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Rights in the criminal process: a case study of convergence and disclosure rights

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21.1 Introduction

The subject of criminal procedure rights can be approached from many angles. Legal systems vary on whether and which rights they give, not only to criminal defendants but also to victims of crime, NGOs, prosecutors, witnesses, citizens, media and the public. Legal systems also vary on the legal status that criminal procedure rights have—as constitutional, international, statutory, common law or regulatory rights; on the nature and structure of these rights; and on how they are enforced. One of the themes of contemporary comparative criminal procedure literature has been that the spread of defendants’ rights around the world has accelerated the closure of the gap between common and civil law jurisdictions. According to this claim, the gap is closing because many civil law jurisdictions have moved away from an inquisitorial and toward an adversarial system by adopting more rights (see, e.g., Bradley xxi and xxiv).

This chapter analyzes this convergence claim by concentrating on the defendant’s constitutional right to disclosure or to obtain access to elements of proof collected by public officials. This right may not be the most representative or important, but it illustrates some of the complexities and subtleties around the convergence thesis and the debate about rights in comparative criminal procedure. Civil and common law jurisdictions have come to embrace this right as an abstract concept. But their different pre-existing institutional settings and conceptions of the criminal process have led common and civil law jurisdictions to define, debate and regulate this right in varying ways. The spread of rights is not a simple movement of convergence, but rather a more complex process that achieves convergence while simultaneously maintaining existing divergences and creating new ones between common and civil law jurisdictions.

Constitutional rights are seldom absolute. This chapter will also analyze law enforcement and national security considerations as another global converging force that has placed both explicit and implicit limits on constitutional rights to disclosure, especially in organized crime and terrorism cases. But once again, these law enforcement and national security pressures have played out somewhat differently in civil and common law jurisdictions.

Finally, the chapter will move beyond the common/civil law focus of traditional comparative criminal procedure scholarship by briefly comparing American, British and Canadian

regulations concerning the right to disclosure. The differences among these regulations cannot be explained in terms of legal traditions, but rather may depend on the contingencies of when these jurisdictions first recognized constitutional rights to disclosure as well as legislative responses to disclosure rights, including legislative assertion of competing rights on behalf of victims or other interests.

Other jurisdictions may be influenced by these and other contingent factors. The recognition of rights within the criminal process emerges as complex. Although some broad patterns of convergence are apparent, they are in turn influenced by legal and institutional traditions and by the concerns of the day.

21.2 The civil and common law dichotomy and rights in the criminal process

The difference between the criminal process in common law and civil law—also sometimes referred to as Anglo-American and Continental jurisdictions or, in a more abstract fashion, as adversarial and inquisitorial systems—has been at the centre of the field of comparative criminal procedure for over 200 years.

One way to conceptualize the differences between the criminal process in common and civil law is by concentrating on two contrasting features. First, in the common law tradition, criminal procedure is conceived as a dispute between two parties—prosecution and defence—before a passive umpire; while in civil law jurisdictions, criminal procedure is conceived as a unitary investigation run by impartial officials (see, e.g., Langer 2004). Second, lay people in a horizontal relationship with each other (e.g., in the form of the jury) have historically been the crucial decision-makers in common law countries, while legal experts who are members of hierarchical public bureaucracies have dominated in civil law countries (Damaška 1986).

These contrasting features are relative rather than absolute. They can be considered ideal types that no jurisdiction actually matches (Packer; Roach 2003). But even as ideal types, they are reflected in actual criminal justice practices and have been, to a certain extent, internalized by institutions and individual actors in common and civil law jurisdictions (Langer 2004).

The concept of rights has played an important role in the academic literature and in policy debate. According to some scholars, the different regulation of defendants' rights was one of the crucial differences between the common law and civil law criminal process from the thirteenth to the nineteenth centuries, because common law jurisdictions conceived criminal defendants as subjects with rights, while civil law jurisdictions conceived criminal defendants as objects of investigation (see, e.g., Maier). This understanding would also be reflected in the different approaches to remedies as exemplified by the iconic status of *habeas corpus* in common law systems, with its focus on the liberty of the subject. Possible reasons for the later development of procedural rights in civil law jurisdictions would include a more authoritarian conception of the state and the administration of criminal justice in continental Europe than in England; the higher importance that codes and legislatures have played vis-à-vis judges in the regulation of procedure in civil law; and the special focus on substantive rather than procedural criminal law in civil law jurisdictions. Whatever its historical accuracy, this characterization no longer describes the two systems, because many members of both types of systems today conceive defendants as subjects with rights, as reflected in domestic constitutions, regional and international human rights instruments, codes and statutes, judicial decisions and actual institutional practices (Bradley; Trechsel).

There has also been a debate in comparative criminal procedure on whether common or civil law countries are more respectful of defendants' rights. One group has claimed that civil law jurisdictions emphasize accuracy over fairness, are less protective of defendants' rights during police investigations, tend to hold defendants in pretrial detention for longer periods or establish weaker trial rights (see, e.g., Damaška 1973; Hodgson; Maffei; Vogler). Other studies have challenged at least some of these characterizations and argued that civil law jurisdictions have other institutional mechanisms that differ from rights to check prosecutors' and judges' power, or have claimed that in actual practice civil law countries may be more respectful of defendants' rights because they do not rely on the widespread use of guilty pleas and plea bargaining and impose milder sentences (Langbein 1979; Langer 2006; Roach 2010b; Ross 2008; Van Kessel) (on punishment and constitutional law more generally, see [Chapter 16](#) in this collection).

A third line of inquiry has sought to explain why certain rights have been defined or debated in a different fashion in common and civil law jurisdictions, given pre-existing differences between them. For instance, it has been argued that there are two different conceptions of the right to privacy in the United States and continental Europe, respectively relying on the ideas of liberty and dignity, and each of these conceptions would have deep historical roots (Whitman 2004).

21.3 The right to know the results of the investigation run by public officials

The right to disclosure has not been explicitly included in constitutions and human rights instruments in either common or in civil law jurisdictions. Rather, courts and legislatures have held that this right is part of the concept of more general rights explicitly established in constitutional and human rights documents such as due process (*Brady v Maryland* in the US); the right to make full answer and defence that would itself be part of the right not to be deprived of liberty except in accordance with the principles of fundamental justice (*R v Stinchcombe* in Canada); the right to have adequate facilities for the preparation of one's defence (see, e.g., *Jasper v United Kingdom* in the European Court of Human Rights); the right to a (fair and public) hearing (*Edwards and Lewis v United Kingdom* in the European Court of Human Rights; Section 103.1 of the German Basic Law); and the rights of defence (see, e.g., Pradel 2004, § 504, regarding France). One of the main rationales for including the right among fundamental rights has been that it is a crucial tool for the defendant to be able to mount a meaningful defence and exercise his other rights. The right to disclosure provides another example of the proliferation of implied rights that are the product of interpretation of basic and general norms. The judicial and legislative creation of disclosure rights underlines the dynamic nature of such rights and the possibility of contraction of rights and the assertion of new and competing rights (Devins & Fisher).

To the extent that both civil and common law jurisdictions have embraced the right to disclosure as a fundamental one, there has been convergence between these two types of jurisdictions at an important level. But the way this abstract concept has been adopted has reproduced pre-existing differences between these jurisdictions and created new ones.

Different expressions have been used to refer to disclosure rights that reflect different conceptions of it. While in civil law jurisdictions it has been defined as the right to access the file (as reflected by expressions such as the *droit de consulter le dossier* in French, *Akteneinsichtsrecht* in German, *derecho a examinar el expediente* in Spanish), in common law jurisdictions the right has been defined as the right to disclosure or discovery of an open-ended list of items,

typically possessed by the prosecutor but also at times possessed by the police and other agencies.

The reference to the dossier in the civil law formulation is not coincidental given the central role that the dossier has played in an administration of justice conceived as a Weberian bureaucracy run by impartial legal professionals. In such a conception, investigating officials are supposed to document all their procedural activity—including the gathering of elements of proof. And even if many civil law countries have established public and oral trials, the written dossier still has an important weight in adjudication. First, certain elements of proof collected in the written dossier during the police and pretrial phases—including statements—can be treated as evidence in many civil law jurisdictions (Maffei; Summers). In addition, the written dossier is read by at least one of the members of the trial court before trial—which can create preconceptions about the case—and is used by the court to decide which evidence should actually be presented at trial and in which order, and to interrogate witnesses and expert witnesses at trial.

In contrast, in common law jurisdictions, the right to disclosure does not make a reference to any privileged locus. The historical centrality of the trial by jury as the crucial adjudicatory moment in the criminal process de-emphasized the importance of the pretrial phase and contributed to keeping it relatively informal and flexible. As a consequence, police and prosecution do not need to document all their procedural activity. This means that even a prosecution office with an open-file policy toward the defence may not fully discharge its disclosure duties because there may be information and elements of proof that have been identified in the investigation by public authorities but which have not been included in the prosecutorial file. It also means that the elements the prosecutor has to disclose to the defence include more than notarized documents and real evidence, such as informal notes taken by the police or the name of potential witnesses. It also implies that the prosecutor may have to do more than simply give access to something that is already there and, rather, must actively identify what elements found in the investigation fit the disclosure criteria. The decentralized nature of adversarial disclosure may also reflect the idea of a decentralized state and the idea of a trial as a form of dispute resolution that is similar to that used to resolve civil disputes between private parties in common law. The adversarial system encourages competitive parties to search for the ‘smoking gun’ that even the government may advertently or inadvertently hide, while the civil law still trusts the dossier and those who compile it (Damaška 1986; Kagan).

Differences between civil and common law jurisdictions may also help explain the history of the right in each of these legal traditions. Given the centrality and weight that the written dossier has had in civil law, it is not surprising that this right has a longer history in these jurisdictions as it would be almost impossible for the defence to meaningfully participate in the criminal process without knowledge of what the dossier contains. For example, even at the height of inquisitorial procedures in continental Europe, according to certain legal authorities the judge was required to disclose incriminating evidence or give the defendant access to the dossier after the collection of incriminating material (Damaška 2011). According to the highly influential Napoleonic *Code d’instruction criminelle* (1808), defence attorneys could make copies of those parts of the dossier that they considered useful for their defence before the trial before the assize court (art 305). And the *loi Constant* (1897) in France established that the defence attorney could access the dossier during the pretrial phase to assist the defendant during his pretrial interrogations (see, e.g., Pradel 2004, ¶ 401). In modern Germany, the original 1877 version of the Criminal Procedure Code already established that the defence attorney was authorized to see the written dossier after the conclusion of the preliminary investigation or

after the issuing of the indictment; and in the 1964 reform of the Code, the right to access the dossier was established as a general principle (Lüderssen & Jahn, 1995).

In contrast, the United States federal system included such a right at a statutory level only in 1946 with the promulgation of the Federal Rules of Criminal Procedure (see, e.g., Miller *et al*, 753), and the US Supreme Court held that the right had constitutional status that would apply to the states in *Brady v Maryland* in 1963. In Canada, the Supreme Court held that the right had a constitutional status only in 1991 in *Stinchcombe*. In England, disclosure obligations were affirmed in the early 1990s in a number of cases stemming from miscarriages of justice (*R v Ward*) and then were subsequently subject to statutory regulation and restrictions (Corker & Parkison). One can explain this later reception of the right by common law countries as a consequence of a conception of criminal procedure as a dispute resolution process run by self-interested parties rather than as an official process concerned with accuracy and administrative regularity. In adversarial systems, each of the parties in both public and private disputes could plausibly claim that the results of their investigations were theirs and 'the element of surprise was one of the accepted weapons in the arsenal of the adversaries' (*Stinchcombe*). That said, the idea that parties in the adversarial system are self-interested is not absolute and the later assertion of disclosure rights in the United States, England and Canada was also accompanied by assertions about the ethical responsibilities of prosecutors to ensure that justice was done and accurate results achieved at trial.

This brief historical description also reveals that the right to disclosure in common law systems has emerged primarily from case law. Cases such as *Brady* in the United States, *Ward* in England and Wales and *Stinchcombe* in Canada have assumed iconic status in the legal system even when subject to statutory refinement. In contrast, disclosure in many civilian systems is based on explicit obligations in various Codes. Even as the systems converge towards greater disclosure rights, they do so in a manner that follows distinct legal methodologies, reflecting the respective bias of common law and civil law systems towards case-by-case adjudication and legislative regulation.

The elements covered by the right also differ between civil and common law jurisdictions. Since impartial investigators in civil law jurisdictions are supposed to document all their procedural activity, the defendant's access to the dossier means, in theory, access to the whole investigation. Full access may be delayed until some specific point in the proceedings or in certain situations, but there is no question that the defendant will get access to the whole dossier at some point before trial. The question has been thought of differently in common law jurisdictions with a criminal process that has a more informal pretrial phase and that is conceived as a dispute between two competing parties building competing cases. In these jurisdictions, the question has been framed as to whether disclosure should be complete or partial; and, if partial, what it should include. Framing the criterion as to what elements are material or favourable for the defence case has assumed that there is a separate defence case as opposed to one unitary investigation in which the defence participates as in inquisitorial systems. Consequently, the accused's right to disclosure in an adversarial system may depend in part on the specific defence presented by the accused.

Another set of differences involves identifying who has the duty to disclose or give access. In civil law countries, the impartial official in charge of the investigation is the one who has to give access to it to the defence, at least in the first instance. Depending on specific country regulations and the procedural phase the case is at, this official may include not only the prosecutor but also the police and the court. In contrast, in common law jurisdictions, the prosecutor is the official primarily responsible for disclosing elements to the defence. In fact, disclosure is sometimes seen as a matter of prosecutorial ethics as well as legal entitlement.

The role of the court in enforcing these duties in common law jurisdictions is limited to deciding controversial issues that the parties bring, not only because the court is generally not supposed to act on its own motion, but also because the court does not have enough information about the parties' investigations.

The discussion on whether the defence has a duty to disclose the results of its own investigation to the prosecution only makes sense within a criminal process conceived as a competition between the cases of the prosecution and the defence. This helps explain how the right to disclosure has been conceived as a reciprocal right in many common law jurisdictions—at least when it has a statutory status. In this understanding, the prosecution has to honour certain disclosure duties only if the defence is willing to disclose some of its own information or elements of proof in exchange (see, e.g., Federal Rule of Criminal Procedure 16 in the United States). The idea has been foreign to civil law jurisdictions that conceive criminal procedure as a unitary investigation.

When the right is triggered has also been debated and regulated differently in common and civil law jurisdictions. As common law jurisdictions have traditionally conceived the trial as the crucial adjudicatory moment, it is not surprising that some common law jurisdictions have conceived the right to disclosure as a trial right (see, e.g., *US v Ruiz*). Even common law jurisdictions that have challenged this position have instead argued that the prosecution's duty to disclose applies at the latest before the defendant elects a mode of trial or decides to waive his right to trial by jury by pleading guilty (see, e.g., *Stinchombe*). In contrast, in civil law jurisdictions, the right to disclosure generally applies much earlier in the pretrial process because the pretrial phase has historically had more weight. Depending on the jurisdiction and the circumstances of the case, the right may thus kick in before an attorney agrees to serve as counsel for the defendant (CPP Argentina, art 106), before the defendant is interrogated by the investigating judge (CPP France, art 114) or before a decision on pretrial detention (StPO Germany §147.2), to mention some of the choices.

Notice also that this right did not spread from common to civil law jurisdictions. In fact, it was adopted by civil law jurisdictions earlier than common law ones, not necessarily because the former were more due-process oriented than the latter, but probably because the civil law institutional setting with its more formal approach to the pretrial stage made apparent the need to establish and expand this right once the defence was given a (more) prominent role in the adjudication of criminal cases.

Finally, our analysis also suggests that civil law jurisdictions have given a broader scope to this right than common law ones as the former give earlier access to the defence to the whole investigation run by public officials. But once again, this broader scope is not the result of a more due-process orientation in civil law but of the way the issue has been thought of within a pre-existing set of institutional practices and conception of the criminal process. The broader scope of this right in civil law jurisdictions should also not be read as suggesting that civil law jurisdictions are more protective of defendant rights generally. In fact, as the next section will make apparent, some of the very features that have led civil law jurisdictions to give a broader scope to the right to access the dossier may have contributed to these jurisdictions being less protective of other rights of criminal defendants.

21.4 Law enforcement and national security concerns and the right to know the results of the investigation

Besides converging on an abstract agreement on the right to disclosure, civil and common law jurisdictions have been subjected to somewhat similar law enforcement and national security

pressure to limit the right's scope. These pressures have relied on the argument that there are elements of proof or information that the defendant should not get access to because it would jeopardize investigations (including those involving transnational co-operation); the safety or well-being of informants, public officials and potential witnesses; or efforts to prevent the commission of crimes. This argument has been raised especially, though not exclusively, in the context of organized crime and terrorism and reveals how pressures to limit rights can be a source of convergence with respect to those rights.

Once again, though, similar pressures to limit disclosure rights have played out differently in civil and common law jurisdictions due to the different institutional contexts already described. Civil law countries have focused on how these rights can be accommodated within a dossier system that generally has had a weaker right to confrontation and cross-examination, operates without a general rule restricting the use of hearsay evidence, and is more accommodating of unsourced or only generally sourced material and anonymous witnesses.

For example, the French Criminal Procedure Code establishes that, for offenses punished with at least three years' imprisonment, a judge may order that the identity of a witness not be revealed if there is danger to the life or physical integrity of that person or members of his family or other people close to him (CPP France, arts 706–57 to 706–63). In undercover operations, only the police officer in charge of the operation has to testify, while the identity of the undercover agents is protected (CPP France, arts 706–81 to 706–87; on similar practice and regulations in Germany, see StPO §110b and Ross 2007). In terrorism cases, police officers who testify do not have to reveal their names or their marital status (CPP France, arts 706–24 to 706–25.2).

France has not been alone in this respect, as reflected by the multiple cases on anonymous witnesses that have reached the European Court of Human Rights (for review of these cases, see, e.g., Maffei; Summers). The European Court of Human Rights has held that 'the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the [European] Convention [of Human Rights]' (*Van Mechelen v The Netherlands*, § 54). The Court has also said that even when the anonymous witness does not testify at trial, 'to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with Article 6(3)(d) [of the European Convention of Human Rights] provided the rights of the defence have been respected' (*Kostovski v The Netherlands*, ¶ 41). And even if the accused had not had the opportunity to examine the anonymous witness either during the investigation or at trial, a conviction may be valid if it is not based solely or in a decisive manner on the deposition of anonymous witnesses (see, e.g., *Van Mechelen v The Netherlands*).

Besides anonymous witnesses, a number of civil law jurisdictions have used unsourced information as another way to deal with the already described pressures. Jean-Louis Bruguiere, a retired judge who investigated many terrorism cases in France, has stated that the civil law system is more 'flexible' in responding to the threat of terrorism and that the 'common law system is too rigid, it can't adapt because its procedural laws are more important than the criminal law at its base' (Human Rights Watch, 13). Human Rights Watch has criticized the French system for making it difficult for defence lawyers effectively to challenge the very long and unmanageable case files produced in terrorism investigations that often contain unsourced intelligence materials (id, 17–18, 33–37). In Canada, a French investigative file was challenged by a person resisting extradition to France on terrorism charges in part on the basis that it featured unsourced intelligence that could not be challenged and that might have been obtained from foreign agencies on the basis of torture or other forms of mistreatment. The

Canadian government eventually withdrew this information and the accused was ordered extradited on the basis of other evidence (*France v Diab*).

Common law systems have also faced similar pressures with respect to witness protection and the protection of intelligence from disclosure to the accused. But use of anonymous witnesses and intelligence has been more difficult for them, given restrictions on hearsay evidence and a stronger right to confrontation and cross-examination at trial. One common method that common law jurisdictions have used to limit disclosure obligations are public interest immunity proceedings, which allow prosecutors to apply to judges for non-disclosure orders. In England and Wales, the courts have stressed the need for judicial approval of such orders. In a 1993 case that overturned a terrorism conviction in part because the Crown had not made full disclosure, the Court of Appeal criticized the prosecution for acting 'as a judge in their own cause on the issue of public interest immunity' (*R v Ward*, 648). Although British restrictions on disclosure are subject to review by the European Court of Human Rights, the Court has stressed that the entitlement to disclosure of relevant evidence is not an absolute right, and can be outweighed to preserve the fundamental rights of another individual or to safeguard an important public interest (*Edwards and Lewis v the United Kingdom*, ¶ 46).

Public interest immunity proceedings are also used in Australia, Canada, Israel and the United States to limit disclosure rights (Roach 2010a; Kitai-Sangero, 292). In some cases, these proceedings are even conducted at least in part on an *ex parte* basis without full participation from the accused for fear of revealing the secrets. Another available alternative is to allow the accused's interests to be represented by a special advocate, a security-cleared counsel (*R v H and C*).

In the United States, the *Classified Information Procedures Act* PL 96-456 allows prosecutors to obtain non-disclosure orders to protect national security interests. It embraces notions of proportionality by encouraging both the government and judges to provide the accused with disclosure of non-classified substitutes for disclosure of material that might, if disclosed, reveal confidential sources, harm ongoing investigations or breach promises of confidentiality made to other agencies. In some cases, the accused's lawyer may be granted access to the secret material subject to receiving a security clearance and undertaking not to disclose the material to the accused: this procedure has been used in notorious terrorism cases including those of bin Laden and Zacarias Moussaoui (*United States v bin Laden*, 121; *United States v Monssaoui*). Like the British special advocate procedures, these procedures demonstrate how common law systems are willing to qualify the lawyer/client relationship thought to be fundamental to the adversarial system in order to protect other important competing interests such as national security. They also underline how common law systems are prepared to limit the right to disclosure, albeit in a manner that employs nominally adversarial hearings and, as such, differs from the means used in civil systems where investigating judges and prosecutors place less emphasis on confrontation and can use unsourced intelligence in their investigative files. At the same time, real and perceived inflexibility of disclosure requirements in both the US and the UK may have played a role in encouraging both states to use alternatives to the criminal justice system such as military and immigration detention and control orders based, in part, on secret evidence (Roach 2011).

21.5 Comparing American, British and Canadian regulations

This chapter has so far revolved around comparison of disclosure rights in common law and civilian systems. Such comparisons provide a rich source of material for examining how

different legal and institutional contexts influence constitutional law. At the same time, however, the common law/civil law axis is not the only axis of comparison and it risks over-estimating the degree of similarities within such systems. In the remainder of this chapter, we will briefly compare American, British and Canadian approaches to disclosure to highlight some important divergences within common law systems. Similar diversity can also be found in civil law systems (see, e.g., Pradel 2002, 467–9).

In the United States, since *Brady v Maryland*, the focus of the constitutional right to discovery has been on favourable evidence to the accused's case, not on any material evidence or evidence that advances a side issue such as a rights violation. In addition, the constitutional right to discovery has been conceived as a trial right (*US v Ruiz*). Case law in the United States continues to provide nuanced divergences in defining what material must be disclosed and when it must be disclosed.

The Canadian Supreme Court in its 1991 *Stinchcombe* decision rejected the *Brady* approach as overly narrow and not responsive enough to the dangers of wrongful convictions. It held that the prosecutor had an obligation to disclose all relevant and non-privileged information in its possession before the accused elected whether to be tried by a jury or not. The different disclosure regimes in the two countries can be explained in part by increased concerns about wrongful convictions when the Canadian right was created by the Supreme Court. (As in the United States, a complex jurisprudence has developed over disclosure, particularly over remedies for failure to make disclosure, with the courts drawing fine distinctions between violations of rights that require new trials and those that do not. Even as they embrace broad disclosure rights, common law systems promote nuanced distinctions about the scope and remedies for such rights.)

The British system of disclosure provides a contrast with the American–Canadian system. Broad disclosure rights in the UK were originally the product of common law, not constitutional, decisions stemming from wrongful convictions and attempts by prosecutors to withhold relevant information without judicial approval (*Ward*). Britain has moved away from relying on court decisions to define the prosecutor's disclosure obligations, while legislation has both reduced disclosure obligations and made them more certain. This legislation has also imposed disclosure obligations on the accused with secondary disclosure in response to that disclosure. Disclosure rights today would ultimately be constitutionalized both through the Human Rights Act 1998 and the European Convention on which it is based, but in a more flexible form than in the United States or Canada. Constitutional rights may also reflect on the adequacy of statutory starting points suggesting the need for constitutional lawyers to study the latter as well as the former (Samaha). There is also some evidence that the standards on anonymous witnesses developed in civil law systems have migrated to England, which now provides for a use of anonymous witnesses that would not be accepted in either the United States or Canada (see Criminal Evidence (Witness Anonymity) Act 2008, [chapter 15](#)). The migration of constitutional ideas (including reasons for limiting rights) (Choudhry) transcends the civil/common law divide and seems to have been fostered by European human rights institutions.

21.6 Conclusions

This chapter has explored comparative constitutional law in two comparative axes. The first axis was to engage in macro comparisons of countries that have traditionally followed civil and common law systems. We have suggested that while the different legal traditions still have an influence, both systems have embraced broader disclosure rights for those accused of

crime. This convergence has occurred despite the absence of explicit provisions for disclosure rights in various constitutions. Although this convergence is important and belies simplistic dichotomies between rights-friendly common law democracies and more statist civilian systems, important differences remain. Although language and other barriers present challenges, we believe that comparative constitutional law should include comparisons across the common law/civil law divide and that modern developments such as supra-national rights protections instruments and international developments such as the International Criminal Court will assist researchers in bridging the common law/civil law divide (see, e.g., Jackson 2008). The divide must be bridged, but attention should still be paid to the enduring significance of these and other different legal traditions. The lessons of such comparisons might also be applied to different legal traditions beyond those of civil and common law, including the influence of religious and indigenous law (Glenn).

The second axis of comparison that we have employed is comparing disclosure rights of similar countries, in this case, Canada, the UK and the US. Such comparisons are a useful antidote to simplification and essentialization that may accompany more macro comparison of countries that have different legal traditions. The more micro comparisons of similar countries should also have a historical dimension as our findings suggest that matters such as the starting points for rights, the timing of rights and the contingency of interests and rights that compete with disclosure rights play an important role. In this sense, comparative constitutional law may follow the path of a history of legal ideas and legal reform (Langer 2007). Another approach would be to focus on events with global repercussions such as the increased emphasis on the prevention of terrorism since 9/11 (Roach 2011). This approach, consistent with our findings on the first axis of comparison, demonstrates both broad convergence in accepting limits on disclosure rights in the name of national security and witness protection, and continued divergence in the precise implementation of these limits on disclosure rights. Again, the glimpse of comparative constitutional law presented in this chapter is one of simultaneous convergence and divergence united by the continued impact of both different legal traditions and global pressures, but also divided by the historical specificity of the law as it is shaped in each country and each era.

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