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COELUM Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

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New criteria adopted by the Supreme Court of Justice in regards to the application of the Constitution and International Treaties by ordinary judges.

by *Juan Antonio Tiscareño**

The interpretation of the norms is a fundamental topic that nowadays constitutes a specialized branch in the academy and in the legal literature. In most legal systems, judges are not only limited to apply the laws, their work also signifies the correct interpretation of them, in order to resolve the cases entrusted to their authority. Mexican judges are not unfamiliar with this current practice. In our system, federal judges create Law, by issuing interpretative and guiding criteria, which under certain rules becomes mandatory for all judges. In this context, I will analyze the new criteria that have been recently generated by the Supreme Court of Justice of Mexico (SCJ) in regards to the application by ordinary judges of the Constitution and international treaties and conventions.

“In our system, federal judges create Law, by issuing interpretative and guiding criteria, which under certain rules becomes mandatory for all judges.”

Background

In the period between August 2010 to July 2011, and during ten long public sessions, the SCJ analyzed in detail the scope of the resolution that the Inter-American Court of Human Rights (ICHR) issued in the case of Rosendo Radilla Pacheco vs. Mexico.¹ In this case, several issues of great relevance were analyzed², but for purposes of our article we will focus on the topic of “diffuse control of the constitutionality and conventionality³ of secondary laws”, understanding this concept as the obligation of any judge, regardless of their hierarchy within the judicial system, of not applying a law, if such law is in contradiction with the provisions the Mexican Constitution or the international treaties and conventions enforceable in Mexico. It is important to stress that the decision of the SCJ was strongly influenced by the major constitutional amendments in respect to human rights that took place in June. For the purposes of this article, we will just refer to the amendment of Article 1 of the Constitution, which states the following:

* IN COLABORATION OF ROBERTO NAJERA.

1.- Relatives of Mr. Rosendo Radilla initiated legal action before the Inter-American Commission on Human Rights, and later before the Inter-American Human Rights Court, obtaining a favorable decision on November 23, 2009, claiming a denial of justice in the Mexican legal system due to the disappearance of their relative during 1970's.

2.- The sentence of the ICHR also generated a profound change in respect to the scope of application of the military jurisdiction; however, this interesting topic far exceeds the subject of this article.

3.- The word conventionality is a literal translation from the Spanish “convencionalidad” which is a neologism that stands for the lawfulness of a law according to an international convention or treaty.

“The norms related to human rights shall be construed in accordance with this Constitution and international treaties on the subject encouraging at all time the more extensive protection for persons.

All authorities within the scope of their competence have the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness. In consequence, the State must prevent, investigate, punish and restore human rights violations, in the terms established by law.”

As we can see, this significant text was included in article 1 of the Constitution, in order to emphasize that all authorities, including judges, must protect and promote human rights within the scope of their competence. Before the amendment to article 1 of the Constitution, the doctrine of the diffuse control was grounded on a peculiar construction of article 133 of the Constitution, which states the following:

“Article 133. This Constitution, the laws of the Federal Congress emanating from it, and all Treaties that are in accordance therewith, entered into and to be entered by the President of the Republic, with Senate approval, will be the Supreme Law of the Union. The judges of each State will conform to such Constitution, laws and treaties, notwithstanding any contradictory provisions that may appear in the Constitutions or laws of the States.”

The SCJ issued a binding court precedent⁴ setting out the concentrated control of constitutionality (the precedent does not even touch the issue of the control of conventionality), meaning that the ordinary courts and judges were not authorized to discuss if law was consistent with the provisions of the Constitution, because their work should be limited only to apply secondary – local – laws, with the explicit prohibition to rule on questions of constitutionality.

The reason claimed at that time – eleven years ago – by the SCJ was that the Mexican legal system provided a specific way to assess the constitutionality of acts of authority through an amparo, which is a specific judicial process that must be tried before federal courts; a different point of view would mean that ordinary judges, who are not part of the federal judicial system, could officially examine the constitutionality of local laws and acts of authority, and this would generate a severe anarchy within the jurisdictions and competences contemplated by the Mexican constitution.

As we can see, the interpretation that the SCJ made at that time was somewhat different from a literal reading of the constitutional text. In our view, it is clear that the SCJ on that occasion paved the way for giving a monopoly of the interpretation of the Constitution to federal courts, although this interpretation was contrary to the text of the constitution itself. Times have changed, and taking the opportunity presented by the sentence in Radilla’s case, and the amendment to the Constitution

4.- Case number 74/1999 resolved by the SCJN.

so generated, the SCJ has issued a new and completely different criterion. In synthesis, the questions that the justices of the SCJ responded on those sessions could be summarized as follows:

1. Are the sentences of the ICHR mandatory and enforceable in Mexico?
2. Must the Judicial Power exercise diffuse control of constitutionality and conventionality ex officio?
3. Must this diffuse control be performed only by federal judges, or also by all judges in Mexico?

In questions number 1 and 2, the Justices responded affirmatively by a majority of seven to four. In the third question, with the same majority, the Justices responded that the diffuse control should be performed by all judges without distinction. We can recognize the profound change of criteria by the SCJ.

Effects and consequences in other legal fields.

The interpretation of the SCJ was made in rigorous compliance with a sentence of the ICHR, and also in harmony with the recent constitutional amendments in the topic of human rights. Therefore it could be thought that taking into consideration these circumstances, the diffuse control should be limited only to cases involving human rights. Is this completely true? How wide is the range of application of these new criteria? Should the diffuse control be limited to the topic of human rights, or it should be extended to other matters, like for example, aviation? The answer to this question is fundamental to designing legal strategies in litigation cases. The option of defending a case from a constitutional perspective when needed, instead of being restricted only to a legal perspective – understood as the possibility of supporting a case solely on secondary legislation – could be encouraging. Constitutional arguments could be used to the benefit of the affected party, in order to obtain a more fair, prompt and effective judgment. In many of cases, there will be no need to wait for the admissibility of an amparo, a procedure that can be used, by general rule only when previous legal procedures have been exhausted.⁵

From the meticulous review of the public debates of the Justices, our conclusion is that nothing prevents the diffuse control in topics different from human rights. We do not believe that there is a necessity of providing a different solution. On the contrary, we consider that the criterion must be the same; it is a simple question of congruence. The diffuse control of constitutionality and conventionality by ordinary judges is an activity fully determined in the Mexican constitution and it will help to provide fairer and more effective judgments.

5.- For example, in commercial litigation related to default of aircraft lease agreements, the admissibility of an amparo is prohibited before the ordinary remedies established by secondary laws are exhausted.

Canada Reached an Expanded Air Transport Agreement with Mexico.

by *Misael Arellano*

As we have discussed in other editions of Coelum, bilateral agreement negotiations with Mexico always give very profitable rights to other states and opportunities for the other country's airlines in a liberalized global environment. Unfortunately, absence of expert mediators and negotiators from Mexican aviation authority caused, once again, very feasible disadvantages on expanded air agreement which builds on the existing air transport agreement between Canada and Mexico.

Denis Lebel, Minister of Transport, Infrastructure and Communities, and Ed Fast, Minister of International Trade and Minister for the Asia-Pacific Gateway, announced on August 12, 2011 that Canada and Mexico had reached an expanded air transport agreement which will facilitate increased travel and trade between the two countries. For its side, the Mexican aviation authority seems not to be too proud of the agreement reached; even more, officers involved are very closed mouthed in respect to this matter, because apparently, negotiations and the agreement reached were performed without Senate authorization as required by law. This could mean that expanded agreement probably will not be ratified and published in the official gazette any time soon so as to make it enforceable in Mexico.

It should be noted that the rights given in the expanded agreement, which falls short of an 'open-skies' agreement, provides a completely open framework for direct flights between Canada and Mexico, thereby allowing any number of airlines from either country to offer additional services between any Canadian and any Mexican city, representing several improvements over the old agreement which is replaced.

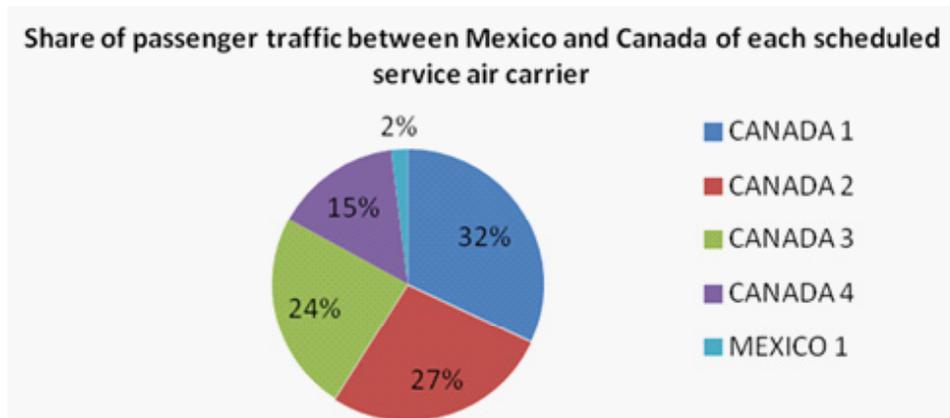
“...provides a completely open framework for direct flights between Canada and Mexico, thereby allowing any number of airlines from either country...”

Moreover, the new agreement imposes no restrictions as to the number of carriers that may be designated by each party. The expanded agreement will eliminate the series of diplomatic notes between aviation authorities that were required in the past and improve safety provisions in concordance with Canada's recently open skies type agreements reached with South American countries such as El Salvador, Costa Rica or Brazil. The new agreement also provides greater flexibility to adjust prices according to market forces, instead of tariffs filed on a single disapproval basis as included in the old agreement.

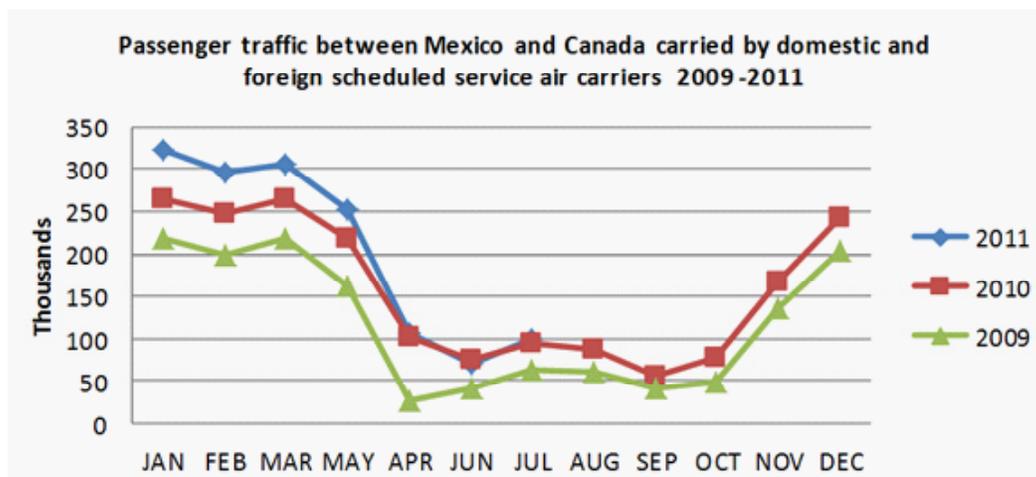
In words of Minister Lebel, Mexico is Canada's third largest air transport market, and as publicly acknowledged, Mexico is a very popular destination for Canadian leisure travel. Also, since NAFTA came into force in 1994, Canadian trade has more than quadrupled between

Canada and Mexico, so any additional air transport routes will encourage even more growth.

Based on operational statistics published by DGAC¹ from January to July, 2011 just five designated scheduled carriers, four from Canada and one from Mexico transported 100.7 thousand passengers between the countries. 98% of passengers were transported by the three Canadian scheduled carriers, and main gateways in Canada from and to Mexico are Montreal, Toronto, Vancouver, Calgary and Quebec.



Published statistics also show that Mexico is a very popular destination for Canadians, and the annual holiday traffic from November to May significantly increases overall traffic.



As shown above, it is a fact that Mexican carriers do not have the capacity to compete in that market as do Canadian companies. One Mexican designed carrier operates just 7 non-stop flights per week from Mexico City to Montreal, while just one of four Canadian designated carriers operates 95 non-stop flights per week to six cities in Mexico from 19 cities in Canada.²

1.- <http://www.sct.gob.mx/transporte-y-medicina-preventiva/aeronautica-civil/estadistica/estadistica-operacional-de-aerolineasair-carrier-operational-statistics/>

2.- <http://www.canadafreepress.com/index.php/articles-travel/39483>

The new expanded agreement should reduce the administrative burden associated with applications for route rights, and thus improve the ability to offer more economical air services between the two countries. A carrier designated by Mexico cannot compete with the Canadian carriers, bearing in mind the number of operations and offered destinations. Under this scenario the agreement will facilitate increased travel and trade between the two countries but just for Canadian carriers involved who will compete between themselves and may reduce fares as the market dictates.

“...expanded agreement should reduce the administrative burden associated with applications for route rights, and thus improve the ability to offer more economical air services between the two countries.”

It is evident that the negotiations and final agreements, in this case with Canada, performed by Mexican aviation authorities, just generated several hits to Mexican aviation and Mexican international carriers. Even when Mexican carriers are invited to the bilateral agreement negotiations in order to offer their requirements and the possible effects of certain granted rights, the reduced number of Mexican carriers cannot properly support the Mexican aviation authority's position before counterparty states. As described on first paragraph, Mexican aviation authority must prepare experts on bilateral agreements negotiations that conducts and prepares required analysis of specific markets necessities, attends to bilateral meetings, prepare and send diplomatic notes; and principally, be fully responsible of bilateral agreements' operation through an under close surveillance, in order to keep objectives for what such agreements were executed.

Probably the Mexican aviation authority should create a special commission for negotiations of bilateral air transport agreements. Agreements in which travellers, shippers, tourism and international trade sectors would always be involved as parties to all negotiations performed with any country and not just invited to attend as observers sporadically or just to involved specific carriers.

Identification of Railway Rolling Stock and Registration under the International Registry.

by Jessi Saba

It is of several importance to give an accurate definition of railway rolling stock, under the Protocol on Matters specific to Railway Rolling Stock adopted in Luxembourg in 2007 (the “Protocol”), in order for it to be properly identified for purposes of the Rail Registry established under the Protocol. The Protocol defines railway rolling stock in article I, paragraph 2(e):

“railway rolling stock” means vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.

Under this definition, the term “railway rolling stock” covers more than just trains, even when it does not have a direct international connection. The railway rolling stock does not purposely have to be intended for international use or transport for it to enter the sphere of protection of the Protocol. Having this idea in mind, it is of vital importance to discuss the issue regarding the identification of rolling stock.

The Convention on International Interest in Mobile Equipment (the “Convention”) sets out a framework for an international method of registration of mobile assets, which because of their nature are able to cross borders, hence changing the applicable legal systems, which can easily become a problem for the parties. Yet, the Protocol is not restrictive to rolling stock that crosses borders; it applies to all types of rolling stock, facilitating not only international financing, but also domestic, considering that most of the countries do not have an internal specific registry for security interests on rolling stock, thus, the Protocol will make even domestic financing much more secure by the registration under the International Registry for Rolling Stock (the “Registry”).

“...the validity of a created interest is given when such item is identifiable under the terms of article V-1 of the Protocol, so if the railway rolling stock is not identifiable the created interest would not be valid.”

According to the Protocol, the validity of a created interest is given when such item is identifiable under the terms of article V-1 of the Protocol, so if the railway rolling stock is not identifiable the created interest would not be valid. The mentioned article states the following:

“For the purposes of Article 7(c) of the Convention and Article XVIII-2 of this Protocol, a description of railway rolling stock is sufficient to identify the railway rolling stock if it contains:

- (a) a description of the railway rolling stock by item;*
- (b) a description of the railway rolling stock by type;*
- (c) a statement that the agreement covers all present and future railway rolling stock; or*
- (d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.”*

The Registry will be based in Luxembourg, establishing a supervising authority to set out the guidelines on how the Registry will work. According to article XII-1 of the Protocol:

“This authority shall be a body established by representatives, one representative to be appointed:

a) by each party state

b) by each of a maximum of three other States to be designated by the International Institute for the Unification of Private Law (UNIDROIT); and

c) by each of a maximum of three other States to be designated by the Intergovernmental Organisation for International Carriage by Rail (OTIF)”

“...it is now always visible for inspection, so it is the Registry’s responsibility to come up with a system to provide a unique identification to each and every item to be registered.”

Each item to be registered in the Registry is required to have a unique identification number, which is not a requirement that can be easily satisfied, because for instance, the system used in North America to allot a specific manufacturer’s serial number would not be definitive, such number can be repeated and can change repeatedly through time, adding that in order to search for a specific asset in the United States or Canadian registration system, it has to be done through the parties identities, not by asset, as proposed by the Protocol¹. Also, many manufacturers do not allot a specific serial number to the product, and if they do, it is now always visible for inspection, so it is the Registry’s responsibility to come up with a system to provide a unique identification to each and every item to be registered.

After many meetings and long discussions, the Rail Working Group came out with an alternative that could be applicable for all States. The Registry will contain a list of all the registration numbers applicable to the asset during the security agreement. This is important, because during the validity of the security agreement, the asset could have gone from one country to another, through different registration systems, or leased on other countries with different methods, thus creating certainty regarding the rights owned for a specific asset. This alternative method of identification, definitely will provide for countries that already use and have an efficient registration system, to work with the Registry to create a uniform railway rolling stock registration, in order to avoid complications or the lost of rights because the asset could not be correctly identified.

Today, the rail industry worldwide is going through a renaissance, and Mexico is not the exception, having new projects countrywide, the ratification of the Luxembourg Protocol would definitely give financiers and lessors the opportunity of a safer investment carrying less risks, while it gives the opportunity to the operators to create new business strategies, and the government to create infrastructure that will cause an improvement to the economy. The creation of an International Registry for railway rolling stock would definitely impulse the development of the industry in Mexico, causing certainty to investors, financiers and lessors.

1.- Peter Bloch. Identification and definition of railway rolling stock and integration of existing registries and the International Rail Registry.

Agreement between Flight Attendants Union and Aeromar avoids strike.

Flight Attendants Union (ASSA) reached a labor agreement with Aeromar regarding the salary increase, which avoided the strike planned for the first minute of September 1st, 2011. ASSA informed that the salary increase was about 5.62% while the 12 working hours per day that Aeromar tried to impose was successfully reduced to 8 hours. *Milenio*. 02/September/11.

GAP reports 4.5% less passenger traffic.

Passenger traffic on the terminals operated by Grupo Aeroportuario del Pacífico (GAP) went down 4.5% in respect to last year, because of a smaller traffic of national passengers, even though international passengers traffic increased. At the beginning of this year, GAP expected an increase of 3%-4%. *El Economista*. 07/September/11.

Experts agree on the difficulty of operating airports.

Many authorities converge to operate an Airport, such as federal, local or even international authorities, causing logistic problems that affect flights, particularly on Mexico City International Airport (AICM). The AICM has a lot of inconsistencies in its system that could be prejudicial to the security. One of the most important issues to be resolved is to obtain the newest technology for passenger inspection. The National Chamber of Air Transportation, proposed to the Ministry of Communication and Transportation to regulate more efficiently the security at the AICM. *Excélsior*. 08/September/11.

Mexicana's Future depends on the judge.

At 2 months of closure of Mexicana's insolvency proceeding, its future remains uncertain. The judge handling the process ensures that there are six groups of interested investors: Avanza Capital, Ivan Barona, Altus Prot and three more groups that remain anonymous. At the same time, land and pilots unions jointly with Tenedora K are preparing a plan B for the airlines' rescue. According to the Judge, on October 28 ends the suspension for computing the period of reconciliation that gave as request by the workers, so in mid-November the airline might be declared on bankruptcy if a new owner is not found. *Reforma*. 08/September/11.

Ask explain "open skies" to Canada.

Senate calls for subpoena the director of aeronautics. Senate's appoints to appear the General Director of Aeronautics to explain the reasons of signing on July an agreement between Mexico and Canada without the knowledge and ratification of the senate, putting at risk the national aviation industry. It is noted in the opinion that "in addition to tourist traffic the Canadian airlines may enter to the markets traditionally reserved for nationals and the open skies have been naturally aspired by Canadians, Americans and other countries which Mexico is in a clear disadvantage position. Also is detailed in paragraph 10 of that agreement signed by the General Director of Aeronautics, this agreement forces "aviation authorities of both nations allowing airlines to operate air services immediately and foreseeing the issuance of licenses operating, contrary to the provisions of articles 76 fraction I and article 89 fraction X of the Constitution. *La Jornada*. 09/September/11.

News | September

Extract of Mexican Aviation News

Mexico invests 17,000 mdp in airport.

Mexico has invested 17 thousand 323 million pesos from 2007 to 2011 on the modernization and equipment of airports, as on the new terminals in Huatulco, Mérida and Oaxaca, the new airport in Puerto Peñasco and expansions in Toluca and Cuernavaca airports. *El Financiero*. 20/September/11.

Aviation Industry hasn't recovered the precrisis level.

The aviation industry in Mexico is not showing an enough growing to recover the levels recorded before the crisis of 2008, as passenger traffic has registered a drop of the nine percent from the mentioned year. *Milenio*. 20/September/11.

DGAC point out an emergency for an alternate airport.

The General Directorate of Civil Aviation stated that the International Airport of Mexico City is reaching the limit of its capacity, being urgent to have an alternate airport. *Reforma*. 23/September/11.

News | September

Extract of Mexican Rail News

Next Suburban Train in Chalco will be bid in December.

The Secretary of Communications and Transports could relaunch at the end of this year the bid to construct the line number three of the Suburban train that runs in its first phase 13.2 kilometers from Chalco to la Paz. This could happen after the conclusion of the actualization of the studies of demand, stroke, equipment and systems that took place last July. *Notimex*. 02/September/11.

While the world advance in the use of railway, Mexico goes back.

Its really necessary that México advance in the construction of railways and less highways, considering international examples like Europe, Asia and Southamerica in which railroad is a great transportation and is also very important in economic relevance, said Senator Francisco Alcibíades García Lizaldi. He also urged to the Executive that through the Secretary of Communications and Transport, revitalize the railway system of passengers and continue with the construction of interurban and suburban trains. *Uno mas uno*. 10/September/11.

Suburban Train and Mexibús: The new transportation in the Valley of México.

Massive transportation in the valley of México has taken a new impulse in the last six years with the creation of the Suburban train and the Mexibús system, that links México City with a lot of municipalities of the metropolitan area of the State of México. Some of the main Works in public transportation are underway and have the participation of the federal and state governments. The suburban train that travels from Cuautitlan to Buena Vista cost 12 billion of pesos, and Mexibus, cost 1 billion 150 thousand pesos. *El Semanario*. 14/September/11.

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