

Beyond subordination and legal fetishism: New reasons for Mexican federal judges to apply international human rights law

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LL.M.

Thesis

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INTRODUCTION

During the last decade, several Mexican scholars¹ and Mexican NGOs² have been calling for a more active Federal Judicial Power³ in the field of human rights. However, such pressure has not led to more protection of human rights by the Mexican federal judges. In fact, Mexican Professor Ana Laura Magaloni argues that the Mexican Supreme Court of Justice (the “SCJN”) has “practically forgotten” the “second great task of constitutional jurisdictions”, which is “the protection of the rights and constitutional liberties”.⁴

This thesis will analyze why the call for a more active Federal Judicial Power in the field of human rights has not led to more protection of human rights by the federal judges.

¹ For example, see, Vasconcelos, Rubén, Una Corte de Justicia para la Constitución. Justicia Constitucional y Democracia en México (2010), <http://biblio.juridicas.unam.mx/libros/libro.htm?l=2788>.

² An extensive analysis in how some Mexican NGO’s observed the Judicial Power as a driver of change in society can be observed in Oficina en México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, El Litigio Estratégico en México: la aplicación de los derechos humanos a nivel práctico, experiencias de la Sociedad Civil (2007), <http://www.hchr.org.mx/files/doctos/Libros/litigioestrategico.pdf>.

³ The calling has been directed towards the Federal Judicial Power given that “[t]he federal Judiciary is the most important court system in the country. It has jurisdiction in both ordinary federal matters and in amparo matters, which allow these courts to review the legality and the constitutionality of any action or decision by any public authority, including all other federal and state courts and tribunals. [...] The federal judiciary is composed of the following courts: the Supreme Court of Justice, the collegiate circuit courts, the unitary circuit courts; the district courts and the Electoral Court”. See López-Ayllon, Sergio and Fix-Fierro Hector, “Faraway, So Close!” The Rule of Law and Legal Change in Mexico, 1970-2000, in Legal Culture in the Age of Globalization, Latin America and Latin Europe, pages 305-314 (2003).

⁴ Magaloni, Ana Laura, ¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de derechos fundamentales?, Documento de Trabajo CIDE, (2007), <http://www.cide.edu/publicaciones/status/dts/DTEJ%2025.pdf>.

Additionally, this thesis will provide two arguments to persuade Mexican federal judges about the virtues of more judicial activity in the field of human rights. Namely that Mexican scholars and NGOs have pushed for more judicial activity in the field of human rights, but without providing suitable arguments for convincing Mexican judges about the virtues of having more judicial activity in the field of human rights.

Additionally, this thesis argues that, given the human rights instruments ratified by Mexico, according to the subsidiarity principle, more domestic judicial activity in the field of human rights, contrary to being an external imposition over the Mexican legal tradition, is precisely a way of preventing the international bodies from directly intervening in the activity of the Mexican courts. Such argument can be an adequate alternative to the majority perception (among NGO's and scholars) , that the only approach to improve human rights standards in Mexico is to defer to the Inter-American system of human rights and its jurisprudence. Furthermore, this thesis holds that, given the ideology of Mexican federal judges, the subsidiarity approach can be welcomed by them, and therefore, it may be an important contribution towards the improvement of human rights standards in Mexico.

This thesis will be divided in three chapters. Chapter one, provides a general framework of the different issues involved in the call for a more active judiciary in the field of human rights. Specifically, chapter one will look at the different models around the world regarding the relationship between constitutional law and international human rights norms; the different ways in which local courts and international human right courts relate and what should be the role of local courts in the protection of human rights; the difficulties in the interpretation of human

rights norms; and finally, whether the adoption of any of the models described determine the activism or restraint of local judges regarding human rights.

Chapter two will try to provide some explanations in regards to why Mexican federal judges have not been active in the field of human rights. Specifically, chapter two will look at the institutional (the way in which institutions determined the activity of judges in connection with the protection of human rights), ideological (personal interest that judges have regarding the promotion and protection of human rights) and socio-political (the involvement of civil society in the calling for a more active Federal Judicial Power in the field of human rights) dimensions of the issue.

Finally, chapter three will suggest the appropriate role for Mexican federal judges interpreting human rights issues. Additionally, chapter three will briefly explain the subsidiarity principle and will provide compelling reasons for Mexican federal judges to apply human rights norms and will suggest what the relationship of Mexican judges with international bodies should be.

CHAPTER I: GENERAL FRAMEWORK OF THE PROBLEM: CONSTITUTIONALISM, JUDICIAL ACTIVISM AND INTERNATIONAL HUMAN RIGHTS NORMS

The calling for a more active judiciary in the field of human rights relates to several issues concerning the relationship between constitutional law, judicial activism and international human rights norms. It also opens the issue of judicial interpretation of human rights norms.

The definition and interpretation of constitutionalism means has changed since 1945, when it was generally accepted that a sovereign state was able to include any normative content in its constitution.⁵ However, this notion has increasingly been challenge, constitutional law theory now considers that “not all constitutional texts are committed to the principles and serve the ends of constitutionalism.”⁶

It is true that “[c]onstitutionalism is nowhere defined”.⁷ Yet, constitutional law theory recognizes that modern constitutionalism has a substantive content, usually related to democracy, rule of law, separation of powers, and respect for fundamental human rights.⁸ Furthermore, almost all constitutions around the globe contain a bill of rights. Nevertheless, despite the well-established relationship between constitutionalism and human rights, it is not clear how constitutional law and international human rights norms relate. For example, there is not a clear answer whether constitutional norms and international human rights norms are on the same level. Furthermore, the way in which international human rights norms are incorporated into the local level and enforced varies around the world. Along the same vein, empirically, there are several

⁵ Larry Catá Backer, From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power System, 113, Penn St. L. Rev., 671, pages 716-730 (2008-2009).

⁶ Henkin, Louis, A new birth of Constitutionalism: genetic influences and genetic defects, in Constitutionalism, Identity, Differences and Legitimacy, Theoretical Perspectives, 39, page 40 (1994).

⁷ Idem

⁸ Larry Catá, *supra* note 5, page 722.

ways in which local courts and international courts relate. Finally, there is still debate about what should be the role of judges in the protection of human rights and how human rights should be interpreted. These questions have been answered at the local constitutional level and there are a variety of models.

The following sub sections of this chapter will briefly summarize (1) the different models around the world regarding the relationship between constitutional law and international human rights norms; (2) the different ways in which local courts and international human right courts relate and what should be the role of local courts in the protection of human rights; (3) the difficulties in the interpretation of human rights norms and finally (4) whether the adoption of any of the models described in sub sections (1) and (2) determines the activism or restraint of local judges regarding human rights.

(1). The relationship between constitutional norms and international human rights norms: an overview of the different models

Professor Dinah Shelton recently published a book extensively describing the different models around the world in which international law and domestic legal systems relate to each other.⁹ The purpose of this section is not to thoroughly describe all the models and countries addressed by Professor Shelton. Yet, this section has two specific purposes: (1) to provide a brief outline of the different models; (2) to highlight that different sources of international law can be incorporated differently within one legal system, and finally, (3) to point out that absolute statements describing the relationship between international human rights norms and constitutional law tend to be erroneous.

⁹ Shelton, Dinah, International Law and Domestic Legal System, Incorporation, Transformation, and Persuasion (2011).

The relationship between constitutional law and international human rights norms encompasses two items: incorporation of international human rights norms into domestic legal systems; and second, the hierarchy of international human rights norms within the domestic legal systems. As Professor Dinah Shelton demonstrates in her book, the place (hierarchy) and incorporation of international human rights law in the domestic legal system depends on the source of international law in question.¹⁰ It is important to remember that international human rights law is not a single and coherent set of norms. Rather, as international law in general, human rights law derives its norms from four different sources: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹¹

Similarly, Professor V.T. Thamilaran argues that the incorporation of treaties in national law is determined by two different constitutional techniques that he refers to as "legislative incorporation" and "automatic incorporation".¹² For example, "[i]n some states the provisions of ratified treaties do not become national law unless they have been enacted as legislation by normal method. The legislative act creating the norms as domestic law is an act entirely distinct from the act of ratification of the treaty. The legislative bodies may refuse to enact legislation implementing the treaty. In this case the provisions of the treaty do not become

¹⁰ *Idem*, page 5.

¹¹ Statute of the International Court of Justice (annexed to the UN Charter), June 26, 1945, 1 U.N.T.S. XV1, entered into force October 24, 1945, article 38.

¹² Thamilaran, V. T., International law and national law elements of automatic incorporation, 11 Sri Lanka J. Int'l L. 233, page 233 (1999).

national law. This method, referred to as ‘legislative incorporation’, is used, *inter alia*, in the United Kingdom, Commonwealth countries and Scandinavian countries. In other states, which have a different system, ratified treaties become domestic law by virtue of ratification. This method is referred to as ‘automatic incorporation’ and is the method adopted, *inter alia*, by France, Switzerland, the Netherlands, [...] and many Latin American countries and some African and Asian countries”.¹³

Finally, some “[c]ourts utilize different terminology in deciding whether or not to enforce a treaty provision invoked by one of the parties to a pending case. The courts of several countries, including the United States and Japan, refer to the doctrine of ‘self executing’ treaties, while European courts tend to discuss ‘direct applicability’ or ‘direct effect’”.¹⁴

On the other hand, “[n]ational constitutions rarely use the term customary international law or custom. It is much more common for the phrase ‘general principles and norms of international law’ to appear or, in some older constitutions, the term ‘law of the nations’. Most continental European Constitutions call for direct incorporation of such ‘norms’, ‘general principles’ or ‘rules’ of international law. [...]The British common law has long held that customary international law that does not conflict with legislation automatically forms part of the common law and has direct legal effect in courts without the need for incorporation. Countries whose legal systems are based on common law generally follow this tradition”.¹⁵

Regarding hierarchy of international human rights norms in domestic legal systems, some states “like the Netherlands, [...] place international treaties at a constitutional rank. [...] A few

¹³ *Idem*

¹⁴ Shelton, Dinah, *supra* note 9, page 11.

¹⁵ *Idem*, page 13.

states separate out human rights treaties for enhanced (constitutional) status”.¹⁶ For example, “[i]n Serbia, as in several other countries, separate constitutional provisions govern human rights and treaties concerning the status of minorities”.¹⁷ Other states, however, place international treaties below the local constitution.¹⁸ Finally, “a few constitutions appear to leave the issue of hierarchy between treaties and domestic law unresolved”.¹⁹

On the other hand, “many countries lack a clear rule on the place of custom in domestic legal order. For example, whether or not customary international law overrides common law precedents in Canada is unclear. [...] In contrast, [...] in Italy [...] any domestic law in conflict with custom is held to violate indirectly the Italian Constitution and can be repealed by the Constitutional Court”.²⁰

Furthermore, as stated above, different sources of international law can be incorporated differently within one legal system. For example, in most common law countries, ratified treaties “do not automatically become part of [local] law, but their contents must be enacted into law by Parliament”.²¹ Yet, “customary international law that does not conflict with legislation automatically forms part of the common law and has direct legal effect in courts without the need for incorporation”.²²

Finally, “[t]he recent growth of international institutions with the power to render decisions, judgments and issue recommendations has presented courts with a new body of

¹⁶ *Idem*, page 5.

¹⁷ *Idem*, page 9.

¹⁸ *Idem*

¹⁹ *Idem*, page 6.

²⁰ *Idem*, pages 6 and 7.

²¹ *Idem*, page 10.

²² *Idem*, page 15.

normative texts [...]. The relatively recent development of this body of norms, coupled with the lack of consensus about the juridical status of much of it, has left courts to develop their own approaches to the legal weight to be afforded 'soft law'. The courts have responded with varying degrees of receptiveness and models of legal analysis. The general view seems to be to view such texts as 'persuasive' but not generally binding".²³ This issue will be addressed in the next section.

In conclusion to this section, there are different models around the world regarding the relationship between constitutional law and international human rights norms. Furthermore, different sources of international law can be incorporated and have different hierarchy even within a single legal system. Thus, absolute statements describing what the relationship between international human rights norms and constitutional law tend to be erroneous.

(2). The relationship between local courts and human rights courts and the role of local courts in the protection of human rights

Local courts are important for the protection of human rights. This is not a new idea, but an idea deeply rooted in modern constitutionalism and international law. In fact, international law has borrowed local courts to enforce its corpus. Yet, resorting to local courts for the enforcement of international human rights law generates tensions. The first tension, described in section (1) above is the relationship between constitutional law and international human rights norms. The second tension, addressed by this section, is how local courts and international human right courts relate and what should be the role of local courts in the protection of human rights.

²³ Idem, page 15.

As Rosenfeld points out, “[t]he pursuit of central values embodied in constitutionalism only makes sense in relation to sociopolitical settings that can be construed as revolving around the two opposite poles of identity, and diversity or difference. Indeed, without some predominant identity, such as that of the sovereign nation or the constitutional self, it is difficult to imagine how one could justify the imposition of a constitutional order.”²⁴ Yet, it may be argued that the “old consensus of conventional constitutionalism, that constitutions are legitimately grounded either in domestic law and the unique will of a territoriality defined *demos*, is now challenged by a view that constitutional legitimacy requires conformity with a system of universal norms grounded in an elaboration of the mores of the community of nations”.²⁵

Furthermore, “the idea of constitutionalism as a pattern of order is only meaningful within states, rendering any concept of constitutional order beyond the states’ internal sphere, let alone global constitution, futile from the very outset”.²⁶ Yet, states have entered into international human rights instruments with a series of human rights bodies, some of them, issuing binding rulings to the nation states.

Nevertheless, in no way does international law require national courts to replicate the criteria of the international human rights courts. Theoretically, there are three possible alternatives for local courts and international human rights courts to relate to each other: subordination of the local courts to international bodies; subordination of international bodies to the local courts; and cooperation.

²⁴ Rosenfeld, Michel, Modern Constitutionalism as Interplay Between Identity and Diversity, in Constitutionalism, Identity, Difference and Legitimacy, Theoretical perspective, page 4 (1994).

²⁵ Larry Catá, *supra* note 5, page 679.

²⁶ Preuss, Ulrich K., Disconnecting Constitutions from Statehood, is Global Constitutionalism a Viable Concept?, in The Twilight of Constitutionalism?, page 25 (2010).

Subordination of the local courts to the international bodies means that local courts follow the criteria established by international tribunals. For example “[i]n *Bulacio v. Argentina*, the Inter-American Court ordered Argentina to prosecute a police captain regardless of domestic extinguishment of the criminal action against him. Argentina's Supreme Court voiced its disagreement with aspects of this judgment, noting that it appeared unduly to restrict the rights of the defendant and that it did so on grounds not of an independent determination of the facts but, rather, of the procedural fact of Argentina's international acknowledgment of responsibility before the Inter-American Court. Nonetheless, the Supreme Court stated that ‘in spite of the reservations expressed here, it is the duty of this Court, as part of the Argentine State, to comply [with the judgment of the Inter-American Court]’”.²⁷

Subordination of the international courts to local courts means that local courts can freely choose to disregard the criteria of international bodies. An example of this approach was taken by the Supreme Court of the United States in the *Medellín v. Texas* case.²⁸ In that case, “[t]he Supreme Court affirmed the ruling of a lower US court and declined to follow the course of action suggested by the [International Court of Justice (ICJ)]. Figuring prominently in the Supreme Court’s analysis was the wording of Article 94 of the UN Charter, by which each UN member state ‘undertake to comply with’ ICJ decisions. That formulation, according to the majority of the justices, evidences that ICJ judgments were not intended to be directly applicable in the legal systems of UN member states”.²⁹

²⁷ Cavallaro, James L. and Brewer, Stephanie Erin, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The case of the Inter American Court, 102 A.J.I.L. 768, page 787 (2008).

²⁸ O’Connell, Mary Ellen, Scott, Richard F. and Roht-Arriaza, Naomi, Medellín v. Texas (Supreme Court of the United States, 552 U.S. 491, 128 S. Ct. 1346) in The International Legal System, cases and Materials, pages 1086-1091 (2010).

²⁹ Shelton, Dinah, *supra* note 9, page 18.

Finally, cooperation would mean that in many human right issues, opinions in democratic societies may differ widely according to the national or predominant identity in the nation state.³⁰ Therefore, local courts should only follow international bodies when they have not adequately protected human rights.³¹ For example, the “German Federal Constitutional Court decided in 2004 that all provisions in the German legal order have to be construed in accordance with the [European Convention of Human Rights (ECHR)] so as to avoid any conflict, but if an avoidable conflict arises with provision of the Basic Law, the constitution outranks the ECHR. [Yet], [g]erman administrative authorities and courts must take into account decisions of the European Court of Human Rights against Germany in interpreting relevant German law”.³²

Another example of a cooperation relationship among local courts and international courts is “[t]he doctrine of the ‘margin of appreciation’ first developed by the European Court of Human Rights.”³³ “The margin of appreciation doctrine, [...] establishes a methodology for scrutiny by international courts of the decisions of national authorities – i.e., national governments, national courts and other national actors. While the case law of the European Court of Human Rights and other international tribunals on the contours of the doctrine is somewhat inconsistent, two principal elements may be identified: (i) *Judicial deference* – international courts should grant national authorities a certain degree of deference and respect their discretion

³⁰ European Court of Human Rights, Sahin v. Turkey (Judgment of the Grand Chamber, Application No. 44774/98), in, International Human Rights in Context, pages 625-634.

³¹ See, Carozza, Paolo, Subsidiarity as a Structural Principle of International Human Rights Law, 97 Am. J. Int'l L. 38 (2003).

³² Shelton, Dinah, *supra* note 9, page 17.

³³ Carozza, Paolo, Subsidiarity as a Structural Principle of International Human Rights Law, *supra* note 31, page 40.

on the manner of executing their international law obligations. Thus, international courts ought not to replace the discretion and independent evaluation exercised by national authorities”.³⁴

Additionally, regardless how national courts relate to international human rights bodies, nation states should decide the role that local courts should play in the protection of human rights, resulting in either strong courts or weak courts.

Strong courts have broad powers of judicial review and the last word regarding human rights issues, as determined by the constitution. In contrast, weak courts are those that, under the constitutional design, have limited judicial review and defer to other power, usually the legislature, final decisions on human rights issues. Professor Mark Tushnet argues that the decisions of weak courts “can be revised in the relatively short term by a legislature using a decision rule not much different from the one used in the everyday legislative process”.³⁵ The classic example of a strong court is the Supreme Court of the United States, while Tushnet argues that New Zealand, the United Kingdom and Canada are examples of weak courts.³⁶

Usually, when designing a constitutional model, and specifically, the powers and mandate of courts, it is assumed that strong courts are going to be active. According to Professor Hiroshi Itoh “[j]udicial activism and judicial restraint describe the relationship between the judiciary and the political branches of government. [...]A court is activist whenever it declares public policies unconstitutional. Conversely, a court is self-restrained whenever it upholds the constitutionality of public policies”.³⁷ Additionally, Professor Kent Roach argues that “[j]urisprudentially, judicial activism is a term that should be broken down into analytical

³⁴ Shany, Yuval, Toward a General Margin of Appreciation Doctrine in International Law?, EJIL, Vol. 16 No. 5, 907–940, page 909 (2005).

³⁵ Tushnet, Mark, Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law, page 24 (2008).

³⁶ *Idem*

³⁷ Itoh, Hiroshi, Judicial review and judicial activism in Japan, 53 Law & Contemp. Probs. 169, page 169, (1990).

compartments that include judicial creativity in making law, judicial willingness to go beyond the traditional bi-polar model of adjudication, judicial willingness to enforce rights over social interest, and judicial willingness to impose solutions on the legislative and executive branches of government”.³⁸

However, for the purposes of this thesis, active courts are those that have a great amount of activity interpreting human rights issues, while restrained courts are those that voluntarily defer those issues to other power (usually the legislature), even if they have a broad mandate or strong powers under the constitutional system. Thus, this thesis understands active courts as those willing to enforce human rights norms, while restrained courts would rather not address those issues.

Many authors have advanced arguments against the “strong and active” court model. For example, Professor Michael Perry holds that “it is undemocratic to give to politically independent courts- rather than to politically dependent, because electorally accountable, policymaking officials of the legislative and/or executive branches of the government - the authoritative word as to what human rights forbid (or require) in particular contexts. [...] By imposing on government their own judgments about what human rights forbid government to do in particular contexts, courts necessarily discourage citizens and their electorally accountable representatives from themselves deliberating about what the human rights forbid in those contexts.”³⁹

³⁸ Roach, Kent, Judicial Activism in the Supreme Court of Canada, in Judicial Activism in Common Law Supreme Courts, page 118 (2003).

³⁹ Perry, Michael, J., Toward a Theory of Human Rights, religion, Law, Courts, page 97 (2007).

Professor Jeremy Waldron argues that “judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side issues about precedents, texts, and interpretation. And it is politically illegitimate.”⁴⁰ However he explains that his case against strong courts “is against judicial review of legislation, not judicial review of executive action or administrative decision making. [...] [I]t is almost universally accepted that the executives’ elective credentials are subject to the principles of the rule of law, and, as a result, that officials may properly be required by courts to act in accordance with legal authorization.”⁴¹

Yet, it is important to note that, as Professor Waldron acknowledges, the above mentioned arguments against strong and active courts only work in cases of democratic countries that have (i) democratic institutions working in a reasonably good way; (ii) a set of judicial institutions in reasonably good order; (iii) a commitment on the part of the members of the society and most of its officials to the idea of individual and minority rights; and (iv) persisting, substantial and good faith disagreement about rights.⁴²

Furthermore, Jeremy Waldron states that in new democracies, strong and active courts could be adequate to teach participants of the new democracy to value rights, or to give guarantees to minorities that might not be forthcoming in a pure majority rules systems.⁴³ This same argument was advanced by the South African Constitutional Court. In the case of the *State v. Makwanyane*, the Court argued that “[t]he very reason for establishing [...] judicial review

⁴⁰ Waldron, Jeremy, The Core of the Case Against Judicial Review, The Yale Law Journal, 115:1346, pages 1353, (2006).

⁴¹ Idem, page 1354.

⁴² Idem, pages 1359-1369.

⁴³ Idem, page 1346.

[is] to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are to claim this protection include the social outcast and marginalised people of [...] society. It is only if there is a willingness to protect the worst and the weakest amongst [society] that all of us can secure that our own rights will be protected”.⁴⁴

Similarly, Professor Tom Ginsburg claims that strong courts can be insurance in new democracies. For example, he mentions that “a geographically concentrated ethnic minority may need to be assured that it will be given fair treatment and the availability of a constitutional court provides a minoritarian guarantee. From the perspective of the majority, this can be seen as insurance against rebellion or secession. Similarly, constitutional protection of property rights, with a strong court as guarantor, may help prevent capital flight by private investors in situations where the old regime had capitalism but not democracy”.⁴⁵

Finally, in his book, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, Professor Ran Hirschl argues that empirically, contrary to what it is believed, strong judiciaries do not protect all kinds of rights equally. He argues that strong judiciaries tend to focus on and protect more freedom of speech, due process and religious tolerance rather than socio-economic rights.⁴⁶ Further, he argues that “the constitutionalization of rights and the establishment of judicial review is not driven solely, or even primarily, by politicians’ genuine

⁴⁴ The Constitutional Court of the Republic of South Africa, THE STATE versus T MAKWANYANE AND M MCHUNU, Case No. CCT/3/94, Delivered on 6 June 1995, Page 58, paragraph 88, <http://www.saflii.org/za/cases/ZACC/1995/3.pdf>

⁴⁵ Ginsburg, Tom, Judicial Review in New Democracies, Constitutional Courts in Asian cases, page 248 (2003).

⁴⁶ Hirschl, Ran, Towards Juristocracy, The Origins and Consequences of the New Constitutionalism, Chapter 4 (2007).

commitment to progressive notions of social justice or to an elevated vision of universal rights”.⁴⁷

In conclusion to this section, there are several models about the relationship between international courts and local courts. Additionally, there are different alternatives to what should be the role of local courts in the protection of human rights. Rather than holding that a specific model is better than the other, this thesis suggests that the model each nation state undertakes should be in accordance with its socio-political context and the needs of the population.

(3). Understanding human rights norms

Applying human rights norms requires the judges to perform a reasoning and argumentative exercise to interpret human rights norms. “Most human rights are indeterminate in the context of many of the cases in which they are likely to be invoked; with respect to most human rights, there is room for a reasonable difference of judgment, in many, if not most, cases about what the right at issue forbids, even if the relevant facts are clear and beyond controversy”.⁴⁸

The reason behind this issue is that “[h]uman rights is not a single coherent idea, but represents the intersection of a variety of different traditions of thought, many of which in various degrees have mutually incompatible premises. [...] [I]t remains a pervasive and persistent characteristic of international human rights that its fundamental principles are based on a very thin, if any, consensus about where they come from. [...] [P]rinciples of fundamental rights in law are inherently undetermined, and necessarily subject to further specification through

⁴⁷ Idem, page 213.

⁴⁸ Perry, Michael, J., *supra* note 39, page 91.

interpretation and legislation”.⁴⁹ Consequently, “[i]nternational instruments [...] reflect the resistance of an international political system committed to state sovereignty and related state values. [...] The international instruments are committed to the idea of equality, but their vision and conception of equality are not clear. They require equal protection of the laws, but it is not clear whether that permits or perhaps even requires unequal treatment to compensate for inequalities.”⁵⁰

Therefore, it is perfectly acceptable that in a democratic society, there are disagreements about the scope and content of human rights norms. In fact, “[d]isagreements about rights are often about central applications, not just marginal applications. [...] The issues involved are serious issues on which is not reasonable to expect that there would be consensus. [...] It is not reasonable to expect that people’s views on complex and fraught issues of rights will always converge to consensus”.⁵¹

(4). The relationship between internalization of international human rights law, strong courts and judicial activism

According to Reyneck Matemba, Assistant Chief Legislative Counsel of the Ministry of Justice of Malawi, “incorporation of human rights principles and obligations enshrined in international and regional human rights instruments into domestic law is the most effective way of ensuring that the instruments have a significant impact in a national legal order”.⁵² This is a very popular

⁴⁹ Carozza, Paolo, *Human Rights, The “Art” of Democracy, and the “Taste for Local Freedom”*, in, *La Sostenibilità Della Democrazia Nel XXI Secolo*, page 15 (forthcoming).

⁵⁰ Henkin, Louis, *supra* note 6, page 50.

⁵¹ Waldron, Jeremy, *supra* note 39, pages 1367-1368.

⁵² Matemba, Reyneck, *Incorporation of international and regional human rights instruments: comparative analyses of methods of incorporation and the impact that human rights instruments have in a national legal order*, *Commonwealth Law Bulletin*, 37:3, 435-444, page 436 (2011).

idea among people who want to enhance the human rights situation around the world. At the same time, there is an idea that there is a correlation between active courts (as understood by this thesis) and incorporation of international human rights norms into the domestic legal system. At the same time, as it was mentioned above, when designing a constitutional model, and specifically, the powers and mandate of courts, it is assumed that strong courts are going to be active.

If the ideas described above are true, then, a combination of automatic incorporation of international human rights norms at the highest possible level within a domestic legal system and a strong courts model would render very high levels of human rights protection by the judiciary. However, the idea that by internalizing international human rights norms together with a strong courts model would entail that judges will automatically apply international human rights norms, needs to be revisited.

In fact, it is possible to have strong and active courts, strong but restrained courts, weak but active courts, and weak and restrained courts. An example of a strong and active court is the Supreme Court of India.⁵³ “The jurisdiction of the court is extensive. Under article 142(1) of the Constitution of India the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it”.⁵⁴ Additionally, “the Supreme Court of India has established itself as a one of the most judicially active apex courts in the common law world”.⁵⁵

⁵³ See, Jacobsohn, Gary Jeffrey, The Wheel of Law, India’s Secularism in Comparative Constitutional Context, Chapter Eight, So You Want a (Constitutional) Revolution? Lessons from abroad, pages 227-264 (2003)

⁵⁴ Iyer, Venkat, The Supreme Court of India, in Judicial Activism in Common Law Supreme Courts, page 121 (2003).

⁵⁵ *Idem*, page 163.

On the other hand, an example of a strong but restrained court is the Supreme Court of Japan. In this vein, the “Japanese Constitution clearly states [the] premises necessary for judicial review”.⁵⁶ However, the Japanese Supreme Court has “been very willing to defer their judgment to that of bureaucrats and politicians on sociopolitical policymaking. Indeed, one of the key reasons for the successful operation of judicial review on Japanese soil is the sparse and cautious invocation of this newly acquired constitutional power, lest the powerful political branches become upset by any appearance of judicial superlegislation”.⁵⁷

An example of a weak but active court is the Supreme Court of Canada. Professor Mark Tushnet argues that Canada is an example of a weak court. However, according to Professor Kent Roach, the Canadian Supreme Court “has addressed a very wide variety of issues under the [bill of rights], including many matters relating to criminal justice and divisive issues such as gay rights, Aboriginal rights, and health care”.⁵⁸ Finally, an example of weak and restrained courts is the High Court of Australia. According to Professors Fiona Wheeler and John Williams, ‘the absence of an entrenched Bill of Rights has shielded the High Court from the ‘boiling brew of politics’ associated with the United States Supreme Court”.⁵⁹ At the same time, the Australian High Court has not granted itself powers to decide on human rights issues.

Additionally, there is not a necessary correlation between the direct incorporation of international human rights law and judicial activism. In this vein, Professor Janet Koven Levit suggests that the internalization of human rights norms in Argentina, at least until 1999,

⁵⁶ Danelski, David J., Documenting the Establishment of Judicial Review: Japan and the United States, in Comparative Judicial Review and Public Policy, page 22 (1992).

⁵⁷ Itoh, Hiroshi, *supra* note 37, page 178.

⁵⁸ Roach, Kent, *supra* note 38.

⁵⁹ Wheeler, Fiona and Williams, John, ‘Restrained Activism’ in the High Court of Australia, in Judicial Activism in Common Law Supreme Courts, page 26 (2003).

produced “rather limited results in terms of compliance because it failed to empower, mobilize, and create synergistic relationship among a diverse panoply of transnational actors- individuals, politicians, non-governmental organizations (NGOs), governmental entities and supranational bodies- that straddle Argentine’s legal, political and social spheres”.⁶⁰ In fact, international law can be used in different manners by judges and courts. For example, “International law is certainly performing a different function in [Argentina during] the Kirchner Court, compared with the Menen Court in the 1990s. The Menen Court used international law as a basic tool for economic globalization. [...] By contrast, the Kirchner Court is struggling with the evils from the past (crimes against humanity, human rights violations, pension reforms), while at the same time trying to achieve social and political legitimacy”.⁶¹

In conclusion, the reasons why judges take an active position or “adopt different approaches to the adjudicative role on constitutional issues include the nature of the legal culture within which judges receive their education, the method for appointing judges, the pool from which they are drawn, the prevailing political culture in the country [...], the nature and age of the Constitution. [...] We are dealing with human beings here, not institutions, and human beings have innumerable, and often unconscious, motives for deciding a dispute one way rather than another”.⁶² Even if a country has the most “progressive” human rights norms and a “strong judicial review system”, it does not mean that judges are going to use the human rights norms in an active way.

⁶⁰ Koven, Levit, Janet, The Constitutionalization of Human Rights in Argentina: Problem or Promise?, 37 Colum. J. Transnat’l L. 281, page 283 (1998-1999).

⁶¹ Carnota, Walter F., Judicial Globalization, How International Law of Human Rights Changed the Argentine Supreme Court, in Globalizing Justice, page 263 (2010).

⁶² Dickson, Brice, Comparing Supreme Courts, in Judicial Activism in Common Law Supreme Courts, pages 13-14 (2007).

In fact, Professor Tom Ginsburg argues that “[f]ormalism is a particularly inappropriate theory to understand how courts behave in new democracies. If courts simply apply ‘the law’, there should be no difference in their willingness to do so across different political regimes. Courts with the power of judicial review under authoritarian regimes (for example, those in Taiwan until 1986, Poland from 1985-89, and Hungary from 1983-89) should be willing to exercise the power without regard to punishment. But judicial review is almost exclusively associated with democratic governance”.⁶³ Likewise, Professor Charles R. Epp argues that “[t]he fate of a bill of rights [...] depends on forces outside of it”.⁶⁴ Furthermore, he states that “it takes more than judicial independence and a bill of rights to [generate judicial activism].⁶⁵ The following chapter will attempt to provide some explanations of why Mexican federal judges have not been active in the field of human rights.

⁶³ Ginsburg, Tom, *supra* note 45, page 69.

⁶⁴ Epp, Charles R., The Rights Revolution, Lawyers, Activist, and Supreme Courts in Comparative Perspective, page 13 (1998).

⁶⁵ *Idem*, page 14.

CHAPTER TWO: THE MEXICAN CASE ABOUT HUMAN RIGHTS AND LOCAL COURTS

In June 2011, the Mexican Constitution was amended in order to expand the protection of human rights.⁶⁶ One of the most important sections of the amendment was to directly incorporate human rights treaties entered by Mexico as part of the Mexican Constitution. Specifically, Article 1 of the Mexican Constitution states that “[i]n the United Mexican States all persons should enjoy the rights recognized in the Constitution and international treaties to which the State of Mexico is a party, as well as guarantees for their protection, whose exercise may not be restricted or suspended except in the cases and under the conditions that this Constitution sets”.⁶⁷ Additionally, Article 1 establishes that “[a]ll authorities within the scope of its authority have the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness. Consequently, the State must prevent, investigate, punish and remedy human rights violations in the terms established by law”.⁶⁸

⁶⁶ The complete version of the presidential decree publishing the constitutional amendments in the Federal Official Gazette can be found in the following link (version available only in Spanish): <http://www2.scjn.gob.mx/Leyes/ArchivosLeyes/00130212.pdf>.

⁶⁷ Constitution of the United Mexican States, article 1, complete version available at <http://www.ordenjuridico.gob.mx/Constitucion/cn16.pdf>. The translation cited above was made by the author: [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].

⁶⁸ Idem [Todas las autoridades, en el ámbito de sus competencias, tienen la obligación de promover, respetar, proteger y garantizar los derechos humanos de conformidad con los principios de universalidad, interdependencia, indivisibilidad y progresividad. En consecuencia, el Estado deberá prevenir, investigar, sancionar y reparar las violaciones a los derechos humanos, en los términos que establezca la ley].

This amendment has been highly welcomed by scholars, international organizations,⁶⁹ national and international NGOs.⁷⁰ Even the SCJN stated that such amendment “is an evidence of the progressive recognition of human rights by clearly establishing the *pro persona* principle of law as rector for the interpretation and application of legal norms”.⁷¹ At the same time, some academics have stated that such constitutional amendment constitutes a “new paradigm” for the Mexican constitutional law.⁷²

However, even before the constitutional amendment of June 2011, Mexican constitutional law did include legal tools for the protection of human rights and the direct application of human rights treaties. Yet, Mexican federal judges were restrained concerning human rights issues. Therefore, the constitutional amendment of June 2011 would not automatically modify the way in which Mexican federal judges decide on human rights issues. This chapter seeks to explain why Mexican federal judges have not been active in the field of human rights.

⁶⁹ For example, see the statement of the High Commissioner for Human Rights available at <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=11129&LangID=S>.

⁷⁰ See statement by Mexican NGO’s available at <http://fundar.org.mx/mexico/?p=799>.

⁷¹ The complete version of the statement made by the SCJN can be found at <http://www2.scjn.gob.mx/red/constitucion/>. The translation cited above was made by the author: [El 6 y 10 de junio de 2011, se publicaron dos importantes reformas a la Constitución Política de los Estados Unidos Mexicanos que impactan directamente en la administración de justicia federal.

La primera de ellas concierne fundamentalmente al juicio de amparo [...]

La segunda, en íntima relación con la anterior, evidencia el reconocimiento de la progresividad de los derechos humanos, mediante la expresión clara del principio *pro persona* como rector de la interpretación y aplicación de las normas jurídicas, en aquellas que favorezcan y brinden mayor protección a las personas. Así, la ampliación de los derechos que significa la concreción de algunas cláusulas constitucionales, como aquella relativa a los migrantes o a la suspensión de garantías, aunada a la obligación expresa de observar los tratados internacionales firmados por el Estado mexicano, miran hacia la *justiciabilidad* y eficacia de los derechos que, a la postre, tiende al mejoramiento de las condiciones de vida de la sociedad y al desarrollo de cada persona en lo individual].

⁷² Carbonell, Miguel and Salazar, Pedro, La Reforma Constitucional de Derechos Humanos: Un nuevo paradigma (2011), <http://biblio.juridicas.unam.mx/libros/libro.htm?l=3033>.

Mexican Professor Julio Rios Figueroa states that there can be “different answers to this question based on three dimensions: socio-political, personal or ideological and institutional”.⁷³ The socio-political dimension makes reference to the involvement of civil society in calling for a more active federal judiciary in the field of human rights, the personal or ideological dimension makes reference to the personal interest that judges have regarding the promotion and protection of human rights, and finally, the institutional dimension makes reference to the way in which institutions determine the activity of judges in connection with the protection of human rights.

The following sections will try to give some explanations of why Mexican federal judges have not been active in the field of human rights. Each section will address one of the dimensions suggested by Professor Julio Rios Figueroa, beginning with the institutional dimension, followed by the ideological dimension and concluding with the socio-political dimension.

(1). Institutional dimension: Evolution and role of the federal judicial power in the Mexican state and the human rights agenda

The institutional dimension is significant but insufficient to explain the restraint of the Mexican federal judges concerning human rights issues. In fact, the next paragraphs will contend that, while it is true that for more than 50 years the federal judiciary was ignored by the Mexican political system, and the Mexican federal judges lack independence from the other political branches; over the last fifteen years or so, the Mexican federal judiciary had the necessary conditions to take a more active stand regarding human rights cases. Nevertheless, Mexican

⁷³ Ríos Figueroa, Julio, Justicia Constitucional y Derechos Humanos en America Latina, Revista Latinoamericana de Política Comparada, Volumen 3 (2010), http://www.reformapolitica.cide.edu/documentos/JuecesyDerechosHumanosAL_RLCP_JRF.pdf.

federal judges have been restrained concerning human rights issues. To understand the argument submitted in this section, it is necessary to briefly discuss the evolution of the Mexican Federal Judicial Power, at least, since 1917⁷⁴ to the present.

In connection with the aforementioned, “until very recently, checks and balances did not work in Mexico and the president, if he so desired, could always use his power arbitrarily. The Mexican political system was characterized by a strong *presidencialismo*, a strong dominance of the president over other branches of government deriving from sources beyond the constitution.”⁷⁵ Professor Beatriz Magaloni further argues that the SCJN was subordinated to the executive because the “president controlled nominations and dismissals [of the justices]”.⁷⁶ Finally, “from the 1917 Constitution there was no Mexican state entity responsible for preparing the agenda of the administration of justice in the country”.⁷⁷ This means that the judiciary had little importance under the Mexican political system. In fact, Professor David A. Shirk argues that “[a]s is common to other parts of Latin America; the problems faced by Mexican judiciary are largely attributable to the historical neglect—if not outright subversion—of the institution in the political system. Due to several factors that hindered democratic development in the 19th and

⁷⁴ It is true that as some authors have argued that the role and identity of the Mexican judges can be tracked since the very independence of the country and even during the colonial era. Yet, for purposes of the thesis, I chose 1917 as the starting year given that in 1917 the ruling Mexican constitution was enacted.

⁷⁵ Magaloni, Beatriz, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, in *Democratic Accountability in Latin America*, page 280 (2003)

⁷⁶ *Idem*, page 287.

⁷⁷ Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación, *Libro Blanco de la Reforma Judicial: una agenda para la Justicia en México*, page 68, (2006). The translation cited above was made by the author: [a partir de la Constitución de 1917 no existió una entidad del Estado mexicano encargada de elaborar la agenda de la impartición de justicia del país].

20th centuries, Mexico's judiciary has been far weaker than the legislature and (especially) the executive branch".⁷⁸

In conclusion, the lack of independence of the judiciary and the little importance that the judiciary played within the Mexican political system are institutional factors that help us understand why, from 1917 to 1987, the federal judges did not play an important role in the promotion and protection of human rights. Yet, from 1987 on, several institutional changes to address these two issues took place.

For instance, in 1987 an amendment was introduced to the Mexican constitution. Such amendment had mainly, two purposes: 1) the SCJN was granted authority to initiate the elaboration of a judicial agenda; and 2) begin what might be called the process of conformation of a constitutional court.⁷⁹ Therefore, the federal judiciary became an emerging new relevant actor in the Mexican political system.

Additionally, in 1994, a new amendment to the Mexican Constitution was approved transforming Mexico's Supreme Court of Justice into a constitutional tribunal.⁸⁰ The main features of the amendment were the following⁸¹: (i) the number of justices was reduced from 25 to 11; (ii) a new mechanism for election of the justices was introduced (the nomination of the Supreme Court Justices is made by the President of the Republic, who submits a short list of

⁷⁸ Shirk, David A. Shirk, Judicial Reform in Mexico, Change & Challenges in the Justice Sector, page 6 <http://catcher.sandiego.edu/items/peacestudies/Shirk-Justice%20Reform%20in%20Mexico.pdf>.

⁷⁹ Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación, *supra* note 77, pages 69-70. The translation cited above was made by the author: [La reforma de agosto de 1987 señala dos directrices capitales para poder entender la dirección del proceso de reforma judicial en su conjunto. A saber, se le otorgaron facultades a la Suprema Corte de Justicia de la Nación para poder iniciar, así fuese en forma muy incipiente, la elaboración de una agenda judicial, circunscrita al Poder Judicial de la Federación, y por otra parte se inicia lo que podría denominarse el proceso de conformación de un Tribunal Constitucional].

⁸⁰ Magaloni, Beatriz, *supra* note 75, page 294.

⁸¹ For a detailed description of the amendment see Magaloni, Beatriz, *supra* note 75 and Fix Fierro, Hector, Poder Judicial, in Transiciones y Diseños institucionales, pages 209-211 (1999).

three candidates to the Senate, which after hearing all candidates, selects one of them⁸²); (iii) a Judicial Board (*Consejo de la Judicatura*) in charge of the administration of the Federal Judicial Power was established⁸³; and (v) two new mechanisms for the control of constitutionality were introduced: (a) the constitutional controversy (for adjudicating disputes between branches of the government) and (b) the constitutional action (abstract judicial review).⁸⁴

Therefore, beginning in 1994, on, the federal judiciary became a reasonably independent power. Furthermore, the federal judiciary became a relevant actor in the Mexican political system. In fact, Mexican Professor Alejandro Madrazo argues that the “1994 constitutional amendment overhauled the Supreme Court and, to a somewhat lesser extent, reformed the rest of the judiciary”.⁸⁵ In this same vein, Professor Miguel Schor argues that “the Mexican Supreme Court became an important player in Mexican politics. The reforms changed the political understanding surrounding the Supreme Court's role as a check on the separation of powers. Disputes that were once ignored or handled behind closed doors by the president are now resolved by the court”.⁸⁶ Therefore, from 1994 on, Mexican federal judges had the institutional

⁸² Constitution of the United Mexican States, *supra* note 67, article 96, translation by Carlos Perez Vazquez, available at <http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf> [Artículo 96.- Para nombrar a los Ministros de la Suprema Corte de Justicia, el Presidente de la República someterá una terna a consideración del Senado, el cual, previa comparecencia de las personas propuestas, designará al Ministro que deba cubrir la vacante. La designación se hará por el voto de las dos terceras partes de los miembros del Senado presentes, dentro del improrrogable plazo de treinta días. Si el Senado no resolviere dentro de dicho plazo, ocupará el cargo de Ministro la persona que, dentro de dicha terna, designe el Presidente de la República.

En caso de que la Cámara de Senadores rechace la totalidad de la terna propuesta, el Presidente de la República someterá una nueva, en los términos del párrafo anterior. Si esta segunda terna fuera rechazada, ocupará el cargo la persona que dentro de dicha terna, designe el Presidente de la República].

⁸³ Constitution of the United Mexican States, *supra* note 67, article 100.

⁸⁴ Constitution of the United Mexican States, *supra* note 67, article 105.

⁸⁵ Madrazo, Alejandro and Vela, Estefania, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 Tex. L. Rev. 1863, page 1865 (2011).

⁸⁶ Professor Schor further explains that “This transformation can be seen most readily in a number of recent cases involving the president. It would have been unthinkable for the Mexican Supreme Court to have resolved these disputes before the 1994 reforms. One such dispute involved a suit filed by opposition lawmakers seeking information regarding the questionable financing of Mr. Zedillo's 1994 campaign. Another involved a dispute between President Vicente Fox and Congress over an attempt by the President to limit the budget in 2005. The

framework necessary to take a more active stand concerning human rights issues. Furthermore, as stated above, even before the constitutional amendment of June 2011, Mexican constitutional law did include legal tools for the protection of human rights and the direct application of human rights treaties.

In fact, there were some isolated examples of the federal judiciary taking an active stand concerning human rights issues. For example, interpreting article 133 of the Mexican Constitution⁸⁷, the SCJN stated that international treaties are located above the federal and local laws (but below the Federal Constitution) and therefore the international obligations of Mexico cannot be ignored by invoking provisions of Mexican internal law.⁸⁸ As a consequence, a Circuit

Mexican Supreme Court upheld Fox's actions but provided a mechanism by which Congress could reject presidential changes to the budget. Another important case occurred when the court ruled that a former president could be tried for crimes committed in office. The striking aspect of these three cases is that the Mexican Supreme Court assumed an important role as an umpire in disputes between the different branches of government. The Mexican Supreme Court has not been as active as the Colombian Constitutional Court, however, in effectuating individual rights". See Schor, Miguel, An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia, 16 Ind. J. Global Legal Stud., 173, pages 182-183 (2009).

⁸⁷ Article 133 of the Mexican Constitution establishes that the "[...] Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and should be made in accordance therewith by the President of the Republic, with the approval of the Senate, should be the supreme law of the whole Union. The judges of each State should conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States". See Constitution of the United Mexican States, article 133, translation by the Organization of the American States (OAS) http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf

⁸⁸ Suprema Corte de Justicia de la Nación, Novena Época, No. Registro: 172650, Instancia: Pleno, Tesis Aislada, Fuente: Semanario Judicial de la Federación y su Gaceta, XXV, Abril de 2007, Materia(s): Constitucional. Tesis: P. IX/2007, Página: 6, Amparo en revisión 120/2002, Mc. Cain México, S.A. de C.V., 13 de febrero de 2007, [TRATADOS INTERNACIONALES. SON PARTE INTEGRANTE DE LA LEY SUPREMA DE LA UNIÓN Y SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES GENERALES, FEDERALES Y LOCALES. INTERPRETACIÓN DEL ARTÍCULO 133 CONSTITUCIONAL. La interpretación sistemática del artículo 133 de la Constitución Política de los Estados Unidos Mexicanos permite identificar la existencia de un orden jurídico superior, de carácter nacional, integrado por la Constitución Federal, los tratados internacionales y las leyes generales. Asimismo, a partir de dicha interpretación, armonizada con los principios de derecho internacional dispersos en el texto constitucional, así como con las normas y premisas fundamentales de esa rama del derecho, se concluye que los tratados internacionales se ubican jerárquicamente abajo de la Constitución Federal y por encima de las leyes generales, federales y locales, en la medida en que el Estado Mexicano al suscribirlos, de conformidad con lo dispuesto en la Convención de Viena Sobre el Derecho de los Tratados entre los Estados y Organizaciones Internacionales o entre Organizaciones Internacionales y, además, atendiendo al principio fundamental de derecho internacional consuetudinario "pacta sunt servanda", contrae libremente obligaciones frente a la comunidad internacional que no pueden ser desconocidas invocando normas de derecho interno y cuyo incumplimiento supone, por lo demás, una responsabilidad de carácter internacional.]

Court ruled that human rights treaties ratified by Mexico could be invoked in constitutional law suits given that international treaties were part of the Supreme Law of the Union as established by the SCJN.⁸⁹ Additionally, “Mexico’s supreme court has ruled on landmark cases that have gained international attention for putting the country at the head of the advancement of sexual and reproductive rights. Since 2007, Mexico’s Supreme Court has sanctioned the decriminalization of first-trimester abortion and the legalization of gay marriage and adoption, and it has established the fundamental right of transgender individuals to change their officially recognized sex without public registry of their previous sex”.⁹⁰

In spite of these rulings, the federal judges have been restrained in the protection of human rights. In fact, some empirical studies suggest that the federal judges indeed avoid entering to the study of the merits in *amparo* proceedings (constitutional lawsuit for the

⁸⁹ SÉPTIMO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO, Novena Época, No. Registro: 169108, Instancia: Tribunales Colegiados de Circuito, Tesis Aislada, Fuente: Semanario Judicial de la Federación y su Gaceta, XXVIII, Agosto de 2008. Materia(s): Común, Tesis: I.7o.C.46 K, Página: 1083, Amparo directo 344/2008, [DERECHOS HUMANOS, LOS TRATADOS INTERNACIONALES SUSCRITOS POR MÉXICO SOBRE LOS. ES POSIBLE INVOCARLOS EN EL JUICIO DE AMPARO AL ANALIZAR LAS VIOLACIONES A LAS GARANTÍAS INDIVIDUALES QUE IMPLIQUEN LA DE AQUÉLLOS. Los artículos 1o., 133, 103, fracción I, y 107 de la Constitución Política de los Estados Unidos Mexicanos, establecen respectivamente: que todo individuo gozará de las garantías que ella otorga; que las leyes del Congreso de la Unión, que emanen de ella, y los tratados acordes a la misma, serán la Ley Suprema de toda la Unión; que los tribunales de la Federación resolverán toda controversia que se suscite por leyes o actos de la autoridad que violen las garantías individuales; y, las bases, los procedimientos y las formas para la tramitación del juicio de amparo. Por su parte, la Suprema Corte de Justicia de la Nación ubicó a los tratados internacionales por encima de las leyes federales y por debajo de la Constitución, según la tesis del rubro: "TRATADOS INTERNACIONALES. SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL." (IUS 192867). De ahí que si en el amparo es posible conocer de actos o leyes violatorios de garantías individuales establecidas constitucionalmente, también pueden analizarse los actos y leyes contrarios a los tratados internacionales suscritos por México, por formar parte de la Ley Suprema de toda la Unión en el nivel que los ubicó la Corte. Por lo tanto, pueden ser invocados al resolver sobre la violación de garantías individuales que involucren la de los derechos humanos reconocidos en los tratados internacionales suscritos por México].

⁹⁰ Madrazo, Alejandro and Vela, Estefania, *supra* note 85, page 1869

protection of human rights).⁹¹ Additionally, Professor Fix Fierro states that even the SCJN has traditionally focused more in procedural issues rather than the interpretation of human rights norms contained within the Constitution.⁹²

Furthermore, human rights issues were not an important part of the agenda of the Federal Judicial Power. As a matter of fact, in 2003, the SCJN launched an invitation in order to initiate a national consultation aiming to reform the justice system in Mexico (Consulta Nacional para una Reforma Integral y Coherente del Sistema de Impartición de Justicia en el Estado Mexicano). The result of the national consultation was a book called “Libro Blanco de la Reforma Judicial: una agenda para la Justicia en México” (the White Book for the Reform of the Justice System in Mexico: an agenda for the Justice System in Mexico). The White Book contains the goals and challenges for the reform of the justice system in Mexico. Yet, the human rights issues are marginally addressed. The White Book focuses, mainly, in strengthening the independence of the judges, reducing the backload of the Federal Judicial Power.⁹³

Mexican Professor Ana Laura Magaloni suggests that the low level of judicial activism concerning human rights issues can be explained by two reasons. First, given the democratization process in Mexico, the SCJN main focus was to solve the political conflicts in Mexico.⁹⁴ Therefore, human rights issues were not included in the judiciary’s agenda. Second, human rights issues are an overlooked problem for Mexican society.⁹⁵ Therefore, the behavior of

⁹¹ See, Magaloni, Ana Laura y Negrete, Layda, El Poder Judicial y su política de decidir sin resolver, Documento de Trabajo, DEJ No. 1., Centro de Investigación y Docencia Económicas (2001).

⁹² Fix Fierro, Héctor, *supra* note 81, page 201.

⁹³ For more details please see Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación, Libro Blanco de la Reforma Judicial: una agenda para la Justicia en México, (2006).

⁹⁴ Magaloni, Ana Laura, ¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de derechos fundamentales?, *supra* note 4.

⁹⁵ Magaloni, Ana Laura, Los derechos humanos, la democracia y la Suprema Corte de Justicia en México, page 2, http://www.miaulavirtual.com.mx/administracionypolicaspublicas/desarrollo_social/ForoInternalDesSocMex/Foro

the courts follows a general pattern of Mexican society regarding human rights. In this vein, Professor Magaloni suggests that the SCJN has to play a strategic role in selecting important human rights cases and create significant precedents to boost the judicial activism of lower courts.⁹⁶

At this point it is important to recognize that with the 2011 constitutional amendment, human rights issues became more important in the agenda of the SCJN and the Judicial Board (*Consejo de la Judicatura*). For example, in his 2011 annual report, Justice Juan Silva Meza, President of the SCJN and of the Judicial Board (*Consejo de la Judicatura*) stated that “the constitutional amendment in human rights is undoubtedly a very important advance in the legal framework for the protection and guarantee of human rights”.⁹⁷ He further stated “for the President of the Supreme Court of the Nation and the Judicial Board (*Consejo de la Judicatura*), it is a priority to enable the promotion of human rights norms among District and Circuit Judges, as well as the training of said judges. It is also important to establish communication with other stakeholders, and agency partnerships in order for Federal and Circuit judges and court staff in general to perform their jobs in this new legal framework”.⁹⁸ Essentially, the strategy taken by

[IntDesSocMexPDFs/08_%20Los_derechos_humanos_en_un_estado_de_derecho/04_Derechos%20Humanos_Ana%20Laura_Magaloni_CIDE.pdf](#) [La segunda razón por la que la agenda de derechos humanos continúa en la periferia tiene que ver un problema social que, en mi opinión, es por todos conocido, tan conocido y familiar que se ha convertido en un problema invisible].

⁹⁶ See Magaloni, Ana Laura, *¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de derechos fundamentales?*, *supra* note 4, page 2.

⁹⁷ Silva Meza, Juan, *Informe Anual de Labores 2011*, Poder Judicial de la Federación, page 11 (2011), <http://www.cjf.gob.mx/documentos/informe2011ejecutivo.pdf>. The translation cited above was made by the author: [La Reforma Constitucional en Derechos Humanos representa, sin duda, un avance muy relevante en el marco jurídico para la protección y garantía de los derechos humanos [...]. Para la Presidencia de la Suprema Corte de Justicia de la Nación y el Consejo de la Judicatura Federal resulta prioritario el impulso de actividades de formación, generación de herramientas, interlocución con otros actores, y establecimiento de alianzas interinstitucionales, para que Juezas, Jueces, Magistradas y magistrados, el personal jurisdiccional en general, puedan realizar su trabajo en este nuevo marco jurídico].

⁹⁸ *Idem*

the SCJN and the Judicial Board is to make a partnership with the human rights community⁹⁹ in order to teach judges what human rights are about (herein referred to as “the SCJN Human Rights Teaching Strategy”).¹⁰⁰

Yet, even if the SCJN follows the strategy suggested by Professor Magaloni, and the SCJN Human Rights Teaching Strategy is fully executed, it would not place human rights issues in the agenda of all Mexican federal judges. In practice, human right advocates would not encounter more Mexican judges willing to apply human rights norms, especially international human rights norms because of the ideological and socio-political dimensions of the problem, which will be further explored in the following section.

(2). The ideological dimension of the Mexican federal judges

According to Mexican Professor Hector Fix Fierro, from 1917 to 1994, the SCJN avoided political matters.¹⁰¹ This phenomenon was described by him as the voluntary restriction in political matters. Similarly, Mexican judges avoid citing in their decision international human rights norms. In fact, many Mexican scholars and Mexican human rights activists have spoken about such resistance.

For example, Ricardo J. Sepúlveda Iguíniz (Director of the “Centro Jurídico para los Derechos Humanos”) states that there is a cultural resistance to apply international human rights

⁹⁹ Which includes human rights professors and human rights activists

¹⁰⁰ I make this assertion based on the annual report of Justice Silva Meza, specifically, pages 74-92 (Silva Meza, Juan, *supra* note 97, page 74-92) and on my personal knowledge about the human rights movement in Mexico and the way in which the SCJN is implementing its policy. For instance, some of the institutions that the SCJN is partnering with, for example FLACSO, or the OACNUDH Mexico (Office of the High Commissioner for Human Rights) are institutions regarded as part of the human right community in Mexico and which hold the leading (if not hegemonic) vision about what human rights should be in Mexico.

¹⁰¹ Fix Fierro, Héctor, *supra* note 81, page 176, footnote 25.

norms.¹⁰² Additionally, Karlos Castilla (advisor to the SCJN in human rights issues) mentions that among Mexican judges there is a lot of opposition to apply international human rights treaties.¹⁰³ Furthermore, he argues that a generational change may be needed to remove such resistance.¹⁰⁴ The same view is held by Jaime Cardenas Garcia who affirms that a cultural change accompanying the democratization process is needed in Mexico.¹⁰⁵ Additionally, Professors Sergio Lopez-Ayllon and Hector Fix Fierro indicate that within the Mexican legal community there is the idea that the “inadequate training and traditional mentality of judges [is] a major obstacle for a judiciary operating in a new environment”.¹⁰⁶

However, none of the authors cited above offers an explanation of the cultural resistance and opposition to apply international human rights norms. There is no study or survey explaining the reason of why Mexican judges do not like to apply international human rights norms (or human rights norms, in general). However, two hypotheses can explain such an issue: first, the legal traditions under which Mexican judges have been trained; second that some judges consider human rights norms an outside imposition over the Mexican legal tradition and losing autonomy in favor of international courts and foreign countries.

¹⁰² Sepúlveda Iguíniz, Ricardo, Aplicación de los tratados internacionales en materia de derechos humanos por los operadores judiciales, in Seminario Internacional sobre Aplicación de Instrumentos Internacionales en Materia de Derechos Humanos en el Ámbito Interno (Tribunal Superior de Justicia del Distrito Federal), page 72 (2010), <http://www.derechoshumanosdf.gob.mx/work/models/DOCDH/Resource/176/1/images/Libro%20digital%281%29.pdf>.

¹⁰³ Castilla, Juárez, Karlos, Impacto de la jurisprudencia internacional en materia de derechos humanos en las decisiones judiciales, in Aplicación de los tratados internacionales en materia de derechos humanos por los operadores judiciales, in Seminario Internacional sobre Aplicación de Instrumentos Internacionales en Materia de Derechos Humanos en el Ámbito Interno (Tribunal Superior de Justicia del Distrito Federal), page 100 (2010), <http://www.derechoshumanosdf.gob.mx/work/models/DOCDH/Resource/176/1/images/Libro%20digital%281%29.pdf>.

¹⁰⁴ Idem

¹⁰⁵ See, Cárdenas García, Jaime, Hacia un cambio en la cultura jurídica nacional, <http://www.juridicas.unam.mx/publica/librev/rev/revlad/cont/7/cnt/cnt6.pdf>.

¹⁰⁶ López-Ayllón, Sergio and Fix-Fierro Héctor, “Faraway, So Close!” The Rule of Law and Legal Change in Mexico, 1970-2000, in Legal Culture in the Age of Globalization, Latin America and Latin Europe, page 317 (2003).

Mexican law belongs to the civil law tradition. “[A]lthough there is a superficial similarity of functions between the civil law judge and the common law judge; there are substantial disparities in their accepted roles. In part, the contemporary civil law judge inherits a status and serves a set of functions determined by a tradition going back to [...] Roman times. This tradition, in which the judges have never been conceived of as playing a very creative part, was reinforced by the anti-judicial ideology of the European revolution and the logical consequences of a rationalistic doctrine of strict separation of powers”.¹⁰⁷ Furthermore, judges are “operators of a machine designed and built by legislators. The judicial function is a mechanical one”.¹⁰⁸

Second, this thesis also suggests that some judges consider human rights norms an outside imposition over the Mexican legal tradition and a loss of autonomy in favor of international courts and foreign countries. This assertion is based on my personal experience litigating several human rights cases before Federal District Judges and Circuit Judges in Mexico. In fact, once, a very well-known Circuit Judge mentioned to me that he was a sovereignty defender and that he did not like to apply international treaties. He literally said: “if one begins by applying international treaties, then we will lose our natural resources in favor of foreign countries”. In this same vein, Professors López-Ayllon and Fix Fierro indicate that among the Mexican legal community there is some opinions stressing the difficulties derived from incorporating foreign institutions and systems without sufficient consideration of their consequences for the Mexican legal system.¹⁰⁹ Furthermore, Professors López-Ayllon and Fix

¹⁰⁷ Merryman, John Henry and Pérez-Perdomo, Rogelio, The Civil Law Tradition: An introduction to the legal Systems of Europe and Latin America, page 37 (2007).

¹⁰⁸ Idem, page 36.

¹⁰⁹ López-Ayllón, Sergio and Fix-Fierro Héctor, *supra* note 106, page 318.

Fierro called this phenomenon legal nationalism, explaining that, traditionally, the Mexican system has been relatively closed to outside influence.¹¹⁰

The above mentioned legal nationalism is also connected with the civil law tradition. In fact, in many civil law countries, “legal nationalism early took the form of codification. [...] One consequence of the unification of national law in these early codes was that the *jus commune* was displaced as the basic source of law, [...] the authority of the law was derived more from the state than from tradition, or the inherent reasonableness of the legal norms themselves”.¹¹¹ Therefore, it is highly possible that Mexican federal judges tend to value more national legal norms rather than international instruments as a consequence of legal nationalism and codification phenomena, together with the traditional role that judges have played under the civil law tradition.

Nevertheless, this thesis does not aim to evaluate the opinion of Mexican judges regarding international human rights norms or the incorporation of foreign institutions to the Mexican legal system. It also does not evaluate the civil law system and the role of the judges. Rather, this thesis aims to understand the core issue of why Mexican judges have not been active in the field of human rights in order to suggest strategies and arguments to persuade them to apply human rights norms. The perception shared by the Circuit judge has a meaningful value as an indicator of the “cultural resistances” that a successful human rights policy should attack.

¹¹⁰ Idem, page 294.

¹¹¹ Glendon, Mary Ann, Carozza, Paolo G., and Picker, Colin B., Comparative Legal Traditions, Text, Materials and Cases on Western Law, page 60 (2007).

(3) The socio political dimension

According to Professor Charles R. Epp, “cases do not arrive to supreme courts as if by magic. [...] Legal mobilization¹¹² also depends on resources, and resources for rights litigation depend on a support structure of rights advocacy lawyers, rights advocacy organizations and sources of financing. [In conclusion], rights revolutions depend on widespread and sustained litigation and support of civil rights and liberties”.¹¹³ This section will briefly analyze the role of the support structure of rights advocacy in Mexico. According to Professor Ilan Bizberg, after a period during which the Mexican NGOs were strengthened, they have been diminished after 2000.¹¹⁴ This is also true for the support structure of rights advocacy. In Mexico, according to my own experience, there are no more than a dozen of organizations that have the capacities (human resources, financial resources and even adequate technical knowledge) to litigate human rights cases before the local courts. In fact, “Mexico is lacking in experience of human rights litigation”.¹¹⁵

However, some members of the support structure - for example human rights professors and activists - have managed to partner with the federal judicial power in order to train and teach judges about human rights. Some of them have even obtained positions inside the federal judicial power. Yet, this thesis holds that the support structure strategy to persuade judges to apply

¹¹² Defined by Professor Charles R. Epp as “the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights”. See, Epp, Charles R., *supra* note 64, page 18.

¹¹³ Epp, Charles R., *supra* note 64, page 18.

¹¹⁴ Bizberg, Ilan, *Una Democracia Vacía. Sociedad Civil, Movimientos Sociales y Democracia*, in *Los Grandes Problemas de México*, page 56, (2010). The translation cited above was made by the author: [No obstante, luego de un periodo durante el cual las OSC mexicanas se fortalecieron, están han retrocedido a partir de la alternancia].

¹¹⁵ Sánchez Matus, Fabián, Introducción, in *El Litigio Estratégico en México: la aplicación de los derechos humanos a nivel práctico, experiencias de la Sociedad Civil*, page 11 (2007), <http://www.hchr.org.mx/files/doctos/Libros/litigioestrategico.pdf>. The translation cited above was made by the author [En México es carente la experiencia de litigio estratégico].

human rights norms has not been adequate; first, because it is trapped in a legal fetishism culture prevailing in Mexico, and second, because it holds that Mexican judges should be subordinated to international bodies.

The issues mentioned above will be explained in the following paragraphs. Specifically assessing the positions held by important actors within the Mexican human rights community in the International Conference on the Implementation of International Human Rights Instruments by Local Courts (Seminario Internacional sobre Aplicación de Instrumentos Internacionales en Materia de Derechos Humanos en el Ámbito Interno) organized by the Local Judicial Power of Mexico City (Tribunal Superior de Justicia del Distrito Federal), the local Congress of Mexico City (Asamblea Legislativa del Distrito Federal) and the Human Rights Commission of Mexico City (Comision de Derechos Humanos del Distrito Federal).¹¹⁶

Legal fetishism

Mexico has lived in what might be called a legal fetishism. That is, to suppose and assume that an amendment in the law (a simple legislative change) will automatically produce the expected results or social changes.¹¹⁷

For example, “on January 1, 1994, [...] an armed rebellion deep in the Mexican state of Chiapas initiated by a group of indigenous people calling themselves Zapatistas”.¹¹⁸ “The Zapatista movement began as a violent uprising. However, the national relevance of the movement’s claims, coupled with the national and international support it received, meant that a

¹¹⁶ Tribunal Superior de Justicia del Distrito Federal, Seminario Internacional sobre Aplicación de Instrumentos Internacionales en Materia de Derechos Humanos en el Ámbito Interno (Tribunal Superior de Justicia del Distrito Federal), (2010), <http://www.derechoshumanosdf.gob.mx/work/models/DOCDH/Resource/176/1/images/Libro%20digital%281%29.pdf>.

¹¹⁷ Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación, *supra* note 77, page 68.

¹¹⁸ Palau, Marco, The Struggle for dignity, land and autonomy: the rights of Mexico’s indigenous people a decade after the Zapatista revolt, 36 Colum. Hum. Rts. L. Rev. 427, page 427 (2005).

violent solution to the uprising was not an option for the government. The Mexican State would have to engage the rebels in negotiations and include the Zapatistas' ideas in the national political discourse".¹¹⁹ As a consequence, "the government agreed to give legal significance to the agreements. It promised that the rights afforded to indigenous peoples in the Accords-political, social, economic, cultural, and jurisdictional rights - would be translated into constitutional reforms".¹²⁰ "Ultimately, both the Mexican Senate and Chamber of Deputies agreed to the constitutional reforms on April 25 and 28, 2001, respectively".¹²¹ Such reforms were regarded as a remarkable achievement for the social movements in Mexico. However, in practice, the situation of the indigenous communities in Mexico has not significantly changed since 1994.

In large part, the strategy of the human rights community in Mexico to encourage more judicial activity in the field of human rights was to promote and support the 2011 constitutional amendment.¹²² However, in Mexico, the possible effects of the 2011 constitutional amendment have been exaggerated. Human rights activists now speak of the "new paradigm" in Mexican constitutional law.¹²³ Yet, as the SCJN has point out that "this assumption often leads to a failure in setting the corresponding objectives and goals to implement the desired policies".¹²⁴

Nevertheless, there has not been much cooperation between the support structure of human rights litigation and the federal judicial power. In fact, some activists see local judges as

¹¹⁹ *Idem*, page 442

¹²⁰ *Idem*, page 446

¹²¹ *Idem*, page 461

¹²² This can be observed in the following press release http://www.cmdpdh.org/index.php?option=com_content&view=article&id=288%3Aosc-celebran-aprobacion-de-las-reformas-constitucionales-al-juicio-de-amparo&catid=37%3Acomunicados&Itemid=162&lang=en

¹²³ Carbonell, Miguel and Salazar, Pedro, *supra* note 72.

¹²⁴ Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación, *supra* note 77, pages 69-70.

enemies, more than allies.¹²⁵ Moreover, this thesis holds that usually when human rights activists have had the opportunity to speak to federal judges, they have not used persuasive arguments to encourage the application of international human rights law.

Subordination

The prevailing notion among the Mexican human rights community is that Mexican federal judges should be subordinated not only to the Inter-American Court of Human Rights, but to all human rights bodies derived from the treaties to which Mexico is a party to. For example, in a press release, several human rights NGOs stated that Mexican judges should replicate the criteria of the Inter-American Court of Human Rights and also by other international human rights organizations such as the Working Group on Enforced or Involuntary Disappearances of Persons, the Rapporteur on the Independence of Judges and Lawyers and the High Commissioner for Human Rights.¹²⁶ Additionally, in the International Conference on the Implementation of International Human Rights Instruments by Local Courts, Professor Daniel Vazquez (Director of the Master in Human Rights and Democracy in FLACSO) stated that “when a State signs and ratifies a treaty, it is bound not only by this document, but also by the interpretations from the competent bodies that interpret the treaty. For example, the committees conforming the conventional system of protection of human rights [...]”.¹²⁷ In the same vein,

¹²⁵ Assertion made based on my personal experience working with human rights organizations.

¹²⁶ Civil Society Organizations celebrate resolutions made by Mexico’s Supreme Court regarding human rights and military jurisdiction, available at http://www.cmdpdh.org/index.php?option=com_content&view=article&id=384%3Aorganizaciones-de-la-sociedad-civil-celebran-las-resoluciones-de-la-scn-sobre-derechos-humanos-y-jurisdicion-militar&catid=37%3Acomunicados&Itemid=162&lang=en

¹²⁷ Vázquez Daniel, El derecho internacional de los derechos humanos y los tribunales locales, in Seminario Internacional sobre Aplicación de Instrumentos Internacionales en Materia de Derechos Humanos en el Ámbito Interno (Tribunal Superior de Justicia del Distrito Federal), page 59 (2010), <http://www.derechoshumanosdf.gob.mx/work/models/DOCDH/Resource/176/1/images/Libro%20digital%281%29.pdf>. The translation cited above was made by the author: [Un punto importante a señalar es que cuando un Estado firma y ratifica un tratado, no sólo se obliga por dicho documento, sino también por las interpretaciones provenientes de los órganos competentes para especificar ese tratado. Por ejemplo, los comités que integran el

Professor Jose Luis Caballero Ochoa (Director of the Master in Human Rights of the *Universidad Iberoamericana*) holds that “constitutional courts should construe the essential content of rights, and the essential content consists of the Constitution, treaties (especially the American Convention) and what international human rights bodies hold, especially the Inter American Court of Human Rights”¹²⁸

The foregoing assertion can be severely criticized for not being technically accurate under international human rights norms. Yet, the purpose of this section is not to criticize the legal accuracy of this assertion, but rather, to state that they are not adequately persuasive for judges.

If the hypothesis regarding the cultural resistance and opposition to apply international human rights norms by Mexican federal judges is accurate, then the subordination model will not encourage Mexican federal judges to be more active in the protection of human rights and in the application of international human rights norms. On the contrary, it could make Mexican judges even more reluctant to apply human rights norms. The last chapter of the thesis will provide an alternative model to the subordination idea.

sistema convencional de protección de los derechos humanos y que a través de observaciones generales han generado un importante proceso de especificación de normas que, en principio, podrían parecer no autoejecutables pero que con dichas observaciones se fortalece la posibilidad de aplicación].

¹²⁸ Caballero Ochoa, José Luis, Aplicación de los tratados internacionales en materia de derechos humanos por los operadores judiciales, in Seminario Internacional sobre Aplicación de Instrumentos Internacionales en Materia de Derechos Humanos en el Ámbito Interno (Tribunal Superior de Justicia del Distrito Federal), page 80, (2010), <http://www.derechoshumanosdf.gob.mx/work/models/DOCDH/Resource/176/1/images/Libro%20digital%281%29.pdf>. The translation cited above was made by the author: [Esa es una primera etapa que yo creo que la Corte empieza a pasar, una segunda etapa tiene que ver con algo que la Corte si ha hecho muchísimo pero me parece que es la idea de que todavía no caen en cuenta de que son un tribunal constitucional y que los tribunales constitucionales se dedican a construir el contenido esencial de los derechos y ese contenido esencial está conformado por la Constitución, lo que dicen los tratados, especialmente la Convención Americana y lo que dice el organismo a cargo de esa interpretación que es la Corte Interamericana y que es nuestro tribunal regional y no les ha caído en conciencia porque lo que han hecho es que un muchísimas sentencias dedicarse a repetir numerales de los tratados como soporte].

CHAPTER THREE. BEYOND SUBORDINATION AND LEGAL FETISHISM: NEW REASONS FOR MEXICAN JUDGES TO APPLY INTERNATIONAL HUMAN RIGHTS LAW

The 2011 constitutional amendment to the Mexican Constitution provides the answer about the relationship of the Constitution and international human rights treaties ratified by Mexico. Yet, such an amendment does not provide an answer to the questions of how Mexican judges should incorporate other sources of international human rights norms. Additionally, such an amendment does not answer, by itself, what should be the role of the Mexican judges in interpreting human rights norms. Finally, the constitutional amendment does not provide an answer to what the relationship between Mexican courts and international human rights bodies should be. As stated in chapter one, there are a variety of models around the world for answering these questions. Therefore, Mexico should answer these questions in accordance with its socio-political context and the needs of the population.

This chapter intends to provide an answer to what should be the appropriate role of Mexican federal judges interpreting human rights and suggests an appropriate relationship with international human rights bodies. Essentially, this chapter aims to go beyond the traditional discussions and analysis that has dominated the Mexican human rights movement during the last decade, for example, in regards to the legal fetishism approach prevailing in Mexico. An amendment in the law (a simple legislative change) will not automatically produce the expected development in human rights issues. Therefore, it is necessary to find new solutions other than SCJN Human Rights Teaching Strategy. The core of the issue is to persuade federal judges to voluntarily apply international human rights norms. As the well-known Eleanor Roosevelt's

phrase states, “human rights begin [...] in small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere”. Therefore, this thesis seeks to provide a new alternative for making international human rights norms meaningful for Mexican federal judges.

This chapter will focus on two reasons for Mexican federal judges to be active in the field of human rights. First, given that Mexican democracy is a young democracy, the appropriate role of Mexican federal judges interpreting human rights issues is to be active. Furthermore, an active judiciary will help to teach participants of the Mexican democracy to value rights. Second, according to the subsidiarity principle, more judicial activity in the field of human rights, contrary to being an outside imposition over the Mexican legal tradition, is precisely a way of preventing the international bodies from directly intervening in the activity of the Mexican courts.

(1). The appropriate role of Mexican judges in the field of human rights

It has been previously mentioned within this thesis that, despite pressure by NGOs and scholars, Mexican federal judges have practically set aside the protection of human rights and constitutional liberties. Additionally, chapter two of this thesis provided some reasons that may explain this problem. Yet, it is also important to ask, whether Mexican federal judges should be active in the field of human rights. In other words, it is important to examine if the call for more judicial activism in the field of human rights is appropriate for the Mexican context.

As was mentioned in chapter one, some scholars argue that judicial activism is not appropriate because it is politically illegitimate (decisions should be made by democratically elected representatives rather than courts) and it does not allow society to focus clearly on the real issues at stake when citizens disagree about rights. On the contrary, it distracts them with side issues about precedents, texts, and interpretation. Finally, some empirical data shows that judicial activism only renders benefits in the field of civil and political rights.

Yet, as was also established in chapter one, the arguments against judicial activism only work under certain conditions: (i) reasonably good democratic institutions; (ii) a set of judicial institutions in reasonably good order; (iii) a commitment on the part of the members of the society and most of its officials to the idea of individual and minority rights; (iv) persisting, substantial and good faith disagreement about rights.

However, some of the conditions mentioned in the paragraph above are not fully present in Mexico. For example, democratic institutions in Mexico do not operate in a reasonably good way. In fact, some studies suggest that since 2000, there are indicators of a new crisis of legitimacy of Mexican democracy.¹²⁹ Furthermore, a large segment of Mexican citizens do not feel represented by the Mexican political parties.¹³⁰ Therefore, the legislative branch is not necessarily entitled to make decisions about human rights, given that it does not adequately represent all sectors of society.

¹²⁹ Crespo, José Antonio, *Participación política y ciudadanía*, in *Debatiendo la Reforma Política. Claves del cambio institucional en México*, page 267 (2010). The translation cited above was made by the author: [Sin embargo, desde que se registro la alternancia, hay indicadores de una nueva crisis de legitimidad de la nueva y más operativa democracia representativa mexicana, pese a los cambios registrados].

¹³⁰ *Idem*, page 271. The translation cited above was made by the author: [Precisamente, el creciente alejamiento de los ciudadanos respecto de los partidos políticos en México explica el movimiento de protesta electoral durante los comicios de 2009].

Furthermore, in Mexico there is not a commitment on the part of the members of society and most of its officials to the idea of individual and minority rights. In fact, minorities are often disregarded in Mexico. For example, the National Human Rights Commission (CNDH) found that “Mexico, today, suffers from discrimination against a sector of its population commonly identified as the LGBTTT community [lesbian, gay, bisexual, transvestite, transgender, and transsexual]. If this problem is not addressed in a timely and effective fashion, the fundamental freedoms, integrity, and human rights protection of said community are at risk. This significantly hampers the construction of a law-abiding culture and the respect for human rights in Mexico”.¹³¹ Similarly, the Committee on Migrant Workers stated that “it is concerned, however, that migrant workers and members of their families continue to suffer from various forms of discrimination, especially discrimination based on ethnic origin and gender, and from stigmatization in the media and in society at large”.¹³²

On the other hand, the federal judiciary is in reasonably good order. As a matter of fact, the Special Rapporteur on the independence of judges and lawyers reported that “[i]n general, the federal judiciary is independent and impartial. The Supreme Court has played a key role in recent years, especially in opening its door to the public and in promoting the reform of the country’s justice system”.¹³³ Furthermore, Jose Ramon Cossio Diaz (law professor and currently justice of the SCJN) and Professor Stephen Zamora argues that “[a] second and equally important result of the demise of *presidencialismo* has been an increase in the stature of the

¹³¹ Comisión Nacional de los Derechos Humanos, Mexico, Special Report by the National Human Rights Commission (CNDH) on Homophobia-Related Human Rights Violations and Crimes, page 1, <http://www.cndh.org.mx/node/35>.

¹³² Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Mexico, 3 May 2011, UN Doc CMW/C/MEX/CO/2, paragraph 23, <http://www2.ohchr.org/english/bodies/cmw/cmws14.htm>.

¹³³ UN GA, Report of the Special Rapporteur on the independence of judges and lawyers, Addendum, Mission to Mexico, April, 18, 2011, A/HRC/17/30/Add.3, paragraph 82.

Mexican [federal] judiciary, in particular of the Mexican Supreme Court, as a major factor in the development of law and policy in Mexico”.¹³⁴ Additionally, as stated above, “[a]dministration, oversight and disciplinary action with respect to the federal judiciary, with the exception of the Supreme Court, are the responsibility of the Council of the Federal Judiciary [in this thesis refer as Judicial Board] , which is an independent body in both practical and administrative terms and is empowered to issue decisions”.¹³⁵

It is true that the federal judiciary needs to improve several issues, for example “[a]ccess to justice is an area in which Mexico must do more for the sake of many of its citizens, especially women, the indigenous population, immigrants and people living in poverty and in remote rural areas”.¹³⁶ In spite of this, as explained in chapter two, the federal judiciary has experienced a series of transformations which place it in reasonably good order as to take a more active standing in human rights issues. Therefore, given the lack of representation of the Congress and commitment on the part of the members of the society and most of its officials to the idea of individual and minority rights, more judicial activity in the field of human rights seems to be justified.

Furthermore, strong and active judges could be adequate to teach participants of the Mexican democracy to value rights. This is particularly relevant given that in Mexico there is persisting, substantial and good faith disagreement about rights. For example, there is disagreement regarding abortion, same sex marriage, and the role of the military in public security issues, among others. However, the intervention of the SCJN in these issues created a

¹³⁴ Zamora, Stephen and Cossio, Jose Ramon, Mexican constitutionalism after *presidencialismo*, 4 Int'l J. Const. L. 411, page 420, (2006).

¹³⁵ UN GA, Report of the Special Rapporteur on the independence of judges and lawyers, *supra* note 133, paragraph 11

¹³⁶ *Idem*, paragraph 93.

public debate that had not taken place before. The issues were discussed thoroughly by national media¹³⁷ and Mexican society, in general, became more informed and aware about abortion and same sex marriage.

Finally, another argument in favor of more judicial activity in the field of human rights is that the decisions made by the judiciary are not final. Although in theory the Mexican constitution is difficult to amend,¹³⁸ it is flexible in practice. This means that the Mexican constitution can be easily amended. In fact, until 2008, the Mexican constitution had been amended 26 times.¹³⁹ This means that, in case that the federal judiciary makes a decision interpreting human rights; there is room for the legislative branches to challenge the decisions made by judges. For example, in the recent abortion cases, the SCJN made a decision and the local assemblies responded by amending their local constitutions.¹⁴⁰

In conclusion, it is appropriate for the Mexican federal judges to have an active role interpreting human rights norms. I believe the above mentioned reasons can be compelling for

¹³⁷ See the following links to newspapers in Mexico: (abortion) <http://mexico.cnn.com/nacional/2011/09/26/la-legalidad-del-aborto-en-mexico-a-discusion-en-la-suprema-corte>; <http://www.eluniversal.com.mx/editoriales/55042.html>; <http://www.animalpolitico.com/2011/09/%C2%BFcomo-va-la-discusion-sobre-el-aborto-en-la-scjn-derechoadecidir/>; <http://eljuegodelacorte.nexos.com.mx/?p=1413>; (gay marriage) <http://mexico.cnn.com/nacional/2010/08/16/la-suprema-corte-aprueba-el-derecho-de-adopcion-a-matrimonios-gay>; <http://www.milenio.com/cdb/doc/noticias2011/58728fb8aae6dbf3108c44ad7550e958>; <http://www.eluniversal.com.mx/notas/699911.html>; <http://eljuegodelacorte.nexos.com.mx/?tag=caso-matrimonio-adopcion-gay&paged=2>.

¹³⁸ In fact, article 135 of the Mexican constitution established a complex amendment process. For example, it requires that the amendments be approved by two thirds of the individuals present at Congress of the Union, and then, be approved by a majority of the legislatures of the States. [**Artículo 135.** La presente Constitución puede ser adicionada o reformada. Para que las adiciones o reformas lleguen a ser parte de la misma, se requiere que el Congreso de la Unión, por el voto de las dos terceras partes de los individuos presentes, acuerde las reformas o adiciones, y que éstas sean aprobadas por la mayoría de las legislaturas de los Estados. El Congreso de la Unión o la Comisión Permanente en su caso, harán el cómputo de los votos de las Legislaturas y la declaración de haber sido aprobadas las adiciones o reformas].

¹³⁹ Negretto Gabriel, *Paradojas de la Reforma Constitucional en America Latina*, page 40, <http://www.cide.edu/investigador/documentos/gabriel.negretto/ParadojasReformaConstAL.pdf>

¹⁴⁰ See the following links with media coverage on the issue: <http://mexico.cnn.com/nacional/2011/09/27/reformas-contras-el-aborto-violentan-derechos-de-la-mujer-legisladores>; <http://www.jornada.unam.mx/2009/11/29/sociedad/036n1soc>; <http://www.ehui.com/2011/09/27/con-proyectos-favorables-al-aborto-la-corte-discute-reformas-en-2-estados>.

the Mexican federal judges to change their traditional civil law judge role and play a more creative one. Furthermore, active judges are a path for action to overcome the legal fetishism issue in Mexico. Active judges can help bring to reality the rights contained in the Mexican constitution and international treaties ratified by Mexico.

(2). The Subsidiarity principle in international human rights norms

As was stated in Chapter one, there are three possible alternatives for local courts and international human rights courts to relate to each other: subordination of the local courts to international bodies; subordination of international bodies to the local courts; and cooperation. Additionally, chapter two described that the prevailing notion among the Mexican human rights community is that Mexican federal judges should be subordinated not only to the Inter-American Court of Human Rights, but to all human rights bodies derived from the treaties to which Mexico is a party to.

However, chapter two also points out that the cultural resistance and opposition of the Mexican federal judges to apply international human rights norms can be explained by the civil law tradition under which Mexican judges have been trained and because some judges consider human rights norms an outside imposition over the Mexican legal tradition and losing autonomy in favor of international courts and foreign countries. Furthermore, chapter two contends that the subordination model will not encourage Mexican federal judges to be more active in the protection of human rights and in the application of international human rights norms. On the contrary, it could make Mexican judges even more reluctant to apply human rights norms.

This section thus proposes that the subsidiarity principle is a reasonable alternative to resolve the tension between the application of international human rights norms and the legal nationalism of Mexican federal judges. Furthermore, the application of the subsidiarity principle can be a turning point for the adoption of a cooperation model between Mexican federal judges and international human rights bodies.

In relation to the benefits of such a model, “the principle of subsidiarity in the framework of international human rights norms means that, despite the existence of international rules and procedures for the protection of human rights (or precisely because of them), the nation states are the first instance to observe and enforce such rights within its territorial jurisdiction. Only when the States have not provided an adequate or effective protection, the international bodies can and should exercise jurisdiction”.¹⁴¹ Furthermore, “the correlation between subsidiarity and human rights is apparent even from a basic glance at the first constitutive documents of international human rights law, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (collectively, the International Bill of Rights)”.¹⁴² In this vein, “[w]here national

¹⁴¹ Del Toro Huerta, Mauricio Iván, El Principio de subsidiariedad en el Derecho Internacional de los Derechos Humanos con especial referencia al Sistema Interamericano, page 24, available at <http://biblio.juridicas.unam.mx/libros/5/2496/7.pdf>. The translation cited above was made by the author: [El principio de subsidiariedad en el marco del derecho internacional de los derechos humanos supone que, no obstante la existencia de normas y procedimientos internacionales para la protección de los derechos humanos o precisamente en virtud de ellos, es a los Estados a los que corresponde en primera instancia respetar y hacer respetar tales derechos en el ámbito de su jurisdicción y solo cuando estos no han brindado una protección adecuada o efectiva es que la jurisdicción internacional puede y debe ejercer su competencia].

¹⁴² Carozza, Paolo, *supra* note 31, page 46.

governments are unable or unwilling to address [human rights violations in its territory], international law may step in to help build their capacity or stiffen their will”.¹⁴³

Therefore, according to international human rights norms and the principle of subsidiarity, national judges act as agents of international law in domestic law. Yet, national courts have a reasonable margin of appreciation to evaluate a human rights problem according to the needs of their particular society.¹⁴⁴

However, the idea of subsidiarity may conflict with the subordination approach described in chapter two. For example, as explained by Professor Carozza, “the principle of subsidiarity necessarily entails an affirmation of a degree of pluralism and diversity in society.”¹⁴⁵ Furthermore, “[w]hether in restraint or in positive action, though, the roles that the state is obligated to assume with respect to human rights do not amount to the definition of a specific model of government or economy. The obligations leave the parties a great deal of room for a diversity of systems. Obviously, the obligations are incompatible with a government set on destroying rights and liberties—on systematically discriminating against minorities, for instance, or on suppressing all political dissent—as well as with a government so removed from the wellbeing of its people that it will not implement measures of any kind to help ensure their dignity and freedom. In between these extremes, the foundational documents of human rights do not prescribe means and models”¹⁴⁶

¹⁴³ Slaughter, Anne-Marie and Burke-White, William, The Future of International Law is Domestic (or, The European Way of Law), 47 Harv. Int'l L.J., page 331 (2006).

¹⁴⁴ Del Toro Huerta, Mauricio Iván, 108, *supra* note 141, page 27.

¹⁴⁵ Carozza, Paolo, *supra* note 31, page 47.

¹⁴⁶ Carozza, Paolo, *supra* note 31, page 49.

In summary, according to the subsidiarity principle, a human rights problem may have different valid solutions at different territorial jurisdictions, which conflicts with the idea that the solutions to human rights problems is the one set by international bodies. Yet, in some cases, the subsidiarity approach can be more useful than the subordination approach. In fact, “[w]here human rights law identifies a set of clear prohibitions on government behavior, coupled with a set of positive aspirations toward economic, social, and cultural rights, [the subsidiarity approach] seek[s] actively to shape not only domestic law but also the domestic political environment to enable and enhance domestic government action”.¹⁴⁷

Thus, if Mexican federal judges would like to preserve the legal nationalism and carefully incorporate foreign institutions and system into the Mexican Legal System, contrary to voluntarily avoid citing in their decision international human rights norms, Mexican federal judges should be actively scrutinizing international human rights norms and applying them into their decisions. Furthermore, given the subsidiarity principle, an active judiciary in the field of human rights is the best tool to avoid outside impositions over the Mexican legal tradition and losing autonomy in favor of international courts and foreign countries. In fact, some of the judgments by the Inter-American Court of Human Rights against Mexico could have been prevented had Mexican federal judges taken an active position in the protection of human rights.

For example, the Castañeda Gutman case could have been avoided had the federal judiciary provided an effective remedy. An effective remedy does not mean that the victim of a human right violation wins a case, but that “[a]n effective judicial remedy is one, which can produce the result for which it was conceived; in other words, the remedy must be capable of

¹⁴⁷ Slaughter, Anne-Marie and Burke-White, William, *supra* note 143, page 331.

leading to an analysis by the competent court to establish whether there has been a human rights violation and of providing reparation”.¹⁴⁸

The subsidiarity principle does not require states to take a specific position in human rights issues. Rather, it requests states to sufficiently justify a limitation to human rights and exercise the judicial discretion with responsibility. Furthermore, given that most human rights norms are undetermined in the context of many of the cases in which they are likely to be invoked and necessarily subject to further specification through interpretation and legislation (as explained in Chapter one, section 3), there is room for disagreement with the interpretation of international bodies, in case that Mexican judges find better interpretations according to the needs and context of Mexico.

In conclusion, the relation between the Mexican federal judges and the international bodies should not be one of subordination, but of cooperation in order to build the basic capacity to govern in countries like Mexico, that lack sufficient material and human resources to pass, implement, and apply laws effectively.¹⁴⁹ Therefore, Mexican federal judges will only have to follow international bodies when they have not adequately protected human rights. On the other hand, Mexican federal judges should embrace an active stand towards human rights issues. Finally, this subsidiarity-cooperation model also offers a path of action to overcome the legal fetishism issue in Mexico. According to the subsidiarity principle, a constitutional model with the most progressive human rights norms and a strong judicial review system is not enough for the protection of human rights. Rather, in order to avoid international intervention, the progressive human rights norms and a strong judicial review system have to become reality.

¹⁴⁸ Inter-American Court of Human Rights, Case of Castañeda Gutman v. México, Preliminary objections, merits, reparations and costs, Judgment of August 6, 2008, paragraph 118.

¹⁴⁹ Slaughter, Anne-Marie and Burke-White, William, *supra* note 143, page 335.

CONCLUSION

During the last decade Mexican scholars and NGOs have pushed for more judicial activity in the field of human rights. Yet such pressure has not led to more protection of human rights by the Mexican federal judicial power. This thesis holds that one of the reasons for the low judicial activity in the field of human rights by the federal judiciary is that Mexican scholars and NGOs did not properly address the ideological dimension of the Mexican federal judges and have been confined themselves to legal fetishism.

In fact, in Mexico, the prevailing perception of the human rights community is that judges should apply international human rights instruments in a subordinated manner, not only to international tribunals, but to all human rights bodies. In this sense, it seems that the prevailing proposal of the human rights community is that federal judges replicate the criteria of the Inter-American Court of Human Rights and other international human rights bodies.

Yet, this perception has several inaccuracies. First, it does not recognize that there are different valid models around the world regarding the relationship between constitutional law and international human rights norms and different ways in which local courts and international human right courts relate. Additionally, it does not recognize that it is perfectly acceptable that in a democratic society, there are disagreements about the scope and content of human rights norms and that with respect to most human rights, there is room for a reasonable difference of judgment.

Second, the prevailing proposal of the human rights community in Mexico does not adequately incorporate the fact that some federal judges are legal nationalists that may consider human rights norms as an outside imposition over the Mexican legal tradition. Additionally, the prevailing position disregards that Mexican judges are essentially trained under the civil law tradition where judges have not been traditionally conceived of as playing a creative role, but as operators of a machine designed and built by legislators.

In order to address the two factors mentioned above, this thesis proposes that Mexican judges should apply international human rights norms more actively because, given the lack of representation of the Congress and commitment on the part of the members of the society and most of its officials to the idea of individual and minority rights, more judicial activity could be adequate to teach participants of the Mexican democracy to value rights. Second, if Mexican federal judges would like to preserve the legal nationalism and carefully incorporate foreign institutions and systems into the Mexican legal system, rather than avoid citing international human rights norms, they should be actively scrutinizing international human rights norms and applying them into their decisions. Moreover, the relation between the Mexican federal judges and the international bodies should not be one of subordination, but of cooperation in order to build the capacity for respecting human rights in Mexico.