Constitutional procedures for the approval of treaties in Canada, the United States and Mexico

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Canada

Unlike the United States and Mexico, in Canada the Constitution has very special meaning. It is not a unique document, nor the latest handed down, or approved by a special constituent assembly, nor is it final or has its last word been written.

It is an "evolving" constitution, which begins with the British North American Act (also called the 1867 Constitutional Act), and comes down to the recent 1982 Constitutional Act (signed by Elizabeth II), which includes several amendments and intermediate constitutional additions.

Thus, the Canadian Constitution is composed of the 1867 Constitutional Act, subsequent constitutional laws and, lately, by the 1982 Constitutional Act. In addition, a series of judicial resolutions, of the highest level, based on "common law" and customary British practice, have also achieved constitutional status and form part of the Canadian Constitution.

The 1867 Constitutive Act created a Confederation called the "Dominion of Canada", so named to emphasize the complete sovereignty of Canadians over their territory which joined the two Canadas (Ontario, Upper Canada, and Quebec, Lower Canada), as well as the provinces of Nova Scotia and New Brunswick, Later, six more provinces were included to make a total of ten. Two territories were also included. The provinces enjoy great autonomy, while the territories depend on the general (Federal) Government.

Strangely enough, this original 1867 Constitutional Act did not include a Declaration of Human Rights, although their neighbor to the south, the United States, had already proclaimed a "Bill of Rights" in the previous century. Nor was there an established means to amend the Constitution. Both omissions were corrected through the 1982 Constitutional document.

Canada is a democracy within a Constitutional Monarchy, whose Head of State is the Queen of England. Every public act is performed and formalized in her name. It is also a Federal State which seeks to combine unity with diversity. It was very difficult for Canada to achieve "international status." Though this was finally obtained when it was accepted as a full member in the former League of Nations.

The country was built and functions under a parliamentary system; that is, under the predominance of the Legislative Branch. A Governor General, proposed by the Prime Minister and appointed by the Queen, represents her. The Parliament includes the Queen, the Senate which consists of 104 members appointed by the Governor and the House of Commons, whose members are elected by proportional distribution among the provinces and territories. The cabinet is formed by the winning party in an election and its leader becomes the Prime Minister, who becomes the head of government.

In Canada, treaties, mentioned very briefly in the Constitution (Article 132), hold a very special position. Treaties are not part of domestic law, as they are in the United States and Mexico. Custom distinguishes between the "power to

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As regards the Trilateral Trade Treaty, which is now being negotiated between Canada, the United States and Mexico, most commentators have referred to the substance of the matter, that is, to the diverse issues which will constitute the trilateral treaty. I consider it of considerable interest to deal with the subject from the formal aspect of the treaty, in relation to the constitutional procedures which will have to be followed in all three countries for the treaty to be approved.

sign treaties" based on constitutional usage, and the "power to implement" them, based on the division of powers determined by the constitution.

The latter, the implementation, only follows if it lies within the jurisdiction of the government of Canada or if the necessary legislation has been approved or an agreement with the provinces has been reached.

Before a treaty is concluded, verification takes place, to determine if domestic legislative changes are required in order to implement it. In the event such changes are necessary, the relevant legislative adjustments are made in advance.

No rule is imposed on the general government, to refer or send the treaties to Parliament. Quite often, they are concluded and formalized without the approval of Parliament and even without its official knowledge.

The constitutional way to negotiate and formalize treaties is performed according to Royal prerogative usage (section 9 of the Constitution) delegated to the Governor General. Thus, in the recent agreement concluded between the United States and Canada, it was the Governor General, who verified the ratification, establishing January 1, 1989, as the date on which the Trade Agreement between the United States and Canada came into force.

Summarizing, the treaties in their negotiation and conclusion are an act of the Executive, carried out, in fact, by the Prime Minister and by the Minister for Foreign Affairs, and formalized by the General Governor. They may be submitted for prior approval of Parliament, but there is no constitutional requirement to do so. The Parliament acts, as mentioned above, when there is a need to write related domestic legislation, prior or subsequent to implementation or execution of the treaty.

United States

International treaties are a very important part of the written law of the United States. International relations are entrusted to the President. Yet, treaties formalized by the President, must always have the "advice and consent" of the Senate, by a majority of two thirds of its members. Approval by the Senate is so crucial that failure to obtain it, for example, meant rejection of the League of Nations Treaty so earnestly promoted by President Woodrow Wilson. On the other hand, the U.S. Senate's rejection of the Maclane-Ocampo Treaty, fortunately spared Mexico the cession of most of its Isthmus of Tehuantepec to the United States.

How do treaties relate to the Constitution of the United States? the answer appears in its Article VI, paragraph two:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

In general, international treaties that comply with constitutional requirements, come into force without the need of special law. Yet, certain kinds of treaties require the passage of auxiliary laws for their proper fulfillment and, as laws, are approved by the entire Congress, that is, the House of Representatives and the Senate. In such cases, it is important to have the support and prior approval of both chambers.

An obvious example of the above, is the Free Trade Treaty between Mexico and the United States[1], assuming it will be a formal treaty and not merely an executive agreement. President Bush asked for the "fast track", not only to speed up paper work for the agreement, but also because its approval will involve and require Congressional law for its execution.

Approval by the Senate will continue to be indispensable for the

[1] I start from the assumption that the international agreement to be celebrated by Mexico and the U.S., will be a formal treaty and not a mere executive agreement.

Mexico-United States Free Trade Agreement. Though the House of Representatives' blessing will ostensibly not be essential to approval, laws will be required for the implementation of the Agreement, which must indeed be approved by both House and Senate.

The federal government's "Treaty Making Power" includes accepting regulations not included in the expressed prerogatives of the government and which can therefore affect the States of the Union.

In accordance with general International Law, treaties are the supreme law among states and, thus, rank above constitutions, the supreme law of each state. Were it otherwise, international law would be at the mercy of the will of each nation. Yet, from the domestic legal perspective of most nations, enforcement and precedence of agreements is ruled by what domestic legislation establishes, at the head of which stands the constitution, the Supreme Law of the Land.

In the United States, the constitution is unquestionably the highest law, admitting no other law above it, even of an international nature. Yet, a treaty approved with all the requisite formalities (President and Senate) could one day be challenged as unconstitutional, for example, if the agreement encroached on the Human Rights guaranteed in the constitution.

The next issue refers to the precedence of treaties with respect to the laws of Congress. Interpretations of this vary according to country.

In the United States, conflicts between treaties and laws of Congress are not solved by criteria of rank or precedence, but by applying principles of general law that have existed for centuries, in which recent law revokes or abrogates prior law, even though the latter may not be expressly mentioned. Thus, in the event of conflict between treaties or laws of Congress, the treaty or law subsequently approved is the one that prevails. Under the constitutions and laws of the States, treaties always take precedence.

Mexico

Just as in the United States, in Mexico treaties are negotiated and formalized by the President of the Republic, whose powers include (Article 89 of the Constitution) directing foreign policy and concluding international treaties. These must be submitted for approval by the Senate, approval which may be granted by simple majority of the senators present, and not, as in the U.S. Senate, by a two thirds majority of the whole.

Constitutional supremacy is express in Mexico, since the Constitution of 1857 (article 126), and was reaffirmed in article 133 of the Constitution of 1917, now in force:

This constitution, the laws of the Congress of the Union set forth by it and all the treaties in accordance with it, celebrated and to be celebrated by the President of the Republic, with approval of the Senate, will be the Supreme Law of all the Union. Judges of each State will adjust laws and treaties to such Constitution, notwithstanding opposing regulations found in the Constitutions or laws of such states.

According to the above provision, there is no doubt that the Mexican Constitution prevails over treaties. To eliminate any doubt in this respect, under my father Ambassador Oscar Rabasa's initiative, article 133 originally approved by the Constituent Assembly of Queretaro, was added by amendment of January 18, 1934, which states that treaties must be in accordance with the Constitution.

President of the Mexican Supreme Court of Justice, Ignacio L. Vallarta, did not share the thesis of the Constitution's supremacy over treaties. He considered treaties and constitution to fall within two different systems of jurisprudence.

The issue, whether treaties rank higher, equal to or lower than federal laws, "the laws set forth by Congress", has not, as yet, been clearly solved in Mexico.

A first "literary" reading of article 133, might indicate that the legal "pyramid" or ladder strictly establishes the following order: first, the Constitution; second, federal law and third, treaties. Consequently, treaties would be subordinate to the laws of Congress.

Some Mexican jurists have wanted to seek the preeminence of either Congressional law or treaties, by classifying the laws of Congress as constitutional laws or organic law and others.

I believe the distinction to be somewhat whimsical, for each and every law set forth by Congress, is supposed to be constitutional. On the other hand, which would be the organ to decide upon the exact nature or classification of these regulations? I consider federal laws and treaties, when the latter are concluded in keeping with the Constitution, to rank at the same level.

Therefore, once more, resorting to the old principle under which recent law annuls or revokes law promulgated in the distant past, in the event of conflict, either the law of Congress or the treaty may prevail depending on their dates of promulgation.

What is indisputable, under the Mexican Constitution, is that the Constitution itself, the laws of the Congress of the Union set forth by it and all the treaties in accordance with it, concluded by the President of the Republic, with the approval of the Senate, are the supreme law of all the Union. They constitute higher law which definitely prevails over the constitutions and laws of the states.

Lastly, treaties that fulfill constitutional requirements, become an effective part of the Mexican juridical order, as do all other laws issued in accordance with the Constitution