INTERNATIONAL NORMS, GENDER AND THE LAW OF EVIDENCE

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I. Introduction

In many instances, evidence is scarce in criminal trials. This limitation causes concern of the fallibility of fact-finders and reflects the uncertainty of justice and the risk of error. Rules of evidence and procedure are a body of rules that are a means by which "people's rights and duties may be declared vindicated or enforced" and in the alternative "remedies for their infraction secured".[1] The international human rights instruments view the rules of evidence in the context of the right to a fair trial. Whereas the development of the laws of evidence in international criminal law, while including the right of the accused to a fair trial, emphasis truth-seeking and efficiency. Added to this complex subject matter are the limitations caused by a lack of gender awareness and stereotyping which increases the concerns for the fallibility of fact-finders and risk of error.

This paper has the modest goal of introducing some of these limitations in the law of evidence. The first part will discuss some of the fundamental concepts and the various approaches to the purpose of a criminal trial in order to lay the ground for a look at evidentiary matters under international law and then from a gender perspective.

II. Concepts relating to the Rules of Evidence

1. Purpose of the Criminal Trial

In any discussion of the rules of evidence, there is either an articulated discussion or an underlying assumption as to what is the main purpose of a criminal trial. The adversarial system requires the autonomy of each party to define the issues and decide the evidence they will submit, such as who to call as witnesses.[2] Parties may object to evidence offered by the other side and have the right to cross-examine every witness called by the other side. The court then makes a determination based on the evidence and the legal arguments of the parties. It is the law of evidence that should guide and control the parties in this process.

Sheppard describes the main purpose of a trial as being the establishment of the facts on which the final decision will be based.[3] In his view, a trial is to be a search for truth, but not at any cost. The objective of pursing the truth must be balanced with such factors as procedural fairness, time and costs. And it is the law of evidence that should strike the proper balance between the search for the truth and the other factors.

Some emphasize truth finding more than any other relevant factor such as procedural fairness. For instance, it was Bentham's position that accuracy in fact-finding to facilitate the implementation of the substantive law was the overarching goal of the law of

[1] Gwynn MacCarrick *"The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition From Nuremberg to East Timor)"* paper delivered at the Edinburgh Conference of the International Society for the Reform of Criminal Law (2005: Edinburgh, Scotland).
[2] This description is summarized from Anthony Sheppard, Evidence, Revised Edition (Carswell: 1996).
[3] Sheppard, *supra* note 2.

evidence.[4] As such he argued that those evidentiary rules that do not promote the finding of truth should be kept to a minimum.

Others argue that the fact-finding process is fraught with uncertainty and a subsequent high chance of error.[5] They argue that the limits of human beings make truth finding very difficult. From such a perspective, the rules of evidence are viewed as the way to address this risk or minimize this risk.[6] The individual rights reflected in evidentiary law are seen as ways to minimize the risks of error being imposed by the all mighty State, and as such similar to substantive rights. The risk of wrongful conviction and wrongfully depriving someone of their liberty is balanced against the risk of an erroneous acquittal which can result in a more insecure society.[7] This views the rules of evidence as involving a cost-benefit analysis.

Some commentators in their review of Canadian jurisprudence put forward the argument that there has been a recent shift from the "traditional conceptualization of a criminal trial as an independent testing of facts to the standard of proof beyond a reasonable doubt" to the view of the "trial as a search for the truth".[8] The traditional view was expressed in *Thompson v Glasgow Corporation*:

> "Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth…. A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests they see that the rules are kept and count the points.[9]

According to this view, the court's primary function is seen to do justice, according to law.

Kilback and Tochor question whether a trial judge or jury can really know the truth.[10] At best they can accept facts as proven based on the evidence presented but it is impossible for them to know for certain whether those facts are true. They worry that the truth-seeking approach allows courts to justify whatever policy decision is being made using the argument that it is for truth-seeking rather than using a principled approach. As they state:

> "If judges are concerned with finding the empirical 'truth' about what took place, and if that is the focus of the exercise, then evidentiary issues take less importance and technical objections to the admissibility of evidence must be outweighed by the judge's ultimate aim of finding the truth. On the other hand, if judges are evaluating the evidence with a view to determining whether certain facts have been proven beyond a reasonable doubt, then evidentiary issues are very important. A court is either looking for the truth or is looking to find proof beyond a reasonable doubt"[11]

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[4] W.L. Twining, Theories of Evidence: Bentham & Wigmore (London: 1985).
[5] Twining, *supra* note 4.
[6] Alex Stein *"Evidential Rules for Criminal Trials: Who Should be in Charge?"* (21 April 1999, International Commentary on Evidence) found at www.law.qub.ac.uk/ice/papers/evident1.html.
[7] Stein, *supra* note 6.
[8] Keith Kilback and Michael Tochor *"Searching for Truth but Missing the Point"* (2002) 40 Alberta Law Review 333.
[9] *Thompson v Glasgow Corporation* (1961) Scots Law Times 237 at 245-46 as cited in Kilback and Tochor, *ibid* note 8 at 334.
[10] Kilback and Tochor, *ibid* note 8.
[11] Kilback and Tochor, *ibid* note 8 at 337.

The search for truth has been used to justify limiting evidentiary and procedural protection to an accused and to increase judicial discretion in determining what evidence is admissible. The emphasis for the search of truth is reflected in the most recent developments in international criminal law, the *Rome Statute* establishing the International Criminal Court. The Statute provides broad discretion and flexibility to the judges with respect to the laws of evidence under the *Rome Statute's* jurisdiction while also guaranteeing extensive due process rights of the accused.

Evidentiary rules promote other values in addition to that of truth; such as the procedural norm of fairness. Fairness is important as it can make up for a deficit in truth and guarantee a generally "just" verdict. Truth should not be discovered at all costs for there are other norms that a State bound by the rule of law must also consider. These norms are reflected in international law's right to a fair trial, including the privilege against self-incrimination, the presumption of innocence, the right to counsel and the right to examine and cross-examine witnesses. The notion of material truth should not be made absolute as this ignores the reality that the truth is only part of an overarching cost benefit calculation.[12]

How one views or balances the competing interests of the State in securing the conviction of the guilty while continuing to protect the integrity of the criminal justice system and the rights of the individual, has consequences on the application of the rules of evidence, particularly on the exclusionary rule of improperly obtained evidence.

2. Fundamental concepts of the rules of evidence

The law of criminal evidence is devoted to determining what information is admissible, what information is inadmissible and what information may be admitted for limited purposes only during a criminal trial.[13] Basically, for the courts to find evidence admissible, it must be material, relevant and not excluded by any rule of evidence.[14] What is material is determined by the applicable substantive law in the situation. This is a legal concept since what is material in the case depends upon the applicable substantive law, the issues raised by the allegations contained in the indictment, and the applicable procedural law.

Relevance, on the other hand, is not a legal concept. It exists in the relation between an item of evidence and the proposition of fact that one party seeks to establish through the introduction of that evidence. As set out in the American Federal Rules of Evidence, relevance is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.[15] Relevance can also be described as a balancing of probative value against other policy

[12] Dr. Klaus Volk, *"The Principles of Criminal Procedure and Most Modern Society: Contradictions and Perspectives"*, Paper delivered at the International Society for the reform of Criminal Law in the Hague, Netherlands, 2003 found at www.isrcl.org/paper/volk.pdf.
[13] Andrew Wistrich, Chris Guthrie, and Jeffrey Rachlinski *"Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding"* (2005) University of Pennsylvania Law Review Vol 153, 1251.
[14] Sheppard defines immaterial to mean probative of some matter not requiring to be proved and irrelevant to mean not logically probative. Sheppard, *supra* note 2.
[15] American Federal Rules of Evidence Rule 702 and 403.

considerations, such as the danger of manufacturing evidence, multiplicity and confusion of issues, the danger of prejudice and wasting of court time.[16]

The rules of admissibility are part of the rules of evidence. They generally set out the conditions for evidence to be excluded. Evidentiary rules excluding relevant information fall into two categories. First "intrinsic exclusionary rules' exclude relevant information on the ground that its omission will promote accurate fact finding. For example, Rule 403 of the American Federal Rules of Evidence excludes relevant information where its probative value is outweighed by the risk that it will confuse or mislead the fact finder. In Canada, the common law confers on a trial judge a limited or residual discretion to exclude otherwise admissible evidence if it is gravely prejudicial to the accused, tenuously admissible and of trifling probative value. Second, 'extrinsic exclusionary rules' exclude relevant evidence to promote a policy interest, regardless of its impact on the accuracy of fact finding. Such policy considerations include for example, fear of fabrication, trial efficiency, avoidance of undue or unfair prejudice, and the broader public interest.[17]

II. International Norms in Evidentiary Matters

1. The international human rights instruments

The international human rights instruments view the rules of evidence within the context of "fair trial". Rules of evidence and procedure promote the adherence to "due process" before the law, and "separate the trial process from what might be regarded as merely interest, ingenuity, or unrestrained power".[18] The right to a fair trial, articulated in international human rights instruments, first by the *Universal Declaration of Human Rights* and then the *International Covenant on Civil and Political Rights* (*ICCPR*), is reflected in both national and international criminal justice systems, both common law and civil law traditions.[19] This right ensures both a standard and fair justice system that can be assessed with quantifiable external measures. As one commentator puts it, "without fixed standards, a criminal trial becomes a public demonstration, or general inquest, where extraneous and improper considerations might impact upon the ultimate verdict".[20] Part of those quantifiable measures include clearly defined rules of evidence.

Like all human rights, the right to fair trial is played out in the context of a relationship of power exercised by the State vis-à-vis the individual. Fairness in procedural terms, principally aims to achieving equality before the law. Article 14 of the *ICCPR* provides that all persons charged with a criminal offence are presumed innocent until proven

[16] As one of the preliminary treatises on evidence provides the provision that all relevant evidence is admissible with certain exceptions is a "presupposition involved in the very conception of a rationale system of evidence". Thayer, Preliminary Treatise on Evidence (1898) 264.
[17] David Watt, Watt's Manual of Criminal Evidence (Carswell: 2002).
[18] MacCarrick, *supra* note 1.
[19] *Universal Declaration of Human Rights*, 1948 *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 entered into force Mar. 23, 1976. *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.
[20] MacCarrick, *supra* note 1.

guilty according to the law by a competent, independent and impartial tribunal.[21] The onus is on the prosecutor to prove the guilt of the accused. Minimum guarantees to ensure a fair trial include the rights of the accused: to be informed promptly and in detail of the nature and cause of the charge; adequate time and facilities to prepare for his or her defence; counsel of his or her choosing; to be tried without undue delay; to be tried in his or her presence and defend himself or herself; to examine or have examined the witnesses against him or her and to call his or her own witnesses; to have an interpreter if needed; and not to be compelled to testify against himself or herself or to confess guilt.[22]

Fairness in evidentiary terms attempts to regulate evidence that is unreliable or prejudicial, the admission of which would be antiethical to the trial process. One of the principal fair trial rights that impact on fairness in terms of evidentiary matters is the right to call witnesses on behalf of the accused and to examine, or have examined, witnesses against them[23]. This right is fundamental to the principle of equality of arms and is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining witnesses as are available to the prosecution. There is a general principle in common law jurisdictions that testimonial evidence should be excluded when the witness is not available for cross-examination, referred to as the hearsay rule. However, there are numerous exceptions to the hearsay rule.

International law has recognised limitations on the examination of prosecution witnesses, for example when witnesses fear reprisal or have become unavailable. It is noted that the rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. In balancing these rights, measures taken by courts include providing victims and witnesses with information and assistance throughout the proceedings, closing all or part of the proceedings to the public "in the interests of justice", and allowing the presentation of evidence by electronic or other special means. These measures have been further

[21] *ICCPR* Article 14(1). All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

[22] *ICCPR* article 14 (3) In the determining of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equity:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of his right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

[23] *ICCPR* Article 14(3)(e): in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality… (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him.

elaborated in the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[24]

Evidentiary rights also include the right to be acquitted in the face of a reasonable doubt; the immunity from possible prejudice, such as the inadmissibility of character evidence and using prior convictions of the accused when offered to prove guilt; and limitations on the procedures that apply to an accused testifying in his or her own defense.

These international standards are implemented in different criminal justice systems, common law and civil law countries. There is a relationship between procedural models in various countries and evidentiary matters.[25] The differences between evidentiary rules in common law and civil law jurisdictions are summarized by one commentator:

> "Some argue that the common law so ritualize aggression and has become so concerned with rules regulating the battle that it seems perfectly acceptable that a party perhaps in the right on the merits should lose on a technicality. It might be argued that civil law attempts to ascertain the truth while common law seeks to achieve fact finding precision often erecting evidentiary barriers to conviction. Others argue that an excessive preoccupation with material truth might give implicit approval of less than savory methods of fact finding. The common law has expanded upon the notion of procedural rights and adjudicative fairness through elaborate rules of evidence, being traditionally more comfortable than the continental legal system, with the exercise of restraint over evidence. As a matter of fairness, the common law will allow only that evidence which rules of exclusion and public policy permit."[26]

2. Evidentiary law in international criminal law

In an effort to accommodate both legal traditions, recent international criminal law has "spawned a hybrid, homogenized legal culture".[27] The most recent expression of rules of evidence under international law are those found in the *Rome Statute of the International Criminal Court* and the companion document, the *Rules of Procedure and Evidence* of the International Criminal Court (ICC) which entered into force July, 2002.[28] The International Military Tribunals of World War II and the more recent *ad hoc* criminal tribunals of the Former Yugoslavia and Rwanda (ICTY and ICTR respectively) and their practice and experience of rules of evidence informed the development of the ICC documents. The tribunals of Nuremberg and Tokyo were instructed to "adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and to admit any evidence which it deemed to have probative value".[29] International criminal law attempts to balance the efficiency of the court with fairness in its procedure and rules of evidence.

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[24] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* G.A. res. 40/34 of 29 November 1985.
[25] Kristina Rutledge *"Spoiling Everything – But For Whom? Rules of Evidence and International Criminal Proceedings"* (2004) 16 Regent University Law Review 151 at 166.
[26] MacCarrick, *supra* note 1.
[27] MacCarrick, *ibid*.
[28] In July 1998, the *Rome Statute of the International Criminal Court* (U.N. Doc. A/CONF.183/9th) was adopted by 120 States participating in a United Nations sponsored conference in Rome. The *Rome Statute* sets out the structure and functions of the first ever permanent international criminal tribunal, which has jurisdiction to try people accused of genocide, crimes against humanity and war crimes, and once agreed upon, the crime of aggression. The *Rome Statute* entered into force on July 1, 2002. For more information please see www.un.org/law/icc.
[29] References to the IMT Charter and the Tokyo Charter found in Rutledge, *supra* note 25 at 166.

Article 68 and 69 of the *Rome Statute* provides for rules on the admissibility and disclosure of evidence. The Court has the authority to admit all evidence that it considers necessary for the determination of the truth.[30] It is from this foundation that all other rules of evidence are formulated. The Court can rule on the relevance or admissibility of any evidence and shall take into account the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.[31] As one Chamber of the ICTY describes reliability, it forms the "invisible golden thread which runs through all the components of admissibility".[32]

Evidence obtained by means of a violation of the *Rome Statute* or internationally recognised human rights shall not be admissible if the violation casts substantial doubt on the reliability of the evidence, or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[33] In the jurisprudence of the *ad hoc* tribunals, the chambers have "weighed the value of the evidence and the threat that it poses to the legitimacy of the case and to the tribunal as a whole".[34]

The Statute and the Rules of Evidence and Procedure do not contain comprehensive evidentiary rules. For example, common law lawyers will not find complex rules on matters such as hearsay evidence. This is because the Court is intended to represent the international community as a whole and so its evidentiary rules reflect a compromise between the different legal systems. There are no general rules or principles on why some types of evidence should be considered relevant or admissible.

Generally the testimony of a witness at trial shall be given in person. Exceptions to this include allowing for a summary of the evidence when there are concerns regarding the protection of victims and witnesses.[35] The testimony can be given by recording or through means of video or audio technology as well as through written transcript, all of which must not be prejudicial to or inconsistent with the rights of the accused.[36] This means that such technology must permit the witness to be examined by the prosecutor, the defence and the judges at the time that the witness is testifying.[37] The Rules explicitly provide that the methods chosen for the conducting of the testimony must ensure both the promotion of truthfulness and open testimony as well as the promotion of the safety, physical and psychological well-being, dignity and privacy of the witness.[38]

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[30] Article 69(3) *Rome Statute*.
[31] Article 69(4) *Rome Statute*.
[32] *Prosecutor v Delalic et al.*, ICTY Case No. IT-96-21, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to provide a Handwriting Sample (January 19, 1998) at para 32.
[33] Article 69(7) *Rome Statute*.
[34] Rutledge, *supra* note 25 at 169.
[35] Article 68(5) *Rome Statute*: Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
[36] Article 69(2) *Rome Statute*.
[37] Rule 67(1) *Rules of Evidence and Procedure*.
[38] Rule 67(3) *Rules of Evidence and Procedure*.

Rules 63 to 84 of the *Rules of Procedure and Evidence* provides yet more details relating to the evidentiary rules that the Court will apply. The rules specifically provide that the Court will not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, particularly those of sexual violence.[39] Further, the Rules list a number of scenarios where consent cannot be inferred in cases of sexual violence and that previous and subsequent sexual history cannot be used to infer credibility, character or predisposition to sexual availability and shall not be considered as admissible evidence.[40] There are also Rules dealing with privileged communications and information and self-incrimination by a witness or family member.[41]

The accused has several rights associated with his or her status as a witness to the alleged events. Article 67 of the *Rome Statute* incorporates the fair trial norms and the rights of an accused provided by international human rights instruments. The accused has the right to testify in his or her own defence or not to testify, to remain silent and such silence cannot be used against him or her. The ICTY has interpreted this right to silence to be an unqualified right not to testify in any manner. One case precluded the prosecution from compelling the accused to disclose a handwriting sample in order to authenticate documents allegedly written by him.[42] Regarding confessions, such statements must be disclosed to the defence prior to the trial to allow defense the opportunity to challenge the confession. The burden is on the accused to provide inadmissibility. This shift of burden to the accused has been criticized by a number of commentators.[43]

Some commentators are concerned with the emerging international criminal procedure, particularly when the judge appears to be assuming the more active investigative role of inquisitor, while at the same time; the Prosecutor appears to be assuming the more aggressive common law position of adversary.[44] A worrying result could be altering the trial balance where both the prosecutor and the judges seem to play the same role, which may appear to displace the onus on the prosecutor to prove guilt according to law and thereby affecting the presumption of innocence. Furthermore, the merging of the common law and civil law traditions into the evidentiary rules results in more emphasis on unchecked judicial discretion and away from the controlled admission of evidence under common law. One commentator is concerned that such a balancing of probative value versus prejudice will result in favoritism to the prosecution.[45]

[39] Rule 63(4) *Rules of Evidence and Procedure*.
[40] Rules 70 and 71 *Rules of Evidence and Procedure*.
[41] Rules 73, 74 and 75 *Rules of Evidence and Procedure*.
[42] *Prosecutor v Delalic et al*., ICTY Case No. IT-96-21, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to provide a Handwriting Sample (January 19, 1998).
[43] Rutledge, *supra* note 25 at 183.
[44] MacCarrick, *supra* note 1.
[45] MacCarrick, *ibid*.

IV. Evidentiary Matters from the Gender Perspective

In examining the purpose of the criminal trial and fundamental concepts of the rules of evidence, there is growing recognition of the need to incorporate gender analysis in this examination. This reflects increasing awareness in the mainstream that there still remains unequal power relations that lie at the heart of the oppression of women. Feminist academics write about the gendered assumptions built into "language, culture and into the structures of knowledge" and the importance of understanding how gender biases affect what is recognised as "truth" and how beliefs about men and women affect the way men and women are seen and treated by law.[46] What counts as truth is usually based on the experiences of those who shape it, who until recently were almost entirely men, although is often seen as gender neutral.[47] As one scholar argues "the law sees and treats women in the way that men see and treat women".[48]

International conventions, such as the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination Against Women* emphasize that the law should not operate so as to disadvantage women. The *Rome Statute* and the *Rules of Evidence and Procedure* were enhanced by the active participation of feminist scholars to respond to concerns of female victims in the international court. However, women continue to be disadvantaged in many aspects of many societies. For instance, it is marginalized communities, such as women who are hardest hit by crime.[49] Sexual violence and domestic assaults continue to harm and control woman.[50]

1. Neutrality of evidentiary laws?

Evidentiary rules, like many aspects of our criminal justice system are thought to be characterized by a "belief in the autonomy, neutrality and objectivity of law".[51] Generally speaking, rules of evidence identify valid data, specify how that data should be presented and guide the court's evaluation of that data.[52] The test to identify which beliefs qualify as "good data" is dealt with by exclusionary rules and burdens of proof. The issue of what kinds of data should be known and methods of verification are dealt with by rules on credibility and corroboration. As one judge notes:

> "We are more aware now that the trier of fact does not ascertain the truth in any real sense. What he does is to give a decision on the evidence presented to him, evidence which is often incomplete, and with the collection and presentation of which the judge himself has nothing to do. The problem is made even more intractable because it is not simply a problem of ignorance, of not having all the facts, but emerges from the

[46] Professor Marcia Neave *"How Law Constructs Gender and Vice Versa"* (2001) Presentation for the Women's Barrister's Association Annual Dinner, 30 August 2001.
[47] Neave, *supra* note 46.
[48] Catharine MacKinnon, Towards a Feminist Theory of the State (1989) 242.
[49] Julianne Parfett *"A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence"* (2002) 40 Alberta Law Review 299.
[50] Dianne Martin *"Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform"* (1998) 36 Osgoode Hall Law Journal 151 at 155.
[51] Christine Boyle and Marilyn MacCrimmon *"To Serve the Cause of Justice: Disciplining Fact Determination"* (2001) 20 Windsor Yearbook of Access to Justice 55.
[52] *ibid* at 61.

> dynamics of human reasoning, which in part is a product of one's personal experience, one's 'cognitive filters'".[53]

In Canada, over the last few decades, there is a new understanding that we are living in a diverse society which may have a variety of differing views on what it means to "seek justice".[54] Following on this new understanding is the appreciation that how we view the laws of evidence "affects our knowledge about truth and how it is conditioned by the culture to which we belong and our historical circumstances".[55] This perspective argues that very often facts can no longer be simply viewed as "pure facts". Rather, some facts are constructed by our conditioned view.

Over the last few decades, there has been an attempt to rid the law of evidence of stereotypical assumptions regarding gender. In Canada, this effort has been seen both in Parliament through the passage of specific legislation and in the courts, through the interpretation of jurisprudence, particularly in the area of prosecuting sexual assault cases. Concern has been raised that some of these reforms only address formal equality, ensuring that rules that discriminate against women are removed so that they are treated the same as men within the criminal justice system.[56] However, formal equality may not specifically address institutional and systemic inequality. If the criminal justice system is basically based on patriarchal norms and men's experiences, then ensuring only formal equality will mean women will be granted equality to norms that have been defined by men's experience. This effectively silences women's experience and does not encourage a gender analysis to understand how various laws impact differently on men and women.

2. Concept of materiality and relevance

The law of evidence requires that evidence be material. As some commentators write, this requirement of materiality is affected by how the triers of fact access or perceive the social context.[57] The logic goes that materiality is governed by the substantive law. Therefore changes to the substantive legal rule results in changes to the rules of admissibility of evidence. Evidence will "shift from immaterial to material or vice versa when the wording of the rule or the understanding of the meaning of the terms of a rule is changed".[58] These commentators argue that this could have a good side, "helping marginalized groups control the operation of stereotypes by making discriminatory social knowledge immaterial or by making egalitarian social knowledge material". [59]

The case of *R v Lavalee*, a decision of the Supreme Court of Canada is an example where changes to a substantive rule or to the understanding of its meaning affected the determination of "materiality" of the evidence.[60] In this case, formerly immaterial evidence was held to be material. Ms. Lavalee was a battered woman who had been

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[53] Judge Gerald Seniuk *"Liars, Scoundrels and the Search for Truth"* (2000) 30 C.R. (5th) 244 at 250-51.
[54] Boyle and MacCrimmon, *supra* note 51.
[55] Boyle and MacCrimmon, *ibid*.
[56] Neave, *supra* note 46.
[57] Boyle and MacCrimmon, *supra* note 51 at 70.
[58] Boyle and MacCrimmon, *ibid* at 70.
[59] Boyle and MacCrimmon, *ibid* at 70.
[60] *R v Lavalee* [1990] 1 S.C.R. 852.

domestically abused by her partner when she was charged with murdering her partner. The defence put forward the argument that she had acted in self-defence. The substantive defence of self-defence requires that the accused act under a reasonable apprehension of death or grievous bodily harm. Earlier jurisprudence held that "the requirement of an imminent attack had rendered inadmissible evidence of the context which might have made the use of force in self defence reasonable".[61] In *Lavalee*, the Court ruled that such evidence could be admitted. Subsequently, another Supreme Court of Canada case provided guidelines for identifying material social context:

> "To fully accord with the spirit of Lavalee, where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered woman's experiences are generally outside the common understanding of the average judge and juror and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonable of the woman's actions, without relying on old or new stereotypes about battered women."[62]

Once the court determines materiality, the next question is one of relevance. Relevant evidence is evidence that has any tendency to make a material proposition more or less probable. As proposed by Boyle and MacCrimmon, "analytically, the link between the evidence and proposition is provided by a generalization about the behavior of people or things".[63] People, such as the triers of fact, make generalizations based on their experience and common sense knowledge. There is growing awareness that relevance is not a value-neutral concept and there has been more discussion to identify when assessments of relevancy are based on discriminatory generalizations. These scholars argue that fact finding and the determination of relevance may require some legal controls. For example the values in the *Canadian Charter of Rights and Freedoms* may provide such controls.

A good example of where there has been some legal controls introduced to address stereotypes that might influence the determination of relevance are cases dealing with sexual assaults. For example, in the past the fact that the complainant in a sexual assault case had previous consensual sexual relations use to be considered relevant. This had been due to the: "generalization that women who have consented to sexual relations in the past are more likely to have consented to sexual relations or, in other words, that they have a disposition to consent on the ground that it draws on illegitimate myths and stereotypes".[64] Relevance grounded on such myths and stereotypes about a person's character is inconsistent with human dignity and autonomy.

[61] Boyle and MacCrimmon, *supra* note 51 at 70-71.
[62] *R v Malott* [1998] 1 S.C.R. 123 per L'Heureux-Dube J and McLachlin J as cited in Boyle and MacCrimmon, *supra* note 51 at 72.
[63] Boyle and MacCrimmon, *supra* note 51.
[64] Boyle and MacCrimmon, *ibid*.

3. Stereotypical assumptions regarding testimonial competency

A good example of the development of evidentiary laws taking into account gender stereotypes has been addressing the rules of evidence which called into question the competency of the testimony of women. For most of the twentieth century, the rules of evidence "reflected an inherent suspicion of the testimony of women and children".[65] This suspicion and stereotypical assumption led to the belief that women's prior sexual history and her failure to make a timely complaint were relevant to her credibility. As Tanovich writes: "this view believed that there is a link between sexual experience and truthfulness, thinking that perhaps those women who have had sex are more likely to lie than women who are virgins".[66]

A myth about rape seemed to assume that rape allegations are easy to make and difficult to disprove, although this is unsupported by empirical evidence.[67] This "rape myth" meant that prosecutions should not succeed on the testimony of the female victim alone. This resulted in a corroboration requirement for sexual assault cases. Prior to 1975, the Canadian *Criminal Code* contained a rule of law requiring the judge to warn the jury about the uncorroborated testimony of a complainant in certain sexual cases. In 1975, Parliament abolished the rule of law to avoid discrimination against women. However, the courts developed a rule of practice conferring a discretion on the judge to warn the jury about the testimony of a victim of a sexual crime, which also appeared to discriminate against women. In 1982, the Canadian Parliament abolished the rule of practice and prohibited the judge in a prosecution for incest, gross indecency or sexual assault from warning the jury that it is unsafe to find the accused guilty on the uncorroborated testimony of the complainant. In 1987, Parliament abolished the requirement of corroboration and prohibited a wariness to the jury in numerous sexual offences.[68]

This reform was seen as essentially one striving for formal equality; to remove those aspects of the law on sexual assault that treated women differently than men.[69] However, other reforms tried to use the law for more pro-active purposes to change attitudes and behaviors within the legal system itself and also in society to address the systemic gender inequalities. This led to establishing new evidentiary rules that restricted the defence in cross-examining the complainant's previous sexual history. These new evidentiary rules explicitly prohibited using prior history evidence to draw an inference that because of that sexual history the complainant was more likely to have consented to the activity in question. This pro-active direction to the judges was an effort to address one of the more insidious of the rape myths.[70] If the defence applies to introduce the previous sexual history of the complainant, the Canadian *Criminal Code* requires the judge to balance the right of the accused to make a full answer and defence to the charge, against the importance of ensuring that sexual assaults are reported and the need to "remove from the

[65] David Tanovich *"Starr Gazing: Looking into the Future of Hearsay in Canada"* (2003) 28 Queen's Law Journal 371 at 378.
[66] Tanovich, *supra* note 64.
[67] Neave, *supra* note 46.
[68] This particular summary of the Criminal Code amendments in this area were taken from Sheppard, *supra* note 2.
[69] Martin, *supra* note 50.
[70] Martin, *ibid* at 166.

fact-finding process any discriminatory belief or bias" when considering whether to permit any questioning of the complainant about the history.[71]

Some scholars have discussed whether the purpose of a criminal trial is to seek the truth or to test the facts to the standard of proof beyond a reasonable doubt.[72] They see the abrogation of the doctrine of recent complaint in sexual assault cases as being justified by this truth-seeking function rather than promoting the traditional view of testing the facts to the standard of proof beyond a reasonable doubt.[73] The court in one case held that by removing this doctrine, "Parliament sought to dispel an assumption which had a real potential to mislead the trier of fact and distort the search for truth" and that the abrogation of this rule "struck a blow for both equality and the truth-finding function of the criminal trial process".[74] The abrogation of the doctrine of recent complaint should also be seen as assisting the testing of facts to the required standard of proof. The testing of facts should not be based on stereotyping or discriminatory views of women.

New rules have been created to promote equality and ensure a "sensitive judicial system".[75] Evidence of children and, with recently proposed amendments, any vulnerable victims and witnesses; there is a more common sense approach to ensure that their testimony is available to the courts which do not deter them from participating in the criminal justice system. This includes testifying behind a screen, in closed courtrooms and with a support person. Videotaped statements made within a reasonable time after the offence are now admissible as testimonial aid.[76]

4. Gender and the rules of hearsay

A thesis put forth by one commentator is that "cleansing the law of evidence of gender and age-based stereotypes has been part of the motivation for the development of the principled approach to hearsay".[77] This approach to hearsay emphasizes flexibility, moving away from the past rigid approach to the hearsay rule and its exceptions. This

[71] Martin, *supra* note 50 at 166-167.
[72] Kilback and Tochor, *supra* note 8.
[73] Kilback and Tochor, *ibid*.
[74] *R v Batte* (2000) 145 C.C.C. (3d) 449 (Ontario Court of Appeal).
[75] Term from R v F.(C.C.) as cited in Tanovich, *supra* note 64 at 379.
[76] In 1999, Bill C-79 introduced the Act to Amend the Criminal Code (Victims of Crime). This Act highlights the need to reconcile the rights of victims and witnesses with the rights of the accused. It underscores the importance for the criminal justice system to treat victims and witnesses with courtesy, compassion and respect. The amendments recognize that participating as a victim or witness in a criminal proceeding can be a traumatic experience. The trauma may be greater for young or disabled witnesses or victims, or for victims of sexual and/or violent offences. The amendments extend to victims of sexual or violent crime up to 18 years of age protections which restrict personal cross-examination by accused persons representing themselves by providing for the appointment of counsel to conduct the cross-examination. The amendments also permit a victim or witness who is under 14 years or with a mental or physical disability to have a support person present while giving testimony. The Act also clarifies that subsection 486(3) of the Criminal Code, which provides for a publication ban on the identity of sexual offence complainants, will protect their identity as victims of sexual offences as well as any other offences committed against them by the accused; and permit a judge to restrict publication of the identity of a wider range of victims or witnesses where the victim has established a need for such restrictions and where the judge considers it necessary for the proper administration of justice. There is currently a draft bill tabled by Parliament that contains a package of reforms that is meant to safeguard children and other vulnerable persons from sexual exploitation, abuse, neglect and will better protect victims and witnesses in criminal justice proceeding. Proposed steps to modernize the Criminal Code include: facilitating the testimony of child victims and witnesses by providing for greater clarity, consistency and certainty for the use of testimonial aids for victims and witnesses under the age of 18 years. For example these reforms would allow children under 14 to give their evidence if they are able to understand and respond to questions. A competency hearing, which is currently mandatory, would no longer be required. Also similar reforms are proposed to facilitate the testimony by other vulnerable victims and witnesses including victims of spousal abuse, criminal harassment and sexual assault.
[77] Tanovich, *supra* note 64 at 380.

approach is seen to be more responsive to individual situations by seeking to address the necessity and reliability required for the admission of the evidence while at the same time safeguarding the dignity and integrity of the complainants or witnesses. The Supreme Court of Canada's case law reflects this approach:

> "The Court's decision in *Khan* to permit a child's out of court statement to be received where necessity and reliability are present was in keeping with the increasing sensitivity of the justice system to the special problems children may face in giving their evidence and the need to get children's evidence before the court if justice is to be done".[78]

This approach has an impact on those cases dealing with women and children and prosecuting sexual assault and domestic violence cases.

5. Distinction between law and fact

Basically, there is a procedural rule separating the functions of judge and jury for the purpose of the trial process, with the judge deciding legal questions and a jury deciding factual questions. It is not always clear when something is a determination of fact or a legal issue. An example of this from a gendered perspective is in the area of sexual assault and the issue of consent.[79] It has been debated whether consent is primarily a factual or legal determination. For instance, when a woman who says "no" this has sometimes be taken to be consent to the sexual contact. If this issue is approached as a factual one then it is possible for the trier of fact, whether that is jury or a judge, to decide that "no can mean maybe" or presumably "yes". If it is approached as a legal issue, then it is open to the law to take the position that "no means no" and that therefore a complainant who said no has not consented as a matter of law. In Canada, Parliament passed a law on sexual assault which provides that no consent is obtained where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity.[80]

The leading Supreme Court of Canada case dealing with implied consent is *R v Ewanchuk* where a woman had said no during a sexual assault.[81] At trial, the court acquitted the accused based on implied consent. The Court of Appeal agreed with the trial judge's reasoning. However the Supreme Court of Canada overturned that decision. The decision maintains the recognition that the meaning of consent is fundamentally a matter of law and thus reviewable by appeal courts. It recognizes that some mistakes, for instance that silence constitutes consent are mistakes of law and thus no defence. The classification of the issue as a legal one has significant advantages for women, the

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[78] Justice McLachlin in R v F. (W.J.) as cited in Tanovich, *supra* note 64 at 380.
[79] This example is from Boyle and MacCrimmon, *supra* note 51 at 62-66.
[80] Bill C-49 (1992 chapter 38) amended the Criminal Code to include s. 273.1. S. 273.1(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
(2) No consent is obtained, for the purposes of s. 271, 272 and 273, where
(a) the agreement is expressed by the words or conduct of a person other than the complainant;
(b) the complainant is incapable of consenting to the activity;
(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
[81] *R v Ewanchuk* [1999] 1 S.C.R. 330.

primary targets for sexual assault.[82] As Boyle and MacCrimmon write: "the legal definition controls the operation of social knowledge by minimizing the possibility of discriminatory assumptions about the sexual accessibility and mendaciousness of women, such as willing women pretending to be unwilling. Thus the shift from fact to law is an attempt to regulate social knowledge by eliminating archaic myths and stereotypes about the nature of sexual assaults".[83] Sheila McIntrye refers to the awareness of the need "to reform the substantive law that allows male-centered stereotypes and myths about women and women's sexuality to define the criminality of male violence".[84]

6. Social context evidence - judicial notice and expert evidence

Judicial notice can be useful to provide knowledge of a social context without the need to call evidence in individual cases. It is acknowledged that judges and jurors determine facts from a perspective that is molded from their social knowledge, background and experience.[85] So judicial notice can be used to "expand the social context to include an understanding of the adverse effects of racism and gender bias in our society".[86]

Another way of introducing social context evidence is through expert testimony. Social science evidence has been relied upon to provide a context in which to understand the behavior of the witnesses, victims and the accused. For example an expert introduced evidence of battered women syndrome in *R v Lavalee* to assist the jury in assessing the evidence, particularly the reasonableness of the perception of a battered woman who killed her abuser.[87] Another example is when an expert was allowed to explain the reasons why young victims of sexual assault often do not complain immediately in *R v Marquard.*[88] It seems sensible to assume that the more we know, the more we might be able to combat inequalities in the world. Expert evidence can correct misconceptions about human behavior. For example, in *R v Chisholm*, the court stated:

> "There exists, it seems a trend toward the admission of expert evidence relating to the reactive behavior of individuals who have been sexually victimized as relevant and necessary to the comprehension of the credibility of sexual assault complainant's testimony. Experts such as a clinical psychologist can make a valuable contribution to an informed understanding of common patterns of behavior clinically identified in instances of sexual victimization".[89]

This sort of evidence can assist the trier of fact by providing alternative context for the complainant's conduct, "originally one which serves as an informed check on the rush to a presumed inference that the behavior is inconsistent with the occurrence of the assault alleged".[90]

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[82] Boyle and MacCrimmon, *supra* note 51 at 64.
[83] Boyle and MacCrimmon, *ibid* at 64-65.
[84] As cited in Boyle and MacCrimmon, *ibid* at 65.
[85] Human reasoning in part is a product of one's experience, as stated by Boyle and MacCrimmon, *ibid* at 78.
[86] Boyle and MacCrimmon, *ibid* at 78.
[87] *R v Lavalee* [1990] 1 S.C.R. 852.
[88] *R v Marquard* [1993] 4 S.C.R. 223.
[89] *R v Chisholm* (1997) 8 C.R. (5th) (Ont. Gen. Div.) as cited in Boyle and MacCrimmon, *supra* note 51 at 80.
[90] Boyle and MacCrimmon, *ibid* at 81.

IV. Conclusion

For any criminal justice system currently undertaking reforms in the area of evidentiary law, the developments under international law as well as gender analysis issues should be taken into account to ensure both the greatest certainty of justice and the least amount of error.

International criminal law developed rules of evidence that allows for broad discretion to the courts to admit all evidence that it considers necessary for the determination of the truth. Such rules must not only look at the probative value of the evidence but also any prejudice that such evidence could cause to a fair trial or fair evaluation of the evidence. These international instruments reflect the understanding that evidentiary rules promote other values beside truth. These other values include fairness and the integrity of the system. The international instruments also incorporate, to some extent, a gender perspective in its newly evolving rules of evidence. For instance, there is no legal requirement that corroboration is required in cases dealing with sexual assault; consent cannot be inferred in some situations of sexual violence; previous and subsequent sexual history of the victim cannot be used to infer credibility or admissible as evidence.

Rules of evidence are in place to assist the criminal justice system, to some extent, to seek the truth at trial. There are continuing debates as to what is the correct balance between the search for truth with such factors as procedural fairness, time and cost. In any such balancing it is important to understand how gender biases affect what is recognised as “truth” and how truth can be conditioned by the culture and history to which we belong.