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8. Reconstituting the Mexican Constitution and NAFTA: Human Rights Vis-à-vis Commerce

SUMMARY: I. Introduction. II. Reconstituting the Mexican Constitution. III. The Mexican Constitution and NAFTA. IV. Conclusion. V. Bibliography.

“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”*— implies the necessity to expand not only the actual enjoyment of human rights and separation of powers, on one hand, and even the fulfillment of democracy and rule of law, on the other,¹ but also the real endorsement of the principles that exemplify a truly representative, democratic, and federal Republic as Mexico (re)constituted itself in 1916-17 like the phoenix over its ashes.

The aim of this paper is threefold: first, to bear in mind the main characteristics not only of the great transformation, experienced in the Mexican institutional framework, mainly in the economical realm, in the last thirty-five years, in general, and in the past twenty years, in specific, via constitutional reforms, but also the great(er) expectation that such structural reform has generated in the process of reconstituting the constitution in the political one, along the lines of human rights and separation of powers; second, to bring into play the role of treaties in such process, by focusing in the debate on whether NAFTA, as an international treaty, regardless of its denomination, is constitutional or not, and in the discussion on the place of treaties in the hierarchy of norms, by critically analyzing a controversial jurisprudential criteria, according to which treaties

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¹ *Vid.* Flores, Imer B., “Constitución, democracia y derecho: teoría constitucional y valores constitucionales”, *Revista del Instituto de la Judicatura Federal*, no. 13, 2003, pp. 145-159; and “Assessing Democracy and Rule of Law: Access to Justice”, in Peczenik, Aleksander (ed.), *Proceedings of the 21st IVR World Congress, Lund (Sweden), 12-17 August, 2003, Part I: Justice*, Stuttgart, Franz Steiner Verlag, 2004, pp. 146-154.

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are above federal laws and below the federal constitution; and, third, to call upon the necessity that in a eventual conflict between a treaty on commerce and one on human rights, the later ought to prevail over the former.

Let me advance that we are going to emphasize the (active) role of the courts and tribunals not only as responsible of guarding the constitution and protecting human rights but also—in case of *impasse* due to the fact of a divided government— of guaranteeing further implementation of human rights through constitutional mutation via judicial interpretation. In a similar fashion, we will insist on the importance of considering the Senate in a federal state as representative of the federal entities.

At this point, I will like to explicit some of my underlying arguments: *First*, although there is a strong tendency—especially in the civil law tradition—to think that it is enough to enact “law” to alter, automatically, “reality”; it is clear that that seldom happens to be the case. *Second*, in any case, to sustain the existing “normativity” or to substitute it with an alternative “counter-normativity” we must also try to place them into an actual “normality” and to displace the “abnormality” responsible of the malfunctioning of the mesh.² *Third*, the institutional innovation must be complemented by a cultural renovation, *i.e.* by taking culture—and the cultural manifestations and practices— seriously.³ Therefore, a successful amendment must really take these three relationships into account, and thus 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.⁴

² Vid. Flores, Imer B. and Flores Mancilla, César, “Las paradojas entre cultura de la legalidad e instituciones jurídicas en México”, in Aguiar Meugniot, Leticia (ed.), *Demos ante el espejo: análisis de la cultura política y de las prácticas ciudadanas en México. Memoria del Seminario para el Análisis sobre Cultura Política y Prácticas Ciudadanas*, México, UNAM, 2005, pp. 205-217. Cfr. Heller, Herman, *Teoría del Estado*, trans. by Luis Tobio, Mexico, Fondo de Cultura Económica, 1942, pp. 199-216 and 267-289 [Original title and publication: *Staatslehre*, 1934]; O’Donnell, Guillermo and Schmitter, Philippe C., *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore, The John Hopkins University Press, 1986, 65 [There is version in Spanish: “Conclusiones tentativas sobre democracias inciertas”, in O’Donnell, Guillermo, *et al.* (comps.), *Transiciones desde un gobierno autoritario*, Vol. 4, Buenos Aires, Paidós, 1988].

³ Vid. Flores, Imer B., “Heráclito vis-à-vis Parménides: cambio y permanencia como la principal función del derecho en una democracia incipiente”, in Molina Piñeiro, Luis J. *et al.* (eds.), *Funciones del derecho en las democracias incipientes. El caso de México*, México, Porrúa, Facultad de Derecho, UNAM, 2005, pp. 149-171. Cfr. Fukuyama, Francis, *Trust. The Social Virtues and the Creation of Prosperity*, New York, The Free Press, 1995 [There is version in Spanish: *Confianza*, Buenos Aires, Atlántida, 2000]. Huntington, Samuel P. and Harrison, Lawrence E. (eds.), *Culture Matters: How Values Shape Human Progress*, New York, Basic Books, 2000 [There is version in Spanish: *La cultura es lo que importa*, Barcelona, Planeta, 2001].

⁴ Vid. Flores, Imer B., “The Quest for Legisprudence: Constitutionalism v. Legalism”, in Wintgens, Luc J. (ed.), *The Theory and Practice of Legislation: Essays on Legisprudence*, Oxon, Ashgate, 2005, pp. 26-52. Cfr. Cohen, Felix S., “Transcendental Nonsense and the Functional Approach”, *Columbia Law Review*, No. 35, 1935, p. 809 [There is version in Spanish: *El método funcional en el derecho. Sinsentido trascendental y el enfoque funcional*, trans. by Genaro R. Carrió, Buenos Aires, Abeledo-Perrot, 1962].

In that sense, let me insist that it is necessary to reconstitute our constitution at least in two fundamentally constitutive ways, in order to empower: 1) human rights and separation of powers, in general; and, the Courts and Tribunals as the guardians of the Constitution and of the protection of human rights, in particular; and 2) democracy as the government of, by, and for all the people; and, the rule of law as the government under rules (*reason*), not men nor women (*passion*).⁵

All these ideals can be synthesized in one principle: *isonomy*, i.e. equal application and protection of law to all: authority and citizen, majority and minority, poor and rich, including white and non-white, national and foreigner, man and woman, heterosexual and homosexual, believer and non-believer/skeptic, both at home and abroad.⁶ Moreover, the problem is that in a world characterized by great division and inequality, the application and protection of law rarely is general or universal and both the actual enjoyment of human rights and separation of powers, on one side, and the real fulfillment of democracy and the rule of law, on the other, are compromised.⁷

II. Reconstituting the Mexican Constitution

According to article 39 of the Constitution: “The national sovereignty resides essential and originally in the people”; and to article 40: “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”. At this point, it is worth mentioning that Mexico has 31 states and 1 *Distrito Federal* (i.e. a Federal District), summing up to a total of 32 federal entities.

However, much has been said on the 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 Constitution to reduce the gap between the two but also for reconstituting it into a true representative, democratic, and federal Republic.

In fact, the Constitution was promulgated on February 5th 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

⁵ Cfr. Thucydides, *History of the Peloponnesian War*, London, Penguin Books, 1972, Book II, § 37, 145: “Our constitution is called a democracy because power is in hands not of a minority but of the whole people”. Lincoln, Abraham, “The Gettysburg Address, November 19, 1863”, *Lincoln on Democracy*, New York, Harper Collins, 1990, 308: “government of the people, by the people, for the people” [emphasis added]. Cfr. also Aristotle, *Politics*, New York, Cambridge University Press, 1988.

⁶ Vid. Flores, Imer B., “Igualdad, no discriminación (y políticas públicas): a propósito de la constitucionalidad o no del artículo 68 de la Ley General de Población”, in Torre Martínez, Carlos de la (ed.), *El derecho a la no discriminación*, México, UNAM, Instituto de Investigaciones Jurídicas, 2006, pp. 263-306.

⁷ Vid. Flores, Imer B., “Constitución, democracia y derecho...”, *op. cit.*, note 1, pp. 145-159; and “Assessing Democracy and Rule of Law...”, *op. cit.*, note 1, pp. 146-154.

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has been reformed by 170 decrees, which comprehend 443 additions or modifications to its text, including 3 transitory dispositions that were later on derogated. It is worth mentioning that the first half of those decrees were published prior to February 4th 1977, in sixty years, and the other half in the last thirty years, counting the decree published on February 12, 2007 as the latest.

1. *The Great Transformation*

The reforms under the Presidencies of Luis Echeverría Álvarez (1970-1976) and José López Portillo (1976-1982) sum 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 (1994-2000) there were alone 18 decrees (3 per year) and 77 alterations (12.8 per year). It is worth noting that in 1997 under Zedillo, PRI lost for the first time its absolute majority on both chambers, retaining the relative majority on the Senate, and since then the phenomenon of “divided government” has become the rule. As the procedure to reform the 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 reforms has slowed down since that year to the extent that in the first four years of the Presidency of Vicente Fox Quesada there were only 10 decrees (2.5 per year) with 18 reforms (4.5 per year). Moreover, in the last two years of Fox’s term as President, Congress regained much confidence and approved 9 decrees (4.5 per year) with 14 transformations (7 per year)

In the last years, due to the *impasse* between the Executive and the two chambers of the Legislative, it has been the Judiciary, mostly the Supreme Court but other major courts and tribunals as well, which through the interpretation of the constitution and their constitutional doctrine have reformed it informally or materially, a phenomenon described as constitutional mutation via judicial interpretation.

It is also noteworthy that during the two previous presidential terms prior to NAFTA signing, ratifying and entering into force, *i.e.* in the Presidencies of Miguel de la Madrid Hurtado (1982-1988) and Carlos Salinas de Gortari (1988-1994), 34 decrees (2.83 per year) and 120 additions and modifications (10 per year) took place preparing the ground for it: 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. Keep in mind that Mexico entered 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, it has transformed itself significantly by moving from predominantly rural to predominantly urban; from a closed economy to an open one; and from

an authoritarian tradition to a more democratic one.⁸ However, the gap between what Octavio Paz labeled as “Two Mexicos” subsists and the question on whether which one is going to be able to pull the other up or down remains unanswered.⁹

The great transformation was chiefly economical and the idea was to replace the model of import substitution for one of an open market economy, labeled as “neoliberalism” —or to use John Williamson expression “Washington consensus”— which required not only the defeat of the central planning and of the welfare and corporate state but also the want for a (structural) *Economical Reform* which comprises: 1) *stabilization*, by maintaining the balance in the budgetary and financial plans, as well as by reducing public debt and public deficit; 2) *integration*, by disengaging protectionism and by engaging into a commercial incorporation into the World economy, in general, and the North American economy, in specific, through openness to flows of goods and services, as well as of foreign investments, but not —or at least not yet— of persons; 3) *privatization*, by reducing the public participation of the Mexican state in the economy and by returning it to private entrepreneurs both domestic and foreign; and 4) *liberalization*, by restricting state interference on 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 right to vote —and to be voted— in federal elections; to the introduction, in 1963, of proportional representation schemes; and to the reduction of the age to exercise the right to vote to 18 years in 1969 and to be voted into both chambers of Congress, namely, *Cámara de Diputados* and *Senado* to 21 and 30, correspondingly, in 1972.¹⁰

Moreover, the different aspects of the *Political Reform* were gradually enhanced in 1977, 1986, 1990 and 1996, while promoting: 1) *representation*, by increasing the number of representatives to Congress of minority parties through proportional representation; 2) *separation*, by creating an authority responsible of organizing the elections independent from the executive branch: *Instituto Federal Electoral*; and, 3) *specialization*, by creating into the judiciary a tribunal

⁸ Vid. López-Ayllón, Sergio, *Las transformaciones del sistema jurídico y los significados sociales del derecho en México. La encrucijada entre tradición y modernidad*, México, UNAM, Instituto de Investigaciones Jurídicas, 1997, p. 89.

⁹ Vid. Paz, Octavio, “Postdata”, *El laberinto de la soledad, Postdata, Vuelta al laberinto de la soledad*, México, Fondo de Cultura Económica, 2003, p. 287.

¹⁰ Vid. Flores, Imer B., “Gobernabilidad y representatividad: hacia un sistema democrático electoral mayoritario y proporcional”, in Concha Cantú, Hugo A. (ed.), *Sistema representativo y democracia semidirecta. Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, México, UNAM, Instituto de Investigaciones Jurídicas, 2002, pp. 209, 213-215.

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specialized in the qualification of the elections instead of doing it politically by the legislative branch: *Tribunal Electoral del Poder Judicial de la Federación*.

In addition, the 1990 reform duplicated 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 two persons mentioned in the formula—and the remaining fourth seat is designated via proportional representation. However, the later mechanism compromises federalism. Similarly, to the United States of America, the Senate was introduced originally in 1824, suppressed in 1836, and reintroduced later in 1874 supposedly to represent large and small States alike, but with this scheme there is a distortion in the federal composition of the higher chamber of Congress.¹¹

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 and now they are mostly elected, the *Jefe del Gobierno del Distrito Federal* and the *Delegados* since 1997 and 2000, although some are still appointed by the federal executive, after being proposed by the local executive, and can be ceased by the former alone, such as the General Attorney and the Secretary of Public Security. In addition, there was not a true local legislature until 1994; it was simply a representative assembly, with no legislative powers of their own. It is worth mentioning that the Federal Congress can still nowadays legislate on those subjects not explicitly conferred to the legislative assembly of Mexico City.

The significant reforms in the social realm involved major cornerstones, such as articles 3, 27, and 130. In 1993, the *Educational Reform* to article 3 enlarged the obligation of the State—throughout its three levels of government: federal, local and municipal—to guarantee education to all the people from elementary only to include preschool and secondary as well. 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 not to be changed ever, since they 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*

¹¹ *Ibidem*, p. 234. Cfr. Flores, Imer B., “Democracia y participación: consideraciones sobre la representación política”, in Orozco Henríquez, J. Jesús (ed.), *Democracia y representación en el umbral del siglo XXI. Memoria del III Congreso Internacional de Derecho Electoral*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 1999, Vol. I, pp. 195 and 233.

and *Procuraduría Agraria*; and the latter to recognize legal personality in equal terms of all “religious associations” and at the same time reinforced the “liberty of religion”, while at the same time maintaining the separation between church and state.

In the legal realm, probably, the most important reform was the borrowing of the Scandinavian *Ombudsman* —in the form of a President of the Human Rights National Commission— to guarantee the respect of the human rights, especially in the criminal and penal realms: eradicating disappearances, torture, and so on. However, after NAFTA entering into force, the most outstanding reform has been the judicial one, which compacted the Supreme Court from 21 justices (plus 5 supernumerary to make a total of 26) to 11, one of which is the chief justice; and created a *Consejo de la Judicatura*, composed of 7 counselors in charge of the administrative staff and stuff of the court, presided also by the chief justice. Furthermore, the Supreme Court gained some of the faculties that usually correspond to a constitutional tribunal, such as resolving constitutional controversies between different branches or levels of government. However, it retained the undue centralized monopoly of the judicial review of the constitutionality of laws.

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, not only on commerce but also on human rights. Indeed, in the last 35 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.

As a result the Mexican state has accepted the competence of the Inter-American Council and Court on Human Rights,¹² where Mexico has already been sued,¹³ and the jurisdiction of the Human Rights Committees of the United Nations.¹⁴ Besides, the Mexican government has brought one case to the International Court of Justice, demanding the United States of America for the human rights violations of our fellow citizens sentenced to the death penalty and executed in their soil.¹⁵

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-Fierro pointed out, in a research that comprises the years 1917-1998, that from 200,000 jurisprudential

¹² For a comment, *vid.* Carmona Tinoco, Jorge Ulises, “Algunos aspectos de la participación de México ante los órganos del sistema interamericano de protección de los derechos humanos”, *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, No. 9, julio-diciembre, 2003, p. 3.

¹³ *Vid.* Carmona Tinoco, Jorge Ulises, “El caso Alfonso Martín del Campo Dodd vs. Estados Unidos Mexicanos, ante la Corte Interamericana de Derechos Humanos”, *Anuario Mexicano de Derecho Internacional*, No. 5, 2005, p. 705.

¹⁴ *Vid.* Carmona Tinoco, Jorge Ulises, “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”, *Reforma Judicial. Revista Mexicana de Justicia*, No. 1, 2003, p. 161.

¹⁵ *Vid.* Gómez-Robledo, Juan Manuel “El caso Avena y otros nacionales mexicanos (México c. Estados Unidos de América) ante la Corte Internacional de Justicia”, *Anuario Mexicano de Derecho Internacional*, No. 5, 2005, p. 173.

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criteria of the Supreme Court analyzed 106 significantly referred to treaties: 68 dictated between 1917 and 1988 (0.96 per year) and 38 between 1988 and 1998 (3.45 per year).¹⁶ 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 into the latter 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*).

2. *The Great(er) Expectation*

Moreover, the expectation generated by the earlier transformations and the seizing of the Presidency by a candidate from a political party other than PRI was even greater. At first the idea was allegedly not only to continue and pursue other features of the previous reforms such as the *Educational Reform*, which remained incomplete; the *Political Reform*, by strengthening, at least, Congress and controlling the Executive, and by consummating the restructuring of the Federal District — supposedly in more equal terms in relation to the other Federal Entities—; the *Judicial Reform*, by reforming the *Ley de Amparo* to enforce, among other things, compliance with international treaties on human rights (the initiative was presented in the Senate in 2003 and is still in the Committees); but also to complement the *Economical Reform* with a comprehensive *Social Reform*. In addition, some aspects of the *Financial Reform*, besides those enforced in order to keep the macroeconomic stability and other features of the so-called *Structural Reform*, are still missing, for instance, the *Tax Reform*, and other second generation reforms such as the *Energy Reform*, the *Labor Reform*, and so on.

Since the main road for further constitutional reforms appears to be blocked due to the fact that neither party has more than two thirds in both chambers of Congress, the alternate route, namely the constitutional mutation via judicial interpretation by the Supreme Court and other major courts and tribunals, has become increasingly popular. Please do not get me wrong, I do not intend to say that everything they do is right, but at least that due to the poor performance of the Presidency and of Congress, it has been an active Judiciary the responsible of unlocking the political process. By the by, in doing so judges are being charged of the “judicialization of politics” and/or the “politization of justice”, but if by now a judge intervenes on precisely what politicians

¹⁶ López-Ayllón, Sergio and Fix-Fierro, Héctor, “¡Tan cerca, tan lejos! Estado de derecho y cambio jurídico en México 1970-1999”, *Boletín Mexicano de Derecho Comparado*, No. 97, enero-abril, 2000, pp. 252-253. *Vid.* Carmona Tinoco, Jorge Ulises, “La aplicación judicial de los tratados de derechos humanos”, in Méndez Silva, Ricardo (coord.), *Derecho internacional de los derechos humanos. Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 2002, p. 189.

cannot decide, it is quite the opposite: judges have ceased to make politics and justice has stopped to be politicized, at the very same time in which they started to fully fulfill their duties by extending their control to the illegal exercise of power by elected officials and representatives.¹⁷

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

To make a long story short, let me enunciate briefly some of the most outstanding rulings on: 1) *Political Reform*, recognition of the same legal status to *Jefe de Gobierno del Distrito Federal* as the one enjoyed by the governors of the 31 States, but not similarly to the legislative assembly in comparison with the legislatures of the other federal entities; 2) *Energy Reform*, reformulation of the limits to what can be done with or without a further constitutional reform by holding that an executive decree was unconstitutional and by suggesting that if asked whether the federal statute is constitutional or not they will rule that it is unconstitutional too; 3) *Labor Reform*, endorsement of the “freedom of association” by ruling out that as the statute established that there must be a sole union per public department; 4) *Political Reform*, reinforcement of the democratization of the political parties, but not allowing independent candidacies for being arguably inconsistent with the need for consolidating political parties; and 5) *Legal Reform*, reinterpretation of the criteria regarding the hierarchy of laws in order to hold that international treaties are above the federal laws as they constitute long term arrangements of the Mexican state.¹⁸

III. The Mexican Constitution and NAFTA

Since it is said that most of the reforms evolve around NAFTA it is imperative to recall its relationship to the Constitution: first, by examining briefly whether NAFTA is constitutional or not; and, second, by exploring lengthy the hierarchy of norms and the place of international treaties on it. Furthermore in the process of doing so it is necessary to contrast the cases of Mexico and the United States of America.

¹⁷ Flores, Imer B., “Assessing Democracy and Rule of Law: Access to Justice”, *op. cit.*, note 1

¹⁸ *Vid. infra*: III, 2.

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1. *Is NAFTA Constitutional?*

Whereas the debate on whether NAFTA is constitutional or not took place in both countries, it was very different in each. On the one hand, the discussion was primarily aimed to reforming those aspects of the legal system that actually were or might be in contradiction to it. In addition, NAFTA was signed by the President and ratified by a simple majority of the Senate as established by the current interpretation of the “treaty clause” of the Mexican Constitution (article 133).

In view of that, for the Mexicans, NAFTA is a Treaty—in all the extension of the word and not merely an Agreement—on Free Trade for North America, namely *Tratado de Libre Comercio de América del Norte (TLCAN)*. Besides, with the sanction of the *Ley sobre la Celebración de Tratados*, as long as it is approved following the requirements of the Mexican Constitution’s “treaty clause” it is a Treaty, regardless of their denomination, as article 2.1 establishes, or the procedure that it has to follow by the signing counterpart(s).

On the other hand, the dispute, as Bruce Ackerman and David Golove pin pointed in “Is NAFTA Constitutional?”, was principally directed to the fact that NAFTA was approved precisely as a congressional-executive agreement, not as a treaty.¹⁹ The reason is pretty obvious: as long as it was considered simply as a trade agreement, there was no need to comply with the “treaty clause” contained in article 2, clause 2 of the United States Constitution, which requires treaties to be approved by two thirds of the Senate, but according to the two-House procedure of the Trade Act of 1974. Instead of a supermajority approval by the Senate alone a (simple) majority of both chambers of Congress was required.

Ultimately, NAFTA was voted first in the House of Representatives and passed only by a small margin of 234 to 200, and then in the Senate clearly by a vote of 61 to 38, which would have not been enough to meet the two thirds. Thus, the answer to the question on NAFTA’s constitutionality depends on the response to whether the “treaty clause” is the one and only means of committing the nation internationally—as the originalist account suggests—or there are other legitimate methods, such as the congressional-executive agreement, in which the House joins the Senate in the process of consideration, and simple majorities in both chambers of Congress suffice to commit the nation.

Although, there is still some disagreement on this issue, this modern development derives from the constitutional revolution of the New Deal of Franklin D. Roosevelt and was designed to complement, not necessarily to displaced, the “treaty clause” with a fast-track commercial

¹⁹ *Vid.* Ackerman, Bruce and Golove, David, “Is NAFTA Constitutional?”, *Harvard Law Review*, No. 108, 1995, p. 799 [Published also in book format: *Is NAFTA Constitutional?*, Cambridge, Massachusetts, Harvard University Press, 1995].

procedure that has been used to approve many international accords on commerce, including the World Trade Organization. In addition, when NAFTA was challenged a district court affirmed its constitutionality as a legitimate exercise of Congress's power to regulate commerce with foreign nations.²⁰

In a nutshell, NAFTA is a prime illustration of a major change in the constitutional practice of both countries, either by requiring several constitutional and legal reforms in advance—and even afterwards—to comply with its terms as in Mexico or by approving it on an apparent unorthodox way as in the United States of America in order to avoid the possibility of being censured by failing to achieve a concurring supermajority of two thirds of the Senate as happened with the Treaty of Versailles after World War I.

2. Which is the Legal Hierarchy of Treaties?

Nevertheless, the appealing legal contest has not been on the constitutionality of NAFTA, but over the controversy regarding the place that treaties occupy within the hierarchy of Mexican normative system. Please recall that according to the United States Constitution's "supremacy clause" contained on the second clause of article 6: "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". The same formulation was introduced in México first into article 126 of the Constitution of 1857 and repeated in the article 133 of the 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".

Following the "supremacy clause" there are three things that are clear: first, the Constitution *per se* is in the highest point of the legal hierarchy—or Hans Kelsen's "pyramid"—;²¹ second, the laws in pursuance thereof and the treaties in accordance are constitutional; and, third, the Constitution, laws and treaties shall be all together considered as the Supreme Law. However, there is one thing that remained unclear. What ought to prevail in case of a conflict: a law or a treaty?

In 1992, the Mexican Supreme Court—before NAFTA and the abovementioned *Judicial Reform* of 1994-95— held unanimously, by the vote of 18 justices, the jurisprudential criteria "*Leyes federales y tratados internacionales, tienen la misma jerarquía normativa*", i.e. "Federal

²⁰ *Made in the USA Foundation v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). *Vid.* "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", *Harvard Law Review*, No. 113, 2000, p. 1234.

²¹ Kelsen, Hans, *The Pure Theory of Law*, 2nd ed., trans. by Max Knight, Berkeley, University of California Press, 1967 [Original title and publication: *Reine Rechtslehre*, 1934].

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laws and international treaties, have the same normative hierarchy”. Accordingly, laws and treaties in the legal system “occupy, both, the rank immediately inferior to the Constitution in the hierarchy of norms”. That’s why provided that they have the same status: “the treaty cannot be the criteria to determine the constitutionality of a law and vice versa”.²²

Nonetheless, in 1999, this criterion was revised and abandoned —after NAFTA and the aforementioned *Judicial Reform*— unanimously by 10 Justices, who held that “*Tratados internacionales. Se ubican jerárquicamente por encima de las leyes federales y en un segundo plano respecto de la Constitución federal*”, i.e. “International Treaties are located hierarchically above federal laws and in second place with respect to the Federal Constitution”. Consequently, since treaties are above laws it follows: first, both cannot occupy the same rank; and, second, a treaty can be the criteria to determine the constitutionality of a law, but not inversely.²³ As the implications of overturning the prior criterion are far from being self-evident we must at this point make several commentaries on them, especially since the later criterion has been applied in the past years²⁴ and even upheld recently with a divided vote 6-5 by the Supreme Court.²⁵

First of all, it is clear that this decision as Jorge Carpizo puts it “is one of the most important approved by the Supreme Court of Justice since 1995”.²⁶ I couldn’t agree more. However, there is no need to inflate decision too much since some of its answers are still being challenged and it also left some questions unanswered. Let me start to deflate it a little bit by saying that it is curious and even ironic that the Supreme Court held unanimously in two different occasions, the opposite positions, moving from one extreme to the other, in less than a decade. I do not pretend to say that the Court should not abandon a criteria in a short period of time, especially since it appears as if it were two distinct courts, one before and the other after the judicial reform of 1995. Moreover, the only two justices of the preceding Court that also made it to the succeeding one, Mariano Azuela Guitrón and Juan Díaz Romero, were part in both cases of the unanimous decision, lacking further reflection of their own regarding abandoning such criteria.

²² *Semanario Judicial de la Federación*, P. C/92, Mexico, December, 1992, 8a., T. LX, No. 205,596, p. 27.

²³ *Semanario Judicial de la Federación*, P. LXXVII/1999, México, November, 1999, 9a., T. X, No. 192,867, p. 46. *Vid.* Manuel Becerra Ramírez, Jorge Carpizo, Edgar Corzo Sosa and Sergio López-Ayllón, “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)”, *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, No. 3, July-December, 2000, pp. 169-208 [Here in after: “Tratados Internacionales”].

²⁴ “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, México, febrero, 2004, T. XIX, p. 1163.

²⁵ *Amparos en revisión* 120/2002, 1976/2003, 74/2006, 815/2006, 1651/2004, 1738/2005, 2075/2005, 787/2004, 1576/2005, 1084/2004, 1277/2004, 1850/2004, 1380/2006 y 948/2006, February, 2007.

²⁶ Carpizo, Jorge, “Tratados internacionales”, *op. cit.*, note 23, pp. 177 and 183.

Secondly, this jurisprudential criteria derives from the *amparo en revisión* 1475/98, in which the Supreme Court of Justice determined that article 68 of *Ley Federal de los Trabajadores al Servicio del Estado* (LFTSE) is in contradiction with article 2 of Convention No. 87, concerning Freedom of Association and Protection of the Right to Organize, of the International Labour Organization (ILO), since the latter consecrates the freedom to unionize and the former states that “in each public department there must be a sole union”.

However, the issue that the Supreme Court resolved in the appeal was not the original one brought before the attention of the lower federal court, where the Judge had to ruled that since article 68 of LFTSE imposes a limitation to the right to unionize recognized in article 123 of the Constitution it is unconstitutional and for that reason the authorities must not apply it. It was the court itself, as José Ramón Cossío —a former legal scholar and nowadays a justice of the Supreme Court in Mexico— pointed out, who brought the treaty into the forefront and their hierarchy into scrutiny.²⁷ Allegedly, because the petitioner quoted the prior jurisprudential criterion that laws and treaties had the same hierarchy and hence cannot be used to determine its constitutionality, whereas the real source from which the lower court judge was deriving its ruling was precisely contrary to this precedent.²⁸

Moreover, Edgar Corzo Sosa worries that in any case the ruling of the lower court judge encourages authorities to avoid the application of an article that they consider in contradiction with the Constitution with the consequent risk that a collective legislative body is override by one bureaucrat or official alone. He 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 is no need to worry too much since in both cases the actions of an authority applying or not an apparently unconstitutional article can be *impugned*.²⁹

The lower court judge by deviating from such application is promoting that the higher courts pronounce themselves on the issue at stake. I guess the problem is referred to the faulty lines of the Mexican centralized system of judicial review, which need to be reconstituted into its original sense as recognized by the second part of the article 133: “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”.

The Supreme Court could merely have confirmed the decision of the lower court stating that such article cannot be applied because it was unconstitutional, but instead decided to go further to overrule the prior criteria —federal laws and international treaties occupy the same rank in the

²⁷ Cossío, José Ramón, “La nueva jerarquía de los tratados internacionales”, *Este País*, February, 2000, p. 34.

²⁸ Corzo Sosa, Edgar, “Tratados internacionales”, *op. cit.*, note 23, pp. 183 and 185.

²⁹ *Ibidem*, p. 187.

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hierarchy of norms and so the treaty cannot determine the constitutionality of a law and vice versa— to displaced it in favor of one that treats treaties as above federal laws and thus as part of the block to determine the constitutionality of federal laws. The decision of the Court reconstituted the hierarchy of norms but was aimed more to incorporating the treaties to review the constitutionality of federal laws. At the end of the day the ruling was that a constitutional treaty is superior to a constitutional federal law, when in fact they were ruling the absurdity that in the case at hand a constitutional treaty is superior to an unconstitutional federal law.

Thirdly, there are two chief models for the reception of international law: A. *Transformation* (or *indirect reception*) into national law via a legislative enactment; and B. *Incorporation* (or *direct reception*) into national law without further legislative endorsement. It is also worth pointing out that the typology does not necessarily coincide with the distinction between *self-executing* and *non-self-executing* treaties, in which the former do not necessitate any further legislative requirement, whereas the latter do.³⁰ Notwithstanding, there are authors that suggest that since in Mexico the reception takes place without further legislative enactment, all treaties are self-executing and hence superior to laws.

Indeed, the Mexican legal system supports the incorporation or direct reception by not demanding compliance with any further requisite, but in practice there are treaties that by definition have need of an additional legislative procedure. Let me advance that, in principle, as self-executing treaties, such as those on human rights, are incorporated immediately into the Constitution they ought to prevail, in case of conflict, over non-self-executing treaties, such as those on commerce, which require a complementary legislative enactment.

Fourthly, the ruling relies on several arguments from which we are going to emphasize the three main ones:

A. *Treaties are international commitments assumed by the Mexican State at large and compel all their authorities towards the international community.* That is why it had to be both the President—as the head of the (federal) state—and the Senate—as representative of the federal entities—the ones to participate in the “treaty power”, which is nothing but a material legislative power given to the President that must be approved by a simple majority of the Senate and not by the supermajority of two thirds as in the United States of America.

Certainly, sovereign states, as other members of the international community, are free to acquire further duties through treaties. Furthermore they cannot ignore such obligations freely

³⁰ Becerra Ramírez, Manuel, “Tratados internacionales”, *op. cit.*, note 23, pp. 169, 172-174. *Cfr.* Rábago, Miguel, “Aplicación de tratados internacionales por parte de los tribunales mexicanos: algunas observaciones relativas a su efecto directo”, *Revista Mexicana de Derecho Público*, No. 6, abril, 2004, p. 121.

attained, following the principles of *pacta sunt servanda* and *rebus sic stantibus*: treaties must be obeyed with good faith, unless in the meantime the signing conditions have changed substantially. Likewise, article 27 of the Vienna Convention on Treaties of 1969 establishes: “A State cannot invoke its national law as a justification for not complying with a treaty”.

The question that is still open is whether the President and the Senate are an adequate means of representing both the federal state and the federal entities to compel all their authorities or not. I think the answer is affirmative, but I am aware that there are several opinions contrary to my own that we must address and discuss briefly here in order to reply to them.

For instance, Diego Valadés in an editorial suggested that due to this asymmetry the President and the Senate by means of treaties could override or supersede what the federal and local congresses decide in the realms of their respective competences.³¹ Likewise, Corzo wanders 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*,³² and yet, López-Ayllón claims that other subnational entities such as states and municipalities must participate in the treaties and even that some —like the ones on human rights— must be subjected to referendum.³³ Similarly, Carpizo sustains that the Senate no longer represents the federal entities, since local legislatures lost the entitlement to designate their senators, but suggests that it makes no difference at all for the argument of the Court.³⁴

My straightforward response is: First, it is true that there is some kind of asymmetry here, but the question is whether it is justified or not. My line of reasoning is that since the Senate is part of Congress, the joint approval with the Executive of a treaty is a legitimate means of overriding a law that the two chambers of Congress approved before.

Second, since Mexico is a Federal system, there is no need for both chambers to have exactly the same overlapping prerogatives and hence requiring the President and the Senate to approve something on behalf of the federal state and federal entities seems enough rather than asking the people to do it directly by way of referendum or indirectly via their representatives. My 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, as they were stated in the constitution.

³¹ Valadés, Diego, “Asimetrías en el Congreso”, *Excelsior*, 27 de marzo de 2000, p. 9.

³² Corzo Sosa, Edgar, “Tratados internacionales”, *op. cit.*, note 23, pp. 190, 194, and 196. *Cfr.* Rábago, Miguel, “Propuesta de reforma al artículo 105 de la CPEUM: hacia un control previo de constitucionalidad de los tratados”, in Ortiz Ahlf, Loretta *et al.*, *Ensayos en torno a una propuesta de reforma constitucional en materia de política exterior y derechos humanos*, México, Porrúa-Universidad Iberoamericana, 2004, p. 115.

³³ López-Ayllón, Sergio, “Tratados internacionales”, *op. cit.*, note 23, pp. 197, 207-208

³⁴ Carpizo, Jorge, “Tratados internacionales”, *op. cit.*, note 23, p. 181.

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And, third, although I do agree that the status of the Senate as representative of the federal entities has been compromised. I concur but for another reasons, especially, since the adoption of proportional representation schemes to elect senators altered the equal representation between large and small states, and not so much by missing the prerogative of designating them. What's more the argument is really essential for the reasoning of the court, and hence I guess the actual problem is to truly represent the interests of the federal entities through the Senate, by reconstituting it.

B. 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*, but not necessarily should have concluded that the federal and local laws were in the same hierarchy.

However, we must clarify that, on the one hand, treaties do have limits imposed by article 15—such as not authorizing treaties for the extradition of political prisoners and for those criminals that had the condition of slaves, nor for treaties altering the guarantees and rights established by this Constitution to the men and the citizen. Although it is, on the other hand, completely true: *treaties lack limitations of competence that federal and local laws do have.*

C. Treaties are above both federal and local laws, and below the constitution itself. Thus, because treaties do not have the same limitations of competence of federal and local laws it seems that they can cover a much broader realm of subjects, including both federal and reserved to the federal entities; and, given that treaties must meet three requirements—the first two formal and the last substantial—: 1) celebrated by the President,³⁵ 2) approved by the Senate, and 3) in accordance with the Constitution, it follows that they are under the Constitution.

The Court on its interpretation adopts at least three levels in the hierarchy of norms: first, the Constitution; then, the treaties; and, finally, the federal and the local laws. The problem is that by considering that the “federal and local laws are in the third place in the same hierarchy” the Court fails for at least two reasons: 1) by leaving no space for intermediate levels; and 2) by putting both

³⁵ Few years ago, in February 24, 1998, the Supreme Court of Mexico ruled that the President does not have to negotiate a treaty personally in order for it to be valid, as long as it is ratified personally by the President. *Vid.*, “TRATADO DE EXTRADICIÓN INTERNACIONAL CELEBRADO ENTRE MÉXICO 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 RATIFICÓ PERSONALMENTE”, *Semanario Judicial de la Federación*, P. XLV/98, México, mayo, 1998, 9a., T. VII, No. 196,235, p. 133. *Vid.* Méndez Silva, Ricardo, “La firma de los tratados”, *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, No. 3, July-December, 2000, p. 209.

federal and local laws in the same hierarchy, when they belong to different competences as article 124 of the Mexican Constitution establishes.

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 Constitution, such as the *Ley de Amparo*—and even those that were enacted by the constitutional assembly of 1916-1917— are located. It might be said that the constitutional laws and the treaties are in the same hierarchy as they constitute norms that give unity to the federal State as a whole and not to either one of their parts: federal or local competences.³⁶ But that merely reopens the question of what ought to prevail, in case of conflict, a constitutional law or a treaty? In fact the court in this case seems to be overruling the criterion according to which constitutional laws were above treaties, but that does not necessarily mean that a constitutional law is or must be always below a treaty. I guess that depends on which treaty (and constitutional law) we are talking about.

On the other, following an erroneous interpretation of article 124 that defines the competence of federal and local authorities, the court derives that they are in the same hierarchy; whereas the formula states: “The prerogatives that are not expressly conferred by the Constitution to federal authorities, and reserved to the states”. As they are different competences or realms of application, one federal and other local, they cannot be in the same hierarchy and less in conflict. In fact, the Constitution in article 41 clarifies that the sovereignty is exercised by the federal and local authorities in the terms of their respective competence as defined by the federal constitution and the local constitutions, with the sole limitation that the latter cannot contravene the former, *i.e.* the local constitutions must follow the federal constitution. In case of conflict it is clear that the federal law ought to prevail over the local law.

Finally, by adopting three levels in the hierarchy of norms—Constitution, treaties, and federal laws—the court fails not only to leave space for intermediate levels but also to distinguish adequately among different kinds of federal laws and treaties. On the one side, federal laws can be distinguished into those that can be identified as ordinary (federal) laws and those that we already labeled as constitutional laws—or federal constitutional laws—. On the other side, we must also take into account that all the treaties are not the same and thus we must not put all, *e.g.* those on commerce and those on human rights, in the same box.³⁷ Since we are advocating for putting them into different boxes, we must also clarify in the following paragraphs which ought to prevail in an eventual case of conflict.

³⁶ Carpizo, Jorge, “Tratados internacionales”, *op. cit.*, note 23, p. 182.

³⁷ *Cfr.* López-Ayllón, Sergio, “Tratados internacionales”, *op. cit.*, note 23, p. 207.

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

The distinction suggests that there must be some treaties hierarchically inferior/superior to others, *v. gr.* treaties on human rights above those on commerce. By the by, let me suggest that a constitutional reform to article 133 is not necessarily the means to consecrate the special hierarchy of treaties on human rights over those on commerce,³⁸ since their hierarchical superiority is already embedded in the principles recognized recently by jurisprudential and legislative criteria and extensively in comparative law and in the Mexican legal doctrine.³⁹

For such purpose it is helpful to recall some distinctions: A) For the number of signing parties, treaties are bilateral and multilateral; B) For the process of their application, treaties are self-executing and non self-executing; and C) For the subject-matter, treaties cover a whole range of distinct issues, including commerce and human rights.⁴⁰ Regarding the last criteria, although it may be difficult to make an exhaustive hierarchy of treaties it is not impossible *per se*.

In fact, on September 2nd 2004, a controversial complementary bill on Treaties in economic subject-matters (*Ley sobre la Aprobación de Tratados Internacionales en Materia Económica*) was published and came into force the next day. It is controversial among other things because it is not clear why Congress had to approve another bill on Treaties besides the one already approved in 1992. However, its approval 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 one approved in 1992 (article 1) and suggests that treaties, such as those on commerce (article 1), must be in accordance with the Constitution by respecting human rights and division of powers (article 2).⁴¹

In sum, those treaties that amplify human rights, because their content coincides with the constitutional guarantees, as the court holds in its ruling, are and must be in a second plane below the Constitution,⁴² whereas other types of treaties not necessarily. The fact that those on commerce must respect human rights subordinates them. In addition, treaties on commerce can be approved as

³⁸ *Cfr.* Toro Huerta, Mauricio Iván del, “La jerarquía constitucional de los tratados internacionales en materia de derechos humanos: propuesta de reforma al artículo 133 constitucional”, in Barra Mexicana, Colegio de Abogados, *Propuesta de reformas legales e interpretación de las normas existentes*, Mexico, Themis, 2002, Vol. I, p. 645.

³⁹ *Vid.* for instance, Fix-Zamudio, Héctor, “El derecho internacional de los derechos humanos en las Constituciones latinoamericanas y en la Corte Interamericana de Derechos Humanos”, *Justicia constitucional, ombudsman y derechos humanos*, 2nd ed., Mexico, Comisión Nacional de los Derechos Humanos, 2001, p. 452.

⁴⁰ *Cfr.* Toro Huerta, Mauricio Iván del, “La jerarquía constitucional de los tratados internacionales...”, *op. cit.*, note 38, pp. 659-660.

⁴¹ *Vid.* Becerra Ramírez, Manuel, “Ley sobre la Aprobación de Tratados en materia Económica”, *Anuario Mexicano de Derecho Internacional*, No. 5, 2005, p. 697.

⁴² *Cfr.* Becerra Ramírez, Manuel, “Tratados internacionales”, *op. cit.*, note 23, p. 175; Corzo Sosa, Edgar, “Tratados internacionales”, *op. cit.*, note 23, p. 189, and López-Ayllón, Sergio, “Tratados internacionales”, *op. cit.*, note 23, p. 207.

mere agreements, like in the United States of America, by the President and simple majorities in both chambers of Congress, as we have already discussed here. Additionally, international or multilateral treaties are and must be above those regional and bilateral, as well as self-executing must be above non-self-executing.

Therefore, regarding the hierarchy of the Mexican legal system, the 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:⁴³ 1) *Constitution*, approved by a constitutional assembly elected *ad hoc* for such purpose and reformed by two thirds of both chambers and simple majority of legislative assemblies of the federal entities; 2) *Treaties on human rights and other self-executing treaties*, approved by President with a simple majority of the Senate and/or with further requirements such as the two thirds requirement —as in the United States of America— or even via referendum; 3) *Constitutional (federal) laws*, approved by simple majority in both chambers but in regulation of one article or institution within the Constitution to guarantee its enforceability; 4) *Treaties on commerce and other non-self-executing treaties*, approved by the President with a simple majority of the Senate or with the two houses procedure by simple majorities —like in the United States of America—; and 5) *Ordinary (federal) laws*, approved by simple majorities on both chambers.

IV. Conclusion

In the process of reconstituting the Mexican Constitution, treaties have been quintessential and now with the adoption of this criterion it is possible not only to differentiate the hierarchy of treaties on commerce and on human rights and to consider that in case of conflict the later ought to prevail over the former but also to reconstitute the Senate as representative of the federal entities, large and small states alike, despite the fact that it has been compromised by the distortion caused by the introduction of the proportional representation scheme into the election of senators.

To reinforce the point that in order to enjoy our human rights, instead of deifying commerce we must start by defying it, let me call to mind that Immanuel Kant, in the basic formulation of the “categorical imperative”, dictates: “Act according to that maxim which you can at the same time consider that it should become a universal law”. Moreover, from the idea that humans should not be treated only as means but regarded at the same time as ends, derives a second formulation: “Act

⁴³ *Cfr.* Ortiz Ahlf, Loretta, “Jerarquía entre leyes federales y tratados”, in Ortiz Ahlf, Loretta *et al.*, *op. cit.*, note 32, p. 135.

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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". Similarly, from the idea that humans should not merely be subject to another will, but to their own, follows another formulation: "Act always in such a way as if you were through maxims a law-making member of a universal kingdom of ends".⁴⁴

In sum, one of the main challenges in the process of reconstituting constitutions is to take human beings as such and not merely as means to an end but as ends on themselves, with human dignity, duties and rights, including the right to be their own law-giver. In slightly different terms the paradox is to convert from *subjects* of an authoritarian regime to *citizens* of a democratic republic, both national and international, before turning them solely into *consumers* when they are and ought to be first of all *human beings*.

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⁴⁴ Kant, Immanuel, *Groundwork of the Metaphysics of Morals*, New York, Cambridge University Press, 1998.

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