**Comparative Analysis of Constitutional Protections in Canada and Germany**

Marie Pacquette

Literature Review

MSCJ 525

Columbia College

09/09/2024

**Comparative Analysis of Constitutional Protections in Canada and Germany**

A comparative literature review of their respective constitutions reveals the different methods Canada and Germany employ to defend fundamental rights. This review focuses on several key areas: procedural amendments such as due process, warrantless search and seizure, against self-incrimination, and right to counsel, which research sources have supported to show the contrast their systems have in solving legal problems (Hickey & Rancourt, 2022).

**Due Process**

 Due process to a particular individual or event refers to the process of providing him or their fair treatment in the legal framework. In Canada, for example, Section 7 of the Charter States clearly that any such taking of life, liberty, or security of the person shall be done in a manner that is consistent with the principles of natural justice (Hickey & Rancourt, 2022). They note procedural justice as the cornerstone of the legal process and its administration. Looking at the Canadian system, Hickey and Rancourt (2022) examine how the due process of law functions as part of this country's criminal justice system and how it balances state authority and the rights of people.

 In the German context, due process has been subject to the country's legal systems and incorporation into the European Union. Karakamisheva-Jovanovska (2020) considers the relationship between the rule of law and other systems of legal sources in the EU and reveals that Germany's commitment to the Rechtsstaatl Principle entails the priority of legalism and procedural protection. The German approach also represents the respect for procedural guarantees while, at the same time, being colored by Germany's rather different legal culture and experience.

**Search and Seizure**

 Canada and Germany have different legislation concerning search and seizure, which provides insight into how privacy interests can be protected while ensuring law enforcement requirements are met. In Canada, the Charter also has Section 8, which protects search and seizure, stating that a lawful authority must do and be reasonable (Hofman, 2020). Hofman (2020) explains this provision's precise rationale regarding privacy protection while enabling police activities in the Canadian courts.

Therefore, it could be stated that Germany adopts a very conservative approach towards furthering the extent of the powers of search and seizure, especially in the contemporary context associated with the use of new technologies. Wörner and Preetz (2020) look at the German Darknet-Criminal Law Draft, which seeks to regulate other new privacy problems to try and maintain a balance between the privacy rights of individuals and the security of individuals. The German legal framework focuses on defining clear legal frameworks and protection mechanisms against excessive legal actions.

**Self-Incrimination Protections**

 Protection against self-incrimination is essential since it helps make the legal system fair. In Canada, such an unauthorized means of drawing confessions is prohibited by Section 11 (c) of the Charter. Dunn (2021) explores the protection in detail when analyzing its relevance to the Mr. Big police investigations as having a valuable role in preserving the justice system

's fairness.

 As said above, Germany also has a fundamental principle, 'Nemo tenetur se ipsum accusare'—anyone cannot be compelled to accuse himself. Fernandes et al. (2024) analyze the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), thus strengthening this principle in the EU legal framework. Germany's laws and policies are based on standard human rights within the European context, focusing on the right against self-incrimination.

**Right to Counsel**

 Right to counsel is pivotal in providing fair legal representation during custodial interrogations and trials. In Canada, Section 10(b) in the Charter of Rights and Freedoms provides the right to retain and instruct a lawyer immediately if a person is arrested or detained. Khoday (2024) underscores this by contemplating cases like R. v. Dussault and R. v. Lafrance, pointing to the need to retain a lawyer in criminal trials to protect his/her rights.

 Germany also recognizes the right to counsel, as evidenced by its "Verständigung," commonly referred to as plea bargaining. Jahn and Schmitt-Leonardy (2020) have described the dynamics of bargaining regarding the consensual aspects of the criminal trial in Germany and the role of such negotiations in ensuring the adequate representation of defendants' interests. This approach proves that German copyright law cares about procedural justice and the defendant's rights.

**Other Protections**

 Laws in both Canada and Germany also protect civil and political rights, but Canada is better placed in terms of other forms of rights. Burchardt (2020) looks at how national and EU fundamental rights standards interface, considering the recent jurisprudence of the German Constitutional Court. This paper focuses on the German model that has covered how European Union human rights standards have been incorporated into the German legal framework.

 In Canada, Knox and Wagg (2023) examine the consequences of a conscientious objection policy across healthcare organizations that deny medical aid in dying, which raises a renewed discussion of the rights and liberties of an individual on the one hand and the duties and obligations of the state on the other. Bernheim and Brosseau (2023), among other sources, briefly describe Canadian criminal laws and constitutional rights, highlighting that the Canadian legal system needs to adopt more reforms to meet emerging legal issues.

Human dignity is well rooted in the German constitutional and legal frameworks, as described in the country’s well-developed legal system. Human dignity defines the German legal system and social protection, which Yermek et al. (2020) featured. Following this, their research focuses on the role of human dignity in the German legal system as part of Germany’s obligations to incorporate the concept in its legal system.

**Conclusion**

 In conclusion, the literature review aims to compare the constitutional rights of the two countries in terms of due process, search and seizure, the right against self-incrimination, and the right to counsel, which will be done. They both acknowledge individual rights but differ in terms of power, legal framework, experience, and culture. Such insights make us understand more about the perspectives of practicing constitutional rights and interacting with other legal systems.

**References**

Bernheim, E., & Brosseau, F. A. (2023). Canadian Criminal Law Review.

Burchardt, D. (2020). Backlash against the Court of Justice of the EU? The recent jurisprudence of the German Constitutional Court on EU fundamental rights as a standard of review. German law journal, 21(S1), 1-18.

Dunn, J. (2021). Mr. Big police investigations: the interrogation trilogy and Charter implications (Doctoral dissertation, Mount Royal University).

Fernandes, P., Gallo, D., & Nato, A. (2024). Stocktaking on the principle of nemo tenetur in the case law of the ECtHR and CJEU. EUROJUS, (2), 406-428.

Hickey, J., & Rancourt, D. (2022). State Coercion to Receive Medical Injections Confirms Conflicting Interpretations of the Right to Life, Liberty and Security of the Person (Section 7 of the Canadian Charter of Rights and Freedoms). Liberty and Security of the Person (Section 7 of the Canadian Charter of Rights and Freedoms)(October 14, 2022).

Hofman, D. (2020). " Between knowing and not knowing": privacy, transparency and digital records (Doctoral dissertation, University of British Columbia).

Jahn, M., & Schmitt-Leonardy, C. (2020). The German "Verständigung" and Consensual Elements in German Criminal Trials. German Law Journal, 21(6), 1134-1148.

Karakamisheva-Jovanovska, T. A covert or open "battle" between the three legal traditions in the EU (Rule of law, Rechtstaat and Ėtat de droit)–Critical assessments of the Anglo-Saxon versus Continental legal tradition in context of the EU future.

Khoday, A. (2024). A Lifeline During Custodial Interrogations? The Right to Counsel and Reflections on R. v. Dussault and R. v. Lafrance. The Right to Counsel and Reflections on R. v. Dussault and R. v. Lafrance (August 21, 2023). Supreme Court Law Review (2d), 115, 195-215.

Knox, M., & Wagg, A. (2023). Contemplating the Impacts of Canadian Healthcare Institutions That Refuse to Provide Medical Assistance in Dying: A Framework-Based Discussion of Potential Health Access Implications. American Journal of Hospice and Palliative Medicine®, 40(11), 1154-1162.

Wörner, L., & Preetz, N. (2020). The New German Darknet-Criminal Law-Draft–Darkening by Restricting Individual Rights–. Journal of Penal Law and Criminology, 8(1), 33-58.

Yermek, B., Zhanna, K., Dinara, B., Gulzhazira, M., Gulim, K., & Lidiya, B. (2020). Human dignity-the basis of human rights to social protection. Wisdom, (3 (16)), 143-155.