

FOREIGN PRECEDENTS IN MEXICAN CONSTITUTIONAL ADJUDICATION*

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ABSTRACT. *This note is about how Mexican Courts with constitutional jurisdiction have used foreign precedents to support their judgments. It provides an initial overview of the central issues with the objective of stimulating a broader discussion on the topic. The authors have reviewed several judgments from the Mexican Supreme and other Courts that are influenced by foreign judicial opinions. They conclude that this comparative practice by Mexican Courts lacks publicity and standards that could ease its review and application.*

KEY WORDS: *Comparative law, foreign precedents, Mexican courts, constitutional adjudication.*

RESUMEN. *Este ensayo refiere cómo los tribunales mexicanos que poseen competencia constitucional han usado precedentes extranjeros para apoyar sus resoluciones. En una primera aproximación a esta temática, pretende aportar un punto de vista que sirva para comenzar una discusión más amplia al respecto. Los autores han revisado varias resoluciones de la Suprema Corte y otros tribunales mexicanos que de alguna manera están influidos por decisiones judiciales extranjeras. Concluyen que a esta práctica comparativa de los tribunales mexicanos falta publicidad y parámetros que pudieran facilitar su control.*

PALABRAS CLAVE: *Derecho comparado, precedentes extranjeros, tribunales mexicanos, juicio constitucional.*

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I. INTRODUCTION

Taking into account the influence of foreign precedents when making a judgment is today one of the most important tools used in constitutional adjudication. Notwithstanding national peculiarities, most constitutional systems are based upon a few general principles: the supremacy of the Constitution, the recognition of fundamental rights, and the need of a specialized court that enforces these basic rules. This encourages intense interaction between jurisdictions.

There are different reasons why Courts often take into account precedents from foreign tribunals. Marie-Claire Ponthoreau points out two: the quest for democratic legitimacy and the lack of domestic solutions to new problems.¹ The purpose of this note is to establish the extent (if any) that the Supreme Court and other tribunals in Mexico utilize foreign precedents in constitutional adjudication. We will focus on Mexican Supreme Court rulings, as this tribunal is the final interpreter of the Mexican Constitution. Nevertheless, we will also take into account some precedents from Circuit Courts and the Federal Electoral Court.

In general, as a result of legal tradition, Mexican courts seldom explicitly cite foreign precedents. It is therefore often difficult to determine when references to foreign precedents indeed occur. In part, this derives from the silent “comparative practice” of our Courts, which shall be treated in the last section of this article.

¹ See Marie-Claire Ponthoreau, *La circulation judiciaire de “l’argument de droit comparé” Quelques problèmes théoriques et techniques à propos du recours aux précédents étrangers par le juge constitutionnel*. A Spanish translation of this work will appear on 14 REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL. This work is a continued version of the author’s paper included in FERDINAND MÉLIN-SOUCRAMANIE, L’INTERPRÉTATION CONSTITUTIONNELLE 167-84 (2005).

Nevertheless, our research has confirmed that very important constitutional practices recently added to the Mexican legal system by the Supreme Court, were taken from other countries. Moreover, Mexican Courts occasionally cite foreign precedents as collateral support for their own opinions. Supreme Court justices also often cite international comparative references in their individual opinions. This includes an important opinion issued by Justice Genaro Góngora in the case regarding the Action for Unconstitutionality 26/2006 containing a clear reference that supports the use of foreign precedents.

This note identifies a key challenge: Mexican courts need to more seriously and systematically reflect upon the comparative international approach. Standards and procedures for legal comparison need to be more fully developed, since Mexican courts are already engaged in practice in this process.

II. THE MEXICAN LEGAL AND HISTORICAL TRADITION

As a result of its Spanish heritage, Mexico's legal system is part of the civil-law tradition. Combined with the principles of the French revolution, civil law is based principally upon written law enacted by a legislature that represents—at least in theory—the people. Broadly speaking, the court's role in Mexico has traditionally not been critically important; nevertheless, we shall consider certain political and historical factors described below.

In fact, judges' decisions were not important until the introduction of the *juicio de amparo* (action for relief) in the Mexican Constitution in 1847, and the creation in 1870 of the *Semanario Judicial de la Federación* (Federal Judicial Week Report), the official report of federal precedents.² As the Constitution was considered a “political program” and not “higher law,” Mexican judges did not apply the constitutionally-guaranteed right of *amparo* for two years. This issue was resolved in 1849 when Judge Pedro Sámano granted an *amparo* through the application of article 25 of the Reform Act from 1847.³

Afterwards, the *amparo* was progressively restricted by the Supreme Court. This occurred when Porfirio Díaz was President of Mexico—for approximately 30 years—and Ignacio Vallarta was a Justice of the Supreme Court. Justice Vallarta was responsible for the current interpretation of the *amparo* in Mexico. As a result of Vallarta's work in this area, as well as his admiration of the American judicial system, two important legal doctrines were established: (a) the use of precedents in legal proceedings; and (b) the use of foreign precedents to help decide constitutional law.

² The *amparo* judgment was created in the 1841 Constitution of the present State of Yucatán, which during that time was politically separated from Mexico. In the federal Constitution, the *amparo* was not previewed until it was reformed in 1847.

³ See Héctor Francisco Aldasoro Velasco, *La primera sentencia de amparo dictada a nivel federal*, in INSTITUTO DE INVESTIGACIONES JURÍDICAS, LA ACTUALIDAD DE LA DEFENSA DE LA CONSTITUCIÓN 1-13 (1997).

In an interesting work comparing the *juicio de amparo* with writs of habeas corpus, Vallarta explained his ideas on legal precedents.⁴ In his opinion, *amparo* judgments have the “highest” function of “fixing public law,” as they represent the “supreme, definitive and final interpretation of the Constitution.” He also emphasized that due to the thought that “constitutional questions” are only resolved through “legislative acts,” judges fail to think of the doctrinal aspect of decision-making, which explains why “after a hundred, a thousand judgments have re-confirmed the unconstitutionality of an act,” it still remains intact. Vallarta’s ideas on the use of precedents were finally written into legislation: Articles 34 and 70 of the *Amparo* Act of 1882 established the duty of lower court judges to adhere to any constitutional interpretation,⁵ this has been the main procedure used by Mexican judges to establish “*jurisprudencia*,”⁶ which means a precedent that should be observed by lower courts.⁷

As already stated, Mexican comparative tradition could be traced to Vallarta’s judicial opinions. In these opinions, he displays broad legal knowledge and familiarity with American constitutional law. The classic on this matter is an opinion regarding an *amparo* (action for relief) filed by a textile factory against the government for taxes; in it Vallarta correctly cited some American precedents established by Chief Justice John Marshall,⁸ arguing its validity in the following way:

Lacking doctrines, precedents and court rulings, these serious issues are both novel and indisputably important. Given the delicacy and difficulty of this case, and wishing to trust more than just my own reasoning, I have consulted sources of our constitutional law,⁹ specifically US case law, to find doctrines that help

⁴ See IGNACIO L. VALLARTA, EL JUICIO DE AMPARO Y EL WRIT OF HABEAS CORPUS 316-22 (Francisco Díaz de León, 1881).

⁵ Regarding the changes to the *amparo* issued on June 6th 2011, published in the Diario Oficial de la Federación [D.O.].

⁶ Especially in Mexico, “*jurisprudencia*” refers to the said precedent, unlike the sense that the term “*jurisprudence*” has in English, referring to legal philosophy or theory. For further discussion, see José María Serna de la Garza, *The Concept of ‘Jurisprudencia’ in Mexican Law*, 1 MEX. L. REV. 131 (2009).

⁷ We have to distinguish between “*jurisprudencia*” and “*tesis aislada*” (isolated thesis). The first one is compelling due to the circumstances of its creation (repeating judgments, number of votes, etc.); the second is only persuasive because it does not fulfill the said requirements.

⁸ McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 428, 430 (1819); *Providence Bank v. Billings*, 29 U.S. (4 Peters) 514, 563 (1830).

⁹ Mexican public law has always been influenced by foreign doctrines. It is readily employed to object to any ideas that seem overly influenced by foreigners, especially the U.S. Even now, however, the Mexican Constitution contains relics of its American counterpart: the text of Article 133, for example, is practically identical to the text of Article VI of the American Constitution. Furthermore, it is widely accepted that the *juicio de amparo* rose from American judicial review. More recently, constitutional law in Mexico has been influenced by European “New Constitutionalism.”

illustrate my judicial opinion, and provide grounds for the vote I am about to cast.¹⁰

A new period of Mexican precedents (the fifth) started in 1917 when the current Constitution was enacted after the Revolution that toppled Porfirio Díaz. Remarkably, the Supreme ruled that “the application of foreign doctrine to resolve cases, is not [illegal] if the judgment is based upon clearly applicable domestic law.”¹¹ Although the Court was referring to scholarly doctrine and not legal precedent, we can—upon a re-reading of these texts—appreciate the justices’ open-mindedness toward domestic jurisprudence. A nationalist legal approach developed in Mexico during the 30’s. From this point of view the law became subject to politics and an overly powerful presidency which left judges room to properly interpret federal law. In cases involving political issues, justices were often unable to fully or effectively interpret the Constitution.¹²

The Mexican transition to democracy finally lead to constitutional reform in 1994, at which time important changes were enacted regarding the role and power of the Supreme Court. A federal reform was also enacted in 1996 which allowed constitutional challenges of electoral regulations and resolutions. Nowadays, nearly any law —except those involving certain “political questions” (in the sense that we will explain later)— can be challenged on the basis of its constitutionality. Currently, the highest court has considerable weight in the Mexican political system, often issuing the final word on important national issues.

During the reign of “constitutional minimalism”—as Justice José Ramón Cossío Díaz referred to it— prior to the said democratic transition, derived from a “political” and not a “legal” approach to constitutional law, the Constitution and especially the *amparo* were sort of “fetish objects” of political speech. At the risk of simplicity, we could broadly state that two opposing tendencies existed: firstly, the idea that the Mexican Constitution and, specifically, the *amparo* were unique national doctrines that needed protection from unwanted foreign influence; and, secondly, that foreign experience and knowledge could be helpful in the interpretation of domestic legal matters.

¹⁰ 2 IGNACIO L. VALLARTA, VOTOS 16, 22, 27, 28 (Francisco Díaz de León, 1881).

¹¹ Tercera Sala de la Suprema Corte [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Quinta Época, Tomo LXI, Página 3543 (Mex.).

¹² See JOSÉ RAMÓN COSSÍO DÍAZ, LA TEORÍA CONSTITUCIONAL DE LA SUPREMA CORTE DE JUSTICIA especially 116-17 (2002). In 1982-1983, a well-known attorney and legal scholar filed an *amparo* suit to obtain information about the federal public debt involved in the worst economic crisis in Mexican history up to those years, based on the freedom of information contained in Article 6 of the Constitution. The Supreme Court affirmed that this provision grants no right to citizens, but establishes an information system for political parties. See Segunda Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Octava Época, tomo X, Agosto de 1992, Tesis 2a. I/92, Página 44 (Mex.).

For many decades, the former approach was the most “popular,” giving rise to the traditional theoretical foundation of the *amparo*.

As a result of a greater need for legal instruments to help resolve problems of a non totally-binding Constitution—not to mention increased academic exchange between Mexico and other countries (especially Spain)—a new approach to constitutional law and the *amparo* has recently gained important ground.

Adhering to an orthodox approach, the Supreme Court—and lower ones—have avoided explicit citation of foreign precedents in their decisions. For this reason, it is difficult to assess when (and how) Mexican courts base their decisions on foreign law. Nonetheless, it is possible to notice some cases in which our courts have been *very clearly* influenced by precedents in other countries.

II. FOREIGN JUDICIAL DOCTRINES ADOPTED BY MEXICAN COURTS

1. *Proportionality and Balancing*

The so-called “proportionality test” of German origin¹³ was embraced by Mexican courts as a result of the influence of Spanish judgments.¹⁴ This test is a comprehensive tool used to establish the limits and range of constitutional rights, comprised of three steps: suitability, necessity and narrow proportionality. The last step is commonly known as “balancing.”¹⁵

Based on our research, the Supreme Court was the first one to use the proportionality test; this happened in a tax-law case regarding tax equity.¹⁶ Duplicating a well-known Spanish precedent¹⁷ but without stating so, it introduced to the Mexican legal system in 1996 a “balancing judgment (*juicio de equilibrio*)” regarding means and ends as a standard to determine the reasonability and validity of a varying legislative treatment.¹⁸ Unfortunately, the said “transcription” did not follow the Spanish original but cutted off some

¹³ See 19 DECISIONS OF THE GERMAN FEDERAL CONSTITUTIONAL COURT (“BVerfGE;” *Entscheidungen des Bundesverfassungsgerichts*) 342, 348-49.

¹⁴ Amaya Alvez, *¿Made in Mexico? El principio de proporcionalidad adoptado por la Suprema Corte de Justicia de la Nación. ¿La migración de un mecanismo constitucional?*, 253 REVISTA DE LA FACULTAD DE DERECHO DE LA UNAM 381 (2010).

¹⁵ Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 135, 135-36 (2003).

¹⁶ “Tax equity” is just a mode of the principle of equality. It orders that persons under a similar situation should be given the same treatment, and those in a different situation should not be given the same treatment.

¹⁷ TC, 26 de abril de 1990 (76/1990, F.J. 9, A).

¹⁸ S.C.J.N., Apéndice al Semanario Judicial de la Federación 1917-2000, volumen I, Página 240 (Mex.).

words from it; as a result, the idea was not properly understood by Mexican courts and lawyers.

Although lower courts, including several Circuit courts and the Electoral Court,¹⁹ also issued rulings that established the “proportionality”²⁰ and “balancing” tests, they never specifically cited foreign law. Nonetheless, it is clear that they were influenced by European (in particular, German and Spanish) concepts regarding these doctrines.²¹

The Supreme Court continued the development of the proportionality standard, especially regarding the analysis of unequal legislative regulations.²² In 2007, it finally ruled that the reasonability test’s three steps must be utilized by judges to establish fundamental rights’ range and limits; it also decided that the theoretical basis for this test is contained in Article 16 of the Constitution and the prohibition of arbitrariness.²³

2. “*Heightened*” Equal Protection

Clearly influenced by American constitutional doctrine regarding a “heightened equal protection scrutiny,”²⁴ the Mexican Supreme Court recog-

¹⁹ The only domestic court with the authority to correct the interpretation of Mexican constitutional law is the Supreme Court. Although some courts, such as those mentioned above, may adjudicate certain constitutional issues, its constitutional constructions are generally not binding and, as a result, are not considered as precedents. They are nonetheless persuasive and taken as a “mere” illustrative example. See Acuerdo 5/2003 de la Suprema corte de Justicia de la Nación [Agreement of the Supreme Court 5/2003], §IV, I, No. 11.

²⁰ See Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Compilación Oficial de Jurisprudencia y Tesis Relevantes 1997-2005, S3ELJ 62/2002, Página 235 (Mex.); Cuarto Tribunal Colegiado en Materia Administrativa del Primer Circuito (4th Administrative Court of the 1st Federal Circuit), Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXII, Septiembre de 2005, Tesis I.4o.A.60 K, Página 1579 (Mex.) (explicitly using Alexy’s “theory of principles”).

²¹ Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito [1st Administrative Court of the 1st Federal Circuit], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XVIII, Noviembre de 2003, Tesis I.1o.A.100 A, Página 955; Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito [4th Civil Court of the 1st Federal Circuit], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XVII, Marzo de 2003, Tesis I.4o.C.57 C, Página 1709 (Mex.). (Also imitating the very influential judgment number 171/1990 of the Spanish Constitutional Court.)

²² Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXIV, Septiembre de 2006, Jurisprudencia 1a./J. 55/2006, Pagina 75; and Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tomo XXV, Marzo de 2007, Jurisprudencia 2a./J. 31/2007, Página 334 (Mex.).

²³ Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Diciembre de 2007, Jurisprudencia P./J. 130/2007, Página 8 (Mex.).

²⁴ See Romer v. Evans, 517 U.S. 620 (1996).

nized the need for a “strict” analysis of the legal classifications of explicit discrimination prohibitions²⁵ based on the Constitution, using higher standards to test their validity.²⁶ This precedent was established by the First Chamber of the aforementioned court; and was recently adopted by the second Chamber, which mentioned a “special intensity” and “careful scrutiny,” but without obtaining the legally required votes for it to become binding precedent.²⁷

3. German Existenzminimum

The Mexican Supreme Court has closely followed the doctrine of “vital minimum” (*mínimo vital*). Due to the name used by the Mexican Court, we could say that this doctrine is clearly of Spanish origin and hence of German origin as deserving of human dignity as supreme constitutional value.²⁸

The First Chamber of the Mexican Supreme Court established that certain minimal conditions are necessary for the sake of human dignity; *e.g.*, legislators are prohibited from taxing individuals who earn minimum wages because if taxes were levied, these people would be unable to provide for their own “elementary needs” and, as a result, lose their autonomy and capacity to fully participate in the democratic system.²⁹ In order to establish the *mínimo vital* required under Mexican law, the Court based this doctrine on the Kantian definition of “human dignity,” used by the German Federal Constitutional Court.³⁰

This precedent was implicitly followed by the Second Chamber of the Mexican Supreme Court. Since 2007, several decisions by said Chamber invoked Article 123 of the Mexican Constitution, which forbids any seizure or taking of minimum wages “to prevent workers from receiving lower income,” in effect prohibiting the imposition of taxation. This opinion intended to pro-

²⁵ Gender, preferences, health, etc. See Mex. Const., art. 1, third paragraph.

²⁶ Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVII, Abril de 2008, Jurisprudencia 1a./J. 37/2008, Página 175 (Mex.).

²⁷ Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVII, June 2008, Tesis 2a. LXXXV/2008, Página 439 (Mex.).

²⁸ TC, 22 de junio de 1989 (STC 113/1989); 82 BVerfGE 60, 85-6.

²⁹ Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Mayo de 2007, Tesis 1a. XCVIII/2007, Página 792; Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Mayo de 2007, Tesis 1a. XCVII/2007, Página 793; Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXIX, Enero de 2009, Tesis 1a. X/2009, Página 547 (Mex.).

³⁰ See 30 BVerfGE, 25-6.

tect “human dignity and liberty referred to [as a general principle] in Article 25, first paragraph, of the Constitution,” part of the economic chapter of Mexican constitutional law.³¹ As a result of the number of cases in which it was used as *ratio decidendi*,³² the aforementioned doctrine —unlike other precedents established by the First Chamber— is binding on every Mexican court; this is especially important because of the uniform adherence of constitutional principles.

Based on our knowledge, there has not yet been any ruling that properly outlines this doctrine or elucidates its implications and consequences.

4. Political Questions

On August 15th 2007, the First Chamber of the Mexican Supreme Court decided constitutional controversy 140/2006. This case stands out from other Mexican case law because it did not just rely upon a foreign court decision as a reference or point of departure but rather made a direct citation to an American Supreme Court ruling.

In this case, the Governor of the Mexican State of Oaxaca challenged a “point of agreement” (*punto de acuerdo*) issued by the Chamber of Deputies (*Cámara de Diputados*) of the Federal Congress, in which the latter exhorted the former to resign from office as a result local civil unrest.³³ Although this controversy was preliminarily admitted,³⁴ it was ultimately rejected because the issues involved could not be adjudicated by courts of law as they were deemed “political questions.”

The Mexican Supreme Court assumed that “purely political questions” are not subject to judicial review, because allegedly there is no legal standard to test them. As an example, it cited the opinion of the US Supreme Court in *Baker v. Carr*, which held that:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve

³¹ Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Septiembre de 2007, Jurisprudencia 2a./J. 172/2007, Página 553 (Mex.).

³² Article 192 of the Amparo Act (*Ley de Amparo*).

³³ At that time, Oaxaca teachers held several demonstrations demanding better work conditions, to which the local government did not respond. Many organizations joined the teachers, and afterwards their movement made bigger demands in protest against a host of social problems. The city of Oaxaca was occupied by demonstrators, and the situation caused diverse social, political and economic difficulties.

³⁴ See the related precedent established in Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Febrero de 2007, Tesis 1a. LXIV/2007, Página 1396 (Mex.).

a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁵

It is generally accepted that *Baker* is the leading case regarding the “political question” doctrine of the American Supreme Court.³⁶ Based on our reasoning, the Highest Tribunal in Mexico considered this to be an indisputable and well-established doctrine. The Mexican Court failed, however, to adopt the “golden rule” of comparative law; which in Marie-Claire Ponthoreau’s words means: “*il faut avoir une connaissance des concepts juridiques dans leurs propres contextes pour éviter précisément des erreurs d’interprétation.*”³⁷

The “political-question doctrine,” is not settled down as a “universal” principle of constitutional procedural law.³⁸ Upon a careful reading of *Baker*, however, the Mexican Court would have noticed that this precedent considered “political questions” to be highly unusual, since several norms underlie the Constitution and that these had to be taken into account to consider whether “judicially discoverable and manageable standards” are applicable. In *Baker*, the American Supreme Court reversed the challenged judgment that denied standing to the appellants on the grounds that the issue involved was allegedly a “political question,” thereby applying the “equal protection clause” principle for which “Judicial standards [that] are well developed and familiar.”³⁹ In addition, Laurence Tribe reports “only two cases since *Baker v. Carr* in which the Supreme Court has invoked the political question doctrine

³⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

³⁶ Cf. John E. Nowak & Ronald D. Rotunda, *CONSTITUTIONAL LAW* 127 (St. Paul West, 8th ed. 2010); 1 Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 375 (New York, Foundation Press, 3rd ed. 2000).

³⁷ See Ponthoreau, *supra* note 1.

³⁸ For instance, the German Federal Constitutional Court has not developed a “political question” doctrine since German constitutional law is considered “ubiquitous,” governing all matters and pertaining to everything. This understanding of Constitution law makes constitutional courts into “King Midas,” because they are able to turn every question in “constitutional-law gold.” See Klaus Von Beyme, *Génesis de la revisión constitucional en los sistemas parlamentarios*, in *TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA* 277 (2nd ed., 2008); Tribe, *supra* note 36, at 367; Rainer Wahl, “Lüth und die Folgen. Ein Urteil als Weichenstellung für die Rechtsentwicklung,” in *DAS LÜTH-URTEIL AUS (RECHTS-) HISTORISCHER SICHT. DIE KONFLIKTE UM VEIT HARLAN UND DIE GRUNDRECHTSJUDIKATUR DES BUNDESVERFASSUNGSGERICHTS* 389 (Thomas Henne & Arne Riedlinger eds., BMV 2005).

³⁹ *Baker* 369 U.S. at 226.

to hold an issue non-justiciable;” and that this doctrine was to be used to evaluate the justiciability of the question posed to the Court.⁴⁰

Under the American constitutional system, the “political questions doctrine” is more related to the ability of the Courts to find “enforceable rights from constitutional provisions” and to “create judicially manageable standards,” than the “assumption that there are certain constitutional questions that are *inherently* non-justiciable.”⁴¹ The Mexican Supreme Court should have considered the original context of the doctrine it upheld in order to apply it correctly; for this reason, constitutional decision 140/2006 represents a *very important lesson* regarding the future use of foreign precedents in Mexico.

5. *Incidental Quoting of Foreign Precedents*

Mexican courts have cited foreign precedents to support their opinions, especially regarding fundamental rights.

The First Chamber of the Supreme Court established two remarkable precedents in criminal matters. In the first, a ruling regarding cautionary measures in *amparo* cases, the Mexican Court used a *European Court of Human Rights* decision—as well as one by the Inter-American Court of Human Rights⁴²—to affirm their opinion that any restriction on personal liberty should be based on text explicitly contained in the Constitution.⁴³ In regard to the efficacy of criminal defence rights, it quoted several precedents by these same international courts, as well as the German Federal Constitutional Court.⁴⁴

The use of foreign precedents by the Federal Electoral Court is not only important but, if anything, even more extensive. Although we cannot assert

⁴⁰ See Tribe, *supra* note 36, at 376-83. The mentioned cases are: *Gilligan v. Morgan* 413 U.S. 1 (1973) and *Goldwater v. Carter* 444 U.S. 996 (1979).

⁴¹ Cf. Tribe, *supra* note 36, at 367-71 (emphasis added); Nowak & Rotunda, *supra* note 36, at 137.

⁴² These circumstances are meaningful in a Mexican context. Many Mexican judges and lawyers have stridently rejected the influence of international courts, even the Inter-American Court of Human Rights; for this reason, the Supreme Court’s citations of international human rights precedents gain added significance. It must also be considered that since Mexico is not (obviously) a party of the European human rights system; it wouldn’t be wrong to assume that Strasbourg precedents may be considered *foreign decisions*; as Mexico is under the jurisdiction of the Inter-American Court of Human Rights, and the *Pacto de San José* is part of its domestic legal system.

⁴³ Explicitly citing *Baranowski v. Poland* (case 28358/95); Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Marzo de 2007, Página 151 (Mex.).

⁴⁴ Explicitly citing *Kamasinski v. Austria* (case 9783/82), *Stanford v. United Kingdom* (case 16757/90), *Tripodi v. Italy* and 9 BVerfGE 89, 95; Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Mayo de 2007, Página 104 (Mex.).

that the Court has explicitly based decisions upon foreign precedents, it has indeed invoked them to advance its viewpoints on important issues: the limitations of passive voting rights;⁴⁵ freedom of speech as the cornerstone of a democratic society (and possible restrictions);⁴⁶ “spot war” cases of the fierce presidential campaign of 2006;⁴⁷ political rights and limitations due to criminal sentences; and the tribunal’s opinion for the Supreme Court regarding independent candidates.⁴⁸

The cases mentioned herein do not use foreign precedents to substantiate their conclusions, but rather to support basic and general opinions regarding human rights. Nevertheless, their importance lies in providing a window into the legal thinking and reasoning of Mexican courts.

Finally, we can expect more references to European precedents—and to precedents from “foreign” human-rights protection systems—as a result of the “conventionality review” implemented by Mexican Courts in compliance with the rulings of the Inter-American Court of Human Rights, that laid down that all domestic authorities should review that the *Pacto de San José* is not breached. In Mexico and other countries, there has been recent discussion regarding whether non-constitutional courts can study and decide the conformity of laws and other aspects of international law.⁴⁹

IV. FOREIGN PRECEDENTS IN INDIVIDUAL OPINIONS

Just as in the US, Germany and other countries, Mexican Supreme Court justices, as well as lower court judges, can add their individual opinion (*voto particular*) to a judgment in order to provide their reasons for opposing the majority (dissenting opinions); or other reasons upon which they think the decision should have been based (concurring opinions). As an accurate reflection of the justices’ personality and legal knowledge, these opinions often contain

⁴⁵ Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-037/2001, 25 de Octubre de 2001 (quoting the European Court of Human Rights and the Spanish Constitutional Court).

⁴⁶ TEPJF, SUP-JDC-393/2005, 24 de Agosto de 2005 (referring to the *Handyside case* [5493/72] of the European Court, the American Supreme Court in *Murdock v. Pennsylvania* 319 U.S. 105 [1943] —and the preferred position of that freedom— and *New York Times v. Sullivan* 376 U.S. 254 [1964], and judgment 12/1982 [March 31st 1982] of the Spanish Constitutional Court).

⁴⁷ TEPJF, SUP-RAP-31/2006, 23 de Mayo de 2006 (quoting European cases *Oberschlick* [case 11662/85] and *Lingens* [case 9815/82], as well as the American precedents mentioned above).

⁴⁸ TEPJF, SUP-AG-2/2007, 2 de Febrero de 2007 (European case *Refah Partisi /Parti de la Prospérité et autres c. Turquie* [Case 41340/98]).

⁴⁹ See Eduardo Ferrer Mac-Gregor, *El control difuso de convencionalidad en el Estado constitucional*, in HÉCTOR FIX-ZAMUDIO Y DIEGO VALADÉS, FORMACIÓN Y PERSPECTIVA DEL ESTADO MEXICANO 151-188 (2010).

clear citations of foreign precedents; in fact, one of them recently even called for the Supreme Court—extensible to any other legal operator—to be more open-minded in the use of foreign precedents in Mexican constitutional adjudication:

...from my point of view it is not possible that to this day, precedents of international or regional courts, *as well those from other countries of the free world*, are still alien to us or barely appear as a little atoll in our judgments. Notwithstanding that the Mexican State is under the jurisdiction of some [international] courts whose precedents are binding to us, such as the Inter-American Court of Human Rights, the essence of fundamental rights is universal.

In order to prevent this Court's isolation (in these matters), it is necessary to fully discuss international precedents (*colloquio jurisprudencial*) as well as to integrate [legal] comparison as a method of constitutional interpretation. We must take advantage of that developed in other countries as part of humanity's patrimony.⁵⁰

The importance of these quotes is not only their substance but also the situation which prompted their citation by Justice Genaro Góngora. They are taken from his personal opinion in the unconstitutionality decision 26/2006, the so-called *Media Act Case* (*Ley de Medios*), perhaps the most significant Mexican constitutional case in the last twenty years, regarding legal reforms that were purportedly enacted to enhance the profits of powerful media companies against the interests of the Nation and Government. These reforms were ultimately struck down. In the same opinion, the author—practicing what he preached—cited constitutional precedents from Germany,⁵¹ Italy⁵² and France⁵³ to support his views, and linked them to an Inter-American Court of Human Rights decision which he recognized as binding on Mexican courts.⁵⁴

An incidental reference to foreign precedents took place in the debate in connection to another very important issue: the *Budget Veto case*. This case resulted in the most controversial judgment ever made by Mexico's Supreme Court: that the President had the right to veto legislative decisions regarding the federal budget without any clear Constitutional basis for this power. In his personal opinion, Justice Góngora⁵⁵ again invoked a foreign precedent:

⁵⁰ Diario Oficial de la Federación [D.O.], 20 de agosto de 2007, Tercera Sección, Página 80 (Mex.). (Emphasis added).

⁵¹ 73 BVerfGE 118.

⁵² Judgment 420/94 of the Constitutional Court.

⁵³ Decision of October 10th and 11th 1984, of the Constitutional Council.

⁵⁴ *See supra* note 50, at 99.

⁵⁵ This Justice who most regularly cites foreign precedents in his personal opinions, although his colleague José Ramón Cossío Díaz was the author of the leading Court opinions containing the aforementioned foreign legal doctrines (proportionality, “heightened” equal protection and *Existenzminimum*) were acknowledged in Mexico.

the *Line Item Veto II* (US case),⁵⁶ supports his dissenting view that the Mexican Supreme Court should follow the example of Washington which, through “daring” interpretation resolved to restrict itself in light of the “Constitution’s silence,” and not to grant the President any “exorbitant power” that curtails congressional faculties.

V. FINAL COMMENTS

The first challenge to fully employ foreign precedents in Mexican constitutional decision-making is to establish the comparative approach as an absolutely necessary tool. It would not be unfair to point out that in Mexico the struggle between a traditional, isolated approach and a comparative one has been largely silent, although the use of foreign precedents was clearly an important tool in the early days of constitutional interpretation. Due to nationalist tendencies, the comparative approach has until recently been either avoided or rejected; but the tables have turned as a result of new generational perspectives and the impelling reality of our “global village;” young legal scholars are influenced by foreign modes of legal thinking. As a consequence, the Mexican Supreme Court has finally acknowledged the importance and usefulness of foreign precedents in constitutional and human rights decision-making.

The second challenge is that –despite token progress of the comparative approach in constitutional adjudication– Mexican courts are still somewhat reluctant to explicitly cite foreign precedents in their legal opinions. When a foreign legal decision is referred to or even quoted, it is usually only as support for a previously established opinion, or as a secondary argument in favour of it. In broad terms, *it is often difficult to assert when Mexican constitutional law has been clearly based upon specific foreign precedents.*

Evidence suggests that many foreign precedents that influenced Mexican court decisions were intentionally omitted; the best example could be the “migration” of the principle of proportionality from Spanish courts. This silence over the origin of foreign-influenced judicial opinions denies to any party (litigants, legal scholars or citizens) the opportunity to trace the kin of many standards or procedures used by Mexican courts; for this reason, a proper review cannot be made whether their use is proper and suitable.⁵⁷ This lack of citation also diminishes the transparency of Mexican constitutional adjudication, as judges would be well-off to indicate the grounds for their decision-making so that the legal community and society can review their reasoning.⁵⁸

⁵⁶ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁵⁷ See Alvez, *supra* note 14, at 387.

⁵⁸ See RONALD DWORKIN, *FREEDOM’S LAW. THE MORAL READING OF THE AMERICAN CONSTITUTION* 31 (3rd ed. Cambridge, Harvard University Press, 1999).

A third challenge facing Mexican courts to develop an effective comparative approach is methodological. As a consequence of scant attention paid to the use of foreign precedents and their implication, a serious debate about these issues has never taken place in Mexico. Our judges and scholars must address—at the very least—the following issues: (i) when to look for foreign precedents to help resolve domestic legal issues; (ii) which jurisdictions should be taken as “models” and why;⁵⁹ (iii) what are criteria to utilize foreign precedents as “soft sources”—non-legally binding law for national adjudication; and (iv) how should a comparative approach be made between a “standard procedure” to help resolve a national issues (considering which elements are meant to be taken into account—especially considering the inherent differences between common-law and civil-law systems—and how judges should construct their arguments).⁶⁰

Nevertheless, *there are some foreign judicially-constructed legal precedents that have been recently adopted by the Mexican Supreme Court and lower courts*, so we can reasonably conclude that their adoption was caused by increased comparative influence in our legal theory and adjudication. This influence has resulted in the fact that Justices and other judges now take into account with greater frequency the international *state of the art* of the issues they have to settle, at least generally—especially in regard to fundamental rights. Hopefully, this will increase the strength of this approach and serve to enrich Mexican constitutional law, because “there is no other legal science than the universal one.”⁶¹

⁵⁹ This list would include (in a kind of “order of appearance”): the United States, Germany, Spain, Colombia and South Africa, among national courts, and Strasbourg and Luxembourg among international tribunals.

⁶⁰ See Ponthoreau, *supra* note 1.

⁶¹ RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LOS GRANDES SISTEMAS JURÍDICOS CONTEMPORÁNEOS 11 (Jorge Sánchez Cordero trans., 11th ed., UNAM-CMDU-FLDM, 2010).