

# 1 DOUTRINA SOCIOJURÍDICA

## PUBLIC PARTICIPATION AND LEGAL STANDING

### MEXICAN HIGH COURTS AND THE RECOGNITION OF COLLECTIVE CLAIMS IN URBAN AND ENVIRONMENTAL CONFLICTS

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To the memory of Patrick McAuslan  
1938-2014

*Summary:* 1 Introduction. 2 Standing as public participation in urban and environmental legislation: from quiet changes to prominence. 3 The jurisprudence parade. 4 Final remarks. References.

#### **Abstract**

This article describes changes in the rules that recognize standing before the courts to members of the community that oppose projects that damage the environment in contemporary Mexico. In particular, the article analyses how in the last three decades high courts abandoned traditional notions of legal interest, in order to give access to the courtroom to members of the community that claim their right to an adequate environment. The main finding refers to the fact that such recognition is not an invention of an activist judiciary; rather, it was through changes

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in the statutory legislation that such recognition took place, with the courts simply following those legislative changes. At the same time, the paper stresses that by following this course of action, the courts empowered citizens as much as it empowers judges themselves *vis a vis* the administrative branch of government.

**Keywords:** Access to justice. Mexican legal system. Mexican case-law.

### Resumen

Este artículo describe los cambios que han tenido lugar en las últimas décadas en el orden jurídico mexicano en relación con las condiciones de acceso a la justicia de los miembros de las comunidades que se oponen a proyectos que deterioran la calidad del ambiente. En particular, el artículo analiza el modo en que las altas cortes han abandonado los criterios tradicionales de “interés jurídico”, con el fin de dar acceso a la justicia a miembros de la comunidad que reclaman su derecho a un ambiente adecuado. El hallazgo principal del análisis de la jurisprudencia mexicana es que ese cambio no ha sido el producto de una “invención judicial”, sino que se originó en los procesos legislativos. Lo que han hecho los jueces ha sido simplemente seguir las disposiciones de las leyes que, desde principios de los años ochenta, comenzaron a reconocer como legítimos los derechos de los residentes a oponerse a obras y desarrollos que afectaban negativamente la calidad de la vida en sus comunidades. Finalmente, se muestra que, además de “empoderar” a los ciudadanos, las altas cortes reafirman su propio poder frente al poder ejecutivo.

**Palabras clave:** Acceso a la justicia. Orden jurídica mexicana. Jurisprudencia mexicana

### INTRODUCTION

One of the most insightful contributions of urban and environmental legal scholar Patrick McAuslan was his analysis of the three ideologies that compete in the field of planning and environmental law<sup>1</sup>. Private property, the public interest (as seen from state agencies) and public participation, are indeed the three points of view from which any decision that transforms cities and the environment can be considered. Often times, when one of them prevails, it is at the expense of the other two. It would not be an exaggeration to assert that legal practices in this field are nothing less than the result of the ever changing balance between those points of view. This paper describes a shift of balance between those three ideologies in the case of Mexico, as a result of changes in the rules that recognize standing before the courts to members of the community that oppose projects that damage the environment. In particular we will analyse how in the last three decades high courts abandoned traditional notions of legal interest, in order to give access to the courtroom to members of the community that claim their right to an adequate environment - a process that empowered citizens as much as it empowers judges themselves.

Our subject matter lies at the intersection of two issues that are usually debated in separate contexts. On the one hand, since the nineties, many Latin American countries like Mexico have experienced deep constitutional transformations as part of what has been called the “democratic transitions”. The consolidation of a strong judiciary, committed to the protection of fundamental rights, has been at the centre of expectations towards the law in the region. Neo-constitutionalism is the name of the doctrine that translates these expectations into the realm of legal scholarship. On the other hand, the problem of standing, i.e. the question of who is entitled to mobilize the judiciary, is a central issue in planning and environmental law. Organisations

<sup>1</sup> McAUSLAN, Patrick. The ideologies of planning law. *Urban Law and Policy* 2, p. 1-23, 1979; McAUSLAN, Patrick. *The ideologies of planning law*. London: Pergamon Press, 1980.

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that defend environmental rights have been demanding the recognition of standing in order to enforce environmental regulations through the courts when governments fail to do so<sup>2</sup>. Both issues have become salient in Mexican legal practice and there is no doubt that this way public participation has gained power *vis à vis* the ideologies of private property and administrative power.

In July 2011 the Mexican Constitution<sup>3</sup> was amended in order to introduce class actions as well as a profound reform of the *amparo* suit, which is the main remedy that Mexican law provides for the protection of fundamental rights. One of the main features of that reform was the broadening of the possibilities for having access to the *amparo*. The rigid rules of the “legal interest” that was necessary to show in order to file an *amparo* are being replaced with the recognition of a “legitimate interest” (also called “diffuse interest”)<sup>4</sup>. This was seen by progressive legal scholars as a great innovation and, not surprisingly, private businesses’ organisations declared their fears that this would open the door for opportunistic litigation that would jeopardize economic development.

However, and this is the main point in this paper, the fact is that the widening of the concept of legal interest had begun many years before, when urban (and later environmental) legislation granted neighbours a right to oppose developments that damaged their environment, which paved the way for a change in judges’ attitudes towards the question of standing in urban and environmental disputes. As will be seen, even if McAuslan was at that time engaged mostly in Africa and had not even visited Mexico, he was part of that process.

In the first section of this paper I briefly review the legislative changes that in 1983 and 1996 granted neighbours what the courts would

describe as a “right to preserve the residential environment” and then as a mechanism to defend the environment as a “common good”. In the second section I analyse the way federal courts interpreted those legislative changes through *tesis de jurisprudencia*, which represent the main form of judicial interpretation in Mexico. Those “thesis” are the centre of this paper because our intention is to present the recognition of standing rights as a process of cultural change. As we will see, the process had at least two salient features. First it took a long time, almost three decades, for the federal high courts to recognize the full legal consequences of something that enacted legislation had laid down quite clearly since the early eighties. And second, it looks as a straight forward process of making explicit what legislation already says. Whereas most public interest lawyers in Mexico would say that this has been a painful process, in which proving an environmental damage has been at times an impossible mission, when one reads the Mexican *jurisprudencia* on the subject it seems as a natural, even painless, process. We will come back to this paradox in the conclusions.

Now it is important to clarify the meaning of the word *jurisprudencia* in the Mexican context. Legal dictionaries authorize to use the English word “jurisprudence” to refer to “judicial precedents considered collectively”<sup>5</sup>, so we will use the Spanish and the English word as synonymous. In any case, it is important to bear in mind that *jurisprudencia* is recognized as a “source of law”. There is a widespread belief that in legal systems where the Romano-Germanic element predominates, as in the case of Mexico, the judiciary does not have a meaningful role in the creation of the law. Indeed, one of the criticisms that young legal scholars direct towards courts is that they are too loyal to the texts of enacted legislation (Concha and Caballero, 2004). However, the truth is

<sup>2</sup> ALMAGRO NOSETE, José. Tutela procesal ordinaria y privilegiada (jurisdicción constitucional) de los intereses difusos. *Revista de Derecho Político*, n. 16, invierno 1982; LANDI, Pasquale. *La tutela processuale dell'ambiente (art. 18 della legge 8 luglio 1986, n. 349)*, Padova: Cedam, 1991; AGUIRREZABAL GRÜNSTEIN, Maite. Algunas precisiones en torno a los intereses supraindividuales (colectivos y difusos). *Revista Chilena de Derecho*, v. 33, n. 1, p. 69-91, 2006; CAFFERATTA, Nestor. Breves reflexiones sobre la naturaleza del daño ambiental colectivo. *Revista CEJ*, 2005.

<sup>3</sup> *Constitución Política de los Estados Unidos Mexicanos*, as amended, Diario Oficial de la Federación [DO], 5 de Febrero de 1917.

<sup>4</sup> Most authors equate “legitimate interest” with “diffuse interest” (Schmill, 2011). For us, the latter indicates more clearly the collective nature of the grievances that are at stake. Of course there is a doctrinal debate around these categories which falls outside the scope of this paper.

<sup>5</sup> Black’s Law Dictionary, 2000.

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that judges are far from being automats that apply the law in a consistent way and we will try to illustrate this throughout the chapter.

Let us start by pointing at one of the most relevant features of Mexican *jurisprudencia*, i. e. the fact that it appears as a collection of legal formulae, called “thesis” (or *tesis*), that bear no clear relationship with the cases that prompted them. As opposed to the doctrine of precedent in the Common Law tradition, our *jurisprudencia* appears under the guise of abstract formulations, entirely de-contextualized. That is one of the reasons why it is frequently argued that it does not work as precedent, i. e. because it is impossible to compare a current case with the one that motivated a previous judicial decision<sup>6</sup>.

On the other hand, there are clear rules, established in enacted legislation as to when a thesis is compulsory for the judiciary as a whole – typically, it takes five cases in which a thesis is sustained in order for it to be compulsory.<sup>7</sup> However, the fact is that judges at all levels refer to all sort of thesis in order to uphold their arguments. And they invoke *jurisprudencia* as if it was enacted legislation. I will try to show that, in spite of its abstract and de-contextualized character, reading *jurisprudencia* is full of surprises.

## 2 STANDING AS PUBLIC PARTICIPATION IN URBAN AND ENVIRONMENTAL LEGISLATION: FROM QUIET CHANGES TO PROMINENCE

Let us see how the question of standing in urban and environmental conflicts in Mexico entered the legal system. In May 1976 Congress passed the Human Settlements General Act (HSGA, or *Ley General de Asentamientos Humanos*)<sup>8</sup>. This was the first time that urban problems were the subject of a comprehensive law at national level<sup>9</sup>. Its title reveals the intention of the Mexican

government to be in tune with the international debate. In fact it was enacted just before the first UN World Conference on Human Settlements. It included public participation as one of the aspects that should be present in the planning process. Somehow, those who drafted it had the idea that the expertise of planners and other civil servants was not enough to give legitimacy to urban plans – a widespread view in planning circles around the world anyway. However, there were no precise mechanisms to make public participation compulsory or to guarantee that the affected populations were taken into account.

In 1983 it was necessary to revise the HSGA as a result of a constitutional amendment that had just included new provisions to give way to a “municipal reform”. Local governments were granted explicit powers and became the main actors in the urban planning process. Since then, section 115 of the Constitution became the symbol of the most ambitious decentralization programme in modern Mexico. Thus the government prepared a bill amending the HSGA in order to get the planning process in tune with the new municipal regime.

At that time, the dominant political party in the country (the PRI) had such an ample majority in Congress that it did not need to convince or negotiate with other political forces to pass almost any legislation. Thus in November 1983 President Miguel de la Madrid sent the bill to amend the HSGA and three months later the new version was in force. Apart from changes in the planning process that fall outside the scope of this paper, the new act included a provision that came up from the team of lawyers of the Ministry of Urban Development and Ecology – which included a former student of McAuslan’s. There was no public debate around the bill, but everyone who took part in the process thought

<sup>6</sup> ZERTUCHE GARCÍA, Héctor Gerardo. *La jurisprudencia en el sistema jurídico mexicano*. México: Porrúa, 1992; CARMONA TINOCO, Jorge Ulises. La jurisprudencia obligatoria de los Tribunales del Poder Judicial de la Federación. *Boletín Mexicano de Derecho Comparado*, año XXVIII, n. 83, mayo-agosto 1995; MAGALLÓN IBARRA, Jorge Mario. *Los sonidos y el silencio de la jurisprudencia mexicana*. México: UNAM, 2004; VÁZQUEZ ROBLES, Guillermo Gabino. *Artesanos de certezas. Un modelo teórico sobre el discurso jurisprudencial*. Tesis. (Doctorado en Derecho)-Facultad de Derecho, UNAM, Ciudad de México, 2012.

<sup>7</sup> See *Ley de Amparo*, section 172.

<sup>8</sup> *Diario Oficial de la Federación*, May 26th, 1976.

<sup>9</sup> There were planning laws at state level since the thirties, but they referred mostly to the opening of new roads for urban expansion. See generally AZU-ELA, Antonio. *La ciudad, la propiedad privada y el derecho*. Mexico City: El Colegio de México, 1989.

that it was a good idea to strengthen public participation by granting citizens a right to oppose developments that would infringe the rules of an urban plan and brought with them a loss in the quality of life in the neighbourhood. The result was a section 47 that read as follows:

When constructions, subdivisions, changes of land use, or other developments that contravene laws, regulations, or urban development plans are taking place and they originate a deterioration of the quality of life in human settlements, the residents of the area that are directly affected will have the right to demand the corresponding suspensions, demolitions or necessary modifications, so that the rules in force are complied with. Permits that contravene legislation, regulations, and urban development plans will be null and void and the responsible civil servants will be punished according to the law.

This right will be made effective before the corresponding authorities or their immediate superiors, who will listen to the neighbours and the affected parties, and will resolve in no less than thirty days after the complaint was filed.<sup>10</sup>

In the next section we will see how this rule was interpreted by federal judges in the following decades. For the moment it suffices to say that its adoption was neither the product of a social demand nor the subject of a public deliberation. It came out of the federal bureaucracy, almost as a prank of low level civil servants, and did not attract the attention of the media or even the specialized literature. It was only years later that neighbours' organizations began to use it in order to oppose developments.

During the next decade the Mexican political environment had changed radically. After the earthquake of 1985, social mobilisation coalesced in the formation of a wide variety of organizations. An environmental movement began to emerge and in 1987 a new environmental legislation was being discussed in Congress. This time the government had to listen to several social organizations in order to give legitimacy to the legislative process. As a result, the Ecological Balance and Environmental Protection General Act (EBEPGA or *Ley General del Equilibrio Ecológico y la Protección al Ambiente*) came into

force in February 1988. No doubt the most ambitious piece of legislation in Mexican environmental law, in its first version it included some instruments for social participation, such as the right to have access to the information of projects in the process of being subject to an environmental impact assessment. This attracted the involvement of many organizations throughout the country that demanded changes in development projects and sometimes their cancellation.

Nevertheless, the new environmental legislation did not provide for a remedy that would make compulsory for the government to reconsider projects that had already been authorized. Thus, lawyers representing affected communities kept using article 47 of the HSGA. Few years later, with the creation of a new Ministry for the Environment, Natural Resources and Fisheries in late 1994, new spaces for public participation were opened up and environmental NGOs began having an unprecedented voice in the crafting of public policies. In this context, a public consultation process was started in March 1995 in order to revise the EBEPGA. One of the demands of NGOs was the introduction of judicial procedures to carry out class actions, so that every person could have the right to challenge in court projects or government decisions that affected the environment. The consultation process was so intense and conflictive, that it took almost eighteen months to get the bill through Congress. On several occasions, the process was halted because there was no consensus about several issues, the most difficult being precisely the recognition of diffuse interests and the involvement of courts in environmental conflicts. Although the original demand of the organizations did not prosper in full, in the end a consensus was reached in order to include a rule similar to article 47 of the HSGA. With an apparently innocent twist: It would be explicit that citizens' complaints start a process of administrative review in which they were formally recognized as plaintiffs. The legal consequence of this is that the conclusion of such procedure can be challenged in courts. This became section 180 of the EBEPGA:

<sup>10</sup> Section 47, Human Settlements General Act. *Diario Oficial de la Federación*, February 7th, 1984.

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Whenever works or activities that contravene this Act, land use plans, the regulations of natural protected areas, or any regulation derived from the same Act, individual and collective persons of the affected communities will have the right to challenge the corresponding administrative acts, as well as the right to demand that the authorities take the necessary actions in order to comply with the applicable rules, provided that such persons demonstrate that those works or activities originate or may originate a damage to natural resources, wildlife, public health or the quality of life. To this effect, they must file the procedure of administrative review as established in this chapter.

Once this text was accepted by the government, environmental NGOs saw that as a victory and the bill became law with a unanimous vote in both the Senate and the House of Representatives (*Cámara de Diputados*). There would be much to be said about this unanimity, which at that time was a symptom of the influence of environmental NGOs in Mexico's public life.<sup>11</sup>

For the purpose of this paper, what matters is to stress the contrast between the amendment of the HSGA in 1983, that passed largely unnoticed, and that of the environmental legislation one decade later, in an episode that attracted the participation of social organizations that exerted an unprecedented influence in the crafting of a legislative piece.

These legislative changes did not create new judicial procedures such as those that recent constitutional amendments established in 2011. However, even if they can be seen as “backdoor” adjustments of established procedures, they opened the way to what urban and environmental litigation is today in Mexico: dozens of cases throughout the country in which judges are granting injunctions that halt projects while they consider whether they infringe or not urban or environmental legislation. The novelty is, of course, that they have been mobilized by social organizations. Unfortunately there is no statistical record of this activity, but to any observer it is obvious that this is a new, and very relevant, area

of litigation in contemporary Mexico.<sup>12</sup>

## 3 THE JURISPRUDENCE PARADE

There can be no doubt that, since the early eighties, reforms in the statute book granted rights to members of a community to demand the compliance of urban regulations and plans. However, the actual recognition of those rights by the judiciary required a change in the way judges saw legal standing. Public interest lawyers who tried to use the new legal devices in the nineties complained that judges were reluctant to recognize what in continental Europe is known as “diffuse interests”. Judges who come from the private law tradition required the existence of an individual holding a right that has been violated by another individual. In turn, administrative judges depended on another simplified dichotomy, i.e. the conflict between someone who governs in the public interest and a “governed” person, both linked by an “administrative act” by which the former affected the latter. In environmental conflicts, both were quite strict as to the need to prove the damage to the environment. As a result, it took almost three decades to the Judiciary to recognize the full implications of what the statute established with seemingly obvious clarity. Such recognition did not take place with one single decision, but in a long and cumulative process. In what follows we will examine fourteen theses of *jurisprudencia* through which federal courts made sense of the issue of legal standing for the protection of the environment and the quality of life in urban areas.

A “good” *tesis de jurisprudencia* consists of a rule plus an explanation. It usually makes a reference to a legal norm (be it a general principle of law, a provision in the Constitution or in a piece of legislation), then it offers an argument about the correct way of interpreting it. Between 1993 and 2011, federal courts issued fourteen jurisprudence theses that refer directly to the rights of neighbours to oppose a project that affects their environment. We will see that although they did

<sup>11</sup> AZUELA, Antonio. *Visionarios y pragmáticos*. Una aproximación sociológica al derecho ambiental. Mexico City: UNAM/Fontamara, 2006.

<sup>12</sup> For a first statistical account, see AZUELA, Antonio; SAAVEDRA, Camilo; HERRERA, Carlos. *A tumult of rulings*. A quantitative exploration of the legal outcomes of urban litigation in two judicial contexts in Mexico. Working Paper, Lincoln Institute of Land Policy. Cambridge, Mass, 2014.

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not do so in an outright way, in the end they did not find difficult to sustain such right, as it was clearly granted, first by the legislation on Human Settlements, and then by the environmental legislation.

The first time this happened was in 1993, nine years after the inclusion of section 47 into the HSGA. The thesis reads:

Section 47 of the Human Settlements General Act *protects a legal interest* to demand the suspensions, demolitions or necessary modifications, in order for the applicable rules to be complied with, when constructions, subdivisions, changes of land use, or other developments that contravene laws, regulations, or urban development plans and programmes are being carried out and they originate a deterioration of the quality of life of human settlements. This *right* can be exercised by residents that are directly affected before the corresponding authorities, who will be obliged to resolve in less than thirty days [...] (emphasis added).<sup>13</sup>

At first sight, this thesis simply reproduces (and quite literally) the text of the HSGA. But it also explains that, by saying what it says, the HSGA is *protecting a legal interest*. There is neither mystery nor hard reasoning, only a doctrinal explanation of the legal implication of a text that the Congress had approved ten years before. That was how the Supreme Court recognized for the first time that neighbours are entitled to legal standing to demand the administrative authorities to protect their quality of life. It is true that such recognition was rather limited, as it required that neighbours were *directly* affected by the works in progress. But it was nonetheless the first step in a clear direction; and our point here is that the Supreme Court was just making explicit the procedural implications of a substantive rule that was part of the statute book.

It is interesting to note that the justice responsible for drafting the opinion, Miguel Montes, was not a judge by career, but what can be called a “political appointee” –something that has never pleased the “judicial family”<sup>14</sup>. Years before,

he had served as the first Attorney for Consumers’ Protection in the Federal Government,<sup>15</sup> so it is easy to assume that he had been exposed to arguments in favour of widening legal standing in that area, something that would be difficult to expect from more traditional judges.

The second thesis came in 1994 and was issued by a Circuit Tribunal, the same year in which a Constitutional amendment transformed the Supreme Court in such a profound way that most legal scholars say that since then it became a real Constitutional Court, following the trend of other Latin American countries in the post-authoritarian era. However, that thesis simply followed the line that the previous one had established. It just added that the law recognizes a right to neighbours “[...] in front of inadequate planning or erroneous decision making in urban development issues and admits [...] [their] ability to defend the environment where they live”. Also, it removes procedural obstacles by asserting that the recognition of a legal interest in the cases defined by the HSGA only requires that “[...] the plaintiffs demonstrate they reside in the place where the change of land use is to take place”.<sup>16</sup>

Two aspects of this thesis are worth mentioning. On the one hand, as we have said, most tesis de *jurisprudencia* in Mexico are quite hermetic as to the conflict that gave rise to them. But thanks to Google, that oracle of our times, in this case it is possible to know what was at stake. The case involved a plot of approximately 1000 square meters in a low-income residential area in Mexico City, in which the owner wanted to establish a small workshop, so he obtained a zoning change that was challenged by a group of neighbours. It is disappointing to learn that, in the end, the change of land use was authorized because the neighbours did not show up at the meeting that was organised to hear them.<sup>17</sup> This allows us to see that relevant thesis may not have an obvious impact upon the conflicts that prompted them in

<sup>13</sup> Registro 206750. 8a. Época; 3a. Sala; Semanario Judicial de la Federación; Tomo XI, Febrero de 1993, p. 6.

<sup>14</sup> In fact, judicial functionaries in Mexico use that expression to refer to those who have made their careers within the judiciary.

<sup>15</sup> Or *Procurador Federal de Protección al Consumidor*.

<sup>16</sup> Registro 210188 8a. Época; T.C.C. Semanario Judicial de la Federación; Tomo XIV, Octubre de 1994, p. 282.

<sup>17</sup> Acuerdo del Secretario de Desarrollo Urbano y Vivienda, Juan Gil Elizondo, 23 de enero, 1996.



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the first place.

On the other hand, the thesis does not mention the previous one, i.e. that of Justice Miguel Montes, which would have helped as a source of authority because it was also issued by the Supreme Court. This may seem strange in the context of Mexican legal culture, in which lower courts are particularly deferential<sup>18</sup> towards the Supreme Courts' jurisprudencia. Most probably, the authors of this new thesis were not aware of the previous one; the electronic system called IUS that some years later made so easy the access to jurisprudence thesis had yet to be created.

Two years later, in 1996, a new thesis appeared, but it went to the opposite direction. A Circuit Tribunal, also located in Mexico City, bluntly ruled that

[...] residents of a neighbourhood in which someone tries to establish a business lack legal interest to challenge any act regarding such [commercial] land use, because the law does not recognize to them any right to protection for the simple fact of residing in the same area; therefore, closing down a business or cancelling a permit are powers that are vested in the [administrative] authority, who in every case is responsible for any behaviour against the law in force<sup>19</sup>.

This thesis appeared the same year in which the reform of environmental legislation (see section 1 *supra*) had included an expanded version of the right originally established by the HSGA, a process that was widely reported by the media. What is remarkable is that this new thesis ignored not only the two previous ones but also the very existence of section 47 of the HSGA. This may be due to the fact that litigants did not invoke the HSGA, which at least would have forced the judges to explain their position towards that piece of legislation. At any rate, by ignoring the HSGA they were expressing a widely held position of Mexican judges in relation to standing.

The fourth thesis, this time from the Supreme

Court, recognized that the HSGA grants a legal interest to neighbours in the same way as the two first thesis did. But it also made clear that, before they could file a writ of *amparo* before a federal judge, the plaintiffs should seek an administrative review before the corresponding government agency. However, the interesting turn in this thesis is that it gives a name to the right established in section 47, by saying that it “[...] grants a *right to preserve the residential environment* to the neighbors of the residential area affected by works that originated a deterioration in the quality of life of human settlements [...]” (emphasis added).<sup>20</sup>

Although this was still far from a full recognition of the right to an adequate environment, it is interesting to note that the Supreme Court had decided to use the language of rights for something that had begun as a simple procedural device – i. e. having access to courts. Only two weeks before that thesis was approved by the plenary of the Supreme Court, the Mexican Congress had passed, with a unanimous vote in both houses,<sup>21</sup> the amendments to the environmental legislation that had been debated for more than eighteen months. As we explained in the previous section, those reforms expanded the right that had been originally established by the HSGA. Such an unusual situation (a unanimous vote in a context of political pluralism) was possible only because both environmental NGOs and entrepreneurial organizations had expressed their satisfaction with the bill. And the most debated issues of that legislative reform were precisely the new instruments for public participation in environmental governance, i.e. public hearings for major development projects, public access to environmental information, and of course, legal standing to oppose projects that infringe environmental regulations. If it is worth noticing that our thesis did not mention the environmental legislation, it is remarkable that the next the-

<sup>8</sup> As Ansolabehere (2007) has shown in an insightful comparative study of the Argentinian and the Mexican judiciary, in the latter there is a much greater “discipline” of lower judges and courts *vis à vis* the Supreme Court.

<sup>19</sup> Tesis Aislada, I.4o.A.146 A, Semanario de la Suprema Corte de Justicia y su Gaceta, novena época, tribunales colegiados de circuito, IV, septiembre 1996, p. 661.

<sup>20</sup> Registro: 199493 9a. Época; Pleno; Semanario Judicial de la Federación y su Gaceta; Tomo V, Enero de 1997, p. 6.

<sup>21</sup> The jurisprudence thesis was issued on November the 26 and the sessions of the Senate and the House of Representatives took place on the 26th and 30th of October, respectively.

sis in our saga goes in the opposite direction.

It was in 1999 that a Circuit Tribunal based on the highly industrialized northern State of Nuevo León, issued a thesis that restricted neighbors legal standing in these matters. The Tribunal ruled that neighbors had to demonstrate that a direct and personal offense (or *agravio*) had been inflicted to them. Also, it implied that there was no law that granted such rights to neighbors.<sup>22</sup> Like the thesis of 1996, it offered neither a new interpretation of enacted legislation nor to the other three jurisprudence thesis that had recognized those rights. It simply did not mention them, a clear indication that there was still a resistance within the judiciary to recognize legal standing beyond traditional notions of legal interest. However, that was the last time that a jurisprudence thesis overtly denied the rights of citizens to object projects in their communities.

Beyond the apparently inconsistent behavior of Mexican federal courts around this issue, we begin to see a pattern: when a court chooses to deny legal standing to neighbors it simply refrains from making any reference to the legislation and the jurisprudence that grants such standing - it remains to be determined whether that is the result of authentic "ignorance" of the law or of a deliberate strategy. On the other hand, theses that recognize standing always make an explicit reference to legislation. This confirms what socio-legal scholars has been saying about judicial culture in Mexico during the last years: the main source of legal authority is "*la ley*", i.e. statutory legislation.

Sometimes this deference to the legislative extends to by regulations passed by the Executive (or *reglamentos administrativos*). That is the case of our sixth thesis which was issued in 2001 by a Circuit Tribunal at the northeastern state of Tamaulipas. This new thesis does not mention previous theses or urban or environmental legislation. It only quotes the state Building Code (*Reglamento de Construcciones*) and points out that, according to it, in order to authorize a land

use change, "[...] it is necessary to notify the neighbors that might be affected with such change", so that they can challenge the permit through an administrative review.<sup>23</sup> Like other thesis, this one does not enter into the grand debate about "diffuse interests"; it only repeats what an administrative by-law already says: neighbors must be notified of land-use changes.

Indeed, one may wonder why justices in that Tribunal imagined that their reasoning in the case deserved to become *jurisprudencia*, i.e. that "source of law" that comes out from judicial wisdom in hard cases or when obscure legal texts demand a special interpretive effort. In fact, there are many jurisprudence theses that simply repeat what a piece of legislation establishes. According to several sources, there was a huge increase in their numbers after the Judiciary Council (or *Consejo de la Judicatura*), a body created in 1994 to professionalize the judiciary, established certain "indicators" to measure the performance of federal judges. One of such indicators was the number of jurisprudence theses that came out of each court. Very much like academics suffering the "publish or perish" syndrome, judges began to present as thesis pieces of legal arguments even if they added nothing to the clarification of the law.<sup>24</sup> This may look as an irrelevant episode, but it allows us to be aware of the changing institutional conditions under which *jurisprudencia* as a source of law is created. Moreover, the case leads us to two further points: one is that the idea of public participation has got as far as the realm of by-laws at state level. The other is that not all judges were hostile to citizens' involvement in governmental decisions with urban and environmental impacts; for some of them a local by-law was enough and they needed neither national legislation nor *jurisprudencia* coming from the Supreme Court in order to protect neighbors' rights.

A new thesis appeared in 2003. This time the author was a Circuit Tribunal based at the State of Colima, on the pacific coast. There was

<sup>22</sup> Instancia: Tribunales Colegiados de Circuito; Semanario Judicial de la Federación y su Gaceta Tomo: X, Septiembre de 1999 Tesis: IV.3o.A.T.23, p. 816.

<sup>23</sup> Registro: 188059, 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XIV, Diciembre de 2001, p. 1.827.

<sup>24</sup> Personal communication of a former member of the Judiciary Council (Consejo de la Judicatura) that asked to remain anonymous.

nothing new in this thesis as it follows the one of 1997 in which the Supreme Court declared that there was a “right to preserve the residential environment”. It is interesting only because it reproduces, *verbatim*, the Supreme Court thesis without making any reference to it. And then it adds some rather obvious procedural implications applicable to the State of Colima.<sup>25</sup> It goes without saying that these are not academic texts in which plagiarism could be a problem. But it is difficult to understand why a Circuit Tribunal, instead of appealing to the *jurisprudencia* of the Supreme Court as a source of authority, simply reproduces the very same text as if it was of its own inspiration. Maybe the law clerk who drafted it never imagined that IUS, the electronic data base of Mexican *jurisprudencia*, would become so popular that anyone would notice his own little prank; one only wishes that his or her superiors, i.e. the justices that signed the “new” thesis did that without realizing what they were doing.

Thesis number eight in our list is just one more in the same line: it declares unconstitutional the amendment of a transit by-law in the State of Nuevo León because the public enquiry did not follow certain procedures. This is another indication that the idea of public participation began to get hold in Mexican legal culture. In contrast, thesis number nine, from a Circuit Tribunal in Mexico City in 2007, brought with it an interesting innovation. Eight years before, the Constitution had been amended in order to recognize an “adequate environment” as a fundamental right.<sup>26</sup> This thesis is important because it links the question of standing to the existence of such right.

The legal interest that makes possible to proceed with the *amparo* suit can be identified with a right that derives from a legal norm and becomes real in a certain person, giving that person the power to make a legal claim to a public authority. In this context, there is a legally protected right to preserve the residential envi-

ronment that derives from article 4<sup>th</sup> of the Constitution, which guarantees an adequate environment for the development and welfare of persons as a *fundamental right erga omnes*. Such right *implies a collective action* both in a substantive and a procedural aspect, related to section 57<sup>27</sup> of the Human Settlements General Act, which grants affected neighbors a right to demand from the administrative authority the adoption of security measures as well as sanctions, when building activities, land subdivisions or other forms of developments that infringe urban development regulations. Therefore, there is a legal interest of a residents’ association to promote an *amparo* against the permit to install a station for gas distribution, provided that such association demonstrates that it has sought remedy from the administrative authority, without having obtained a clear, coherent, and categorical resolution to its demand (emphasis added).<sup>28</sup>

Even if the practical consequences appear to be the same as in other cases (the cancellation of a project), the way it is defined by the judge introduces a wholly different legal dimension to the case. In times when neo-constitutionalism as a dominant legal doctrine proclaims an evident superiority of human rights law over statutory legislation, this is an important step. It is not only that some “secondary” legislation grants rights to a certain social category (neighbors); such legislation is an instrument of a fundamental right which is explicitly recognized in the constitutional text. Also, it is interesting to note the use of the expression “collective action”, which shows a clear intention to overcome the individualist perspective that is so deeply ingrained in the Mexican judicial tradition.

There is another interesting aspect if this thesis. Even if it was issued in the context of a growing public presence of environmental NGOs, that ten years before have obtained the victory of article 180 of the environmental legislation, the latter is not mentioned in the thesis. The legal reference is still the good old Human Settlements General Act – the same piece of legislation that many environmental activists have blamed for

<sup>25</sup> Registro: 183918. 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XVIII, Julio de 2003, p. 1.030.

<sup>26</sup> Section 4 of the Mexican Constitution, amendment published in the *Diario Oficial de la Federación*, June the 28th, 1999.

<sup>27</sup> The enactment of a new Human Settlements Act in 1993 had moved our provision from section 47 to section 57.

<sup>28</sup> This is a free, rather than a literal, translation. Registro: 173002. 9a. Época; T.C.C.; Semanario Judicial de la Federación y su Gaceta; Tomo XXV, Marzo de 2007, p. 1.694.

<sup>29</sup> AZUELA, Antonio. *Visionarios y pragmáticos*. Una aproximación sociológica al derecho ambiental. Mexico City: UNAM/Fontamara, 2006.

subordinating environmental causes to the needs of urban development<sup>29</sup>.

There is a thesis in 2010 that we will not examine here. It does no harm to our subject, but it does not add anything interesting either. The fact is that its text is wholly incomprehensible, impossible to translate, indeed.<sup>30</sup> This takes us to the four theses that, in 2011, finally recognized the full effects of what had begun in 1983 with section 47 of HSGA and had acquired momentum with the 1996 reforms to the environmental legislation.

The case that prompted these theses was typical of the public interest litigation of our times in Mexico: the most important environmental NGO devoted to the legal defense of the environment, i.e. the Mexican Center of Environmental Law (CEMDA),<sup>31</sup> had won an administrative procedure as a result of which the federal Secretary of the Environment and Natural Resources invalidated a permit to carry out a tourist resort in the State of Quintana Roo, on the Caribbean coast. The private corporation that was affected with that administrative decision filed an *amparo*. There was, at last, an opportunity to establish a connection between a relevant case in the public space and jurisprudence as a “source or law”. The Supreme Court did not miss the opportunity to deliver not one but four theses. José R. Cossío, one of the Court’s justices that had been striving for innovative practices in such a conservative environment stated the thesis that reads as follows:

[...] it can be seen that [the intention behind section 180 was to] recognize standing to seek for administrative review to any person of the concerned communities; such concern must consist of a current or imminent harm to natural resources, wildlife, public health, or the quality of life. In this way, the inclusion of such right into the legislation represents a step forward in the recognition of the legal interest of persons to challenge administrative acts even if they are not addressed to them, [...] this is about the implementation of a de-

fense mechanism for the protection of *diffuse interests* that constitute a component of the vertical efficacy of a fundamental right, that amounts to the constitutional obligation of the availability of authorities and mechanisms that guarantee the sustainability of the environment, which in turn would lead to the indirect protection of the right to an adequate environment that is established in the Constitution...and consequently to the preservation of the ecosystems as common goods, the protection of which is of public interest (emphasis added).<sup>32</sup>

This way, fifteen years after section 180 of EBEPGA, and almost three decades after section 47 of the HSGA, the Supreme Court acknowledged that there was a legislative recognition of *diffuse interests*. The innovation of this thesis resides in that it establishes a clear link between two legal concepts: one is the concept of diffuse interest that is used as the foundation for expanding the subjects that can mobilize the judicial apparatus. The other is the right to an adequate environment that had been included in the text of the Constitution. The result is that the environment as a fundamental right becomes enforceable by the courts at the requirement of concerned citizens. Moreover, what in previous theses had been a right to “preserve a residential environment” is expanded to a more ambitious concept of ecosystems as “common goods”.

The second thesis that justice Cossío drew from the same case dealt with the problem of demonstrating the damages to the environment, and it established that

[...] the damage to natural resources, the wildlife, public health of the quality of life, has to be proven during the administrative review, and therefore it is not a requirement to start such review [...] the existence of such damage is part of the matter of the case.<sup>33</sup>

If this thesis is taken seriously, it makes illegal for governmental authorities to refuse to substantiate an administrative review on the grounds that the environmental damage has not been

<sup>29</sup> Legibility of judicial rulings is something that only the elite of the legal field recognizes as a problem. As a result, in recent years, judges have been subject to training in legal argumentation.

<sup>30</sup> The *Centro Mexicano de Derecho Ambiental* was created in 1993, in the context of the negotiations leading to the NAFTA and it is the most important public interest litigation NGO in environmental issues in the country.

<sup>32</sup> Registro: 160160. 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro VII, Abril de 2012, Tomo 1, p. 874.

<sup>33</sup> Registro: 160161. 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro VII, Abril de 2012, Tomo 1, p. 873.

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proven.

The third thesis in the same case states that the justification for the compulsory character of the administrative review is clear in the “statement of purpose” (or *exposición de motivos*<sup>34</sup>) of the 1996 reform to the LGEEPA that introduced section 180.

As it can be read in the statement of purpose, the fact that the affected communities resort to an administrative review is closely related to the good that is protected by the law (the environment [...]), as there is a public interest in its protection [therefore] the legislator provided an adequate justification of the reasons and motives that led him to establish the right [to be heard in administrative review].<sup>35</sup>

It is important to keep in mind that having access to an administrative review automatically makes the involvement of a federal judge possible, because regardless the content of the decision that comes out of the review, it is an administrative act that can be challenged in court by the person who started it.

Finally, the fourth thesis in this case (fourteenth in our general account) makes clear that “[...] section 180 does not violate the right to legal security established in [...] the Constitution.”<sup>36</sup>

That was the first time that the Court made a special reference to the status of section 180 in relation to constitutional principles of due process. That was a clear answer to allegations against the widening of the rules of standing made by lawyers working for investors. Against every regulation that limits economic activity they usually argue that legal security (or *seguridad jurídica*) should be paramount to any other consideration. This time, private interests were restricted but not by strengthening government power, but by means of a combination of citizens’ rights and judicial intervention. McAuslan’s triangle of state/community/property had adopted a new and unpredicted configuration.

One of the most salient aspects of these four

theses is not their content but their context. Whereas the previous theses passed unnoticed beyond those directly concerned with the conflict, this time the media reported what the Supreme Court had just done. Notably, the Mexican Green Party,<sup>37</sup> proudly announced that this *jurisprudencia* was the direct result of their initiative, as some years before one of its members had been part of a Congressional Committee that suggested minor changes to section 180, as if it were completely new! The fact is that by 2011, there was a “public” for whom this was relevant news. However small that public may be, its presence in the public agenda means something. What we want to stress here is the sharp contrast between this relatively wide publicity and the almost secret way in which section 47 of HSGA was enacted three decade later.

As we have already pointed out, in 2011 there was also a constitutional amendment that recognized a wide definition of legal interest for the *amparo* suit, which was presented as a completely new issue in the life of the Judiciary. We have seen that judicial practice had been recognizing this at least since 1993. The last four theses of that same year we have just described may be seen as the “dress rehearsal” of a new era in the capacity of citizens to mobilize judges to defend their environment.

## 4 FINAL REMARKS

Let us summarize our story by addressing three questions: What was the main outcome of the Mexican *jurisprudencia* on standing in urban and environmental conflicts; how did that happened; and what are its probable social consequences. It should be clear that, by means of their “thesis”, Mexican high courts have recognized new forms of standing that allow residents to participate actively in the enforcement of urban and environmental law. What started in the early nineties as a mechanism for the protection of the quality of life in the narrow world of neighbourhoods, in 2011 had become the subject

<sup>34</sup> *Exposición de motivos* is the document that accompanies a bill in Congress and explains its purposes.

<sup>35</sup> Registro: 160162. 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro VII, Abril de 2012, Tomo 1, p. 873.

<sup>36</sup> Registro: 160163. 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro VII, Abril de 2012, Tomo 1, p. 872.

<sup>37</sup> A political party that has been condemned by many Green Parties over the world because of its support to death penalty.

of a much wider definition in terms of environmental rights as collective interests. Whereas it would be a mistake to assume that *all* judges will follow that *jurisprudencia*, the fact is that the higher levels of the judiciary have recognized diffuse interests as part of the law. At least formally, that stands as the “last word” in the legal system.

The main implication of this development is a change in the balance between the three ideologies that, according to McAuslan, compete in planning and environmental law. The ideology of public participation gets stronger at the expense of the ideology of private property that is the main justification of developers. This is relevant because it occurs in times of an alleged pre-eminence of the interests of private investors. In this chapter we have not analysed the difficulties that social organisations have encountered to exercise their new rights. However, no one working in the field would say the legislative and jurisprudential changes we have described are irrelevant for the advancement of environmental causes in Mexico.

Before looking at the possible impacts of these developments, it is interesting to summarize the conditions under which they took place – i.e. “how did this happen”? When seen from the broader question of the Mexican “transition to democracy”, it is clear that, at least since the early nineties of the last century, courts began to behave in a more independent way. Political scientists have explained that there is a clear relationship between the political pluralism and judicial independence<sup>38</sup>. Our fourteen *tesis de jurisprudencia* are a clear expression of this general condition, since they have often meant not only putting limits to economic activity but also to the government actions that make it possible; thus it is also a shift in the balance between public participation and state power. Having said this, we can ask ourselves whether this is one form of “judicial activism” that would represent a profound change in legal culture. The question calls for a nuanced answer.

It is true that by recognizing new forms of

standing judges were abandoning their own restricted and individualist definition of the capacity of persons to set the judiciary in motion. However, this happened through the deployment of a very traditional mechanism, i.e. by following the provisions of enacted legislation. It was there, in the realm of the legislative branch, that it all began; first as the initiative of obscure civil servants (in the 1983 amendment of the Human Settlements Act) and then with the participation of social organisations as remarkably central actors in the legislative process (in the 1996 amendment of the environmental legislation). By recognizing diffuse interests under different labels, judges were not adding anything substantial to what was clearly established in the statute book. This does not mean to minimize the relevance of the whole process, but simply to acknowledge that it was possible thanks to the fundamental ambivalence of legal culture: a new element came into existence thanks to the working of an old one. In other words, breaking a tradition was possible because another tradition was well and alive.

For many environmental lawyers the opening of new spaces for collective claims is the result of the mobilisation of civil society, a category that since the mid eighties appears in the public sphere as an unquestionable source of legitimacy<sup>39</sup>. While it is true that in the 1996 reform of the environmental legislation NGOs played a fundamental role, the process had started more than one decade before as an idea within the bureaucracy. This is the place for a personal note that would not be acceptable in a regular academic book. It was the author of this essay the one who suggested the inclusion of section 47 in the Human Settlements Act in 1983. I was not only lucky enough to be “at the right place and the right moment” to do it. I was able to do it because years before I had the privilege of being a student of Patrick McAuslan at Warwick. Under his mentorship, it was impossible not to embrace strong ideas about public participation in urban affairs.

<sup>38</sup> RÍOS-FIGUEROA, Julio. Fragmentation of power and the emergence of an effective Judiciary in Mexico, 1994–2002. *Latin American Politics and Society*, v. 49, n. 1, Spring, 2007.

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Going back to our “detached” legal analysis, when one looks at the most relevant environmental conflicts of the last decades, none of them was the subject of a tesis de *jurisprudencia*. The cases that prompted our fourteen theses were indeed minor in comparison to those that involved relevant social mobilisations or at least the attention of the media. Beyond the visibility two or three NGOs the truth is that there are very few lawyers that practice public interest litigation in Mexico. This is part of the explanation to the fact that the whole thing took almost three decades.

Of course, another explanation for this delay is that it was hard for the judiciary to break with its own traditional way of defining standing. However, the way the theses are written suggests that there was something else: Social organisations and their lawyers took too long to realize that there was in the law a mechanism they could use to protect the environment. To the extent courts were not pressed by lawyers invoking the urban and then the environment legislation, they could arrive at judgements and write theses that denied standing to them. If judges themselves were frequently unaware of the Supreme Court’s theses, it is reasonable to assume that “society at large” was even less aware of them. We have seen that it was only when the courts made an explicit reference to the enacted legislation that they recognized standing rights. As a hypothesis for future research, it can be said that judges can ignore the law when litigants do not point at the relevant legal texts.

The last element in our description of the conditions under which this happened is the fact that it was the result of an interaction between branches of government. Long before a constitutional amendment included class actions and “legitimate interests” in the amparo suit, planning and environmental law had established the question of standing and collective claims at the centre of its practice, as part of the apparently modest realm of administrative procedures.<sup>40</sup>

One may wonder why constitutional law scholars, as much as judges themselves, have taken so long in registering those developments. But this demands a deeper inquiry on the ways legal innovations circulate throughout the legal field. As much as we have seen circuit courts using verbatim whole paragraphs from Supreme Court’s thesis as if they were their own, exposing themselves to the scorn of the profession, we can imagine lawyers who try to defend neighbours ignoring that there are specific devices that they could use. Another hypothesis here is that the advent of electronic means to have access to de *jurisprudencia* represented an important change in the way the law circulates.

Finally, it is interesting to reflect upon the long term social effects of the recognition of diffuse interests in planning an environmental law. In the Latin American context this is a relevant question since democratic transitions has brought with them new expectations about the possibility that courts’ activities may bring relevant social changes<sup>41</sup>. Not surprisingly, there is at the same time a debate about whether judges are going too far<sup>42</sup>. However, that debate tends to be of a normative character and led by legal philosophers. The contribution of socio-legal studies here lies in the ability to register the sort of changes that are actually taking place. In our subject the current situation is certainly different from that of three decades ago: social organisations are now been able to halt projects that affect their environment. Although it is impossible to have a precise idea of the size of this phenomenon, those who participate actively in the environmental field are aware that for many projects there is such possibility. That means nothing less than a change in the expectations of relevant actors in relation to urban and environmental law. What is more difficult to assess is the future of this process. It is soon to tell whether this will reach large corporate interests as those represented by open pit mining, who are at the source of many of the

<sup>40</sup> Roberto Gargarella makes a similar point. But article 47 was initially a substantive reform, although not verbalized with the grandeur of the rights discourse. (Grafting social rights onto hostile constitutions. *Texas Law Review*, v. 89, n. 7, June 2011, p. 1.552).

<sup>41</sup> RODRIGUEZ GARAVITO, César; RODRIGUEZ FRANCO, Diana. *Cortes y cambio social. Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia*. Bogotá, 2010. (Colección DeJusticia).

<sup>42</sup> For a recent debate on the subject in Latin America, see *Texas Law Review*, Volume 89, number 7, 2011.

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most acute environmental conflicts in contemporary Mexico. On a deeper level, it also remains to be seen whether preventing projects is going to be the only, or even the main, way of giving content to the right to the environment.

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