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Can amparo be utilized to seek the suspension of an airline's operations?

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L A T A M

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* IN COLLABORATION WITH GERARDO REYES.

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 how high above them those rights would extend. They decided on, Ad coelum et ad inferos, meaning that their property rights would extend as high up as the heavens and all the way down to hell.

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Can amparo be utilized to seek the suspension of an airline's operations?

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In previous articles we have discussed the creation of the state-owned Aerolíneas del Estado Mexicano S.A. de C.V. ("Mexicana"). These articles focused mainly on the reforms related to the Airport Law and Aviation Law that currently authorize the state-owned company of the public-federal administration to provide national public air transport services and the figure of direct allocation (asignación)¹.

Mexicana commenced operations on December 26, 2023, with fourteen routes including Tulum, Puerto Vallarta, Zihuatanejo, Acapulco and Mazatlán, and with plans to operate more routes soon². However, less than one month after the commencement of Mexicana's operations, a troubling debate has emerged regarding Mexicana's viability, triggered by certain citizens' claims that Mexicana has operated certain routes with either only a few passengers on board or with the aircraft completely empty³. As we all know, operating an aircraft incurs significant expenses including fuel costs, maintenance and repairs, crew salaries, insurance, hangar or parking fees, navigation and landing fees and training and certificate. Therefore, the public has started to ask questions about the perceived mismanagement of public resources and the negative impacts to the environment which could give rise to an additional question about whether there is a way to prevent the government from continuing to wastefully spend money on a company created on the president's whim⁴. To answer this question, it would be necessary to consider whether it is possible to promote a legal action against the continuity of Mexicana's operations. Perhaps, the legal means to achieve this would be to interpose an Amparo⁵. For such purpose, we would need to analyze whether Mexicana can be considered a responsible authority according to the Amparo Law. Article 5 fraction II of the Amparo Law establishes:

Article 5:

(...) II. The responsible authority, assuming such a character, regardless of its formal nature, is the one that issues, orders, executes, or attempts to execute the act that unilaterally and mandatorily creates, modifies, or extinguishes legal situations; or omits the act that, if performed, would create, modify, or extinguish said legal situations.

For the purposes of this Law, individuals shall be considered the responsible authority when:

- I. *individuals shall be considered as the responsible authority when they perform acts equivalent to those of an authority.*

"...the public has started to ask questions about the perceived mismanagement of public resources and the negative impacts to the environment ..."

1.- 2023, May 15). Is the government airline really the airline of "well-being"? Retrieved from https://asyv.s3.us-east-2.amazonaws.com/COELUM_MAY_2023_db3c0664ad.pdf.

2.- Associated Press. (2023, December 6). Inicia operaciones nueva aerolínea militar mexicana con vuelo al Caribe. Retrieved <https://apnews.com/world-news/general-news-domestic-news-domestic-news-international-news-9eced8babe755f7133c71a014c1b2af4>

3.- Nación321. (2024, January 10). ¿Qué exclusivo! Avión de Mexicana vuela solo con un pasajero desde el AIFA. Retrieved from ¡Qué exclusivo! Avión de Mexicana vuela sólo con un pasajero desde el AIFA (nacion321.com)

4.- In the 2024 Income Law, an amount of \$119,999,999,999 Mexican Pesos has been allocated to the mass passenger transport project.

5.- Amparo refers to a legal remedy granted by a court to safeguard an individual's constitutional rights against violations by authorities or other parties. It's commonly used in Mexico, as a legal tool for constitutional protection. Amparo proceedings allow individuals to challenge government actions or laws they believe infringe upon their rights, seeking judicial review and potential remedies such as injunctions or compensation.

- II. *These acts affect human rights; and*
- III. *whose functions are determined by a general norm.*

Firstly, the legal precedent Authority for Amparo Proceedings discusses the Supreme Court's decision to interrupt the precedent which use to define "authorities" for amparo purposes as those individuals who have the force of law at their disposal. The court argues that changes in the application of this precedent are necessary due to the reality with growing state intervention in various activities including the development of the quasi-state administration formed by state-participated companies. The court emphasizes that the traditional concept of authority no longer universally applies and must be considered reflecting the specific circumstances or acts. It suggests that, in amparo trials, judges should examine whether the entity in question is legally authorized to make decisions unilaterally affecting the legal sphere of the interested party, considering the current legal framework and the nature of the act⁶. This could potentially be relevant if it can be proven that Mexicana's unilateral actions affect the legal sphere of individuals.

"...based on the previous laws and precedents, the admission of an amparo lawsuit pointing Mexicana as the responsible authority could potentially align with Article 5, fraction II of the Amparo Law, given that the three requirements are satisfied."

Secondly, in respect to rights violated, article 31 of the constitution establishes that citizens must contribute to public expense in a fair and proportional manner⁷ while article 134 of the constitution obligates the government to manage these funds with efficiency, effectiveness, economy, transparency, austerity, and honesty to achieve the state's objectives⁸. In accordance with the above, citizens possess a legal foundation to advocate for the responsible administration of public resources, ensuring the realization of intended goals, which shall include social welfare, essential public services and programs.

Besides, every citizen possesses a justified interest in ensuring that the government does not infringe his entitlement to a healthy environment. Airplanes play a role in environmental pollution by releasing CO₂, nitrogen oxides, and other particles, which have adverse effects on both air quality and human health⁹. According to studies, the aviation industry is estimated to emit approximately 192 grams of CO₂ per kilometer¹⁰ and per

6.- Suprema Corte de Justicia de la Nación. (1997). Jurisprudencia. Gaceta del Semanario Judicial de la Federación, I.3o.A. J/16, Tomo V, página 383. Detalle - Tesis - 199459 (scjn.gob.mx)

7.- Article 31 of the Constitution of the United Mexican States ("Constitution"). Establishes the obligation of Mexicans: (iii) IV.- To contribute to public expenses, both Federation and the States, Mexico City, and the Municipality in which they reside, in a proportional and equitable manner as established by the laws.

8.- Suprema Corte de Justicia de la Nación. (1997). P. XXVII/97. Semanario Judicial de la Federación y su Gaceta, V, 11 Detalle - Tesis - 199459 (scjn.gob.mx)

Article 134 of the Constitution. - The economic resources available to the Federation, the states, the municipalities, and the territorial demarcations of Mexico City will be administered with efficiency, effectiveness, economy, transparency, and honesty to satisfy the objectives for which they are intended. (...)

Article 1 of the Federal Budget Law. - (...). Those obligated to comply with the provisions of this Law must ensure that the administration of federal public resources is carried out based on principles of legality, honesty, efficiency, effectiveness, economy, rationality, austerity, transparency, control, accountability, and gender equity. (...)

9.- ICAO. (2021). Airplanes play a role in environmental pollution by releasing CO₂, nitrogen oxides, and other particles, which have adverse effects on both air quality and human health. Retrieved https://www.icao.int/environmentalprotection/Documents/EnvironmentalReports/2022/ENVReport2022_Art18.pdf

10.- Statista (2024). Carbon footprint of select modes of transport per kilometer of travel. Retrieved <https://www.statista.com/statistics/1185559/carbon-footprint-of-travel-per-kilometer-by-mode-of-transport/>

passenger. It is estimated that 150 to 200 passengers are typically transported in domestic flights in Mexico, so the problem is exacerbated when flights operate with minimal passengers or are nearly empty, resulting in disproportionately high pollution levels. Additionally, according to precedent issued by the court it is not necessary to prove the environmental damage in accordance with the precautionary principle¹¹.

Thirdly, Mexicana's actions are regulated and terminated in accordance with the Civil Aviation Law. As an example, article 2 section XXVIII defines these entities as service providers and Article 10 Bis establishes that the Secretariat of Infrastructure, Communications and Transport has the authority to grant assignment titles to para-state entities of the Federal Public Administration, allowing them to provide the regular national air transport public service and establishes their rights and obligations.

Furthermore, as discussed in previous editions of COELUM, the allocation title is indefinite and will only end when substantial evidence proves the absence of reasons such as public utility, general interest, social interest protection, or national security in justifying its continuation under the Civil Aviation Law. Therefore, the government's vision for Mexicana involves it offering air transport services for strategic objectives, such as ensuring connectivity to remote areas, fostering economic development, or safeguarding national security. So, we could say that it seeks to carry out an inherent act of the state. As a side note, if the state's interest is only to ensure connectivity within the country, then routes currently operated by multiple airlines are not necessary.

To conclude, based on the previous laws and precedents, the admission of an amparo lawsuit pointing Mexicana as the responsible authority could potentially align with Article 5, fraction II of the Amparo Law, given that the three requirements are satisfied. However, the likelihood of someone filing an amparo and a judge subsequently ordering the suspension of the airline's operations is unlikely, the outcome would of course depend on specific circumstances, the legal framework invoked, and the judge's discretion.

Hopefully the operation of the Mexicana will increase so that the funding provided by the government to the airline becomes progressively lower in the next years.

11.- Suprema Corte de Justicia de la Nación. (2023). 1a./J. 79/2023 (11a.). *Gaceta del Semanario Judicial de la Federación*, Libro 26, junio de 2023, Tomo IV, página 3569. <https://sjf2.scjn.gob.mx/detalle/tesis/2026571>

COELUM.

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