

THE CHALLENGE OF CREATING A CONCEPT OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT IN THE MEXICAN CONSTITUTION ACCORDING TO INTERNATIONAL LAW

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Abstract

This article examines the concept of sustainable development, a human right that is subject to reference in the Mexican Constitution and in international treaties to which Mexico is a party. It provides the general definition of sustainable development and describes the challenges of formally incorporating the concept into the Mexican Constitution. This article also examines the Mexican Supreme Court's interpretation of sustainable development and finds that the term must be developed. As a concept, sustainable development must be developed not only under constitutional reform, but also at the level of secondary legal norms that derive from the Mexican Constitution. This article demonstrates that despite the country's international obligations, the rationale of sustainability as a human right is far from accomplished under the current norms that the Mexican Constitution presents.

Key words

Sustainability, Mexico, Constitution, treaties, environment.

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I. INTRODUCTION

This article discusses environmental constitutionalism in relation to international law, specifically what is known as “international sustainable development law.” This article seeks to identify the external elements that allow for the establishment of sustainable development norms from the Mexican Constitution. It tries to identify those elements by using a comparative method: it identifies the differences and similarities between the text of the Mexican Constitution (“*law in the book*”) and those external elements that are present in international law at a given time (“*law in action*”). These external elements reflect the values and interests of the international community and pressure the Mexican Constitution to either change or add new concepts to the existing constitutional norms.

Article 4° of the Mexican Constitution is one of the established constitutional norms that refers to the human right of sustainable development.¹ Moreover, there are other articles in the Constitution which refer to sustainability, but they only mention the concept without defining it. Perhaps this is because many international actors (e.g., international

1. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

corporations, international intergovernmental organizations, etc.) have used the concept in various ways. Therefore, to have an idea about the existing meaning of “sustainable development,” it is necessary to look at the decisions of the Mexican Supreme Court.

Currently, a normative concept of “sustainable development” does not formally exist in the Mexican Constitution, whether in the main norm, which is Article 4^o, or in the other constitutional norms that use the terms “sustainable development” and “sustainability.” Article 4^o refers to sustainable development in a very poor way, as if this right is not important. Therefore, the main purpose of this research is to propose guidelines to create a normative concept of this right according to international environmental agreements to which Mexico is a party.

This article poses two principal questions: Why did the Mexican Constitution establish the concept of sustainable development in such a poor way? Was it on purpose or was it a failure of the legal system as a whole? To answer these questions, this article uses the documentary and comparative methodologies.

The hypothesis of this article is that sustainable development is very difficult to achieve in a country where poverty is one of the main problems for the government in addition to the problems related to environmental protection. Therefore, the establishment of a better normative concept of sustainable development could help to achieve environmental protection without putting the economic development of Mexico at risk.

Scholars around the world have advocated for the protection of the environment at the national level as a form of achieving global environmental justice, in other words, as a way of defending a common future. “Scholars and activists have, for years, advocated the constitutionalization of environmental protection at the national level, whether via judicial interpretation of existing constitutional provisions or via formal amendment.”² In Mexico, this is a challenge.

II. THE MONIST THEORY OF LAW IN THE MEXICAN CONSTITUTION

In the 21st century, the protection of the environment through sustainable development is crucial, considering that “environmental law [means] that certain needs and interests of present and future generations, the global community, and other forms of life can be given foundational legal importance, in such a way that the ensuing costs and benefits that are

2. Douglas A. Kysar, *Global Environmental Constitutionalism: Getting There from Here*, 1 *TRANSNAT’L ENVTL. L.* 83, 84 (2012).

observed by economists will reflect a prior determination by the political community to pursue environmental sustainability.”³

In Mexico, since the constitutional reforms of June 2011, “[i]nternational law has moved from the periphery to the center of public debate in the course of only a few years.”⁴ The significance of international law has increased considerably.⁵

The modification of Article 1° of the Constitution established that human rights in the Mexican Constitution and the nation’s treaties are equivalent. Both share equal footing in the legal hierarchy because Article 1° considers the rights in treaties as an addition to those that the Mexican Constitution has already established.

The importance of these international agreements is enormous in Mexico because they represent a new set of rights that apply in the Mexican territory. Rights that are both constitutional and international constitute a “bloc of constitutionality” because they stand on the same hierarchical level. In other words, there is no difference between the rights that the Constitution established and that international treaties created.

The legal doctrine that supports this point of view is Hans Kelsen’s pure theory of law. It is a normative science with a monist construction of law, in which there is only one legal system consisting of international and national law.⁶ Under this monist construction, all international treaties, including the human rights treaties, are part of the Mexican body of law. They are part of the Mexican legal system. Therefore, there is not a separable set of international norms. This is an approach that differs from those countries that emphasize a dualist model of law.⁷

Kelsen expressed that “two norm complexes may form a single system of norms [such that] both orders are coordinated, that is, that their spheres of validity are delimited against each other.”⁸ In this context, Mexico, through a reform that occurred in June 2011, modified Article 1° of the

3. *Id.* at 88.

4. Oona A. Hathaway & Ariel N. Layinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404 (2006).

5. Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 69 (2011).

6. HANS KELSEN, *PURE THEORY OF LAW*, 333 (Max Knight ed., Lawbook Exchange 2005).

7. The passage states:

Kelsen and many modern theorists insist that, like municipal law, international law possesses and indeed must possess a “basic norm,” or what we have termed a rule of recognition, by reference to which the validity of the other rules of the system is assessed, and in virtue of which the rules constitute a single system. The opposed view is that this analogy of structure is false: international law simply consists of a set of separate primary rules of obligation which are not united in this manner.

HERBERT L. HART, *THE CONCEPT OF LAW* 233 (3d ed. Oxford University Press 2012).

8. KELSEN, *supra* note 6, at 332.

Constitution and added the equal recognition of both the human rights established in the Constitution and those established in international treaties.

Both human rights, constitutional and international, are part of the same body of laws: a monistic version of law, without a real difference between them. They complement each other as a complete set of rules regarding human rights. Kelsen developed this theory in his previous work, *General Theory of Law*, in which he considered that “analysis of international law has shown that most of its norms are incomplete norms which receive their completion from the norms of national law.”⁹

To systematize his theory and establish the relationship between international and constitutional (national) laws, Kelsen used what he called the normative science method, which scholar Malcolm N. Shaw explains as being:

normative science, that is, consisting of rules which lay down patterns of behavior. Such rules, or norms, depend for their legal validity on a prior norm and this process continues until one reaches what is termed the basic norm of the whole system. This basic norm is the foundation of the legal edifice, because rules which can be related back to it therefore become legal rules.¹⁰

In this regard, the Mexican State makes both international and constitutional laws. Both are positive laws. The Mexican legal system incorporates the human right of sustainable development into the Mexican Constitution because Mexico created the right by entering into treaties such as the Rio Declaration. In other words, “Kelsen’s normativism is the result of a long historical commitment to the identification of law as legal rules, especially those rules stemming from the recognized sources of state law.”¹¹

Of course, in Mexican legal practice, it takes time to give effect to the human rights in treaties, and that includes sustainable development. Nevertheless, these rights are valid and can serve as sources of law. Yet, a better concept of sustainable development in the Mexican Constitution, as this academic article proposes, would help to create a complete set of rules, national and international, regarding sustainable development. But it is worth considering that:

9. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE*, 363 (Harvard University Press ed. 1949).

10. MALCOLM N. SHAW, *INTERNATIONAL LAW* 50 (6th ed., Cambridge University Press 2008).

11. Halperin, *supra* note 5, at 47.

the process of the implementation of international conventional rules in national legal orders, either in a monist or a dualist system, is based upon the circulation of legal statements (which are contained in treaties or international case law) and how they are received as new meanings (through “domestic” interpretation) within national legal orders.¹²

In Mexico, because of the constitutional reform of 2011, human rights incorporated in treaties are received in a very comprehensive manner. They are an expansion of the human rights already contained in the Constitution.

III. THE NATURE OF INTERNATIONAL LAW IN MEXICO

In accordance with paragraph one of Article 1° and Article 133, international law is part of the Mexican legal system from a monist theory perspective, as discussed above. Nevertheless, there is a big difference between these constitutional articles. Article 133 establishes the theory of constitutional supremacy; it means that the Constitution controls all treaties such that they cannot be against the Constitution. This article grants the judiciary power to control treaties by the Constitution. Treaties are only valid if they do not contradict or go beyond the terms of the Constitution.

According to Article 133, treaties are part of the Mexican legal system because they fall under the Constitution. Mainly, international law in Mexico represents treaties that Mexico makes with other States or international intergovernmental organizations under the Vienna Convention on the Law of Treaties. Once the President of Mexico signs a treaty and the Senate ratifies it, it becomes part of the Mexican legal system. The treaty then imposes duties and governs relations among Mexico’s own nationals or persons having a legal relationship with the country.

However, the constitutional reform of June 2011 modified Article 1°, which now contradicts Article 133. Article 1° states that Mexico recognizes the human rights expressed in both “this constitution and [in] treaties.”¹³ Therefore, there is no constitutional control on treaties because Article 1° puts the rights of treaties on the same level as constitutional rights. Article 1° means that treaties can grant new human rights to Mexicans, or even go beyond the Constitution in extending the catalog of human rights.

Mexico faces a new approach to international law. Because of the constitutional reform, the country has incorporated human rights from treaties directly into its legal system. As a result, specialized international law areas influence domestic law and drive reforms in many national

12. *Id.* at 70.

13. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

statutes. One of these new areas is international sustainable development law, which creates the human right of personal development in a sustainable environment. At first, this human right of sustainable development was an environmental right. Due to the growth of international law, it is now its own specialized area of international law.

Treaties, being effective in Mexico, are based on consent, will, and acceptance under Article 11 of the Vienna Convention on the Law of Treaties. Article 11 points out that: “the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”¹⁴

Once Mexico expresses consent to a treaty, it is bound to that treaty according to international law. Article 26 of the Vienna Convention on the Law of Treaties establishes the principle of *pacta sunt servanda*, which is another theory that Hans Kelsen, among others, developed. Article 26 incorporates the theory by providing that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁵

Treaties, according to Article 38 of the Statute of the International Court of Justice, are one of the sources of international law. Paragraph 1, subsection 1.a of Article 38 establishes the principle as follows:

Article 38.- The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.¹⁶

This highlights the importance of treaties in the Mexican context. Treaties, and the human rights that derive from them, are part of the Mexican legal system. The human rights that derive from Mexico’s treaties are incorporated directly into the text of the Mexican Constitution, following the guidelines that those treaties set out.

IV. THE INTERNATIONAL TREATY PROCESS IN THE MEXICAN CONSTITUTION

The treaty-making process in Mexico, as in many other countries, consists of three big phases: 1) negotiation, 2) signature and 3) ratification. These phases are subsequent and interrelated. This means that if you do not finish the first phase, it is impossible to continue with the next.

14. Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331.

15. *Id.* art. 26.

16. Statute of the International Court of Justice art. 38, <https://www.icj-cij.org/en/statute>.

The first phase of negotiation corresponds to the President of Mexico, the Head of the Mexican State. According to Article 89 subsection X¹⁷ of the Mexican Constitution, the President has the power to negotiate treaties with other countries and carry out the operations to establish the text of a treaty. These juridical negotiations can be conferences, congresses, bilateral or multilateral meetings among secretaries of states and ministers of foreign affairs and so on. Some call the President of the United Mexican States “the Big Legislator,” because he is the only one that participates in the negotiation process without the intervention of any member of the Federal House of Representatives or the Senate. This is so even though the Senate participates in the ratification process.

The second phase in the treaty-making process is the signing of a treaty. There are two types of signatures in the process: definitive and *ad cautelam* or *ad referendum*. The President of Mexico makes the first signature in his role as the Head of the Mexican State and as the people’s representative. As discussed in the paragraph above, this branch of government has the power and duty to definitively sign treaties once the negotiating States and international organizations agree to a treaty’s text. The head of the negotiating team, which can be the Secretary of the State, Ambassador, or any other designated Mexican state representative, makes the second signature. This *ad cautelam* signature becomes definitive only after the head of the negotiating team signs the treaty and the President of Mexico confirms the instrument.

This signature process has two functions: 1) to establish the end of the negotiation period and 2) to express consent to be bound by a treaty. These two phases correspond to the President of Mexico. Both phases are a form of exercising a centralized power in the treaty-making process without the intervention of any other branch of government.

The third phase is ratification, which corresponds to the Mexican Senate. In Mexico, ratification is a synonym for “approval” because,

17. The original wording of Article 89 of the Mexican Constitution in Spanish: Las facultades y obligaciones del Presidente, son las siguientes:[...] X.- Dirigir la política exterior y celebrar tratados internacionales, así como terminar, denunciar, suspender, modificar, enmendar, retirar reservas y formular declaraciones interpretativas sobre los mismos, sometiéndolos a la aprobación del Senado. En la conducción de tal política, el titular del Poder Ejecutivo observará los siguientes principios normativos: la autodeterminación de los pueblos; la no intervención; la solución pacífica de controversias; la proscripción de la amenaza o el uso de la fuerza en las relaciones internacionales; la igualdad jurídica de los Estados; la cooperación internacional para el desarrollo; el respeto, la protección y promoción de los derechos humanos y la lucha por la paz y la seguridad internacionales; [...].

Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 89, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

according to Article 76 subsection I of the Mexican Constitution¹⁸, the Senate has the power to “approve” treaties that the President of Mexico negotiated. This is the Senate’s only duty in the treaty-making process because it does not participate in the negotiating phase. Members of the Senate simply “raise their hand” or “press the button” to approve a treaty without intervening in the definition of the terms of the treaty. This is very different from the treaty-making process in the United States of America. In American law, the Senate has the power to advise the President during the negotiating process. By contrast, in Mexico, the President has the exclusive power to define the terms of a treaty during negotiation.

V. SUPREMACY CLAUSE IN THE MEXICAN CONSTITUTION

Article 133 of the Mexican Constitution establishes a constitutional supremacy,¹⁹ which means that all treaties and federal and local laws are subject to the Constitution. They take their legal validity from the *Magna Carta*. According to Article 133, the Mexican Constitution is the foundation of all treaties and laws that apply in Mexico.

Supremacy means that something stands above all else, that something is on the top. Therefore, under Article 133, the Mexican Constitution stands on the top of all treaties, laws, and statutes. In this context, the Constitution is the fundamental norm, the primary source of law, the origin of the Mexican legal system.

Therefore, constitutional supremacy means that the Constitution is the fundamental norm because it stands over all other laws and treaties. In a constitutional State like Mexico, the Constitution is the point of convergence and reference for the rest of the statutes and treaties. They must exist under the Constitution because it is the fundamental law from which human rights and the State’s organs derive.

18. The original wording of Article 76 of the Mexican Constitution in Spanish is:

Son facultades exclusivas del Senado: I. Analizar la política exterior desarrollada por el Ejecutivo Federal con base en los informes anuales que el Presidente de la República y el Secretario del Despacho correspondiente rindan al Congreso. Además, aprobar los tratados internacionales y convenciones diplomáticas que el Ejecutivo Federal suscriba, así como su decisión de terminar, denunciar, suspender, modificar, enmendar, retirar reservas y formular declaraciones interpretativas sobre los mismos;[...].

Id. art. 76.

19. The original wording of Article 133 of the Mexican Constitution in Spanish is:

Artículo 133. Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, serán la Ley Suprema de toda la Unión. Los jueces de cada entidad federativa se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de las entidades federativas.

Id. art. 133.

However, in 2011, the Constitution underwent reform. Reform ultimately challenged the supremacy that Article 133 established. A modified Article 1^o paragraph one now stands in contrast to Article 133 by stating that the human rights that derive from treaties share the same hierarchical position as the human rights that derive from the Constitution.²⁰

Yet, constitutional supremacy remains for domestic laws but not for international treaties because the human rights in the Constitution and in treaties exist at the same level. No one set of human rights can obtain their legal validity from the other. Rather, they complement each other and amplify the human rights of Mexicans.

In this sense, what used to be “the law of nations” (*ius gentium*²¹) is now “international law.” However, the concept of international law (*ius inter gentes*) is misleading because it falsely suggests the existence of a body of laws that only governs relations between nations and not persons. In truth, international human rights belong to human beings as part of an international community of persons that share the same rights. No matter the country, all people belong to this international community.

The positivist Jeremy Bentham first coined the term “international law.”²² He could not find a better concept to synthesize the emergence of a new body of laws which nations were creating. However, nowadays this body of laws applies not only to States but also to human beings in human rights matters.

Consequently, there is a problem with Articles 1^o and 133 of the Mexican Constitution. Article 1^o is a “coordination article” while Article 133 is a “subordination article.” There is a clear contradiction between them. Yet, the Mexican Supreme Court decided to maintain constitutional supremacy regardless of what Article 1^o states about the human rights that derive from treaties.

There is no doubt that the Mexican Supreme Court’s interpretation of Articles 1^o and 133 is going to change in the future, just as the Court has

20. The original wording of Article 1^o of the Mexican Constitution in Spanish is:
Artículo 1o. En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece. [...].

Id. art. 1.

21. See Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 133 (2005) (stating “[b]ut I shall use the Latin phrase ‘jus gentium’ to refer to the law of nations in the more comprehensive sense—a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems”).

22. HART, *supra* note 7, at 237.

changed the criteria regarding other constitutional articles. It is possible to predict that the “coordination article” is going to prevail over the principle of constitutional supremacy because, in an even more globalized and interdependent world, there must be general rules, principles, and norms which the international community shares. The international community accepts these norms as good for itself, in other words, deems them important enough to become international law: “*a construit son concept de droit à partir de la notion d’acceptation, et non de la notion de sanction.*”²³

VI. PRINCIPAL TREATIES REGARDING SUSTAINABLE DEVELOPMENT SIGNED BY MEXICO

According to the Mexican Senate official journal, Mexico has signed seventy-two treaties related to environmental matters.²⁴ Some of them relate to sustainable development; therefore, we are going to mention the most important treaties pertaining to the matter. In this context, what is the meaning of sustainable development for Mexico? Is there a new or different way to conceptualize it from an international perspective? The concept first appeared in the 1987 report of the World Commission on the Environment and Development (WCED). The report defined the concept of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their needs.”²⁵ This commission, also known as “the Brundtland Commission” because of it being chaired by Gro Harlem Brundtland, was very important. It established that poverty is an evil itself, and that “sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life.”²⁶

This concept is a very ethical and philosophical one, because it looks to the future generations: future people that we expect will be living on this planet. It suggests that present living people have a duty to protect the planet from environmental degradation. Of course, it recognizes that

23. Alberto Puppo, *Lutte Internationale Contre le Terrorisme, Sécurité Internationale et Droits Fondamentaux. Les Pirouettes des Juges Européens Entre Creation de Hiérarchies Normatives Improbables et Sacrifice de Garanties Juridictionnelles les Plus Élémentaires*. 9 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 279, 280 (2009).

24. Proposiciones de Ciudadanos Legisladores, *Gaceta del Senado de Mexico*, SENADO DE LA REPÚBLICA (May 22, 2019), https://www.senado.gob.mx/64/gaceta_del_senado/documento/95687 (last visited Oct. 4, 2022).

25. U.N. Secretary-General, *Development and International Economic Co-operation: Environment*, ¶ 27, U.N. Doc A/42/427 (Aug. 4, 1987), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N87/184/67/IMG/N8718467.pdf?OpenElement>.

26. *Id.*

present living people must also take advantage of the planet, but without risking the social and economic development of the coming generations.

The concept of sustainable development is also multidimensional, with many meanings depending on the field of knowledge that we are studying. For instance, we may study the concept of sustainable development from an economic perspective, trying to refer to this concept as economic growth without affecting the environment, or we can study the concept from an environmental perspective and consider that any other dimension of sustainable development has to take into consideration the environmental protection, and so on. Indeed, there is not a single concept of sustainable development serving as a umbrella concept.²⁷ In addition, any State, like Mexico, can take this concept in their proper view, exercising their sovereign rights as State, in terms of principle 2 of the Rio Declaration, but taking into consideration what the international community has considered as sustainable development.²⁸

Sustainable development has been adopted by Mexico in some international treaties, as a form of agreements among international subjects of law, including States and International Intergovernmental Organizations. Therefore, the concept of a treaty is taken from the Vienna Convention on the Law of Treaties, which in article 2 refers to a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”²⁹

In Mexico, there is a national law that also considers a concept of a treaty as the agreement governed by public international law, concluded in a written form between the Government of the United Mexican States and one or various subjects of international public law, and for its application requires the celebration of particular agreements in specific areas by which the United Mexican States make commitments.³⁰

In this context, the first international treaty that was signed by Mexico regarding sustainable development was the Stockholm Declaration on the Human Environment of 1972, which was the first global treaty about the negative impacts on the environment by human economic activities,

27. Sudumu Atapattu, *From ‘Our Common Future’ to Sustainable Development Goals: Evolution of Sustainable Development Under International Law*, 36 WIS. INT’L L. J. 215, 228 (2019).

28. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), princ. 2 (Aug. 12, 1992). [hereinafter *Rio Declaration*].

29. Vienna Convention on the Law of Treaties, *supra* note 14, art. 2.

30. Ley Sobre la Celebración de Tratados (Mexican Law on Treaties) [LCT], Artículo 2, Diario Oficial de la Federación [DOF] 2-1-1992, últimas reformas DOF 20-05-2021 (Mex.).

“[w]hile the phrase ‘sustainable development’ does not appear in the Stockholm Declaration, it planted the first seeds of sustainable development.”³¹

One of the principles that allows us to establish that it was the first international treaty regarding sustainable development is principle 2 which mentions that: “[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”³² This principle clearly identifies the responsibility for the present generations to safeguard the environment for the future ones. By the way, the phrase “for present and future generations” appears also in principle 1.

Another important principle is established under principle 8, which considers that “[e]conomic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.”³³ For the first time in human history of international law, the community of states recognized the essential relationship between economic growth and environmental protection for improving the quality of life.

Another important treaty to which Mexico is a party is the Rio Declaration on Environment and Development (RDED) adopted in 1992, just five years after the release of the WCED report. It contains several important principles regarding sustainable development; for instance, principle 1 establishes that “[h]uman beings are at the centre of concerns for sustainable development”;³⁴ principle 3 says that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”;³⁵ and principle 4 expresses that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”³⁶

In addition, principle 5 refers that (for Mexico) eradication of poverty is an essential requirement for sustainable development;³⁷ principle 11

31. Atapattu, *supra* note 27, at 218.

32. U.N. Environment Programme, Res. 2994 (XXVII), Stockholm Declaration on the Human Environment, princ. 2 (Dec. 15, 1972).

33. *Id.* princ. 8.

34. *Rio Declaration*, *supra* note 28, princ. 1.

35. *Id.* princ. 3.

36. *Id.* princ. 4.

37. *Id.* princ. 5.

establishes that the Mexican state must “enact effective environmental legislation”;³⁸ and principle 13 considers that Mexico “shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.”³⁹

This is a comprehensive treaty about sustainable development because it refers to information, warfare, scientific information, technology, communication among countries in case of a natural disaster or transboundary pollution, environmental impact assessment, also, it encourages the participation of women, youth, and indigenous people.

Another treaty to which Mexico is a party, is the Convention on Biological Diversity, which in general terms refers to the sustainable use of biological diversity and the sustainable use of its components as one of the objectives of the Convention.

The Copenhagen Declaration on Social Development is another important treaty in which the Mexican state assumed responsibility. According to commitment 1, Mexico agreed to create at the national level “a stable legal framework, in accordance with our constitutions, laws and procedures, and consistent with international law and obligations,”⁴⁰ in order to create “economic, political, social, cultural, and legal environment that will enable people to achieve social development; eradicating poverty; promoting full employment.”⁴¹

Equally, according to the Johannesburg Declaration on Sustainable Development, Mexico has obligations regarding sustainable development, to formulate legal public policies, as the modification of the Mexican constitution, to achieve sustainable development, because it represents a challenge not only for Mexico, but also for the entire international community, in this sense, principle 26 of the treaty mentions:

We recognize sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners we will continue to work for stable partnerships with all major groups respecting the independent, important roles of each of them.⁴²

38. *Id.* princ. 11.

39. *Id.* princ. 13.

40. World Summit for Social Development, *Copenhagen Declaration on Social Development*, U.N. Doc. A/CONF.166/9, annex I (Mar. 14, 1995).

41. Atapattu, *supra* note 27, at 223.

42. World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF. 199/20, annex I (Sept. 4, 2002).

Also, Mexico “adopted the 2030 Agenda for Sustainable Development containing 17 Sustainable Development Goals (SDGs) with 169 targets,”⁴³ which establishes the three dimensions of sustainable development: economic, social, and environmental.

Finally, Mexico adopted the Convention on Climate Change that ended in the Paris Agreement on Climate Change in which sustainable development is very important in the framework of environmental protection.

VII. SUSTAINABLE DEVELOPMENT IN THE MEXICAN CONSTITUTION AS A HUMAN RIGHT

It is found, in the Mexican constitution, that the words “sustainable” and “sustainability” appear in different articles. Both are situated in Articles 2°, 4°, 25, 27, and 73.⁴⁴ In regard to sustainable development, the two expressions in Article 4°: a) “personal development” and b) “well-being” establishes, perhaps, one of the most important human rights. It relates to principle 1 of the Stockholm Declaration,⁴⁵ and principles 1 and 3 of the Rio Declaration.⁴⁶ Article 4° provides that:

Every person has the right to a healthy environment for their development and well-being. The State will guarantee the respect of this right. The damage and deterioration of the environment will generate responsibility for whom caused it in terms of the law.⁴⁷

Article 2° is another important article pertaining to sustainable development as a human right. It establishes the constitutional obligation of the three spheres of government (federal, local, and municipal) to promote equal development opportunities for indigenous people. It further considers that, to eliminate the lack of development opportunities, the federal, local, and municipal authorities have the obligation:

VII.- To support the productive activities and sustainable development of the indigenous communities through actions that allow them to get enough income, the application of stimulus to public and private investments that promote the creation of jobs, the incorporation of technologies to increase

43. Atapattu, *supra* note 27, at 226.

44. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 2, 4, 25, 27, 73, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

45. U.N. Conference on Environment and Development, *Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 1 (June 1972).

46. *Rio Declaration*, *supra* note 28, princ. 1, 3.

47. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

their own productive capacity, as well as to guarantee the equitable access to the supplies and commercialization systems.⁴⁸

Therefore, Articles 4^o and 2^o consider sustainable development as human right. In addition, there are other articles in the Mexican constitution that establish the obligation of the authorities to guarantee sustainable development as a part of the national development of the State in terms of the obligations that came from treaties to which Mexico is a party. One of those articles is Article 25, stating:

Article 25.- Corresponds to the State, the rectory of the national development to guarantee its integrality and sustainability, that fortifies the national sovereignty and its democratic regime, and that, through competitiveness, the encouragement of the economic growth and the use of a more just distribution of income and wealth, allows the full exercise of liberty and dignity of the individuals, groups and social classes which the security this Constitution protects.⁴⁹

Also, paragraph 9 in this article establishes that the law will protect the economic activities made by the private sector to contribute to the national economic development, promoting competitiveness and implementing a national policy for the sustainable industrial development; it is important to point out that only in this paragraph 9 of the Mexican constitution, the term “industrial sustainable development” is mentioned.⁵⁰

In this context, Article 27 section XX mentions another type of sustainable development, called “rural sustainable development,”⁵¹ which refers to the creation of jobs for the rural people and to guarantee their well-being and their participation in the national development through their forestry, agriculture, and livestock industry.

Finally, the last constitutional article related to sustainable development is Article 73 which, in section XXIX-N, gives the power to the Mexican Federal Congress, which is formed by the Senate and the House of Representatives (Diputados), to legislate in the matter of one form of social organization named “cooperatives” in order to regulate that, the activities made by this particular form of social organization, were done in a sustainable development manner.⁵²

As it was mentioned, the Mexican Constitution establishes five different types of sustainable development: i) Sustainable development as a

48. *Id.* art. 2.

49. *Id.* art. 25.

50. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 25, para. 9, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

51. *Id.* art. 27.

52. *Id.* art. 73.

human right to live in a healthy environment; ii) Sustainable development for indigenous people; iii) Sustainable development of the activities made by the industry; iv) Sustainable development of the economic activities made by rural people; and v) Sustainable development related to the activities made by “cooperatives,” which represent one legal form of social organization.

In Mexico, the main reference to the human right of sustainable development, is established in paragraph 5 of Article 4^o but it is not well conceptualized. Like constitutions of many other countries, the Mexican one, has a challenge to look for the protection of the environment through sustainable development, for instance, “[t]he United States (US) Constitution is one of the few such texts in the world that fails to explicitly address environmental protection.”⁵³

In fact, it appears that this failure to conceptualize sustainable development as a human right in the Mexican Constitution was made on purpose, just to have the minimum number of environmental provisions and, of course, with little impact in the activities of different governmental organs that are responsible for environmental protection. It happens in other countries where “for those countries that do have express environmental provisions in their constitutions, the provisions tend to be vaguely specified and weakly enforced.”⁵⁴

We must consider that Mexico, as a federal state, represents the convergence of three spheres of government (federal, local, and municipal), with specific regulations regarding environmental protection, however, all these regulations shall be considered in terms of the supremacy clause (article 133)⁵⁵ and the human rights clause (article 1).⁵⁶

In this regard, federal, local, and municipal laws coexist, and are related with the international treaties accorded by the Mexican state. This interaction between national and international law generates three kinds of jurisdictions: supranational (Interamerican Court of Human Rights), federal (Federal Judiciary power represented by the Supreme Court), and local (State Courts).

Federal (national) and local jurisdictions coexist and have equal hierarchy. It depends on the competence of the jurisdiction (article 124 of the Mexican Constitution). Both apply directly to individuals, and to have

53. Kysar, *supra* note 2, at 83.

54. *Id.* at 85.

55. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 133, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

56. *Id.* art. 1.

the supranational jurisdiction, one must exhaust the ordinary means of internal defense in both the local and federal levels.

VIII. THE MEXICAN SUPREME COURT AND THE INTERPRETATION OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT

The Mexican Supreme Court has dictated jurisprudence regarding the right of a healthy environment directly related to sustainable development as a human right. According to its interpretation, the human right to a healthy environment is guaranteed by Article 4° of the Mexican Constitution, interpreting that “personal development” means “sustainable development” as a social interest of protecting the environment.⁵⁷ Therefore, the Supreme Court considers that this right of a healthy environment directly relates to Article 25 paragraphs first, second and sixth of the Mexican Constitution, which considers “sustainable development” as a part of the general interest of Mexico.⁵⁸ Consequently, there is a linkage between the right of a healthy environment with the right of sustainable development, in the framework of constitutional liberties; they complement each other in a relationship of synergy, harmony and balance.⁵⁹

The Supreme Court mentions principle 10 of the Rio Declaration⁶⁰, trying to create a comprehensive meaning of sustainable development, which also means that all necessary means must be taken to eliminate or reduce all financing obstacles related to the justiciability of this human right.⁶¹

57. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

58. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 25, paras. 1, 2, 6, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

59. Medio Ambiente Adecuado Para el Desarrollo y Bienestar. Su Relación con Otros Derechos Fundamentales y Principios Constitucionales que Intervienen en su Protección (Adequate Environment for Development and Welfare. Its Relationship with Other Fundamental Rights and Constitutional Principles that Intervene in its Protection), Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo 1, Agosto de 2012, Tesis I.4° A.811 A (9ª), Página 1807 (Mex.).

60. *Rio Declaration*, *supra* note 28, princ. 10.

61. Medio Ambiente Sano. Parámetro que Deberán Atender los Juzgadores de Amparo, Para Determinar Si es Dable Eximir al Quejoso de Otorgar Garantía Para Conceder la Suspensión de Actos que Involucren Violación a Aquel Derecho Humano (Healthy Environment Parameter that the Judges must Observe to Determine Whether it is Possible to Exempt the Complainant from Granting Guarantee to Grant the Suspension of Acts Involving Violation of that Human Right), Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo 40, Vol. II, Marzo de 2017 Página 1199, Tesis 2a./J. 19 2017 (10a.) (Mex.).

The Mexican Supreme Court has considered sustainable development as a form to protect the environment,⁶² which guarantees every person's right to achieve their development and well-being, therefore, there is a "social interest" in the protection of the environment which justifies restrictions, to preserve and maintain that "social interest"; moreover, sustainable development is part of that "social interest" as human right looking at the environmental protection. Consequently, the protection of the environment includes the promotion of personal development and well-being, the protection of natural resources, and the preservation and restoration of the ecological balance; those are fundamental principles in the Mexican Constitution; principles that are not well defined by the Constitution, but the Supreme Court have conceptualized them through systematic interpretation.⁶³

Additionally, the judiciary power has taken the Brundtland Report of 1987 and principles 2, 3, 4, 7, and 15 of the Rio Declaration to conceptualize sustainable development as a human right,⁶⁴ because a healthy environment for the development and well-being of the people, incorporated in Article 4^o paragraph five of the constitution, means that an ecological sustainability is necessary to guarantee the use of natural resources for the present and future generations.⁶⁵ Therefore, in accordance with the jurisprudence, sustainable development means: a) the efficient use of natural resources and the quantitative development; b) the limitation of poverty, the maintenance of social and cultural systems and social equity; and c) the preservation of the physical and biological systems (natural resources) that support the life of human beings in order to guarantee personal rights related with life, health, food and water.⁶⁶ The challenge for

62. Protección al Ambiente y Preservación y Restauración del Equilibrio Ecológico. Es una Materia Concurrente por Disposición Constitucional (Environmental Protection and Preservation of the Ecological Balance. It is a Concurrent Matter by Constitutional Provision), Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo 1, Vol. I, Octubre de 2011, Página 297, Tesis P7J. 36/2011 (9a.) (Mex.).

63. Medio Ambiente Sano. Su Relación con el Desarrollo Sustentable y Otros Derechos Fundamentales que Intervienen en su Protección (Healthy Environment. Its Relationship with Sustainable Development and Other Fundamental Rights that Intervene in its Protection) Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo IV, Junio de 2018, Página 3093, Tesis 3o.16CS (10a.) (Mex.).

64. *Rio Declaration*, *supra* note 28, princ. 2, 3, 4, 7, 15.

65. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, para. 5, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

66. Medio Ambiente Adecuado Para el Desarrollo y Bienestar. Concepto, Regulación y Concreción de esa Garantía (Adequate Environment for Development and Welfare. Concept, Regulation and Specification of this Guarantee) Pleno de la Suprema Corte de Justicia [SCJN],

the legislature is to properly conceptualize sustainable development as a human right, while considering not only the terms of international treaties but also the interpretation that has been made by the highest tribunal.

IX. THE PROBLEM OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT IN THE MEXICAN CONSTITUTION

The Mexican constitution must encompass not only the national interest of the people, but also the global community's interests regarding the protection of the environment, through sustainable development. There is a common need to resolve a common problem represented, among other things, by environmental degradation through economic activities that are not sustainable.

The international community has created many treaties to protect the environment for the present and future generations, but these treaties have to be applied at the national level, creating norms precisely to protect nature. Therefore, the creation or modification of existing norms regarding sustainable development must initiate at the constitutional level which is the highest law in the structure of the hierarchization of norms in a constitutional supremacy point of view.

There is no doubt, however, that the problem of sustainable development as human right really exists in the Constitution, even though international law advocates the protection of the planet by imposing sustainable practices. Nowadays, sustainable development is seen as a part of environmental protection to maintain a healthy environment for the people's development and well-being in terms of article 4 of the *Magna Carta*.

However, there is not a proper concept of sustainable development, because international law has not considered incorporating the concept through the Constitution. It does not consider the phrase "present and future generations," it says nothing about the eradication of poverty, and it is misleading by using the term "well-being," a term that is too general to determine or specify.

Perhaps the lack of a concept of sustainable development as human right is because this concept, through the years, has been considered as a way to impose duties on a country that looks for its economic growth in spite of the degradation of the environment, or perhaps, the concept of sustainable development has been considered "another form of colonialism

and oppression by developed countries to stall their quest for economic development.”⁶⁷

X. CONCLUSION

Treaties are very important in the Mexican legal system because they represent a form by which Mexico participates in the international community, negotiates and signs treaties with other countries, and of course, is obligated by those international instruments which establish additional human rights as a form to expand those rights that already are in the Constitution.

In Mexico, there is a monist perspective of law. Human rights are not only in the Constitution but are also in international instruments carried out by the government. There is an expansion of human rights (national and international) both are in the same hierarchical level in the legal system.

One of those very important human rights derived from international law is sustainable development, which includes the obligation for the Mexican government to provide an atmosphere of environmental protection to develop other human rights such as life and health, taking into consideration present and future generations, and providing adequate means to eradicate poverty.

Including in the Constitution of Mexico a new concept of sustainable development—according to international treaties—will recognize the importance of international law in the challenge of expanding human rights in a globalization era. Therefore, the human right of sustainable development established mainly in Article 4° of the Mexican Constitution should be reformed to include the conceptualization considered in environmental treaties to which Mexico is a party. National law must meet the international compromises assumed by the government, but mainly, to apply the human rights available for Mexicans in the legal system.

Thus, it is necessary to make a constitutional amendment to modify Article 4° paragraph five of the Mexican Constitution to include the human right of sustainable development in terms of its treaties. These treaties are negotiated by the President of Mexico and ratified by the Senate on matters such as environmental protection, economic practices, eradication of poverty and looking for the present and future generations.

67. Atapattu, *supra* note 27, at 218.