

A Comparison between Remedial Systems in Canada and Mexico

The recognition and protection of human rights are some goals that international organizations and a large number of governments have tried to achieve since the second half of the 20th Century. Global and regional treaties have been signed to establish measures that protect human dignity and propose remedies to those whose rights and immunities have been affected by wrongdoings made by official agents. In the same way, domestic laws have been enacted by several nations in order to ensure the observance of those international agreements. Two of the most influential documents regarding the protection of human rights and remedial measures in the international context are the *Universal Declaration of Human Right* 1948 (UDHR) and the *International Covenant on Civil and Political Rights* 1966 (ICCPR) and both documents had been signed by Canada and Mexico. In this sense, Mexico and Canada have implemented domestic systems with constitutional hierarchy that recognize protection of human rights and that provide remedies for the breach of individual immunities. Both traditions are similar in essence, but differ in method, implementation and their associated legal consequences. In this paper I will make reference to the sources of remedies in the Mexican Constitutional system and their implementation and I will highlight some of the similarities and differences between the Mexican and Canadian systems.

In the UDHR, 1948, the international community recognized fundamental rights and freedoms¹ for all human beings and prohibited any type of discrimination and unlawful

¹ UN Charter Articles 1, 2, 3, 4, 5, 6, 7 <<http://www.un.org/Overview/rights.html>> accessed 2 September, 2008

act, such as slavery, torture, or any inhuman or degrading treatment. Moreover, Article 8 is the cornerstone of the system of remedies in the majority of democratic countries all around the world, because it prescribes the universal right to “*an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law*”². Following that tradition but with a wider conception, Article 2 of the ICCOR, 1966³ provided that each State Party has the duty to ensure that competent authorities, such as administrative tribunals, courts or legislative bodies, will enforce remedies when they would be granted. As a result, Canada and Mexico⁴ have accepted without reserve, terms and conditions of Article 2, such that, their domestic legislations provide statutory provisions with constitutional hierarchy in order to ensure that their legal systems are congruent and in accordance with this humanitarian principle.

Canadian and Mexican Constitutional remedies systems are similar by three factors: firstly, both set out a list of rights, freedoms and immunities in favour of any person in their own jurisdictions; secondly, both recognize the principle of *constitutional supremacy* and, thirdly, neither system imposes any standard, whatsoever, as how to assess what constitutes unequal or unlawful treatment. The definition of what exactly constitutes a breach of rights, freedoms or immunities in the context of remedies is left to the courts.

² *Ibid*, Article 8

³ ICCPR Article 2, *Each State Party undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy* <<http://www1.umn.edu/humanrts/instree/b3ccpr.htm>> Accessed 3 September 2008.

⁴ Canada, on May 19, 1976 and Mexico, on March 23, 1981.

It is established in Article 1 of the Canadian Constitution Act, 1982⁵ that: “ *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.* ” A similar provision is written in Article 1 of the Political

Constitution of the Mexican United States⁶ 1917, (PCMUS) that reads as follows:

In the Mexican United States all individuals shall be entitled to the privileges and immunities granted by this Constitution. Such privileges and immunities shall not be restricted or suspended, but in the case and under the conditions established by this Constitution.

As we can see, the CCA 1982 has distinguished between freedoms and rights. Some freedoms set out are freedom of conscience, opinion, expression, assembly and association⁷. Some rights recognized by the Constitution Act are life, liberty and security and political and judicial prerogatives⁸. On the other hand, in the Mexican constitutional system, personal privileges and immunities are known as *individual warranties*⁹ with no particular difference between rights and freedoms. For some commentators,¹⁰ these individual warranties are encompassed in four big categories: liberty, equality, safety and property¹¹, but this identification exists just in the academic field.

⁵ The *Canadian Charter of Rights and Freedoms*, is part of the Canadian Constitutional Act, 1982

⁶ Formal name for Mexican Constitution, enacted on February 5th 1917

⁷ CCA, Article 2 (a), (b), (c) and (d)

⁸ CCA, Articles, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

⁹ PCMUS, First Title, Chapter 1, <<http://www.juridicas.unam.mx/infjur/leg/legmexfe.htm>> Accessed 3 September, 2008

¹⁰ Ignacio Burgoa, *Individual Warranties (Garantías Individuales)*, Porrúa, 1996, Mexico, At. p 34

¹¹ Privileges and prerogatives are described in PCMUS, Articles 1 to 26. This Chapter has 29 Articles, but Article 27 is regarding original property of the Mexican Nation and Article 28 is regarding the prohibition of monopoly activities in Mexican soil.

In Canada, the statutory source of remedies is found in the Constitution Act, 1982, in its articles 52 and 24. Article 52 reads as follows:

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force of effect.

(2) The Constitution of Canada includes

(a) the Act 1982, including this Act;

(b) the Acts and another referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b)

Similar provisions are found in the PCMUS 1917, in its article 133:

This Constitution, and the Laws enacted by the Congress which shall be made Pursuance thereof; and all Treaties made, or which shall be made, by the President of the Republic with the Senate's consent shall be the supreme Law of the Union. The Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State contrary notwithstanding.

The two articles mentioned above make clear that Mexican and Canadian systems recognize the principle of constitutional supremacy. In other words, in these countries there is no power, law or authority above the popular sovereign embodied in the constitutional text. Therefore, any law or act of official servant that limits or restricts rights and freedoms or privileges and immunities without legal justification shall be considered unlawful and will be the source of legal remedy from the State for the person affected.

The explicit provision regarding constitutional remedies in Canada is found in article 24:

24. (1) *Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

(2) *Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights of freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into dispute.*

Using remedies by courts have been a usual practice since the pre-Charter era. These remedies are: damages, injunctions, declarations, standing, prerogative writs; and in the context of criminal law: improper exclusion of evidence, stay of proceeding and *habeas corpus*. Remedies are affected *ex-parte* action, which means that only the person whose rights have been disturbed by official activity is entitled to exercise his or her claim of remedy before a proper court. Similar conditions exist in Mexico as will be described further in this paper.

Provision in regards to remedial actions in the Mexican constitutional system were established in 1857¹² and the idea of limitation of privileges and immunities can be executed only in extraordinary cases when the Mexican Nation would face: “*invasions, serious disturbance of public peace or any situation which puts society in a great danger or conflict*”¹³. This exceptional situation has to be ordered just by the President of Mexico with the consent of all his legal cabinet and the National Congress. This measure can be executed in a whole Mexican territory or in a specific location; however, its

¹² Articles 101 y 102 Federal Constitution 1857, today Articles 103 and 107 Constitution 1917

¹³ PCMUS Article 29

implementation has to be general and with temporal effects. For that reason, a restriction or limitation of privileges and immunities against an individual without the legal requirements mentioned above, means that the affected is entitled to exercise his rights and claim remedial measure by the government. These explicit provisions of remedies are found in Articles 103¹⁴, 107 and 113 of the PCMUS.

The first two articles (103 and 107) comprise the foundation for the constitutional procedure known as an *Amparo*¹⁵ trial, the main goal of which is to restore personal rights or immunities violated by unconstitutional laws or by official agents. On the other hand, article 113 is divided into two parts: the first is in regards to the legal responsibility of public servants in the wrongful exercise of their duty; and the second part, is the recent ability of private parties to seek damages and compensation as a result of the wrongful administrative activity of the federal government¹⁶.

The *Amparo* trail finds its constitutional status in the Federal Constitution of 1857 as it was encompassed in articles 101 and 102. The original nature of this procedure was as a constitutional control exercised by the judiciary branch in order to prevent possible abuses of power committed by the executive or legislative branches. In the *Amparo* process, violations to individual rights are ventilated and it may bring about modification or revocation of the act causing a legal damage. The trial's main objective is to solve the existent controversies from: (a) laws or acts of authorities violating individual rights; (b) laws or acts of federal authorities which restrain the States' sovereignty, and (c) laws or acts of the States which invade Federal authority. Nevertheless, this constitutional control

¹⁴ The Federal Tribunals and the Federal Courts shall resolve any controversy derived from: I. either a law or authority's actions which violate individual privileges and immunities.

¹⁵ *Amparo means protection*

¹⁶ Addition of paragraph 2, on June 14, 2002, published on the Federal Official Diary

has become a concrete base of remedies in favour of those whose particular rights have been affected by unconstitutional provisions or unlawful acts. Its regulation and statutory provisions are contemplated in article 107, under the following principles:¹⁷

“All special trials directed to protect privileges and immunities shall start by an affected individual lawsuit”¹⁸;

This is the principle of Affected *Ex-Parte* Action. Only a party affected by an unconstitutional law or unlawful act is entitled to exercise the constitutional action. The plaintiff must prove that the unlawful act or provision has produced a direct and personal grievance in his or her personal rights or immunities. In others words, any claim of this nature may not be started *ex-officio*. This situation could be quite similar to the inclination of the Canadian Court, until the mid-1970’s, such that, only people directly affected by a statute has standing to seek a declaration¹⁹”

*The resolution of such trials shall always produce individual effects in order to protect and prevent a single person’s privileges and immunities from being violated without making a general declaration with respect to either the law or the actions which caused the submission of the original lawsuit*²⁰.

This provision is known as the principle of Relativity and it means that decisions taken by Constitutional Courts in Mexico do not have *erga-omnes* effects. In other words, they do not accept general declarations or legal consequences for third parties with no participation in the constitutional trail. This is an essential difference with the common law tradition and particularly with respect to Canadian remedy law. The length and

¹⁷ Regulatory Law of Constitutional Articles 103 and 107, 1935 best known as *Amparo* Law

¹⁸ PCMUS Article 107 (I)

¹⁹ Kent Roach, *Constitutional Remedies in Canada*, s. 2.440

²⁰ *Ibid* (II)

extension of the legal consequences in the constitutional trial will be in accordance with the nature of the claim filed by the plaintiff. In this sense, if as result of the trial a statutory provision is considered unconstitutional, its effects will not only impact the plaintiff's rights and privileges; but will also result in obligatory observance of the individual until he or she derogated by the legislative or executive branch.

This provision also encompasses the principle of Strict Legal Right; in other words, federal courts must only decide on those violation concepts argued by the plaintiff and must not substitute them in its favour. Nevertheless, deficient claims can be corrected by the court in order to protect the interests of those who are in a disadvantaged position.²¹

The special trial shall be used against definitive resolutions which put the trial to an end as long as against such resolutions no ordinary modifying appeal can be made. The special protective trial shall be used to appeal violations which affect individual defenses, produce effects beyond the contested trial's result and which are committed either when the final resolution is made or during the contested trial's development, taking into account that in the latter case and whenever the appealed trial is a civil one, the violation has to be contested by either making an ordinary legal appeal or by arguing that such an ordinary appeal is a violation itself. Such further requirements cannot be fulfilled either in those controversies involving an individual's civil status or in those in which either public order or a family's stability is at stake;

²¹ In Criminal matter when the plaintiff is the accused and is under risk of any act against life or liberty; In Labour law, when the plaintiff is the employees; in family issues in order to protect minors; in land claims matters when the plaintiff is a small rural community

The special trial shall be used against violations which, after have been legally appealed, are committed during a trial, once it has been resolved or even within the trial's context and are impossible to correct, and

The special trial shall be used against actions affecting individuals who are not parties in the trial²².

These provisions are known under the name of Principle of Final decision. Ordinary judicial remedies must be exhausted except for those cases in which the law orders otherwise. In other words, ordinary and extraordinary procedures established by ordinary statutory provisions must to be exhausted before they are exercised and have access to the Constitutional control system. Nevertheless, some exceptions are considered such as claims regarding acts or procedures that put may cause real risk and endanger the life and personal freedom of the plaintiff.

Another special feature of this constitutional procedure is that harmful actions can be suspended by judicial resolution before the trial is over. The suspension shall be resolved by taking into account the alleged violation's nature, the feasibility of compensation and the harmful effects, which can be generated against others or against the public interest by granting the suspension. Such suspensions shall be ruled on resolutions of criminal trials once the special protective trial's lawsuit has been summated and on resolution of civil trials, once a plaintiff's security deposit has been made in order to repair any eventual harmful effects derived from the suspension. Such a deposit shall

²² *Ibid*, (III)(a), (b), (c)

be released only by an equivalent one made by the contesting party and which is intended to repair all harmful effects once the protective trial is resolved in the plaintiff's favour²³. This provision is in some way similar to injunctions in the Canadian tradition. The idea of which is to stop possible illegal actions in order to preserve the rights and freedoms of the plaintiff.

According to Article 107, fraction XVI of the Mexican Constitution, once the special protection has been granted, any repetition of the harmful action by the accused authority or any attempt by such authority directed to elude the resolution issued by the federal court, shall be punished by immediately removing such an authority and with the authority's prosecution and trial before a federal judge's jurisdiction as long the Supreme Court of Justice considers the authority's disobedience as an unjustified one. However, the Supreme Court shall grant any authority who has defied a federal resolution in a justified way, a reasonable period of time in order to comply with such a resolution. In this case, if the authority fails again to comply with the resolution, the Supreme Court shall proceed against him or her. Also, in some cases the Supreme Court can order compensations to be paid in order to comply with those federal resolutions that can be detrimental for society or which can economically affect individuals outside the controversy, which outweighs the economic benefits granted to the plaintiff by a favourable resolution. Likewise, the protected plaintiff has the right to request compensation from the authorized agency as long as the nature of the contested action allows for such a request to be made.

²³ *Ibid*, Article 17, (X)

Other sources of remedies in the Mexican constitutional system are found in the amendment made in 2002 to article 113, second paragraph that reads as follows:

Any harmful action against a private individual's wealth or rights, derived from the State's illegal administrative performance shall be challenged in an objective and direct way in court. The affected individuals shall be entitled to compensation under law.

Before the enactment of this provision, the ability to seek damages from the Mexican State as result of illegal performance was very limited, because as we saw above, the main goal of the *Amparo* trial is to restore the rights and immunities violated by unconstitutional laws or unlawful actions. Second paragraph of article 113 has its own statutory regulation²⁴, the purpose of which is to set out “*bases and procedures in order to recognize the right of compensation to those that without legal obligation have suffered damages in their assets or rights as a result of the irregular administrative activity of the State (government)*”²⁵. This provision is for those individual affected by wrongdoings made by federal public entities.

The spirit of this legislation is to ensure that Mexican domestic law is in accordance with the international agreement and covenant on the protection of human rights. A clear example is the explicit reference to the applicability of this provision to comply with decisions made by the Inter-American Human Rights Court and recommendations made by the Inter-American Human Rights Commission²⁶.

The goal of the compensation is to repair all damages, including both personal and moral damages, of an amount that cannot exceed 20,000 times the amount of the minimum

²⁴ *Ley Federal de Responsabilidad Patrimonial del Estado*, Federal Patrimonial Responsibility Law (FPRL) 2004, <<http://www.funcionpublica.gob.mx/leyes/leyfrpe.html>> , Accessed 2 September, 08

²⁵ *Ibid*, Article 1

²⁶ *Ibid*, Article 2, second paragraph.

wage²⁷ in Mexico City. The right to receive proper remedy by the Mexican Federal Government has to be exercised by affected *ex-parte*²⁸ before an Administrative Federal Tribunal.²⁹

Conclusion

As we observe above, Canada and Mexico have constitutional systems that are in accordance with international law on the protection of human rights. Both nations have adopted provisions in their fundamental laws in order to ensure remedial actions if personal rights, freedoms or privileges are unlawfully affected by government officials. It is true that the nature of remedial actions in both countries are different in conception, implementation and legal consequence, however, we can locate some similarities, such as their main goal: to restore rights and privileges unlawfully affected or limited by official entities. Additionally, other parallels can be found between Canadian remedies and those included in the Mexican constitutional system. Article 52 of the Constitution Act, 1982 and 133 of the PCMUS, 1917 have established the supremacy of the constitution in their own jurisdictions. In Mexico, in 2004 with the addition of the second paragraph of article 113 and its statutory regulation, individuals affected by an irregular administrative activity are entitled to seek damages before court; a situation that also is possible in Canada. Articles 103 and 107 recognize the right of any individual to attend federal courts if he or she has suffered any unlawful restriction in his or her constitutional privileges or immunities; the same situation is recognized by article 24 of the Constitution Act. The *Amparo* trial, which was originally designed as a constitutional

²⁷ *Ibid*, Articles 12 and 13 (II) second paragraph. Minimum in Mexico City is

²⁸ *Ibid*, Article 17

²⁹ *Ibid*, Article 18

control to prevent unlawful acts and excess of power, has become the most important source of remedial actions taken by the Mexican State. This procedure has mixed some of the most important remedies conceived by the common law tradition, but with peculiar characteristics. Federal Courts have legal power to suspend possible illegal acts made by official bodies or agents; dismiss criminal accusations without legal base or proper evidence; order legal compensation as a result of the breach of rights or immunities; exclude improper evidence in criminal trials etc. Although, this represents a large and considerable difference between Mexican and Canadian system: Courts are not entitled to produce general declarations in their decisions and for that reason, their legal consequences will affect only those who were parties in the *Amparo* trial.