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## Reconstituting Constitutions—Institutions and Culture: The Mexican Constitution and NAFTA: Human Rights *vis-à-vis* Commerce

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RECONSTITUTING CONSTITUTIONS — INSTITUTIONS AND  
CULTURE: THE MEXICAN CONSTITUTION AND NAFTA:  
HUMAN RIGHTS VIS-À-VIS COMMERCE

*Imer B. Flores*\*

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Act always so that you treat humanity whether in your person or in that of another always as an end, but never as a means only.

— Immanuel Kant.\*\*

## I. INTRODUCTION

Reconstituting constitutions — along the lines of a constitutional archetype such as the one embodied by Article 16 of the *Declaration on Rights of Men and Citizen* of the French Revolution: “*Tout société dans la quelle la garantie des droits n’est pas assurée, ni la séparation des pouvoirs déterminée, n’a point de constitution*” — not only implies the necessity to expand the actual enjoyment of human rights and separation of powers, on the one hand, and even the fulfillment of democracy and rule of law, on the other,<sup>1</sup> but also the real endorsement of the principles that exemplify a truly representative, democratic, and Federal Republic as Mexico constituted itself in 1916-17.

The aim of this Essay is threefold. First, this Essay will focus on the main characteristics of both the great transformation, experienced in the Mexican institutional economic framework during the last thirty-five years, in general, and within the past twenty years, in particular, that were made through constitutional reforms. In addition, the greater expectation that such structural reforms generated in the process of re-enacting the constitution in the political context, should be along the lines of human rights and separation of powers. Second, this Essay will attempt to bring into play the role of treaties in this transformational process, by focusing the debate on whether the North American Trade Agreement (NAFTA), as an international treaty, regardless of its denomination, is constitutional. Furthermore, this debate will concentrate the discussion on the place of treaties in the hierarchy of norms, by critically analyzing a controversial jurisprudential criteria, according to which treaties are above federal laws. Third, this Essay will illustrate that in an eventual conflict between a treaty on commerce and another treaty on human rights, the later ought to prevail over the former.

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\*\* See generally KANT, *infra* note 69.

1. Imer B. Flores, *Constitución, Democracia y Derecho: Teoría Constitucional y Valores Constitucionales*, 13 REVISTA DEL INSTITUTO DE LA JUDICATURA FEDERAL 145 (2003); Imer B. Flores, *Assessing Democracy and Rule of Law: Access to Justice*, IN PROCEEDINGS OF THE 21ST IVR WORLD CONGRESS, LUND (SWEDEN), 12-17 AUGUST, 2003, PART I: JUSTICE, STUTTGART, FRANZ STEINER VERLAG 146 (Aleksander Peczenik ed., 2004) [hereinafter Flores, *Assessing Democracy*, in PROCEEDINGS].

This Essay will emphasize the (active) role of the courts and tribunals not only as responsible for guarding the Mexican Constitution and protecting human rights, but also, assuming a unified government, of guaranteeing further implementation of human rights through constitutional mutation by means of judicial interpretations. In a similar fashion, we will insist on the importance of considering the Senate in a federal state as representative of the federal entities. Moreover, we must first introduce a caveat regarding the process of reenacting constitutions.

## II. RECONSTITUTING CONSTITUTIONS: INSTITUTIONS AND CULTURE

The process of reconstituting constitutions requires both institutional innovation and cultural renovation in order to be effective. In the recent past, Mexico, has been reforming most of its institutions, as is explained below, in section III.A. Yet, the restructuring has not truly impacted Mexican cultural life, belief systems, manifestations, practices, and values, of contemporary Mexicans. As a result, the (re)construction is still to be completed for the most part. In fact, in order for such processes to be effective, culture, in general, and the different cultural manifestations and practices, in particular, must be taken seriously.

To reinforce this point that culture, and not merely institutions, must be considered, Jean-Paul Sartre suggests in the script called *L'engrenage* — [translated into English as *In the Mesh* and into Spanish as *El engranaje*] — that overthrowing a tyrant to put another individual in its place is not going to make a significant difference, because it resembles the same engine from which we took an identical piece and put a duplicate engine in its place.<sup>2</sup> This metaphor further explains that failure is not only of piecemeal institutional reforms, but also of wholesale institutional, or deinstitutionalized modifications as well.

On the one hand, piecemeal reformation can occur in three ways. First, when the new construct fits perfectly in the place of the old institution, there appears no change has taken place. Second, if the new improvement is too big to fit, that reform will either break down and crack the machine, or it will be worn out until it fits rightly in the place of the previous structure. For example, the first modification poses a bigger problem than the original one, because there is both no machine at all, or at the end of the day no modification present. Third, where the new piece is too small to replace the older structure, no transformation will be evidence.

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2. JEAN-PAUL SARTRE, *IN THE MESH* (1948).

Therefore from these three cases, such an adjustment has no meaningful impact on the status quo.

On the other hand, regarding wholesale reorganization, suppose that the only alternative is to substitute one apparatus for another, despite no significant deviation from the previous design. Although this reform presupposes that everything, or at least something, is wrong with the appliance, that does not justify replacing mechanism instead of fixing it. This implies that when a new device substitutes an older procedure, that does not necessarily mean that things are going to change. Consequently, the impacted engine is nothing but a piece in the pipeline of production, which while similarly to the piecemeal revision, the wholesale option will also create a substantial variation.

I guess both cases explain why legal transplants, by either transplanting one part or substituting the whole institutional arrangement into a different cultural establishment, have rarely been entirely successful.<sup>3</sup> In fact, those replaced structures that have been more or less useful are the result of a complex process of adoption-adaptation, in which culture is as serious as the grease that lubricates the machine to keep it functioning properly. In short, sometimes, the answer to the malfunctioning of the machine is neither changing one piece nor removing the whole mechanism, but fixing those arrangements instead.

Someone may object that there are "terminal cases," in which the only thing left is to replace the broken piece or the whole mechanism. In addition, there is really nothing else to do but throw the entire structure away and get a completely different one to take the place of the old. A possibility is that this applies to all cases terminal or not. However, a mere substitution does not imply necessarily that a true change in the state of affairs (other than the substitution itself) is achieved. The false belief that part of, or the whole, should be removed leads to a much worse result, as Boris Pasternak suggests in his novel, *Doctor Zhivago*, that "It has often happened in history that a lofty ideal has degenerated into crude materialism. Thus Greece gave way to Rome, and the Russian Enlightenment has become the Russian Revolution."<sup>4</sup>

At this point, I would like to explain three of my main arguments. First, although there is a strong tendency, especially in the civil law tradition, to think that it is enough to enact "law" to automatically alter "reality," clearly this is seldom the case. Second, to sustain the existing

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3. Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); see generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

4. BORIS PASTERNAK, *DOCTOR ZHIVAGO* (1958).

“normativity” or to substitute it with an alternative “counter-normativity” we must also try to place them into an actual “normality” and displace the “abnormality” responsible for the malfunction.<sup>5</sup> Third, the institutional innovation must be complemented by a cultural renovation, which occurs by taking culture, and the cultural manifestations and practices, seriously.<sup>6</sup> Therefore, a successful amendment must take these three relationships into account. Furthermore, in order to successfully apply those connections a consequential, functional, or sociological approach to law is required, at least to foresee whether a constitutional reform — or a legislative enactment — is going to be successful at all.<sup>7</sup>

As a result of the above issues, it is necessary for Mexico to reconstitute its Constitution in at least two fundamental ways to empower the country of Mexico. First, the Mexican government must reform its human rights and separation of powers, in general, and the courts and tribunals as the guardians of the Mexican Constitution and of the protection of human rights, in particular. Second, Mexico must become a democratic government of, by, and for all the people in which, the rule of law is enforced by the government from those rules, regardless of gender.<sup>8</sup>

All these ideals can be synthesized into one principle, isonomy. From this principle, there should be equal application and protection of law to all no matter their relationship with the government, racial background, economic status, gender, sexual orientation, religious or non-religious beliefs, or national origin.<sup>9</sup> However, the problem is that in a world characterized by great division and inequality, the application and

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5. IMER B. FLORES & CÉSAR FLORES MANCILLA, *LAS PARADOJAS ENTRE CULTURA DE LA LEGALIDAD E INSTITUCIONES JURÍDICAS EN MEXICO* (forthcoming 2005). Cf. HERMAN HELLER, *TEORÍA DEL ESTADO* 199-216 & 267-89 (Luis Tobio trans., Fondo de Cultura Económica 1942) (1934). GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 65 (1986).

6. See generally FRANCIS FUKUYAMA, *TRUST, THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995); *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Samuel P. Huntington & Lawrence E. Harrison eds., 2000).

7. See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

8. Cf. 2 THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* § 37, at 145 (Penguin Books 1972) (431 B.C.E.) (“Our constitution is called a democracy because power is in hands not of a minority but of the whole people.”); Abraham Lincoln, *The Gettysburg Address*, (Nov. 19, 1863), in LINCOLN ON DEMOCRACY 308 (1990) (“government of the people, by the people, for the people”) (emphasis added). See also ARISTOTLE: *THE POLITICS* (Stephen Everson ed., Cambridge Univ. Press 1988).

9. IMER B. FLORES, *HERÁCLITO VIS-À-VIS PARMÉNIDES: CAMBIO Y PERMANENCIA COMO LA PRINCIPAL FUNCIÓN DEL DERECHO EN UNA DEMOCRACIA INCIPIENTE* (forthcoming 2006).

protection of the law rarely achieves the above mentioned democratic, and rule of law, objectives without those ambitions being compromised.

### III. RECONSTITUTING THE MEXICAN CONSTITUTION

According to Article 39 of the Mexican Constitution, "The national sovereignty resides essentially and originally in the people."<sup>10</sup> Further, Article 40 states, "The will of the Mexican people is to constitute a representative, democratic, [and] federal Republic, composed of free and sovereign states in everything concerning to their internal affairs; but joint together into a Federation established according to the principles of this fundamental law."<sup>11</sup> At this point, it is worth noting that Mexico has thirty-one states and one Federal District that total thirty-two federal entities.

However, much has been said of the historically unrepresentative, authoritarian, and centralized features of the Mexican legal and political system. These tensions between the formal and real constitutions justify, at least partially, the need not only for reforming our Mexican Constitution to reduce the gap between the two but also for reconstituting it into a true representative, democratic, and Federal Republic.

In fact, the Mexican Constitution was promulgated on February 5, 1917 and went into force on May 1st of the same year containing 136 articles and 16 transitory dispositions. From that time to now, it has been reformed by 160 decrees, which comprehend 427 additions or modifications to its text, including 3 transitory dispositions that were subsequently derogated. It is worth mentioning that the first half of those decrees were published prior to February 6, 1975, in almost 60 years, and the other half in the last 30 years. As a result, 172 alterations were made in 58 years (2.96 per year), whereas 255 in the last 30 years (8.5 per year). This means that two fifths of the reforms came in two thirds of the time the Mexican Constitution originated, while the other three fifths came in the remaining one third.

#### A. *The Great Transformation*

The reforms under the presidencies of Luis Echeverría Álvarez (1970-1976) and José López Portillo (1976-1982) total 28 decrees (2.33 per year) and 74 additions or modifications (6.16 per year), while in the aftermath of NAFTA during the presidency of Ernesto Zedillo Ponce de León (1994-

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10. MEX. CONST. second title, ch.1, art. 39.

11. *Id.* art. 40.

2000) there were 18 decrees (3 per year) and 77 alterations (12.8 per year). It is worth noting that in 1997 under Zedillo, Institutional Revolutionary Party (PRI) lost for the first time its absolute majority in both chambers, and retained the relative majority in the Senate. Since that political shift the phenomenon of “divided government” has become the general rule. As the procedure to reform the Mexican Constitution requires a majority of two-thirds of members of Congress in both Chambers, as well as a majority of the local legislatures (Article 135) the pace of constitutional reform has slowed down since 1997.<sup>12</sup> This lag in the reform process in the first four years of the presidency of Vicente Fox Quesada there have been only 10 decrees (2.5 per year) with 18 reforms (4.5 per year).

In the last few years, there has been an impasse between the executive and the two chambers of the legislature. Because of this stall the Judiciary, mostly the Mexican Supreme Court and other major courts and tribunals as well, have, through the interpretation of the Constitution and their constitutional doctrine, reformed the Mexican Constitution informally or materially, because of a phenomenon described as constitutional mutation via judicial interpretation.

It is also important that during the two previous presidential terms prior to NAFTA signing, ratifying, and entering into force, that is in the Presidencies of Miguel de la Madrid Hurtado (1982-1988) and Carlos Salinas de Gortari (1988-1994), 34 decrees and 120 additions and modifications (10 per year) took place. In order to prepare the ground for that NAFTA signing 19 decrees (3.16 per year) and 65 alterations (10.83 per year), 15 decrees (2.5 per year) and 55 reforms (9.16 per year), respectively occurred. Moreover, keep in mind that Mexico entered the General Agreement on Tariffs and Trade (GATT) in 1986 and NAFTA in 1994.

Certainly, in the last third of the twentieth century — and especially in the past twenty years, the great transformation, at least in formal terms by the quantity, and not necessarily by the quality, of constitutional reforms, is self-evident. Indeed, Mexico has transformed significantly from predominantly rural to predominantly urban society, from a closed economy to an open one; and from an authoritarian tradition to a more democratic one.<sup>13</sup> However, the gap between what Octavio Paz labeled as

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12. MEX. CONST. eight title, art. 135.

13. SERGIO LÓPEZ AYLLÓN, *LAS TRANSFORMACIONES DEL SISTEMA JURÍDICO Y LOS SIGNIFICADOS SOCIALES DEL DERECHO EN MEXICO. LA ENCRUCIJADA ENTRE TRADICIÓN Y MODERNIDAD* 89 (1997).



“Two Mexicos” subsists and the question on whether which one is going to be able to pull the other up or down remains unanswered.<sup>14</sup>

The great transformation was chiefly economical. The idea of that modification was to replace the model of import substitution for one of an open market economy, labeled as “neoliberalism.” John Williamson expressed that this economy is a “Washington consensus,” which required not only the defeat of the central planning of the welfare and corporate state but also the want for a (structural) Economical Reform which comprises of four proceedings. First, stabilization must take place, through maintaining the balance in the budgetary and financial plans, as well as by reducing public debt. Second, integration has to occur, by disabling protectionism and evolving a commercial incorporation into the world economy, in general, and the North American economy, in specific. This new development happens through a process of openness that flows goods and services, as well as foreign investments, but not (or at least not yet) of persons. Third, privatization is needed, by reducing the public participation of the Mexican state in the economy and by returning the Mexican state to private both domestic and foreign entrepreneurs. Fourth, liberalization must take place, through restricting state interference in the economy.

Although the great transformation was essentially economical, it was complemented to some extent in the political and social realm, including the legal one. In that sense, the political reform can be traced to the explicit and formal recognition, in 1953, of the women’s right to vote in federal elections, to the introduction, in 1963, of proportional representation schemes, and to the reduction of the age to vote at 18 years in 1969 and to hold elective office in both chambers of Congress, specifically, in the Cámara de Diputados at 21 years of age and the Senado at the age of 30 in 1972.<sup>15</sup>

Moreover, the various aspects of the political reform were gradually enhanced in 1977, 1986, 1990, and 1996, while promoting three improvements. First representation was encouraged, by increasing the number of representatives in Congress’s minority parties through proportional representation. Second, separation was advanced, through creating an authority responsible for organizing the elections independent of the executive branch, Instituto Federal Electoral; Third specialization

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14. Octavio Paz, *Postdata*, in *EL LABERINTO DE LA SOLEDAD, POSTDATA, VUELTA AL LABERINTO DE LA SOLEDAD* 287 (2003).

15. Imer B. Flores, *Gobernabilidad y Representatividad: Hacia un Sistema Democrático Electoral Mayoritario y Proporcional*, in *SISTEMA REPRESENTATIVO Y DEMOCRACIA SEMIDIRECTA, MEMORIA DEL VII CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL* 209, 213-15 (Hugo A. Concha Cantú ed., 2002).

was fostered, by creating in the judiciary a tribunal specialized in the qualification of the elections, instead of doing it politically by the legislative branch, the Tribunal Electoral del Poder Judicial de la Federación.

In addition, the 1990 reform doubled the number of senators, starting in 1994, from 2 per each federal entity to 4. According to that criteria, each political party can nominate 2 candidates in a formula and the winning majority formula gets the 2 first seats, while the first minority gets only 1 (the first of the 2 persons mentioned in the formula) and the remaining fourth seat is designated through proportional representation. However, the latter mechanism compromises federalism. Similarly, to the United States, the Senate was introduced originally in 1824, suppressed in 1836, and reintroduced later in 1874 supposedly to represent large and small states alike. Yet, with this American scheme there is a distortion in the federal composition of the higher chamber of Congress.<sup>16</sup>

The other major political reform was the modification of the structure of the government of the Distrito Federal in 1996. Before that the local authorities were appointed directly by the President, now they are mostly elected. The Jefe del Gobierno del Distrito Federal and the Delegados since 1997 and 2000 are elected, although some are still appointed by the federal executive, after being proposed by the local executive, but those Jefe del Gobierno del Distrito Federal and the Delegados can be stopped only by the former (*i.e.*, such as the General Attorney and the Secretary of Public Security). In addition, there was not a true local legislature until 1994. That legislature was simply an assembly of representatives, with no legislative powers of their own. In fact, Congress still keeps some governance over Mexico City, the capital of Mexico.

The significant reforms in the social realm involved major cornerstones of the Mexican government, such as Articles 3, 27, and 130 of the Mexican Constitution. In 1993, the educational reform to Article 3 enlarged the obligation of the state, throughout Mexico's three levels of government (*i.e.*, federal, local and municipal) which guarantee education to all people from elementary, including preschool, to secondary school. Likewise, the agrarian or land reform and the religious reform, required the alteration of Articles 27 and 130, which until then were considered as fundamental political decisions to remain unchanged. These agrarian and

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16. *Id.* at 234. Cf. Imer B. FLORES, *Democracia y Participación: Consideraciones Sobre la Representación Política*, in *DEMOCRACIA Y REPRESENTACIÓN EN EL UMBRAL DEL SIGLO XXI, MEMORIA DEL III CONGRESO INTERNACIONAL DE DERECHO ELECTORAL 195*, 233 (J. Jesús Orozco Henríquez et al. eds., 1999).

religious improvements represented two major developments in Mexican history, the Revolution of 1910 and the (Liberal) Reform of 1856-57.

Moreover, both were reformed, in early 1992, the former to recognize legal personality to populations called “*ejidales*” and “*comunales*,” and to remove some restrictions on their property of the land, as well as to establish a federal jurisdiction, attributed to a specialized *Tribunal Agrario* and *Procuraduría Agraria*. The latter reform recognized legal personality in equal terms of all “religious associations” and, at the same time, reinforced the “liberty of religion” in equivalent terms to all. Also during this period those modifications maintain the separation between church and state.

In the legal realm, probably the most important reform was borrowed from the Scandinavian *Ombudsman* (in the form of a President of the Human Rights National Commission) which guaranteed respect for human rights — especially in the criminal and penal realm (eradicating disappearances, torture). However, after NAFTA took effect, the most successful reform has been in the judicial branch, which decreased the Mexican Supreme Court from 21 justices (plus 5 supernumerary to make a total of 26) to 11, one of the eleven being the chief justice. Further, this improvement of the judicial branch created a *Consejo de la Judicatura*, composed of 7 counselors in charge of the administrative staff of the court, which the chief justice presided over. Consequently, the Mexican Supreme Court gained some of the governing powers that usually correspond to a constitutional tribunal, such as resolving constitutional controversies between different branches or levels of government. However, that Supreme Court retained the undue centralized monopoly of judicial review of the laws constitutionality.

It is also worth pointing out that much of these transformations were accompanied by the signing, ratifying, and entering into force of several international treaties, besides GATT and NAFTA. Those international treaties not only impacted commerce but also human rights as well. Indeed, in the last 34 years, Mexico has ratified more than 50 treaties on Commerce, on one hand, and also over 50 treaties on Human Rights and other related topics, on the other hand.

As a result the Mexican state has accepted the competence of the Inter-American Council and Court on Human Rights,<sup>17</sup> where Mexico has

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17. Jorge Ulises Carmona Tinoco, *Algunos Aspectos de la Participación de México ante los Órganos del Sistema Interamericano de Protección de los Derechos Humanos*, 9 CUESTIONES CONSTITUCIONALES. REVISTA MEXICANA DE DERECHO CONSTITUCIONAL 3 (2003).

already been sued,<sup>18</sup> and the jurisdiction of the Human Rights Committees of the United Nations.<sup>19</sup> The Mexican government has also brought one case to the International Court of Justice, against the United States for the human rights violations of Mexican citizens sentenced to the death penalty and executed on U.S. soil.<sup>20</sup>

Therefore, the impact of international law and treaties in the Mexican legal and judicial system has increased significantly. For instance, Sergio López-Ayllón and Héctor Fix-Fierros' research that comprises the years 1917-1998, encompasses 200,000 jurisprudential criteria of the Mexican Supreme Court, and analyzes 106 significantly referred to treaties like 68 treaties dictated between 1917 and 1988 (0.96 per year) and 38 agreements between 1988 and 1998 (3.45 per year).<sup>21</sup> This increase implies not only the reexamination of the relationship between international law and national law, but also a much faster incorporation and reception of the former international law into the latter national law with a subsequent conflict between them. In fact, one of the major accomplishments was passing, in 1992, a bill on treaties (*Ley Sobre la Celebración de Tratados*).

### B. *The Great(er) Expectation*

The expectation of reform was higher as a result of the earlier transformations and the winning of the Presidency by a candidate from a political party other than PRI. The initial direction of the Mexican government was fivefold. First, the government needed to continue and pursue other features of the previous reforms such as the educational reform, which remained incomplete. Second, the government must enact political reform, by strengthening Congress and limiting executive power,

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18. Jorge Ulises Carmona Tinoco, *El caso Alfonso Martín del Campo Dodd vs. Estados Unidos Mexicanos, ante la Corte Interamericana de Derechos Humanos*, 5 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 705 (2005).

19. Jorge Ulises Carmona Tinoco, *El Significado de la Aceptación de la Competencia de los Comités de Naciones Unidas, Facultados para Decidir Peticiones Individuales en Materia de Derechos Humanos y su Previsible impacto en la Impartición de Justicia en México*, 1 REFORMA JUDICIAL, REVISTA MEXICANA DE JUSTICIA 161 (2003).

20. Juan Manuel Gómez Robledo, *El caso Avena y Otros Nacionales Mexicanos (México c. Estados Unidos de América) ante la Corte Internacional de Justicia*, 5 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 173 (2005).

21. Sergio López-Ayllón & Héctor Fix-Fierro, *¡Tan Cerca, Tan Lejos! Estado de Derecho y Cambio Jurídico en México 1970-1999*, 97 BOLETÍN MEXICANO DE DERECHO COMPARADO 155, 252-53 (2000). Jorge Ulises Carmona Tinoco, *La Aplicación Judicial de los Tratados de Derechos Humanos*, in DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS. MEMORIA DEL VII CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL 189 (Ricardo Méndez Silva ed., 2002).

and completing the restructuring of the Federal District in more equal terms in relation to other federal entities. Third, Mexico should legislate *judicial reform*, by reforming the *Ley de Amparo* to enforce, among other things, compliance with international treaties regarding human rights (the initiative was presented in the Senate in 2003 and remains in the Committees). Fourth, there has to be an agreement between economical reform and a comprehensive social reform. Fifth, some aspects of the financial reform, besides those necessary for macroeconomic stability and other features of the so-called structural reform. For instance, there is still reforms missing in tax, and other second generation improvements in energy, labor, and others as well.

Since the historical process for further constitutional reforms appears to be blocked due to the fact that neither party has more than a two-third majority in either chamber of Congress, the alternate route, namely the constitutional mutation via judicial interpretation by the Mexican Supreme Court and other major courts and tribunals, has become increasingly necessary. The intent of this Essay is not to argue that everything the judiciary does is right, but when compared to the poor performance of the Presidency and of Congress, that Judiciary has been active improving the political process. By making these modifications, these judges are being charged with “judicialization of politics” and “politization of justice.” Yet if one of those judges intervenes in an issue politicians cannot decide the judges are not seen as making politics and justice politicized, while at the same time in which those judges started to fulfill their duties by extending their control over illegal exercise of power by elected officials and representatives.<sup>22</sup>

For the first time, the Mexican Supreme Court has become an independent final arbiter in disputes between branches of government or the federal government and the citizenry. In fact, recently, the President had to withdraw a takings decree, related to the construction of the new international airport in the metropolitan area of Mexico City. The withdrawal occurred not only as a consequence of the violent demonstrations against that decree, but also because the court was presumably going to hold that the decree was unconstitutional because it failed, according to their previous jurisprudential criterions, to provide a fair compensation.

In summary, there have been recent outstanding rulings in five areas of reform. First, the political reform, recognized the same legal status to *Jefe de Gobierno del Distrito Federal* as the one enjoyed by the governors of

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22. Flores, *Assessing Democracy*, in PROCEEDINGS, *supra* note 1.

the thirty-one states, but there was a different legal give to the legislative assembly as opposed to the legislatures of other federal entities. Second, the energy reform, reformulate the limits to what can be done with or without further constitutional reform by holding that an executive decree was unconstitutional and suggested that if asked would rule the federal statute is unconstitutional as well. Third, the labor reform, endorsed the “freedom of association” by ruling out a statute establishing that there must be a sole union per public department. Fourth, the political reform, reinforced the democratization of the political parties, by not allowing independent candidacies to act inconsistent with the need for consolidating political parties. Fifth the legal reform, reinterpreted the criteria regarding the hierarchy of laws in order to hold that international treaties are above the federal laws when they constitute long-term arrangements with the Mexican state.<sup>23</sup>

#### IV. THE MEXICAN CONSTITUTION AND NAFTA

Since it is said that most of the reforms evolve around NAFTA it is necessary to explore its relationship to the Mexican Constitution. We will examine briefly whether NAFTA is constitutional and then explore more deeply the hierarchy of norms and the place occupied by international treaties. It is helpful for clarity to contrast the cases of Mexico and the United States.

##### A. *Is NAFTA Constitutional?*

The debate on whether NAFTA is constitutional took place in both the United States and Mexico, but it was on very different grounds in each. In Mexico, the discussion was primarily aimed to effect the reform of aspects of the legal system that actually were or might be contradictory to it. In Mexico, NAFTA was signed by the President of Mexico and ratified by a simple majority of the Mexican Senate as established by the current interpretation of the “treaty clause” of the Mexican Constitution.<sup>24</sup>

As a result, for Mexicans, NAFTA is a treaty on free trade for North America — in the full meaning of the word treaty. It is not merely an Agreement. In Mexico it is called *Tratado de Libre Comercio de América del Norte (TLCAN or TLC)*. Under Mexican law, with the sanction of the

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23. See generally *infra* IV.B.

24. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) art. 133.

*Ley Sobre la Celebración de Tratados*, as long as it is approved in accordance with the requirements of the Mexican Constitution's "treaty clause" it is a treaty.<sup>25</sup> Article 2.1 establishes this regardless of the document's nomenclatures or the ratifying procedures followed by the counter-signing parties.<sup>26</sup>

In contrast, in the United States, as Bruce Ackerman and David Golove discuss in their article "Is NAFTA Constitutional?," issues may exist as a result of the fact that NAFTA was approved in the United States as a congressional-executive agreement, not as a treaty.<sup>27</sup> Under U.S. law trade agreements do not need to comply with the "treaty clause" of Article 2, clause 2 of the U.S. Constitution, which requires treaties to be approved by two thirds of the Senate,<sup>28</sup> but only require approval according to the two-House procedure of the Trade Act of 1974, which require only a simple majority of both chambers of Congress.<sup>29</sup>

Ultimately, NAFTA was voted first in the U.S. House of Representatives and passed only by a small margin of 234 to 200. It was then passed in the Senate by a vote of 61 to 38, less than two thirds.<sup>30</sup> Thus, in the United States the answer to the question of NAFTA's constitutionality depends on whether the "treaty clause" is the exclusive means of committing the nation internationally, as the originalist school of thought believes, or if there are other legitimate methods, such as the congressional-executive agreement, and simple majorities in both chambers of Congress may commit the nation.<sup>31</sup>

Historically the congressional-executive agreement derives from the constitutional revolution of the New Deal of Franklin D. Roosevelt and was designed to complement, not necessarily to displace, the "treaty clause" with a fast-track commercial procedure. This process has been used to approve many international accords on commerce, including the World Trade Organization.<sup>32</sup> NAFTA has specifically held up to

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25. *Ley Sobre la Celebración de Tratados* [L.S.C.T].

26. *Id.*

27. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 99 (1995).

28. U.S. CONST. art. II, § 2, cl. 2.

29. 19 U.S.C. 2101-2487 (1974).

30. See 139 CONG. REC. S16, 712-13 (daily ed. Nov. 20, 1993); 139 CONG. REC. H10, 048 (daily ed. Nov. 17, 1993).

31. Ackerman & Golove, *supra* note 27.

32. *Id.*

constitutional challenges—a district court held that it was a legitimate exercise of Congress’s power to regulate commerce with foreign nations.<sup>33</sup>

The fast-track process was arguably developed to reform the international trade agreement process and take some issues out of the formal treaty process. Consequently, NAFTA is a prime illustration of major changes in the original constitutional practice of both countries.

### B. *What is the Legal Hierarchy of Treaties?*

In Mexico, the most interesting legal contest has not been on the constitutionality of NAFTA but it has been the controversy over the place that treaties occupy within the hierarchy of the Mexican normative system. In the United States the U.S. Constitution has a “Supremacy Clause” contained in the second clause of Article 6, which states “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>34</sup> The same formulation was introduced in Mexico first into Article 126 of the Mexican Constitution of 1857 and again in Article 133 of the Mexican Constitution of 1917 that establishes, “This Constitution, the laws of Congress in pursuance thereof and all the Treaties in accordance with it . . . shall be the Supreme Law of all the Union.”<sup>35</sup>

There are three facets to the Mexican “Supremacy Clause.”<sup>36</sup> The first facet is, the Mexican Constitution alone is the highest point of the legal hierarchy or Hans Kelsen’s “pyramid.”<sup>37</sup> The second aspect is, the laws passed by the Mexican legislature and the treaties approved by Congress are subordinate to the Constitution. The third view is that the Mexican Constitution, laws and treaties shall be jointly considered as the Mexican supreme law. In this structure, it remains unclear, however, which aspect prevails in case of a conflict pertaining to a law or a treaty.

In 1992, the Mexican Supreme Court — before NAFTA and the *Judicial Reform* of 1994-95 — held unanimously, the jurisprudential

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33. *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). Comment, *Constitutional Law — Treaty Clause. District Court Holds that NAFTA is a Valid Exercise of the Foreign Commerce Power* *Made in the USA Foundation v. United States*, 113 HARV. L. REV. 1234 (2000).

34. U.S. CONST. art. VI, cl. 2.

35. MEX. CONST. art. 133.

36. HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* (Bonnie L. Paulson & Stanley L. Paulson trans., Carendon Press, Oxford 1992); HANS KELSEN, *REINE RECHTSLEHRE [PURE THEORY OF LAW]* (1934).

37. *Id.*



principle “*LEYES FEDERALES Y TRATADOS INTERNACIONALES, TIENEN LA MISMA JERARQUÍA NORMATIVA*,” (the english translation is “Federal laws and international treaties, have the same normative hierarchy”).<sup>38</sup> Accordingly, laws and treaties in the legal system “occupy, both, the rank immediately inferior to the Constitution in the hierarchy of norms.”<sup>39</sup> That is why those laws and treaties have the same status, because “the treaty cannot be the criteria to determine the constitutionality of a law and vice versa.”

Nonetheless, in 1999, this principle was reversed— after NAFTA and the Judicial Reform — unanimously (by the Mexican Supreme Court) held that “*TRATADOS INTERNACIONALES. SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL*,” translated as “International Treaties are located hierarchically above federal laws and in second place with respect to the Federal Constitution.” Consequently, since treaties are now above laws it follows that a treaty can be the criteria to determine the constitutionality of a law, but not inversely.<sup>40</sup>

It is important to explore the implications of overturning the prior principle since this principle has been applied recently and there is at least one case under review by the Mexican Supreme Court at this time.<sup>41</sup>

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38. *Semanario Judicial de la Federación*, P. C/92, Mexico, 8 de Diciembre de 1992, T. LX, No. 205,596, 27.

39. *Semanario Judicial de la Federación*, P. LXXVII/1999, Mexico, 9 de Noviembre de 1999, T. X, No. 192,867.

40. Manuel Becerra Ramírez et al., *Tratados Internacionales. Se Ubican Jerárquicamente por Encima de las Leyes y en un Segundo Plano Respecto de la Constitución Federal (Amparo en Revisión 1475/98)*, 3 CUESTIONES CONSTITUCIONALES, REVISTA MEXICANA DE DERECHO CONSTITUCIONAL 169, 169-208 (2000).

41.

TRABAJADORES EXTRANJEROS. CUANDO DEMANDAN ACCIONES LABORALES INHERENTES A RIESGOS DE TRABAJO, LAS AUTORIDADES DE LA REPÚBLICA NO ESTÁN OBLIGADAS A EXIGIRLES QUE PREVIAMENTE LES COMPRUEBEN SU LEGAL ESTANCIA EN EL PAÍS, EN TÉRMINOS DEL ARTÍCULO 1o., PÁRRAFO SEGUNDO, DEL CONVENIO RELATIVO A LA IGUALDAD DE TRATO A LOS TRABAJADORES EXTRANJEROS Y NACIONALES EN MATERIA DE REPARACIÓN DE LOS ACCIDENTES DEL TRABAJO, POR SER JERÁRQUICAMENTE SUPERIOR A LAS LEYES FEDERALES QUE ASÍ LO EXIJAN.

*Semanario Judicial de la Federación*, IV. 2o. T. 78 L, Mexico, Febrero de 2004, T. XIX, 1163.

It is clear that this decision as Jorge Carpizo, an eminent constitutional law scholar states “is one of the most important approved by the Supreme Court of Justice since 1995.”<sup>42</sup> It is noteworthy however that some of its answers are still being challenged and there are also still some unanswered questions. The fact that the Mexican Supreme Court held unanimously in opposite direction in less than a decade should be seen in the light of there being two distinct courts — before and after the judicial reform of 1995.

The origin of the new principle was a case, which was heard by the Mexican Supreme Court and documented in the ruling *amparo en revisión* 1475/98. In that case the Mexican Supreme Court of Justice determined that Article 68 of *Ley Federal de los Trabajadores al Servicio del Estado* (LFTSE) is inconsistent with Article 2 of Convention No. 87. Article 68 concerns freedom of association and protection of the right to organize, regarding the International Labour Organization (ILO), and Article 87 focuses on the latter consecrates the freedom to unionize and the former states that “in each public department there must be a sole union.” Convention No. 87 has the statute of a treaty and the issue was whether the law, LFTSE Article 68, was in conflict.

The issue that the Mexican Supreme Court resolved in the appeal however was not the original one brought before the lower federal court. In that case heard by the lower federal court, the Judge had to rule that since Article 68 of LFTSE imposes a limitation to the right to unionize which is recognized in Article 123 of the Mexican Constitution<sup>43</sup> it is unconstitutional and for that reason the government must not apply it. It was the Supreme Court itself, as José Ramón Cossío — a former legal scholar recently appointed to be a justice on the Mexican Supreme Court — pointed out, that brought the treaty into the forefront and the Mexican hierarchy of co-equal laws and treaties into scrutiny.<sup>44</sup> Other legal scholars have speculated that because the petitioner quoted the old jurisprudential principle that laws and treaties had the same hierarchy and hence cannot be used to determine its constitutionality, but the lower court did not follow this law and simply crafted a better one.<sup>45</sup>

Edgar Corzo Sosa is concerned that the ruling of the lower court judge and the confirmation by the Supreme Court in this case encourages authorities to avoid the application of an article that in their opinion is unconstitutional with the consequent risk that a collective legislative body

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42. Ramírez et al., *supra* note 40, at 177, 183.

43. MEX. CONST. art. 123.

44. José Ramón Cossío, *La Nueva Jerarquía de los Tratados Internacionales*, ESTE PAÍS 34 (2000).

45. Ramírez et al., *supra* note 40, at 183, 185.

is over ruled by one bureaucrat alone. Sosa suggests that the lower court judge must enforce the application of an article of doubtful constitutional pedigree until the higher courts rule it out completely. However he recognizes that there should be little concern since in both cases the actions of a federal entity applying an apparently unconstitutional article can be prevented or even appealed.<sup>46</sup>

The lower court judge, by deviating from such application, is forcing the higher courts to make a definitive ruling on the issue at stake. This problem possibly refers to the flaws of the Mexican centralized system of judicial review, which needs to be improved, which is recognized in the second part of Article 133, by asserting that "The judges in each State will fix everything to the Constitution, laws and treaties notwithstanding the contrary dispositions that there might be in the Constitutions or laws of the States."<sup>47</sup>

The Mexican Supreme Court could merely have confirmed the decision of the lower court stating that such article cannot be applied because it was unconstitutional. Yet the Mexican Supreme Court instead decided to go further by overruling the prior principle. They chose to displace the rule that federal laws and international treaties occupy the same rank in the hierarchy of norms and so the treaty cannot determine the constitutionality of a law and vice versa with the rule that treaties are above federal laws and thus may be used to determine the constitutionality of federal laws. The Mexican Supreme Court intentionally chose to reconstitute the hierarchy of norms of Mexican laws.

There are two chief models for the reception of international law in the law of a nation. The first model is the transformation (or indirect reception) into national law through a legislative enactment. The second model is the incorporation (or direct reception) into national law without further legislative endorsement. It is also worth pointing out that these distinctions do not necessarily coincide with a treaty being self-executing or not. A self-executing treaty generally does not necessitate any further legislative requirement, but a treaty that is not requires governmental action.<sup>48</sup> Some authors suggest that since in Mexico the reception for all treaties takes place without further legislative enactment, all treaties are self-executing and hence superior to laws.

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46. *Id.* at 187.

47. MEX. CONST. art. 133.

48. Ramírez et al., *supra* note 40, at 169, 172-74; cf. Miguel Rábago, *Aplicación de Tratados Internacionales por Parte de los Tribunales Mexicanos: Algunas Observaciones Relativas a su Efecto Directo*, 6 REVISTA MEXICANA DE DERECHO PÚBLICO 121 (2004).

Indeed, the Mexican legal system supports the incorporation or direct reception by not demanding any further requirements for some treaties, but in practice there are treaties that by their terms do need additional legislation. Self-executing treaties, such as those on human rights, tend to be incorporated immediately into the Constitution and other treaties, such as those on commerce, tend to require a complementary legislative enactment. It should be readily seen why a self-executing treaty should be superior to any law.

There are three main arguments for the change in hierarchy of legal norms. First, treaties are international commitments assumed by the Mexican State at large, and compel all their federal entities towards the international community. That is why both the President, as the head of the (federal) state, and the Senate, as representative of the federal entities, had to be the ones to participate in the "treaty power." This is a material legislative power given to the President that must be approved by a simple majority of the Senate and not by a two thirds majority as in the United States.

Sovereign States, as other members of the international community, are free to acquire further duties through treaties. Furthermore, they cannot ignore such obligations freely attained by following the principles of *pacta sunt servanda* and *rebus sic stantibus*, in which treaties must be obeyed with good faith, unless in the meantime the signing conditions have changed substantially. Similarly, Article 27 of the Vienna Convention on Treaties of 1969 establishes that "A State cannot invoke its national law as a justification for not complying with a treaty."<sup>49</sup>

The question remains whether the President and the Senate are an adequate means of representing both the federal state and the federal entities. One could argue that the answer is affirmative, but there are several contrary opinions that must briefly be addressed and discussed.

For instance, Diego Valadés, a prominent constitutional law scholar, suggested in an editorial that due to this asymmetry, the President and the Senate, through the making of treaties, could overrule the decision of the federal and local congresses.<sup>50</sup> Similarly, Corzo inquires not only whether the lower chamber has to approve the treaties as well or even the local chambers have to be taken into account in the process but also whether the judicial review of treaties must be *a priori* instead of *a posteriori*.<sup>51</sup> Yet,

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49. Vienna Convention on Treaties, 1155 U.N.T.S. 331 art. 27.

50. Diego Valadés, *Asimetrías en el Congreso*, EXCÉLSIOR 27 1, 9 (2000).

51. Ramírez et al., *supra* note 40, at 190, 194, 196. Cf. MIGUEL RÁBAGO, *Propuesta de Reforma al Artículo 105 de la CPEUM: Hacia un Control Previo de Constitucionalidad de los*

López-Ayllón claims that other subnational entities, such as states and municipalities, must participate in the treaties and even that some agreements on human rights must be subjected to referendum.<sup>52</sup> Also, Carpizo contends that the Senate no longer represents the federal entities, since local legislatures lost the entitlement to designate their senators, but Carpizo suggests that it makes no difference regarding the Court.<sup>53</sup>

In contrast, it is true that there is some kind of asymmetry here, but the question is whether it is justified. This Essay reasons that since the Senate is part of Congress, the fact that it approves a treaty is a legitimate means of annulling something that the two chambers approved before.

Further, since Mexico is a federal system, there is no need for both chambers to have exactly the same overlapping powers. Hence requiring the President and the Senate to approve something on behalf of the federal state and federal entities seems proper, rather than asking the people to do it directly by way of referendum or indirectly through the people's representatives. This argument does not intend to decrease democracy, but suggests that it is mistaken to increase it at expenses of federalism when it is necessary to reconstitute both federalism and democratic government, which is consistent with their wording in the Constitution.

Moreover, this Essay agrees that the status of the Senate as representative of the federal entities has been compromised. Since the adoption of proportional representation schemes, used to elect senators, there has been an alteration of the equal representation between large and small states. Central to this problem is that the interest of the federal entities are not being represented by the Senate even after the reforms are put in place.

Second treaties have no limitations. Therefore the President and the Senate can commit the Mexican state in any subject, independently of being federal or reserved to the federal entities. Clearly, this is the main point from which the court derives part of its conclusion that treaties are above both federal and local laws. Yet the court probably should not have concluded that the federal and local laws were in the same hierarchy as that of treaties.

However, we must clarify that, on the one hand, treaties do have limits imposed by Article 15, in which that article prohibits the formation treaties for extraditing political prisoners and for those criminals that had the condition of slaves, nor for treaties altering the guarantees and rights

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*Tratados*, in ENSAYOS EN TORNO A UNA PROPUESTA DE REFORMA CONSTITUCIONAL EN MATERIA DE POLÍTICA EXTERIOR Y DERECHOS HUMANOS 115 (Loretta Ortiz Ahlf et al. eds., 2004).

52. Ramírez et al., *supra* note 40, at 197, 207-08.

53. *Id.* at 181.

established by this Mexican Constitution to the men and the citizen.<sup>54</sup> On the other hand, treaties lack limitations of competence that federal and local laws do contain.

Third treaties are above both federal and local laws, and inferior to the Constitution itself. Thus, because treaties do not have the same limitations in competence as that of federal and local laws it seems that they can cover a much broader realm of subjects, including both federal and the federal entities. Treaties must meet three requirements (the first two are formal and the third is substantial). The first requirement is that the treaty be celebrated by the President.<sup>55</sup> The second element is that the treaty be approved by the Senate. The third element is that treaty be in accordance with the Mexican Constitution.

The Mexican Supreme Court held at least three levels in the hierarchy of norms should be adopted. The court ruled that the Mexican Constitution should be the Supreme governing authority, treaties will come next and finally the federal and local laws. The problem with this hierarchical arrangement is twofold. First, this order leaves no space for the necessary intermediate levels. Second, this hierarchy places both federal and local laws in the same hierarchy, when they belong to different competencies as Article 124 of the Mexican Constitution establishes.<sup>56</sup>

On one side, it is not clear where the so-called constitutional laws, at least those that regulate an article or an institution of the Mexican Constitution, such as the *Ley de Amparo* — and even those that were enacted by the constitutional assembly of 1916-17 — are located. It might be said that the constitutional laws and the treaties are in the same hierarchy, because they constitute norms that give unity to the federal state

54. MEX. CONST. art. 15

55. In February 24, 1998, the Mexican Supreme Court ruled that the President does not have to negotiate a treaty personally in order for it to be valid, as long as he or she personally ratifies it.

TRATADO DE EXTRADICIÓN INTERNACIONAL CELEBRADO ENTRE MEXICO Y ESTADOS UNIDOS DE NORTEAMÉRICA [sic] EL CUARTO DE MAYO DE MIL NOVECIENTOS SETENTA Y OCHO. NO ES INCONSTITUCIONAL POR LA CIRCUNSTANCIA DE QUE EL PRESIDENTE DE LA REPÚBLICA NO LO HAY SUSCRITO PERSONALMENTE, SI INSTRUYO AL SECRETARIO DE RELACIONES EXTERIORES PARA SU NEGOCIACIÓN Y LUEGO LO RATIFICO PERSONALMENTE.

*Semanario Judicial de la Federación*, P. XLV/98, Mexico, 9 de Mayo de 1998, T. VII, No. 196,235, 133. Ricardo Méndez Silva, *La Firma de los Tratados*, 3 CUESTIONES CONSTITUCIONALES. REVISTA MEXICANA DE DERECHO CONSTITUCIONAL, 209 (2000).

56. *Id.*; MEX. CONST. art. 124.

as a whole, without providing an over-amount of attention either federal or local competencies.<sup>57</sup> But this reopens the question of what is supreme, in case of conflict, a constitutional law or a treaty? In fact the Mexican Court in this case seems to be overruling the principle that states constitutional laws were above treaties, yet that does not necessarily mean that a constitutional law is or must be always below a treaty. The resolution to this problem depends on the nature of the treaty, and constitutional law, that is at issue.

On the other side, following an erroneous interpretation of Article 124 that defines the competence of federal and local authorities, the Mexican Supreme Court rules that those federal and local authorities are in the same hierarchy.<sup>58</sup> However, Article 124 states, "The prerogatives that are not expressly conferred by the Constitution to federal authorities, and reserved to the states."<sup>59</sup> As those authorities are different in terms of competence or realms of application, one federal and another local, they cannot be in the same hierarchy and still be in conflict. In fact, the Mexican Constitution in Article 41 clarifies that the sovereignty is exercised by the federal and local authorities in the terms of their respective competence, which is defined by the Federal Constitution and the local Constitutions.<sup>60</sup> The only limitation is that the latter cannot contravene the former.<sup>61</sup> Finally, by adopting those three levels in the hierarchy of norms the Mexican Supreme Court fails not only to leave space for intermediate levels but also fails to distinguish adequately among different kinds of federal laws and treaties.

On the one side, federal laws can be distinguished by those identified as ordinary (federal) laws and those already labeled as constitutional laws (or federal constitutional laws). On the other side, all treaties are not the same and must not be put in the same box.<sup>62</sup> Consequently, in the following paragraph this Essay will clarify whether commerce or human rights treaties ought to prevail in an eventual case of conflict.

### *C. What Ought to Prevail a Treaty on Commerce or on Human Rights?*

The distinction suggests some treaties are hierarchically inferior or superior to others. For example, this difference implies that treaties on human rights are more important than those on commerce. A constitutional

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57. Ramírez et al., *supra* note 40, at 182.

58. MEX. CONST. art. 124.

59. *Id.*

60. *Id.* art. 41.

61. *Id.*

62. *Cf.* Ramírez et al., *supra* note 40, at 207.

reform to Article 133 does not necessarily mean to consecrate the special hierarchy of treaties on human rights over those on commerce.<sup>63</sup> Their hierarchical superiority is already embedded in the principles recognized recently by the jurisprudential and legislative criteria existing extensively in comparative law and in the Mexican legal doctrine.<sup>64</sup>

Moreover it is helpful to recall some of these distinctions. The first difference is the number of signing parties, treaties are bilateral and multilateral. The second various is the process of their application, in which treaties are self-executing and nonself-executing. The third dissimilarity is the subject matter, in which the treaties cover a whole range of distinct issues, including commerce and human rights.<sup>65</sup> Regarding the last criteria, although it may be difficult to make an exhaustive hierarchy of treaties that are not impossible per se.

In fact, on September 2, 2004, a controversial complementary bill on treaties in economic subject matters (*Ley Sobre la Aprobación de Tratados Internacionales en Materia Económica*) was published and was enacted the next day. This bill, among other things, lacks clarity as to why Congress had to approve another bill on treaties besides the one approved in 1992. However, the passage of that controversial bill reinforces not only that treaties on commerce and human rights can be put in different boxes, but also that the former are inferior to the latter. This law defines a "treaty" by referring to the definition included in the treaty approved in 1992 (Article 1), and suggests that treaties, such as those in commerce (Article 1), must be in accordance with the Mexican Constitution for respecting human rights and the separation of powers.<sup>66</sup>

In sum, those treaties that amplify human rights coincides with the constitutional guarantees and must be placed on a second plane below the Mexican Constitution,<sup>67</sup> whereas other types of treaties do not need such an arrangement. The fact that those agreements commerce must respect human rights subordinates those other types of treaties. In addition, treaties on commerce can be approved as mere agreements, like in the United

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63. Cf. Mauricio Iván del Toro Huerta, *La Jerarquía Constitucional de los Tratados Internacionales en Materia de Derechos Humanos: Propuesta de Reforma al Artículo 133 Constitucional*, 1 PROPUESTA DE REFORMAS LEGALES E INTERPRETACIÓN DE LAS NORMAS EXISTENTES 645 (2002).

64. Héctor Fix-Zamudio, *El Derecho Internacional de los Derechos Humanos en las Constituciones Latinoamericanas y en la Corte Interamericana de Derechos Humanos*, in JUSTICIA CONSTITUCIONAL, OMBUDSMAN Y DERECHOS HUMANOS 452 (2d ed. 2001).

65. Cf. Huerta, *supra* note 63, at 659-60.

66. Manuel Becerra Ramírez, *Ley Sobre la Aprobación de Tratados en Materia Económica*, 5 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 697 (2005).

67. Cf. Ramírez et al., *supra* note 40, at 175, 189, 207.



States, by the President and simple majorities in both chambers of Congress, as discussed above. Additionally, international or multilateral treaties are and must be above those regional and bilateral agreements, as well as those self-executing treaties need to be above nonself-executing treaties.

Therefore, regarding the hierarchy of the Mexican legal system, the Mexican Supreme Court must adopt a multiple-standard that distinguishes the procedures for approval, their extent and subject matters. In short, we advocate for the adoption of criteria with at least five levels.<sup>68</sup> The first level must pertain to the Mexican Constitution, which must be approved by a constitutional assembly elected ad hoc for that approval purpose, and reformed by two thirds of both chambers by a simple majority of legislative assemblies of all the federal entities. The second level needs to concern treaties on human rights and other self-executing treaties, approved by the President with a simple majority of the Senate with further requirements such as the two thirds mandate (as in the United States) or even via referendum. The third level should impact constitutional (or federal) laws, approved by a simple majority in both chambers, but regulated by one article or institution within the Mexican Constitution to guarantee its enforceability. The fourth level needs to include treaties on commerce and other nonself-executing treaties, approved by the President with a simple majority of the Senate or with a simple majority of two houses. The fifth level should pertain to ordinary federal laws, approved by simple majorities on both chambers.

## V. CONCLUSION

In the process of reconstituting the Mexican Constitution, treaties have been essential. Now with the adoption of the above criteria it is possible to differentiate between treaties on commerce and on human rights. Also the Senate can be reformed into a representative of the federal entities, regardless of size, despite the Senate's past history.

Furthermore, in order to enjoy our human rights, we should not deify commerce, but we must call to mind that Kant, in his basic formulation of the "categorical imperative," argues that one should "Act only in accordance with that maxim through which you can at the same time will

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68. Cf. Loretta Ortiz Ahlf, *Jerarquía Entre Leyes Federales y Tratados*, in ENSAYOS EN TORNO A UNA PROPUESTA DE REFORMA CONSTITUCIONAL EN MATERIA DE POLÍTICA EXTERIOR Y DERECHOS HUMANOS, *supra* note 51, at 135.

that it should become a universal law.”<sup>69</sup> Moreover, from this premise, Kant derives a second formulation, which continues by stating “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as end, never merely as a means.”<sup>70</sup> Similarly, from the idea that humans should not merely be subject to another’s will, but to their own, Kant instructs us that “Every rational being must act as if he were by his maxims at all times a law-giving member of the universal kingdom of ends.”<sup>71</sup>

In sum, one of the main challenges in the process of reconstituting constitutions is to use human beings not merely as a means to an end, but as ends in themselves, with human dignity, duties, and rights — including the right to be one’s own lawgiver. Paradoxically, in order to convert from subjects of an authoritarian regime to citizens of a democratic republic, both national and international entities must, protect and enforce the rights of all human beings.

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69. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 31 (N.Y. Cambridge Univ. Press 1998).

70. *Id.* at 38.

71. *Id.* at 45.

