

DOI: <http://doi.org/10.5281/zenodo.7322784>

Accepted: 15.11.2022

Prospective of the Procedures of Claim for Affection in Patrimonial Rights: Case Sector of Hydrocarbons in Mexico.

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Abstract

The constitutional reforms that are made to our constitution are aimed at improving the social, legal and economic development of the country, for some authors the reformative function of the constitution should be focused on correcting possible gaps and technical or political errors in which the constituents may have incurred during its drafting, (1) These paradigmatic changes that have been generated throughout the history of our Federal Constitution are those that are required in the growth and development of our country; Some constitutional changes have favoured the economic and social growth of the State; to one that, at times, the reforms have caused the damage to the patrimony of the nation. The constitutional reform in energy matters carried out in 2013, gave rise to a series of modifications to the Mexican legal system, so much so that laws and procedures were repealed and repealed completely, these actions give rise to violations in the field of Human Rights.

Keywords: Principle of Progressivity, Negotiation Mechanisms, Property, District Judge, Ejidatarios.

BACKGROUND TO HUMAN RIGHTS REFORM.

The transition of the Mexican State towards a democratic system brought with it from 2008 to 2011 a series of constitutional changes at the federal level that constituted a significant precedent to provide the Magna Carta with the necessary components that, from various aspects, guaranteed a broad protection of rights.

The reform of the criminal justice system (1), the reform related to collective actions (2), the reforms to the Amparo Law (3) and, finally, the human rights reform (4), undoubtedly redirected the public agenda to focus attention on the latter issue and incorporate international human rights

law in order to correct the structural deficiencies that existed and prevented its effectiveness in the national legal order.

Another of the fundamental distinctions revolves around the replacement of the word "individual" by that of "person", who is considered the essence on which the total protection of rights should revolve.

The guiding core of the normative modification is found in article 1, which, in the words of the ruling commission, constitutes the heart of the reform, since human rights are explicitly recognized, such as those inherent to the human being, differentiated and prior to the State, which were endowed with the fullest recognition and constitutional protection.

Thus, by constitutional provision, all authorities, within the scope of their competences, were obliged to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity.

Although some aspects of the text initially promulgated have undergone variations, the duty assigned to the authorities remains unchanged, as do the principles to be guaranteed, including progressivity.

The reformed article 1 of the Constitution highlights the obligations of the Mexican State, which some authors divide into generic obligations and specific duties. (5)

Guaranteeing human rights implies the decision of the State to generate measures that allow instituting the legal environments required to make effective the rights of the persons or groups of persons affected, that is, to build either legislatively or institutionally the scaffolding that ensures the full exercise of their rights when they are affected.

This construction is due precisely to the spectrum of international protection that binds our country and to which it transited derived from the commitments signed and the aforementioned reform, which undoubtedly must go progressively, not regressively.

IN ACCORDANCE WITH THE PRINCIPLE OF PROGRESSIVITY.

The first chamber of the Supreme Court of Justice has understood the principle of progressivity in the following terms:

The principle of progressivity is provided for in the first article of the Constitution and in various international treaties ratified by Mexico, these principles are generally called upon to broaden the scope and protection of human rights to the greatest extent possible until they are fully effective, for him, in accordance with the factual and legal circumstances: It is possible to dissect this principle into several demands of both a positive and negative nature; addressed to the creators of legal norms and their applicators, with interdependence of the formal nature of the respective authorities, administrative or judicial. in a positive sense, the principle of progressivity derives for the legislator (whether formal or material) the obligation to expand the scope and protection of human rights; and for the applicator, the duty to interpret the rules in such a way as to expand, as

far as legally possible, these aspects of rights. In the negative sense, it imposes a prohibition of regressivity: the legislator is prohibited, in principle, from issuing legislative acts that limit, restrict, eliminate or ignore the scope and protection that at a certain moment was already recognized for human rights, and the applicator is prohibited from interpreting human rights norms in a regressive manner, that is, attributing to them a meaning that implies ignoring the extension of human rights and their level of protection admitted. Previously. In accordance with this principle, the scope and level of protection recognized for human rights both by the Constitution and by international treaties must be conceived as a minimum That the Mexican State has the immediate obligation to respect (No regressivity) and, at the same time, the starting point for its gradual development (positive duty to progress)*

The same first chamber has considered that the principle of progressivity

It is indispensable to consolidate the guarantees of protection of human dignity, because the observance of this principle prevents, on the one hand, the restrictive interpretation of human rights norms and regression with respect to their meaning and scope of protection and, on the other hand, favors the evolution of these norms to expand their scope of protection.

The same first chamber has held that the interpretation of the content of human rights must go hand in hand with the evolution of the times and the current conditions of life of human rights, so it should not be limited to the express text of the norm where that right is recognized but should strengthen:

With the evolutionary or progressive interpretation made by both the national constitutional courts, as ultimate interpreters of their fundamental norms, as well as with the interpretation made by international organizations, authorized interpreters in relation to specific treaties, in a dialectical relationship.

The second chamber of the Supreme Court of Justice has expressed a similar sentiment:

the principle of progressivity of human rights, enshrined in the first article of the Political Constitution of the United Mexican States, is indispensable for consolidating the guarantees of protection of human equality, because its observance requires, on the one hand, that all the authorities of the Mexican State, within the scope of their competence, gradually increase promotion, respect for the protection and guarantee of human rights and, on the other hand, it prevents them, by virtue of their expression of non-regressivity, from adopting measures that reduce their level of protection.

At the international level, the Inter-American Court of Human Rights has reiterated the provisions of its jurisprudence, to the effect that flexibility in terms of time and modalities for fulfilling its progressive obligations under Article 26 implies, essentially, but not exclusively, an obligation to do, that is, to adopt measures and provide the means and elements necessary to respond to the requirements of effectiveness of the rights involved, always to the extent of the economic and financial resources available for the fulfillment of the respective international commitment acquired. Thus, the progressive implementation of these measures may be subject to accountability

and, if applicable, compliance with the respective commitment acquired by the State may be demanded before the bodies called upon to resolve possible human rights violations. (6)

In turn, the jurisprudential criteria issued by the Supreme Court of Justice of the Nation indicate that the principle of progressivity implies both gradualness and progress. Gradualness is understood as the effectiveness of human rights, which is not achieved immediately, but involves a whole process that involves defining short, medium and long-term goals.

(5) Ortega Soriano, Ricardo Alberto. Et al., Methodology for teaching constitutional reform in the field of human rights. Module 6: Specific duties of prevention, investigation and punishment, Mexico, Human Rights Commission of the Federal District-Supreme Court of Justice of the Nation, Office in Mexico of the United Nations High Commissioner for Human Rights, 2013, p.16, <http://cdhdfbeta.cdhdf.org.mx/wp-content/uploads/2015/05/6-Deberes-especificos.pdf>.

(6) Inter-American Court of Human Rights, Case of Cuscul Pivaral and Others v. Guatemala, Preliminary Objection, Reparations and Costs Fund, Judgment of August 23, 2018, para.81.

While progress means that, the enjoyment of rights must always improve. In this regard, the principle of progressivity of human rights is related not only to the prohibition of regressivity in the enjoyment of fundamental rights, but also to the positive obligation to promote them progressively and gradually, since, as the Permanent Constituent Assembly pointed out, the Mexican State has the constitutional mandate to make all the necessary changes and transformations in the economic structure. Social, political and cultural of the country, so as to guarantee that all people can enjoy their human rights.

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Therefore, the aforementioned principle requires all the authorities of the Mexican State, within the scope of their competence, to increase the degree of protection in the promotion, respect, protection and guarantee of human rights and also prevents them, by virtue of their expression of non-regressivity, from adopting measures that, without full constitutional justification, reduce the level of protection of the human rights of those who submit to the legal order of the Mexican State (7).

The interpretation of the specialized bodies leads us to affirm that all the rights that have been obtained require gradual progress until they are fully exercised, in such a way that there can be no retraction because this would disrupt their validity.

From this perspective, we will analyze the mechanism contemplated in the Hydrocarbons Law in force, to determine its scope.

NEGOTIATION MECHANISMS IN THE HYDROCARBON LAW IN FORCE.

We have established in the previous chapter the regulatory framework of the various procedures existing before the entry into force of the energy reform.

Unlike this regulation, the current Hydrocarbons Law simplifies the methodology to access the considerations, in the case of surface use and occupation. To this end, it provides for in Article 100

(8). That the negotiations and agreements that the assignees or contractors may enter into with the owners or holders of the land, property or rights, including the real, ejido or communal rights, for the use, enjoyment or affectation of the land.

It is important for the purposes of this research, to identify some fundamental points of this mechanism to understand its scope and extract our considerations.

(7) Thesis 2a./J. 35/2019, Gazette of the Judicial Weekly of the Federation, Tenth Epoch, t.I, February 2019, p. 980, under the heading PRINCIPLE OF PROGRESSIVITY OF HUMAN RIGHTS. ITS NATURE AND FUNCTION IN THE MEXICAN STATE.

(8) HYDROCARBONS LAW New Law published in the Official Gazette of the Federation on August 11, 2014 CURRENT TEXT Last reform published DOF 20-05-2021

Hydrocarbons Law - Chamber of Diputados<https://www.diputados.gob.mx> › LHidro_20052.

With this guideline, we can say that the law subject to analysis indicates that it is first necessary for the assignee or contractor to express to the owner or holder of the land his interest to exercise over it the power of use, enjoyment, affectation or acquisition.

To this end, the assignee or contractor must set out its plans for the field, including the potential consequences and benefits, and satisfy the concerns raised.

The forms or modalities of use, enjoyment, affectation or acquisition will be through the figures of lease, voluntary servitude, surface or temporary occupation, sale, exchange or any other that does not contravene the law. Depending on the way in which it is agreed, the owners of the land will have the right to have the consideration cover, among other items, the payment of the affectations of goods or rights other than land, as well as the forecast of the damages that could be suffered due to the project to be developed, calculated according to the usual activity of the property.

It is imperative for this, that the consideration, like the other terms and conditions agreed, be recorded in a written contract and be subject to the guidelines and models of contracts issued by the Ministry of Energy with the opinion of the Ministry of Agrarian, Territorial and Urban Development.

The ejidatarios, communities or comuneros may request the advice and representation of the Agrarian Prosecutor's Office in the negotiations. If within that population group there are people with individual rights, they will be given the consideration directly; If it is a community, it will be through the bodies empowered to do so.

Once the agreement between the parties has been made, the assignee or contractor must submit it to the District Judge in civil matters or the competent Unitary Agrarian Court for validation. This authority will verify compliance with the legal formalities, will order the publication of an extract of the agreement and within fifteen days following the first publication, will issue its resolution, as a judgment, provided that it is not aware of the existence of a pending trial in which the goods or rights subject to the agreement are involved.

In our view, such a procedure reveals an apparent equality of conditions between the purchaser and the owner of the land or property, since, on the one hand, the former externalizes his claim and the latter accedes to it.

However, faced with the expectations of the assignee or contractor, it may happen that the owner of the land refuses to agree on any of the forms or modalities of use, enjoyment, affectation or acquisition. In these cases, the assignee or contractor has expedited the jurisdictional or administrative route to promote the conducive.

In the jurisdictional way, he will go before the District Judge in civil matters or the Unitary Agrarian Court to promote the constitution of the legal servitude of hydrocarbons.

In the administrative channel, it will request from the Secretariat of Agrarian, Territorial and Urban Development a mediation in which said organism will suggest the forms or modalities of acquisition, use, enjoyment or affectation of the land, goods or rights, as well as the corresponding consideration.

After thirty calendar days from the suggestion without consensus, the Ministry of Energy will intervene to request, in turn, the Secretariat of Territorial and Urban Agrarian Development, to carry out the pertinent procedures for the constitution of a legal easement of hydrocarbons. This does not prevent the parties from continuing their negotiations. In both cases the purpose sought is the same: Obtaining the legal servitude of hydrocarbons.

Although these provisions are based on the social function that today covers the concept of property enshrined in article 27 of the federal constitution, departing from the individualistic character that once governed, as analyzed in previous chapters, we must not lose sight of the fact that the regulatory framework should not be applied in isolation, but as the intra-extra-systematic scaffolding underlying values that constitute the fundamental basis of a society.

Based on this premise, the scrutiny of the procedure set out in the Hydrocarbons Law in force leads us to question, on the one hand, whether it is sufficient to meet the requirements of the legal framework existing prior to its entry into force; and, on the other hand, if it guarantees the exercise of the patrimonial rights that could be violated to the third parties adjacent to the properties in which the legal easements of hydrocarbons are constituted.

The reason for such concerns comes precisely from the result of the analysis carried out in the antecedents that exist today. Let's take a closer look at some relevant aspects.

As established by the Law on the matter, the recipients of the aforementioned legal easement are those who exercise power over the goods or land. This ownership legitimizes its possibility of agreeing with the assignee or contractor, the payment of the affectations derived from the exploration and extractive activities, as well as the forecast of damages that could be caused.

The argument to support the inclusion of the aforementioned easement, as can be seen from the opinion issued by the United Commissions on Energy and First Legislative Studies, of the Draft Decree of the Hydrocarbons Law, in the section concerning Surface Use and Occupation, focused

on the need to guarantee the adequate implementation of the energy reform, protect certain disadvantaged groups and provide legal certainty to the parties on the implementation of the agreements concluded.

The opinion itself recognizes the particularity of the innovative figure by pointing out that initially they would constitute negotiations between individuals. This element being, in our opinion, the differentiating point with respect to the other easements, because as analyzed in the second chapter of this investigation, the easements are conceived as charges imposed on one property in favor of another, while, in the legal easement of hydrocarbons, the partial or total use of land or goods, It is characteristic of the figure of expropriation.

Moreover, the critical route proposed in the legal norm (jurisdictional or administrative procedures) for the achievement of its implementation, in the absence of an agreement, makes this circumstance more than evident, since even under the argument, debatable, by the way, of the public utility, the coercibility for its imposition is perceived, a characteristic feature as already said, of expropriation, in which it is the State that claims unilaterally in exchange for compensation. This would not be innovative, were it not for the fact that at present, the status of assignee or contractor extends to individuals, as part of the openness provided in the reform.

Seen in this way, the protection of disadvantaged groups raised in the corresponding opinion can be refuted, when the mercantilist character of the reform emerges, which although it is not the subject of our study, it does affect, since by allowing the use of various means of coercion to decree an easement, that deference in favor of the contractor or assignee confers on them a preferential right "very consistent with the Western way of relating to nature – as an object of domination, of appropriation, of natural resources conceived as exploitable economic goods".

Although, in return, the respective considerations are established through a whole procedure in which even experts, appraisals, contractual formalities are contemplated, this is not an impediment to consider that it contravenes the social function of the right to property that, from the conventional and jurisprudential field is conceived through actions that benefit coordinated cooperation and the community; All the more so when it comes to unfavorable population groups (indigenous, ejidatarios, comuneros), in which the notion of "territory" shapes their worldview.

Conclusion

The sector represents a vital point for Mexico and because of this it is necessary to have a degree of detail in it, safeguarding the interests of all interested parties is vital for the exercise to be achieved optimally. However, when we refer to hydrocarbons there is a lot of collateral damage between the parties since many times the invasion of rights is closely connected and what is meant by that is the situation that arises.

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