

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**RIGHT TO A HEALTHY ENVIRONMENT AND CITIZEN PARTICIPATION
(MODIFICATION OF A MEXICAN OFFICIAL STANDARD ON AIR QUALITY)
[DERECHO A UN MEDIO AMBIENTE SANO Y PARTICIPACIÓN CIUDADANA
(MODIFICACIÓN DE UNA NORMA OFICIAL MEXICANA SOBRE CALIDAD DEL AIRE)]**

CASE: *Amparo en Revisión 610/2019*

REPORTING JUSTICE: Alberto Pérez Dayán

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: January 15, 2020

KEY WORDS: human right to a healthy environment, right to citizen participation in environmental matters, modification of Mexican official standards that regulate issues related to the right to a healthy environment, general declaration of unconstitutionality of a Mexican official standard on air quality.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 610/2019*, Second Chamber, Alberto Pérez Dayán, J., decision of January 15, 2020, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-embematicas/sentencia/2022-02/AR%20610-2019.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 610/2019*, Mexico.

SUMMARY OF AMPARO EN REVISION 610/2019

BACKGROUND: The Energy Regulatory Commission (CRE) issued a Resolution modifying the Mexican Official Standard NOM-016-CRE-2016 to increase the allowed parameter of added oxygen up to 10% in volume of ethanol in Regular and Premium gasolines outside the metropolitan areas of the Valley of Mexico, Guadalajara and Monterrey. An inhabitant of the Valley of Mexico filed an *amparo* lawsuit against that Resolution and the process through which the modification of NOM-016-CRE was carried out. The lawsuit was dismissed, but the petitioner challenged the dismissal twice, until a Collegiate Circuit Court admitted the claim and sent the case to the Mexico's Supreme Court of Justice (this Court) for the resolution of the case.

ISSUE PRESENTED TO THE COURT: Whether 1) article 51, second paragraph of the Federal Law on Metrology and Standardization (LFMN) violates the rights to a healthy environment and citizen participation in environmental matters, by allowing the unilateral modification of a Mexican official standard that regulates issues related to air quality such as the ethanol content in gasolines, without involvement of the national standardization advisory committees and the interested public; 2) the modification of NOM-016-CRE to allow the increase in the percentage of ethanol in gasoline was unconstitutional, because it was carried out on the basis of the second paragraph of article 51 of the LFMN without following the ordinary procedure for the creation of the Mexican official standards that allows the participation of the national standardization advisory committees and the interested public, especially when issues that may affect the human right to a healthy environment are involved; 3) the modification of NOM-016-CRE violates the right to a healthy environment by allowing the increase of the maximum percentage of ethanol as an oxygenate of gasolines, as well as the increase of maximum vapor pressure for hydrocarbons that use it for oxygenation.

HOLDING: This Court denied the *amparo* to the complainant regarding the unconstitutionality of article 51 of the LFMN, essentially, for the following reasons. The article 51, second paragraph of the LFMN is not unconstitutional if interpreted correctly, in light of the constitutional obligations imposed by article 4 of the Constitution and various conventional instruments signed by Mexico for the protection of the human right to a healthy environment, in the context of the precautionary

principle and citizen participation. Thus, the exception in that article that allows modifying a Mexican official standard without following the same procedure as for its creation when the original circumstances that motivated it have changed. In cases where there is factual or scientific uncertainty, the ordinary procedure for the creation of a Mexican official standard must be followed, with participation of the national standardization advisory committees and the interested public. On the other hand, this Court granted the *amparo* to the affected party in relation to the Resolution that modified NOM-016-CRE because its modification was unconstitutional for the following reasons. First, the CRE should not have modified it unilaterally based on the exception in the second paragraph of provision 51 of the LFMN. It is not a clear, obvious and undisputable fact that the conditions by which the ethanol content in gasolines was regulated to protect air quality, the environment and public health have changed. In this case, it was essential that the ordinary procedure for modifying these Mexican official standards be followed. Second, such change did not comply with the precautionary principle nor allow citizen participation to ensure that it is in accordance with the human right to a healthy environment since it is not clear, obvious or undisputable that the increase in the percentage of ethanol in gasolines will not bring environmental and public health risks. Third, the decision to increase the maximum permitted percentage of ethanol as an oxygenate in gasolines, as well as the increase in maximum vapor pressure for the hydrocarbons that use it for oxygenation, should have been assessed in the context of the Mexican State's goals to mitigate climate change in accordance with the Paris Agreement. Finally, the purely economic interests behind the change to NOM-016 should have been weighed and measured against the potential risks that could be caused to the environment and the state's obligations to reduce greenhouse gas emissions. These obligations serve the constitutional principle of sustainable development and the protection of the human right to a healthy environment. Based on the above reasons, this Court also established that the effects of the challenged Resolution materialize beyond the legal sphere of the *amparo* petitioner and, as a necessary consequence, this Court declared the general unconstitutionality of such Resolution.

VOTE: The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=259765>

EXTRACT FROM THE AMPARO EN REVISION 610/2019

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of January 15, 2020, issued the following decision.

BACKGROUND

p.1-3 The Energy Regulatory Commission (CRE) issued the "Resolution of the Energy Regulatory Commission that modifies the Mexican Official Standard NOM-016-CRE-2016, Oil Quality Specifications, based on article 51 of the Federal Law on Metrology and Standardization" (hereinafter NOM-016-CRE), through which, among other things, a permitted parameter of added oxygen was increased up to 10% by volume of ethanol in Regular and Premium gasolines outside the metropolitan areas of the Valley of Mexico, Guadalajara and Monterrey.

An inhabitant of the Valley of Mexico filed an *amparo* lawsuit against that Resolution and the process through which the modification of NOM-016-CRE was carried out.

p.6-11 The judge dismissed the lawsuit and the *amparo* petitioner filed a *recurso de revisión*. The Collegiate Circuit Court that processed the appeal declared the dismissal partially illegal and sent the case to this Court to resolve the substantive issue. This Court determined that this High Court would resume its original jurisdiction.

p.18,48,82 The arguments put forward by the affected party in the *recurso de revisión* revolved around three main themes. First, the unconstitutionality of article 51, second paragraph of the LFMN because, by allowing the modification of Mexican official norms unilaterally by the authorities, it violates the human right to a healthy environment in relation to the right of citizen participation in environmental matters. Second, it stated that the procedure used to modify NOM-016-CRE was unconstitutional because there is no correlation between the environmental and health risks that motivated the original regulation of gasoline and the economic reasons on which the CRE based its modification, using the exception of article 51 of the LFMN that eliminates the process of public participation. Finally, it stated that the Resolution modifying NOM-016-CRE violates the right to a healthy environment because the use of ethanol in fuels presents risks to the environment and public health

and contravenes the international and legislative obligations of Mexico to confront climate change.

STUDY OF THE MERITS

p.17 The dispute in this case consists of determining: I. Whether the second paragraph of article 51 of the LFMN is contrary to the human right to a healthy environment; II. Whether it was lawful for the Energy Regulatory Commission to use that article to unilaterally modify NOM-016-CRE; and III. Whether the Resolution of the Energy Regulatory Commission that modifies NOM-016-CRE is a violation of the human right to a healthy environment.

I. Constitutional regularity of article 51, second paragraph of the LFMN: Interpretation in accordance with the precautionary principle and the right to participation in environmental matters

p.18 The affected party considers that article 51, second paragraph, of the LFMN violates the human right to a healthy environment because it allows the modification of Mexican official standards unilaterally by the authorities without public participation when it is determined that the conditions motivating the original issuance of the standard no longer exist. The affected party further argues that the legislative exception unjustifiably restricts the right to participate in decisions affecting the environment, since citizens should have a say regarding the disappearance of the causes that led to the issuance of the Mexican official standard and the consequences of such a regulatory change.

This Court considers that in the case of environmental matters, in order for the exception provided for in article 51, second paragraph of the LFMN to apply “there must be truly extraordinary facts or circumstances that make it clear, obvious and undisputable that the causes that motivated the issuance of the respective Mexican Official Standard no longer exist in such a way that, under those exceptional circumstances, it is justified not to follow the regular procedure for the alteration of the Mexican official standards, since consulting the citizen would serve no practical purpose in the case of undisputable facts”.

p.21-25 Consequently, for this Court, article 51, second paragraph of the LFMN must be interpreted within the framework of the paradigm of sustainable development and the precautionary principle —recognized in various international instruments— under which,

to protect the environment and public health, *prima facie* evidence is sufficient. This is relevant considering that to address environmental matters it is necessary to rely on all available scientific information.

- p.26-30 Regarding the right to public participation, this Court recalls the criteria adopted in the *Amparo en Revisión* 365/2018 on the procedural obligations imposed on the State authorities by the right to a healthy environment, including that of guaranteeing public participation in environmental matters as an essential component to ensure its effectiveness.
- p.45 In this case, the precautionary principle —applied to modifications or cancellations of Mexican official standards— requires that the existence of the damage or risk of damage to the environment that led to its original issuance be determined in the most informed possible manner, involving citizens and national standardization committees, as required in the ordinary procedure that the LFMN regulates.
- p.46 In this context, the application of the precautionary principle in deciding whether existing environmental protection measures are still necessary should begin with a scientific risk assessment, as complete as possible and identifying the degree of scientific uncertainty based on reliable scientific data and analysis, that expresses the possibilities and magnitude of dangerous impacts on the environment and the population.
- p. 46-47 Thus, to comply with the above, the ordinary procedure to modify or cancel a Mexican official standard must be followed, allowing the intervention of experts and interested citizens, especially when these regulatory changes may affect their right to a healthy environment. In these cases, "the conjunction of citizen participation and the application of the precautionary principle has the potential to allow and promote more democratic and inclusive decision-making processes, where different voices are heard and considered, as far as the plausible effects on the environment are concerned".

II. Application of the second paragraph of article 51 of the LFMN to this case

- p.48-49 It is also important to note that the affected party stated in its *recurso de revisión* that the procedure through which NOM-016-CRE was modified is unconstitutional because the need to establish quality specifications for oil products for environmental protection was stated when it was issued, and the CRE only gave economic reasons for modifying it.

Thus, given the absence of a correlation between the environmental and health risk considerations that motivated the original gasoline regulation and the economic reasons that are used to justify the regulatory change, this Court does not think NOM-016-CRE can be modified based on the exception of article 51 of the LFMN, excluding public participation, because the original circumstances that existed when that regulation was issued have not changed.

p.49-55 This Court explains that the issuance of NOM-016-CRE was justified, in part, on the need to establish quality specifications for the oil products that are marketed in Mexico to avoid risks to people's health, their assets and the environment, and to ensure that they are compatible with those established by the countries with which Mexico has a commercial relationship. However, the Resolution amending NOM-016-CRE establishes that the conditions that motivated its creation no longer exist because the conditions of competition between the Mexican border states and the United States of America have changed, including those faced by gasoline dispensers and importers, as a result of factors such as the early release of the price of gasoline and because nationals choose to source on the other side of the border where the price tends to be lower due to the presence of 10% of ethanol.

p.58 Given that in this case it was not demonstrated that the environmental and health risk factors mentioned when the Mexican Official Standard was issued no longer exist, it is clear that the exception provided for in article 51 of the LFMN is not applicable, as erroneously considered by the CRE in modifying it.

p.61 Consequently, this Court notes that in this case there is no information to conclude in a clear, obvious and undisputable way that the use of anhydrous ethanol as an oxygenate of gasolines does not bring any risk of damage to the environment. On the contrary, the Court specifies that the increase in the maximum percentage levels of anhydrous ethanol as an oxygenate in gasoline authorized by the CRE in the modification of NOM-16-CRE-2016 has been and continues to be the subject of important scientific debate on the risks that can be caused to air quality, ecosystems, human health and, in general, to the environment.

- p.76 To support this decision, this Court also takes into consideration that the use of ethanol as an oxygenate for fuels can increase emissions of greenhouse gases that contribute to global warming, which is contrary to the goals of the Paris Agreement, signed by Mexico, in which it committed to lowering emissions with actions based on the best available scientific information.
- p.80 Similarly, this Court explains that the General Law on Climate Change regulates the obligation of national authorities to implement effective actions to mitigate greenhouse gas emissions and comply with the Paris Agreement. That does not occur with the regulation proposed by the CRE, because it is neither obvious nor indisputable that the increase in the percentage of ethanol in gasolines will not pose any risk to the environment.
- p.81 This Court considers the reasons of economic competition used by the CRE as support for the modification of NOM-016-CRE-2016 —such as those related to the use of fuel— are irrelevant when adopting a state decision on environmental matters, since the economic interest cannot ignore the environmental effects that may be generated. Thus "the purely economic interests or values that may be generated by the increase in the percentage of ethanol in gasolines, as an oxygenate, should be weighed and balanced against the potential risks that this could entail to the environment and the state obligations to reduce greenhouse gas emissions".
- p.82 These obligations serve the principle of sustainable development, which requires an appropriate balance between economic growth and environmental protection —as established in article 4 of the Constitution regarding the protection of the human right to a healthy environment and various international instruments.

III. Effects of the declaration of unconstitutionality in relation to the principles of citizen participation, environmental precaution and the international obligations of the Mexican State regarding climate change

- p.83 Regarding the effects of the decision in this case, it is relevant to consider that the *amparo* petitioner resorted to this means of constitutional protection in defense of an abstract legitimate interest that matters to the community; hence "under the assessment of the principle of relativity according to the interpretation most favorable to the person and in relation to the human right of access to justice and the principle of constitutional

supremacy, the effects of this final amparo decision must be specified beyond the legal sphere of the complainant himself, as a necessary consequence of the declaration of unconstitutionality of the challenged amending resolution".

This case concerns the existence of violations of supra-individual legal interests, meaning they belong to a group and, therefore, are indivisible, namely: the environment. Hence, the effects of constitutional protection cannot relate only to the party concerned, since this would be insufficient to achieve an effective restitution of the rights violated in terms of article 77, section I, in conjunction with article 78 of the *Amparo* Law.

p.84 Consequently, the granting of the *amparo* requires giving general effect to the declaration of unconstitutionality of Resolution A/028/2017 amending NOM-016-CRE-2016, published in the Federal Official Gazette on the twenty-sixth of June of two thousand seventeen, specifically regarding the subject of constitutional litigation, namely: I. Observation 5 of exhibit 1 "Specifications of vapor pressure and distillation temperatures of gasolines according to the volatility class", contained in paragraph 4.2; and II. Observations 4 and 7 of exhibit 6 "Additional specifications of gasoline by region", contained in paragraph 4.2; regarding the increase in the parameter of oxygen allowed up to 10% in volume of ethanol in Regular and Premium gasolines outside the metropolitan areas of the Valley of Mexico, Guadalajara and Monterrey.

p.84-85 Therefore, despite the fact that this Court does not consider article 51, second paragraph of the LFMN to be unconstitutional if it is interpreted correctly, in light of the obligations imposed by article 4 of the Constitution and various treaties signed by Mexico for the protection of the human right to a healthy environment, in the context of the precautionary principle and citizen participation, this Court declares the unconstitutionality of the Resolution by which NOM-016-CRE was modified because it was carried out unilaterally, based on the exception provided for in the second paragraph of provision 51 of the LFMN, since it is not a clear, obvious and indisputable fact that the conditions by which the content of ethanol in gasolines was regulated to protect air quality, the environment and public health have changed. For this Court, it is essential that the ordinary procedure for modifying these Mexican official standards be followed allowing the participation of the

standardization advisory committees and the interested public, in application of the precautionary principle and citizen participation.

Since the NOM-016-CRE is a technical regulation of issues that may affect the environment, the invalidity of the aforementioned sections of the challenged Resolution should not be understood as creating a regulatory vacuum in hydrocarbon matters.

p.85 By declaring the unconstitutionality of the unilateral and summary amendment of NOM-016-CRE, the quality specifications of oil products (relating to the percentage of ethanol in gasolines, as well as the specifications of vapor pressure and distillation temperatures of gasolines), as provided for in the regulation prior to the modifications, must continue to apply, in accordance with the provisions published in the Federal Official Gazette on August 29, 2016.

In this regard, in order not to affect the rights of third parties or legal situations generated by virtue of the entry into force of the amendment of NOM-016-CRE, this Court grants the responsible authority and others that are competent in the matter a period of 180 days, within which they must allow acts related to the production and commercialization of Premium and Magna gasolines that use ethanol as an oxygenate in volume up to 10%, as well as a maximum vapor pressure of 1.0 lb/2in, as established in the Resolution declared unconstitutional, be carried out without sanction.

p.86 This Court also determines that "once this period has ended, NOM-016-CRE-2016 must be observed and applied immediately, as it was drafted prior to the modifications made by the challenged resolution, so the Energy Regulatory Commission must put an end to imports and sales of the type of gasoline referred to in the challenged resolution".

Furthermore, this Court does not overlook that the responsible authority could initiate the ordinary procedure for the modification of NOM-016-CRE, following the rules and formalities established in the LFMN, "in order to discuss openly, with as much scientific information as possible and through citizen participation, as well as in observance of the precautionary principle and the international obligations that Mexico has undertaken to reduce its greenhouse gas emissions and to respect and protect a healthy environment, if it is possible to increase the maximum levels of ethanol allowed in gasolines."

DECISION

p.86-87 The decision appealed is overruled. The affected party is given the *amparo* and protected against the challenged Resolution, which modifies the quality specifications of the oil products, published in the Federal Official Gazette on June 26, 2017, for the purposes specified above.