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## Book Review

### CRIMINAL EVIDENCE AND HUMAN RIGHTS: REIMAGINING COMMON LAW PROCEDURAL TRADITIONS, by Paul Roberts and Jill Hunter (eds)<sup>1</sup>

MIKE MADDEN<sup>2</sup>

RECENT EXPERIENCES IN CANADA and a variety of common law jurisdictions clearly demonstrate how difficult it can be to integrate rapidly emerging—and sometimes expanding—conceptions of human rights into more traditional bodies of evidence law and criminal procedure. For instance, the question of whether a testifying complainant's right to exercise her freedom of religion by wearing a niqab on the witness stand prevails over an accused's right to make a full answer and defence through unobstructed cross-examination of the complainant was recently considered by the Supreme Court of Canada (SCC) in *R v NS*.<sup>3</sup> Whose rights prevail in circumstances such as this? Is there a principled basis within either the law of evidence or criminal procedure that can be relied upon when human rights claims are raised during a criminal trial?<sup>4</sup> In *Criminal Evidence and Human Rights*, the editors have assembled a very worthwhile collection of essays that, as a whole, provides readers with insight into how these kinds of important, politically charged questions are being confronted throughout the common law world. The book ultimately leaves readers with an

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1. (Portland, OR: Hart Publishing, 2012) 409 pages [Roberts & Hunter, eds, *Criminal Evidence*].
  2. Lieutenant-Commander, CD, Royal Canadian Navy. B.A., M.A., LL.B., and J.S.D. (candidate) at Dalhousie University's Schulich School of Law.
  3. 2012 SCC 72, 353 DLR (4th) 577 [NS], aff'g 2010 ONCA 670, 102 OR (3d) 161.
  4. In *NS*, a majority of the Supreme Court of Canada refused to lay down a rule that would always subordinate one right to another. Instead, the majority indicated that a witness's right to freely exercise her religion by wearing a niqab on the witness stand would yield to a defendant's right to a fair trial where removal of the niqab would be required in order to prevent a serious risk to the fairness of the trial; alternative measures could not prevent the risk; and the benefits would outweigh the harms of ordering that the niqab be removed (see *ibid*).

understanding of the universality of the struggle to implement lofty and abstract human rights as a means of securing fair criminal trials.

It should be noted at the outset that no single theme or argument unifies the essays in *Criminal Evidence and Human Rights*, nor perhaps could one reasonably expect such unity from a compilation that draws on the jurisprudence of South Africa, Malaysia, Canada, Scotland, Ireland, Hong Kong, New Zealand, and the European Court of Human Rights, in addition to less jurisdictionally specific legal theory. In fact, the editors explicitly acknowledge in their introduction that, apart from inviting contributors to address the core topic, editorial instructions to authors were “sparse and non-prescriptive.”<sup>5</sup> Nonetheless, readers will inevitably perceive a few common themes that run throughout the collection of essays, as I will explain below.

The editors suggest in their introduction that the book’s essays can be grouped into five broad categories: “(a) human rights in constitutional criminal procedure; (b) improperly obtained evidence; (c) human rights and criminal proof; (d) hearsay and confrontation; and, (e) fair trials for all.”<sup>6</sup> Although the sixteen essays that follow the introduction are simply presented as sequential chapters, they are clearly organized into groups dealing with each of these five topics. In some cases, (specifically, the exclusion of improperly obtained evidence and hearsay and confrontation law) the topical organization is quite useful since the respective essays deal with essentially the same narrow legal issues, albeit from different theoretical and jurisdictional perspectives. In addressing the other three (much broader) topics, however, the issues discussed by the contributors are so discrete that there really is not much substance connecting the essays within each group. Thus, while it is recognized that edited collections must be organized in some logical way, one should perhaps avoid any attempts to fit the essays in *Criminal Evidence and Human Rights* into watertight compartments. For instance, if readers are interested in confrontation and cross-examination law, they might find as much value in Peter Duff’s account of the largely ineffective body of Scottish law designed to protect sexual offence complainants from unnecessarily harrowing cross-examination (the book’s final essay, presumably within the “fair trials for

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5. Paul Roberts & Jill Hunter, “Introduction—The Human Rights Revolution in Criminal Evidence and Procedure,” in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 1 at 6.  
6. *Ibid* at 7.

all” category)<sup>7</sup> as they do in two of the earlier essays that are more explicitly dedicated to “hearsay and confrontation.”<sup>8</sup>

The collection’s real contribution to a recently reinvigorated body of literature dealing with theories of evidence and human rights law (and with the practical implementation of these subjects within the realm of criminal procedure) is at a higher level of abstraction than one can see when only looking at narrow legal issues from individual jurisdictions. *Criminal Evidence and Human Rights* follows a series of influential works published in these fields over the last ten years. Larry Laudan’s *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*<sup>9</sup> perhaps marked the beginning of a new academic conversation about evidence law by criticizing, from an epistemological perspective, many common law rules of evidence that purport to aid fact-finders in finding truth. Published shortly thereafter, Alex Stein’s *Foundations of Evidence Law*<sup>10</sup> argues against many of the epistemic claims raised by scholars like Laudan and suggests that the primary purpose of evidence law is to apportion risk in conditions of uncertainty, rather than to aid in finding truth. Hock Lai Ho’s *A Philosophy of Evidence Law: Justice in the Search for Truth*<sup>11</sup> takes evidentiary theory one step closer to the domain of human rights law by suggesting that evidence law, and the criminal process more generally, must communicate respect and concern for criminal defendants in addition to fulfilling its other instrumentalist functions. Finally, between 2004 and 2007 Antony Duff, Lindsay Farmer, Sarah Marshall, and Victor Tadros published a three-volume series on fair trial theory<sup>12</sup> in an attempt to explain how fair criminal trials must function if they are to achieve their purposes.

All of the above works consider at least some questions regarding the appropriate function of evidence law (as an epistemic or rights-protectionist tool), the necessary components of a fair trial, the perspective(s) from which fairness is measured, and the best ways in which human rights law can be integrated

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7. “Human Rights, Cosmopolitanism and the Scottish ‘Rape Shield’” in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 369.
  8. See Mike Redmayne, “Confronting Confrontation” in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 283; Chris Gallavin, “Reliability, Hearsay and the Right to a Fair Trial in New Zealand” in (*ibid*), 327.
  9. (New York: Cambridge University Press, 2006).
  10. (New York: Oxford University Press, 2005).
  11. (New York: Oxford University Press, 2008) [Ho, *Philosophy of Evidence*].
  12. *The Trial on Trial: Truth and Due Process*, vol 1 (Portland, OR: Hart Publishing, 2004); *The Trial on Trial: Judgment and Calling to Account*, vol 2 (Portland, OR: Hart Publishing, 2006); *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, vol 3 (Portland, OR: Hart Publishing, 2007).

with evidence law in criminal proceedings—questions that are again picked up and advanced through analysis of specific problems in specific jurisdictions in *Criminal Evidence and Human Rights*. In other words, Roberts and Hunter's collection of essays is significant not so much in its contribution to our knowledge about any of the five broad topics that it purports to consider, but rather in its ability to relate discussions from within these topics to larger philosophical questions about the nature of the relationship between human rights on the one hand, and more established evidence law and criminal procedure on the other hand.

Some specific examples from *Criminal Evidence and Human Rights* might help to illustrate how many of the essays tend to address common issues in evidence law and human rights theory. For instance, the question of whose rights must be considered when determining the content of a right to a fair trial arises in several different essays. In discussing South Africa's constitutional exclusionary rule, P.J. Schwikkard notes that "fairness to the prosecution may well be a factor to be taken into account in determining whether the admission of evidence would 'otherwise be detrimental to the administration of justice,'"<sup>13</sup> and he suggests that a form of balancing takes place between the rights of the public and the accused in South African exclusionary decisions.<sup>14</sup> John Jackson makes the same point in his essay dealing with Ireland's constitutional exclusionary rule.<sup>15</sup> He asks, "What about the need to protect the constitutional rights of persons other than the accused in non-life-threatening situations?"<sup>16</sup> To answer this question he refers to the "public interest,"<sup>17</sup> concluding that "[t]he strict exclusionary approach towards evidence obtained in breach of the accused's constitutional rights adopted by the Irish courts appears to overcompensate."<sup>18</sup> In his essay about the privilege against self-incrimination, however, Andrew L-T Choo points out problems with jurisprudence that attempts to balance all the rights and interests at stake in a proceeding.<sup>19</sup> Choo argues that even though a state (and the public) may have

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13. "A Constitutional Revolution in South African Criminal Procedure?" in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 25 at 50 [emphasis added] [citation omitted].

14. *Ibid* at 50-52.

15. "Human Rights, Constitutional Law and Exclusionary Safeguards in Ireland" in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 119.

16. *Ibid* at 135.

17. *Ibid* at 143.

18. *Ibid*.

19. "'Give Us What You Have'—Information, Compulsion, and the Privilege Against Self-Incrimination as a Human Right" in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 239.

a strong interest in regulating highway driving, there is a danger in accepting laws that compel vehicle owners potentially to incriminate themselves: “[A] right might lose its symbolic significance, and in time actually become devalued, if it can simply be ‘balanced away’ on an apparently ad hoc basis.”<sup>20</sup>

As these essays—drawn from three different sections of *Criminal Evidence and Human Rights*—all demonstrate, both criminal procedure and evidence law throughout the common law world are now frequently forced to address the ways in which they can and should accommodate the rights of victims, witnesses, and the general public alongside the rights of accused persons in criminal trials. More importantly, the essays focus attention on a significant shift or counter-trend in thinking about any human right to a fair trial: Accused persons in many jurisdictions are now yielding their place as primary holders or beneficiaries of such a right, as courts begin to emphasize the more global perspective from which fairness in criminal proceedings is to be measured.

Many other essays take up the debate about whether evidence law is an epistemic (or instrumentalist) tool designed to find truth or a more communicative (non-instrumentalist) component of a criminal trial. For instance, David Hamer’s essay dealing with delayed complaint cases builds upon Stein’s previous work on evidence law theory and echoes his dominant argument that evidence law is really all about allocating risk in conditions of uncertainty.<sup>21</sup> Thus, in addition to briefly debunking non-epistemic arguments about the unfairness to an accused person of delayed complaint trials, Hamer marshals epistemic theory in order to demonstrate how “[t]he epistemic claim that the loss of evidence [over long periods of time] disproportionately disadvantages the defendant is illogical. Since the evidence is lost, its content is simply unknown.”<sup>22</sup> In other words, Hamer’s epistemic conception of the law of evidence, or of the criminal trial more generally, would suggest that there is nothing unfair about delayed complaint trials. Hock Lai Ho’s essay,<sup>23</sup> however, showcases a dramatically different point of view. Just as Ho had previously described evidence law as a means of demonstrating respect and concern for an accused, rather than simply as a means to extract truth from witnesses,<sup>24</sup> in “The Presumption of Innocence as a Human Right,” he again

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20. *Ibid* at 251.

21. “Delayed Complaint, Lost Evidence and Fair Trial: Epistemic and Non-Epistemic Concerns” in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 215; Stein, *supra* note 10.

22. *Supra* note 21 at 236.

23. “The Presumption of Innocence as a Human Right” in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 259 [Ho, “The Presumption”].

24. *Philosophy of Evidence*, *supra* note 11.

espouses a non-instrumentalist view of evidence law and criminal procedure. Ho, in his discussion of a Singaporean politician's public statements (which tended to imply that an individual was perhaps guilty even after being acquitted at trial), suggests that "the trial is not strictly speaking a factual inquiry [and] ... [t]he presumption of innocence is not an epistemic rule but a normative principle, a central pillar of the rule of law that puts protective distance between government and citizens."<sup>25</sup> Ultimately, Ho's belief that evidence law requires us to be "duly respectful of [a defendant's] personal dignity"<sup>26</sup> and to treat the accused as a subject, not merely an object, of criminal proceedings,<sup>27</sup> leads him to argue for a very strong and uncompromised right to be presumed innocent.

These examples all demonstrate that regardless of whether one analyzes the rights to make a full answer and defence, to confront witnesses, or to be presumed innocent, discussions about evidence law and human rights will necessarily be influenced by one's view of the epistemic or non-epistemic basis of evidence law. In other words, *Criminal Evidence and Human Rights*, while providing readers with useful discussions about specific legal problems throughout the common law world, also forces us to ask ourselves foundational questions about the roles and functions of evidence law and criminal trials—questions that continue to generate controversy among leading scholars.<sup>28</sup>

Another trend that can be identified from various contributions to *Criminal Evidence and Human Rights* is the growing recognition (also recently identified and explained elsewhere<sup>29</sup>) that evidence and human rights law are becoming more internationalized—that is to say, they are becoming increasingly similar throughout the common and civil law worlds as mutual influence and cross-pollination take place across jurisdictions. To a certain extent, this recognition is reflected in the entire collection of essays in *Criminal Evidence and Human Rights*, which draws from an extremely broad range of common law jurisdictions. However, even within individual essays, one sees substantial resort to comparative methodologies. For instance, in suggesting that a suspect's right to have counsel present during interrogations has reached a global (common law) tipping point, Christine Boyle and Emma Cunliffe essentially argue that

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25. "The Presumption," *supra* note 23 at 273.

26. *Ibid* at 277.

27. *Ibid*.

28. See e.g. Laudan, *supra* note 9; Stein, *supra* note 10; Ho, *Philosophy of Evidence*, *supra* note 11; Duff et al, eds, *supra* note 12.

29. See generally John D Jackson & Sarah J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (New York: Cambridge University Press, 2012).

Canada should recognize a similar right in order to conform with the international majority.<sup>30</sup> Chris Gallavin, in critiquing New Zealand's approach to dealing with hearsay evidence, surveys comparable rules created in Canada, England and Wales, Australia, the United States, and the European Court of Human Rights, before concluding that New Zealand would benefit from development towards the Canadian, US and European variants of hearsay rules and exceptions.<sup>31</sup>

In short, this collection of essays helps us to realize how similar evidence law has become in the common law world, if not in substance then, at least, in terms of the core dilemmas faced by courts in applying the law. Further, it highlights the fact that "comparative study may yield other insights when it operates from standpoints of commonality."<sup>32</sup> This realization is important for comparative scholars, since it might weaken long-entrenched perceptions about the fundamental differences that supposedly exist among the criminal procedure rules of common law, civil law, and other legal systems.

It would be difficult to identify any major criticisms of *Criminal Evidence and Human Rights*. Certainly, some essays, such as Mike Redmayne's "Confronting Confrontation"—which concludes with remarks about how "epistemically-based trial rights are often poor candidates for becoming the sort of human rights that are enshrined in legal documents enforceable at the supra-national level"<sup>33</sup>—integrate discussion about wider evidence law and human rights themes into their content, and this type of insight is helpful to scholars in the field. However, even the more descriptive, less analytical essays (such as Simon N.M. Young's "Human Rights in Hong Kong Criminal Trials"<sup>34</sup>) add real value to the collection, if only because they provide much-needed commentary and information about legal developments in common law jurisdictions that are often overlooked by Western scholars.

In Canada, we continue to debate the relative value that should be ascribed to the rights of victims, witnesses, accused persons, and other stakeholders in criminal trials. And this debate is sure to reignite with full force in both academic and popular discourse in the wake of the SCC's decision in *NS*.<sup>35</sup>

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30. "Right to Counsel During Custodial Interrogation in Canada: Not Keeping Up with the Common Law Joneses" in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 79.

31. Gallavin, *supra* note 8.

32. Craig R Callen, "Human Deliberation in Fact-Finding and Human Rights in the Law of Evidence" in Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 309 at 310-11.

33. Redmayne, *supra* note 8 at 307.

34. Roberts & Hunter, eds, *Criminal Evidence*, *supra* note 1, 55.

35. *Supra* note 3.

*Criminal Evidence and Human Rights* offers Canadian readers valuable exposure to the theory and practice of criminal procedure throughout the common law world, where similar questions about the recognition of human rights in criminal trials are being confronted. The book could, however, just as easily be picked up and appreciated by scholars in other common law or (in recognition of the increasing internationalization of evidence law) civil law jurisdictions, regardless of whether readers are interested in criminal procedure, evidence law, constitutional law, or human rights law. *Criminal Evidence and Human Rights* advances many of the major debates that are currently taking place in these fields and is, therefore, a worthwhile read for anyone who seeks to participate in or to influence these important conversations.