

# 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 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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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°, or in the other constitutional norms that use the terms “sustainable development” and “sustainability.” Article 4° 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.”<sup>2</sup> In Mexico, this is a challenge.

## II. THE MONIST THEORY OF LAW IN THE MEXICAN CONSTITUTION

In the 21<sup>st</sup> 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

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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.”<sup>3</sup>

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.”<sup>4</sup> The significance of international law has increased considerably.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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.”<sup>8</sup> In this context, Mexico, through a reform that occurred in June 2011, modified Article 1° of the

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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 th Tw.5 5 (n)0.6 ( t)2.7BB07E(T)-15.77 (at)-10.7 (es)-16 ( a)4230.7 6007 Tw.5 5 (n)0.6 y meser27 (e.5 5 (,6 (27

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

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.<sup>12</sup>

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 judiciarygr,aei (y].s )]v(r)-4 (ygr)6.9 (.6 (6.3 (a)-1.7 (r)1.04 1)u)7 17.174 01.6 is21rygr-1.7 (nt)6.3 (s

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.”<sup>14</sup>

The first phase of negotiation corresponds to the President of Mexico, the Head of the Mexican State. According to Article 89 subsection X<sup>17</sup> 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,

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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 inte





However, in 2011, the Constitution underwent reform. Reform ultimately challenged the supremacy that Article 133 established. A

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 internation

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.<sup>27</sup> 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.<sup>28</sup>

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.”<sup>29</sup>

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.<sup>30</sup>

In this context, the first international treaty that was signed by Mexico regarding sustainable development was the Stockholm Declaration on the

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

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.”<sup>32</sup> 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.”<sup>33</sup> 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”;<sup>34</sup> 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”;<sup>35</sup> 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.”<sup>36</sup>

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

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

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,”<sup>40</sup> in order to create “economic, political, social, cultural, and legal environment that will enable people to achieve social development; eradicating poverty; promoting full employment.”<sup>41</sup>

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:

Also, Mexico “adopted the 2030 Agenda for Sustainable Development containing 17 Sustainable Development Goals (SDGs) with 169 targets,”<sup>43</sup> 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.<sup>44</sup> 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,<sup>45</sup> and principles 1 and 3 of the Rio Declaration.<sup>46</sup> Article 4° provides that:

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

Therefore, Articles 4° and 2° 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.<sup>49</sup>

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.<sup>50</sup>

In this context, Article 27 section XX mentions another type of sustainable development, called “rural sustainable development,”<sup>51</sup> 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.<sup>52</sup>

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



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

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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

The Supreme Court mentions principle 10 of the Rio Declaration<sup>60</sup>, 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.<sup>61</sup>

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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

The Mexican Supreme Court has considered sustainable development as a form to protect the environment,<sup>62</sup> 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

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.”<sup>67</sup>

## 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