greater public interest, but the permitting power found in the sixth paragraph is limited to surface water resources.

The second constitutional provision relating to groundwater is found in the eighth paragraph of article 28: "the laws will establish the procedures to ensure . . . the social utilization of [national] assets." The Federal Executive has constitutional power to regulate the extraction and

14. *See* Vol. II, 8th term, pt. 1, at 12; Apéndice, *supra* note 7, pt. 1, thesis 7, at 11.

15. *See* Vol. I, 8th term, pt. 1, at 14; Vol. II, 8th term, pt. 1, at 196.

use of groundwater and also to establish zones within which groundwater extraction is prohibited. In addition, the Federal Executive has the power to determine which groundwater uses fall within the public interest. Therefore, according to the eighth paragraph of article 28, the Federal Executive must make its determination of appropriate groundwater uses in conformance with the law and the constitutional principles of the social utilization of groundwater.

As discussed previously, article 73 of the Constitution has provisions which relate to federal congressional power over water resources. Subsection XVII empowers the Congress to "issue statutes over the use and profits from the use of water within federal jurisdiction" and subsection XXIX empowers Congress to impose taxes on "the profit and exploitation of natural resources as comprehended by the fourth and fifth paragraphs of article 27." Each of the foregoing subsections of article 73 is problematic. Thus, they will be analyzed separately.

Subsection XVII presents several problems. On one hand, the Federal Congress is granted statutory power to regulated the use and profit from the use of natural resources, including groundwater. On the other hand, the Federal Executive is empowered by the fifth paragraph of article 27 to regulate the use and profit from the use of groundwater and to even prohibit the extraction of groundwater in certain geographic areas. Two interpretations of this seeming overlap in authority between the executive and legislative branches of the government are possible.

The first interpretation would be that the Federal Executive is granted autonomous regulatory power by the operation of the fifth paragraph of article 27.[16] The second and better interpretation is that the Federal Executive has the power to establish specific regulations relating to the exploitation, use, and profit from the use of groundwater in conformity with the overall statutory framework enacted by the Federal Congress. This second interpretation is the better of the two because the Federal Executive power to regulated groundwater is subordinate to the higher constitutional authority of legislation enacted by the Federal Congress. Therefore, under the constitutional framework, specific groundwater regulations promulgated by the Federal Executive are subordinate to laws applicable to the use of natural resources, including groundwater, enacted by the Federal Congress.

The second problem presented by the eighth paragraph of article 73 is the taxation power granted to the Federal Congress over the profits from the use of natural resources. The fifth paragraph of article 27 includes groundwater which underlies property owned by two or more parties as affected with the public interest and therefore, a national water resource.[17] The national government has exclusive taxation power over

16. For a discussion concerning autonomous executive regulations, see GEORGES VEDEL & PIERRE DEVOLVE, 1 DROIT ADMINISTRATIF 58-60 (11th ed. 1990); IGNACIO DE OTTO, DERECHO CONSTITUCIONAL, SISTEMA DE FUENTES 160 (1987).

17. *See* Vols. 151-56, 7th term, pt. 1, at 92, 117; Vols. 157-62, 7th term, pt. 1, at 207.

national natural resources so that state taxation of national groundwater is contrary to the federal government's exclusive taxation authority. State taxation schemes are at risk of being ruled unconstitutional by the Federal Judicial Branch through either an "amparo" trial or by a constitutional controversies trial.[18]

## V. CONSTITUTIONAL FRAMEWORK FOR PRIVATELY OWNED WATER RESOURCES

The third and fourth water classifications established by the fifth paragraph of article 27 of the Constitution are, respectively, for privately owned water and private water having a public utility:

> Any waters not included in the prior listing, will be considered as appurtenant to the land but, if the land is owned by two or more owners, then the water will be considered as a public utility governed by state law.

The text of the fifth paragraph of article 27 describes the two private classifications of water resources as: 1) waters which are not national waters and flow through and terminate in private property; and 2) privately owned water which flows through land owned by two or more persons and is thereby affected with a public utility.

Several problems are presented by the two classifications for privately owned water. The first problem presented by the constitutional classifications of privately owned water is the difficulty of distinguishing between privately and nationally owned water resources. As previously discussed, the Federal Supreme Court has determined that national waters are those waters which meet the exclusive characteristics expressly formulated in the fifth paragraph of article 27. Water resources not having the express characteristics of national water are considered by the Court to be privately owned water resources.

The second problem presented by the constitutional classifications for privately owned water resources is the question of whether the national or state government has the authority to regulated private water. Because the national water classifications are "numerus clausus," federal authority over water resources is limited to national water resources. Therefore, regulation of privately owned water resources is within the prerogative of local government or the appropriate federal district government.[19]

The classification of private water that flows through land owned by two or more persons is affected with a public utility and is within the regulatory jurisdiction of the local government. As an example of local

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18. *See* Vol. II, 8th term, pt. 1, at 131.

19. *See* Contrario sensu, Vols. 151-56, 7th term, pt. 1, at 92, 117; Vols. 157-62, 7th term, pt. 1, at 207; Vol. II, 8th term, pt. 1, at 131.

government regulatory authority, the last part of article 933 of the Civil Code for Federal District governments establishes that when privately owned water flows through property owned by two or more persons, "the profit from the use of the water will be considered as public utility and subject to the appropriate regulatory provisions." The "appropriate regulatory provisions" are statutes enacted by the local Federal District.

A fourth problem is presented by the text of subsection XXIX of article 73 of the Constitution which concerns the scope of taxation authority granted to the Federal Congress over private water resources. Once again, as stated previously, the Federal Supreme Court has effectively limited the taxation authority granted to the Federal Congress in subsection XXIX of article 73 to national water resources as expressly and exclusively classified in the fourth and fifth paragraphs of article 27. The taxation of private water resources is the prerogative of the local Congress.

Finally, the fifth problem presented by the classification of privately owned water resources relates to the type of entity that may privately own water. Four possibilities exist: 1) private water owned by the Federation;[20] 2) private water owned by state governments;[21] 3) private water owned by federal districts;[22] and 4) private water owned by individuals. The Constitution allows private ownership of water based on land ownership. It also allows the federation, states, and federal districts to own land. Therefore, any of these governmental entities may privately own water which is not classified as national water.[23]

## VI. CONSTITUTIONAL FRAMEWORK FOR EJIDOS AND AGRICULTURAL COMMUNITY WATER RESOURCES

The second paragraph of subsection VII of article 27 of the Constitution establishes an additional classification of water:

> The law, considering the respect for and strengthening of the community life of ejidos and communities, will protect the land for human settlement and regulate the profits from the land, woods[,] and water used in common and provide the necessary action for the improvement and upgrading of the quality of life of the settlers.[24]

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20. *See* LEY GENERAL DE BIENES NACIONALES art. 3, § I.

21. For example, see LEY DE BIENES DEL ESTADO DE DURANGO art. 14, *reprinted in* PERIÓDICO OFICIAL DEL ESTADO, Sept. 25, 1980.

22. The assets of the Federal District are regulated by chapter four of its organic statutes, reprinted in DIARIO OFICIAL DE LA FEDERACIÓN, Dec. 29, 1978.

23. *See* Alfonso Nava Negrete, *Voz: Aguas, in* 1 EL DICCIONARIO JURÍDICO MEXICANO 119-20 (1982).

24. DIARIO OFICIAL DE LA FEDERACIÓN, Jan. 6, 1992.

The first part of the provision establishes a constitutional protection for the profit from water used by ejidos and agricultural communities. Being a constitutional mandate, the second paragraph of subsection VII of article 27 does not provide details of the regulatory scheme necessary to protect water use by ejidos and agricultural communities.[25]

Before closing this discussion of Mexican water law, the issue of which government entity has the constitutional authority to regulate water use by ejidos and agricultural communities must be resolved. As mentioned previously, subsection XVII of article 73 classifies commonly held water resources as either private or public water. It could be that either the Federal Congress or the local Congress has power to regulated water use by ejidos or agricultural communities. However, agriculture is a federal interest and it follows that the Federal Congress alone has regulatory power over water use by ejidos and agricultural communities whether or not the water resource is privately owned or a national water resource.

25. These issues are addressed in LEY DE AGUAS NACIONALES tit. 6, ch. 2, § 2, as well as in LEY AGRARIA tit. 3, ch. 2, § 2.