NAFTA: Recent Constitutional Amendments, Sovereignty Today, And The Future Of Federalism In Mexico

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Introduction

This essay is divided into two parts. The first is juridical, both in approach and language. It explains the way in which the Mexican legal apparatus — not only the Constitution, but mainly a variety of secondary laws — has been adapted to NAFTA. At the end of part one, we briefly discuss the implications of NAFTA on Mexico's sovereignty. The second part is more politically oriented; it attempts to explain the indirect impact that NAFTA might have on the nature and features of Mexican federalism. It also addresses the difficult challenge that Mexico will face in terms of regional development due to the new economic growth that NAFTA will bring to the country.

I. Secondary Legislation And Sovereignty

It is not an easy task to outline briefly the consequences of the ratification of NAFTA within the Mexican legal framework — owing principally to the fact that, in recent years, numerous amendments have been made to the country's legal code. We cannot necessarily attribute these modifications to NAFTA, but they are closely connected to it.

We should start by saying that the Mexican legal system does not require constitutional amendment when an international treaty is concluded. It is sufficient that a treaty only not contravene the Constitution in order for it to become a fully valid rule, provided that the procedures established in Article 76, subsection I (Senate approval) and Article 89, subsection X (general principles of foreign policy) of the Constitution are followed.[1]

We may state, then, that policies which have been implemented following the procedures set out in the Constitution, as in the case of international treaties, are presumed to be valid and are constitutional (at least formally). In the case of a violation of individual rights, the contents of a treaty may be reviewed by the Mexican Supreme Court of Justice. This is not only because all acts of authority in Mexico are subject to review through the constitutional procedure called "*juicio de amparo*," but also because, according to Article 15 of the Constitution, "when [international agreements or treaties] ... alter the guarantees and rights established by this Constitution for the individual and the citizen," the Executive Power is limited in its capacity to conclude international treaties.

This does not imply that if the international treaty contains a provision which violates Article 15 of the Constitution it will automatically be declared null and void. Rather, the Mexican legal system precludes a declaration of general invalidity of a rule or policy through the process of *amparo*. Only an injured party can seek a declaration of invalidity through the process of *amparo*, and the declaration can only have the effect of redressing that particular complaint. This system presents serious drawbacks; first, there is no mechanism for prior review of constitutionality and, second, there is no legal remedy established which provides for the elimination of rules from the legal order once they have been declared unconstitutional.

In accordance with Article 133 of the Mexican Constitution, international treaties become part of the legal order as the supreme law of the nation. This does not mean that an international treaty, such as NAFTA, is on the same level as the Constitution and has the same rank and non-derogable force, but, rather, that it will take precedence, within the regulatory hierarchy of Mexican laws, over secondary legislation within the federal sphere. Because it is hierarchically subordinate, such secondary legislation must conform to the text of an international treaty. It would be illogical to think that, in a system such as ours, the supreme law of Mexico must conform to an international treaty, since the Constitution itself, in establishing the process for becoming a signatory to a treaty, figures as the basis of validity for the treaty.

The constitutional reforms carried out by the present legislature (1991-1994) amount to a total of 29 plus one addition. Nevertheless, the matters referred to by these reforms are very diverse in nature and not all relate to NAFTA; some deal with the indigenous populations, labour matters, penal procedure, the political organization of the Federal District and the integration of the two chambers of Congress. But, if we cannot say with certainty that the Constitution has been reformed expressly to accommodate NAFTA, we can indeed say that two recent constitutional reforms have important economic implications: the reforms to Articles 27 and 28.[2] Article 27 concerns property rights, with constitutional reform focusing on changes to rural property rights with a view to increasing productivity. Article 28 concerns trade. Both articles are found within what could be termed the "economic chapter" of the Constitution.[3]

There are no well-founded reasons to think that there will be future changes to the Constitution because of NAFTA. We insist that because NAFTA is a policy whose formal and material validity depends on the Constitution, it is NAFTA which must be adapted to the supreme policy in order to be applicable, and not the Constitution to NAFTA. It is important to note that the majority of the far-reaching changes made to the Mexican legal order in order to make NAFTA applicable have been carried out at the level of secondary legislation. The reforms made to the Constitution arose from requirements of internal order which go beyond NAFTA, that is to say, real problems which were essential to resolve. Thus, there have also been numerous changes, related to secondary trade legislation, effected to permit the application of NAFTA and to prevent possible conflict between trade policies and the treaty. The most important changes have been made to the federal law on *Economic Competition*, the law on *Foreign Trade*, and the new law on *Acquisitions and Public Works*. These reforms have incorporated provisions from NAFTA, detailing different procedures which permit its effective application.[4]

In regard to the question of whether NAFTA affects the internal sovereignty of Mexico in any way, we believe that the concept of sovereignty must be understood from a normative perspective. NAFTA should be analysed, then, from a perspective that it is a free trade agreement and not a constitutive agreement for economic or political union. For these purposes, we can contrast NAFTA with the Treaty of Rome which, although initially a treaty designed to achieve only economic union, had the longer term objective of the political unification of Europe. This objective accentuates the differences rather than the similarities between these two agreements: NAFTA does not have similar political effects in the sense of altering the sovereign status of the signatory states through the process of political integration. It is for these reasons that we believe NAFTA can have no effect on the internal sovereignty of Mexico.

It is a principle of international law that a state party to an international treaty is not entitled to interfere in the internal affairs of another signatory state. Similarly, it is not acceptable to think that internal political decisions could be altered or determined externally. The most important principles which govern Mexican international relations are provided for in Article 89, subsection X. As previously mentioned, the principles are essentially those of "self-determination of nations" and "non-intervention." Such principles should be interpreted in two ways: both as a prohibition against Mexico's intervention in the internal affairs of other countries, and, more fundamentally, as an obstacle to other states interfering within the domain of Mexican jurisdiction.

For this reason, it can be stated that, if the signatory states are bound by the conditions of NAFTA, it also is true that these principles of international law cannot be transgressed, and that no rule can be interpreted which might in any way permit interference with Mexican national sovereignty. If this were not the case, a remedy could be sought through the process of *amparo*, as has already been explained.

On the other hand, and from a strictly political perspective, it is clear that the concept of national sovereignty, which has been dominant throughout the Mexican post-revolutionary period, must change in the face of Mexico's commercial integration with the United States and Canada. It is a bit absurd to pretend that the armed conflict in the state of Chiapas, the

continuation of fraudulent practices by the Institutional Revolutionary Party, or violations of human rights will go unnoticed by our neighbours and trading partners — that these things will remain confined to the "Mexican village." Last February, for example, when the situation in Chiapas was discussed in the American Congress, it provoked vigorous protests by all Mexican political parties against interventionism into our domestic affairs. It is unthinkable to continue to promote the old idea of political sovereignty: by joining commercially with the United States and Canada, Mexico has consented — implicitly, if one wishes, but in an unequivocal manner — to be evaluated politically by the same criteria that these countries use.

The end of Mexico's economic isolation also means, in a sense, the beginning of its political globalization. The Mexican government must now not only fight with domestic public opinion, which for years it has tried to scorn, but with the opinion of other countries, who will judge harshly the Mexican practices of human rights violations and electoral fraud. By no means do we wish with these arguments to legitimize interventionist practices which would violate Mexico's sovereignty. Nevertheless, we believe that the Mexican government must, in the future, promote more open and democratic political practices, not only for domestic reasons, which are the strongest, but also for reasons of international prestige. Finally — and in accordance with the 'law of anticipated reactions' — the most effective way to avoid having other countries proffer their opinions concerning undemocratic political practices is simply not to engage in such practices.

II. NAFTA AND THE FUTURE OF MEXICAN FEDERALISM

Neither NAFTA nor the constitutional reforms to adapt the Mexican legal framework to NAFTA have a direct and explicit impact on the nature or features of Mexican federalism. Nevertheless, it is necessary to clarify that this trade agreement bears relation, at least in two 'contradictory' senses, to the future of the Mexican federal arrangement. On the one hand, NAFTA will help to pluralize the political life of the country and, consequently, will strengthen the federal institutional arrangement; on the other hand, because it does not include clauses on regional development, this agreement may seriously accentuate the great differences in economic development between the states of the Mexican federation. We shall develop both of these arguments.

The main factor which has explained the weakness of Mexican federalism is not an administrative one; nor has it anything to do with the centralism of the distribution of fiscal resources. On the contrary, it has a strictly political character: the most important variable which explains the precariousness of post-revolutionary Mexican federalism is the hegemonic, rather than competitive, party system.

A hegemonic party system and a federal system are two things which, like oil and water, simply do not mix. In 1968, Harry Kantor, an American specialist on Latin American politics, wrote that the presence of a hegemonic system was the most important obstacle to the full functioning of Mexican federalism.[5] William Riker, doubtless the most penetrating scholar on federalism, has insisted upon the same point: the most important variable for defining the political relevance of a federal system is found in the nature of its party system and in its competitiveness.[6]

A widely-held view in Mexico is that the decentralization of administrative powers and fiscal resources would strengthen federalism. Perhaps decentralization would help attain the goal of renewing federalism. Nevertheless, as long as governors cannot be re-elected and owe their mandate not to their constituencies through competitive elections, but to the central power, and as long as they consider the president their political boss — who is simultaneously the leader of the hegemonic party — federalism will never reach its full potential, no matter how many administrative duties, policies, and resources are decentralised. Maintaining *ceteris paribus* responsibilities and resources, federalism may be better strengthened in the partisan diversity of the central power and the federative entities, and in the decentralization of the parties, given that this latter variable is the one which will confer political dynamism to the relationship between the central power and the states. This might allow all of the other issues on the federal agenda (who collects which taxes, who implements which public policies, who spends which resources, who focuses on which responsibilities) to be tackled and discussed by a 'plurality' of political forces.

In our opinion, NAFTA will contribute — along with other strictly domestic variables — to the

development of this plurality. In the past, the Institutional Revolutionary Party (PRI) could monopolize state governorships thanks to, among other things, the use of fraudulent practices against the opposition. But NAFTA will make the continuation of such political practices increasingly difficult. Unfair elections at all levels — national, state and municipal — will be viewed very poorly by Canada and the United States, Mexico's new trading partners. The political costs which the PRI will pay for continuing to commit fraud against opposition parties will be greater than the costs of tolerating, once and for all, the existence of opposition state governments. The presence of opposition parties in state governments will, in turn, clearly strengthen the political dynamics of Mexican federalism. In this sense, it is foreseeable that NAFTA will contribute to the strengthening of the Mexican federal arrangement in the short term, since it will encourage the government and the PRI to respect the triumphs of its competitors at all levels, including the state level.

NAFTA will also contribute to the achievement of this objective in the long term. The new economic growth which this trade agreement will bring to Mexico will speed up the country's modernization process (its industrialization, urbanization, and so on). During the last 30 years, the relationship between industrialization-urbanization and the vote for the PRI has been systematically and strongly negative. The more modern the population, the less support the revolutionary party receives. In the long term, NAFTA will diversify the sources of political and economic power while, at the same time, liberating social forces which will demand institutional stability and democratic rules. If a new modernizing impetus brings greater political and social plurality and, with it, fraud ceases to be practised in Mexican politics, then NAFTA will contribute in the long term not only to the development and modernization of Mexico, but also to its political plurality and, accordingly, to the strengthening of Mexican federalism. On the other hand, and contrary to what happened during the 1940-1980 period when there were high economic growth rates under the Import Substitution Industrialization (ISI) model, the role of the Mexican government in the promotion and control of new economic growth will decrease forthwith. The market will operate much more freely than in the past. The government will have fewer means of political control at its disposal — price controls, large semi-public enterprises, subsidies, etc. — to abate the increasing political plurality of the country. NAFTA implies the abandonment of the ISI model and, therefore, of the excessive interventionism of government in Mexico's economic and political life. This will affect the political life of the country in a definitive manner: it will encourage the political plurality of the electorate and, consequently, of the municipalities and states of the Mexican federation.

Perhaps we ought not to be so optimistic. The impact of NAFTA on federalism will be ambiguous. NAFTA signified an extraordinary opportunity, which was uselessly squandered, to strengthen 'regional development' and the Mexican federal arrangement. Mexico displays marked disparity in the development of its regions and states. The northern states and some central regions show levels of economic and social development which are incomparable to the backwardness that characterizes southern Mexico — which is more reminiscent of Central America than of the rest of the country. If the new economic growth which NAFTA will bring follows traditional patterns of economic concentration seen since the 1940s, perhaps we shall begin to speak of two countries: "Northern Mexico" and "Southern Mexico."

Undoubtedly, the aspect of NAFTA which will be most criticised is the absence of clauses on regional development — clauses which are found in the European treaty. When Spain entered the European Community, redistributive clauses immediately came into effect to prevent, in the long term, the "Africanisation" of the already lagging Andalusia (in the South) and the "isolated Europeanization" of the Basque region and Catalonia (in the North). The European Union tries to consolidate, in the long term, a homogeneous Europe in terms of social development, thus avoiding having the market operate in such a way as to accentuate the disparities between member countries and between different regions within them. We find nothing in NAFTA regarding the important matter of regional development. It is not surprising that the National Zapatista Liberation Army (EZLN), which operates as a guerilla force in the southern state of Chiapas, decided to make its armed uprising coincide with the entry into force of NAFTA on January 1, 1994, arguing that this trade agreement represents a "death certificate" for an extensive number of social groups in this state. It is obvious that federalism will not be strengthened by means of weapons and war, but there is, in the EZLN's discourse, a demonstration of how the impact of Mexico's arrival — with economic growth very regionalized and poorly distributed — into the "First World" is viewed in the South of the country.

There are two possible reasons for the absence of regional development clauses in NAFTA. Perhaps, in the first place, the impact in terms of regional

development which the United States and Canada will experience as a result of NAFTA are minimal when compared with that which Mexico is going to experience. This fact may explain the relative lack of concern, on the part of Americans and Canadians, regarding this matter and, consequently, its exclusion from the negotiation agenda and from the treaty itself. In the second place, NAFTA is an agreement on "free trade," comprised of arrangements which will gradually eliminate customs restrictions and other trade barriers between the countries party to the agreement. That is, NAFTA has no "common market" status, much less, one of "economic union." The latter is a more advanced form of treaty which implies not only the elimination of trade barriers, but the free circulation of goods, persons, services, and capital — the adoption of a unified economic and social policy. This would necessitate the harmonization of a large range of policies (finance, transportation, immigration, health, etc.), which would make the the formation of an "economic union" not only an economic process, but also a political and social one.

As NAFTA is a treaty on "free trade," and not a treaty for the constitution of an "economic union," there was no need to address regional development in the agreement. However, this argument tends to extrapolate mechanically the European experience to that of the North American treaty. The differences between Spain and France in terms of social development cannot be compared with those that are found between the United States and Mexico. Even if the United States and Canada were not concerned about the matter, the Mexican government certainly should have been. The adaptation of the Mexican legal framework to NAFTA could have involved regional development clauses which, at least, could have operated only in Mexico. It is difficult to believe that Mexico can now convince its new trade partners to establish regional development compensation funds to benefit states excluded or affected by the operation of NAFTA, financed trilaterally (according to the degree of national development), and giving priority to the least favoured states in the three federal systems. Nevertheless, it should be one of Mexico's highest priorities to try to avoid — with explicit policies agreed upon between the states of the Mexican federation — the deepening of developmental disparities between regions. The presence of a guerilla force in the south of the country — something entirely new in post-revolutionary Mexican history — with an anti-NAFTA discourse and a distressing complaint about the oblivion into which the south has fallen, is a warning signal to the Mexican government. The absence of an agressive policy of regional development to redistribute new economic growth between the states of the federation is going to have serious political consequences for Mexico.❑

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Endnotes

1. Article 76 Subsection I establishes that it is the exclusive power of the Senate "to analyze the foreign policy developed by the federal Executive power based on the annual reports of President of the Republic and the Secretary of the respective office to Congress; also, to approve the international treaties and diplomatic agreements that the Executive office of the Union concludes." For its part, Article 89 Subsection X establishes that one of the powers and duties of the President is "to guide foreign policy and to conclude international treaties, submitting them for the approval of the Senate. In the management of such policy, the holder of the Executive Power will observe the following ruling principles: the self-determination of nations; non-intervention; the peaceful solutions of disagreements; a ban on threats or the use of force in international relations; the legal equality of states; international cooperation for development; the fight for international peace and security."
2. The latest reforms to Article 27 were approved in January, 1992, and those to Article 28 in June, 1990 and August, 1993. We must not forget that NAFTA was not approved until December, 1993.
3. Articles 25 and 26 are also included in this "economic chapter," along with Article 131 which contains the extraordinary powers which the President of the Republic may exercise as part of his responsibility to legislate on matters of foreign trade.
4. These laws were published in the *Diario Oficial de la Federation* on December 24, 1992, December 22, 1993 and December 30, 1993 respectively. The regulations on the *Law of Foreign Trade* was published on December 30, 1993.
5. Harry Kantor, "Latin American Federalism" in Valerie Earle, ed., *Federalism: Infinite Variety in Theory and Practice* (Itasca: Peacock, 1968).
6. William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little & Brown, 1964).