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Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions

Abstract: In many jurisdictions, the rules of evidence can often be instrumental in determining the outcome of a dispute. But to what extent can evidence law be controlled by codification, or is it better to leave its regulation and development to the judges via common law? In an attempt to bridge the gap between the rules of an antiquated evidence statute and the modern realities of practice, Singapore's Evidence Act was amended in 2012. Certain relevancy provisions were amended to allow greater admissibility of evidence, while new provisions were introduced to act as a check against abuse. However, it will be argued that these amendments have changed the paradigm of the admissibility of evidence under the statute and have also done little to clarify existing ambiguities in the law. This paper explains why and, given the near-complete absence of case law that has interpreted the amendments, offers a few tentative suggestions on possible ways forward. To the extent that Singapore's Evidence Act was largely modelled after Stephen's Indian Evidence Act of 1872, Singapore's 2012 amendments may be of comparative interest to readers in a number of jurisdictions around the world particularly those in Asia such as Bangladesh, Brunei, Burma, Malaysia and Sri Lanka – these countries had adopted the iconic statute to varying degrees – and of course, to India itself. Many of these jurisdictions have also not made major amendments to their evidence legislation, and therefore there may be something to learn ahead of time from Singapore's experiment.

Keywords: Indian evidence act, exclusionary discretion, relevance and admissibility, Singapore evidence law

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1 Establishing the context

> The great bulk of the Law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence. The doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to system… Tell me what evidence is, and I shall be able to understand why you say that this and that class of facts are not evidence.[1]

When Sir James Fitzjames Stephen drafted what became the Indian Evidence Act of 1872, his intention, as the passage above suggests, was to greatly simplify the common law rules of relevance and admissibility into a clean and easily understood paradigm or system for the courts to apply.[2] Thus, instead of asking whether a logically probative piece of evidence is legally admissible based on the elements and exceptions of exclusionary rules (such as hearsay, character and opinion), the then-revolutionary statute would essentially only require one question, rather than multiple questions, to be answered: is the evidence relevant, and therefore admissible, as defined by the relevant relevancy provisions?[3] Arguably, this "inclusionary" approach differed fundamentally from the common law "exclusionary" approach by obviating the need to further ask if the evidence, once found relevant (under the Evidence Act), can nevertheless be

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1 Sir James Fitzjames Stephen, A Digest on the Law of Evidence, x(1881). Stephen went on to add (at x, xi): "To describe a matter of fact as 'evidence' in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the word mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference – in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic… inferring the unknown from the known."

2 Stephen's definition of relevance (*id.* art. 1) is still considered an excellent definition in many parts of the common law world: "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

3 This simplified admissibility paradigm was met with mixed reactions from commentators: Ronald Allen et al., *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 Bos. U. Int'l L. J. 217, 223–227 (2013). At the same time, however, Stephen's attempt to codify the law of evidence when much of the common law world did not think it was feasible or necessary proved to be *avant-garde*, as many of the major common law jurisdictions have codified rules of evidence now.

excluded (or, in the view of some, rendered inadmissible) by the court for whatever reason.[4] But, in the words of the Singapore Law Reform Committee on Opinion Evidence, under the Evidence Act, there is "no distinction between the concepts of relevance and admissibility".[5] Appreciating this feature of the Evidence Act, as will be seen, is utterly critical for reforming its relevancy provisions.

Among the various Commonwealth jurisdictions which the Indian Evidence Act was exported to and adopted in was Singapore. This was done in 1893, and since that time the antiquated Evidence Act[6] has undergone several rounds of amendments, the latest being in 2012.[7] However, whereas prior amendments did not significantly alter the Evidence Act,[8] the 2012 amendments, in yet another attempt to bridge the gap between the statute's old rules and modern common law developments, may well have radically transformed the conceptualization of relevance and admissibility to the point that the law is now more confusing than ever. The relevancy provisions in the Evidence Act – in my view the most crucial ones[9] – are

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4 *Cf.* the language used in A Digest on the Law of Evidence, *supra* note 1, art. 2: "Evidence may be given in any proceeding of any fact in issue, and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed irrelevant, and of any fact hereinafter declared to be deemed to be relevant to the issue whether it is or is not relevant thereto. Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all circumstances of the case."

5 Vinodh Coomaraswamy S.C., Report of the Law Reform Committee on Opinion Evidence, 7 (2011). See also Chin Tet Yung, *Hearsay Reforms: Simplicity in Statute, Pragmatism in Practice?*, 26(2) Sing. Acad. L. J. 398, 405 (2014); Halsbury's Laws of Singapore (vol. 10), [120.009] (2010). *Cf.* a self-contradiction maintained in a later edition of the text in Halsbury's Laws of Singapore (vol. 10), [120.014] (2013): "the formulation of, and hence insistence on, positive relevancy has not raised significant doubts about the existence, under the [Evidence Act], of a judicial discretion to exclude evidence, which though logically relevant has a prejudicial effect outweighing or out of proportion to its probative force, or evidence of little or no weight but which may be gravely prejudicial. The fact that the [Evidence Act] lays down a system of positive relevancy must not be taken as denying the existence of a similar discretion to exclude prejudicial evidence. This is because there is not one standard of 'legal' relevancy but there are several standards, depending on the category of relevant facts. In many instances, these varying standards cannot be applied without taking account of any prejudice that would be occasioned by consideration of the fact in question."

6 Cap. 97, 1997 Rev. Ed.

7 Evidence (Amendment) Act 2012 (No. 4 of 2012).

8 Jeffrey Pinsler, Evidence and the Litigation Process, 19–20 (2010).

9 Even though this paper only considers questions of relevance and admissibility, these are the most fundamental questions surrounding the Evidence Act. This is because until and unless the issue of admissibility is resolved, all the other aspects of the Evidence Act, i.e. mode of proof and production and effect of proof are completely academic.

verging on contradictory due to the 2012 amendments.[10] A proper rethink of the legislation is therefore necessitated and this paper points to several main reasons as to why this is the case,[11] and also considers possible alternative ways forward, including briefly considering modifying certain aspects of model legislation from another common law jurisdiction (Australia) that has had the benefit of invaluable hindsight when formulating its evidence laws. In addition, to the extent that there are quite a number of jurisdictions in Asia (and also beyond it) that still retain vast portions of their versions of the Indian Evidence Act on their statute books,[12] Singapore's latest reformative experiment in attempting to fuse the old and the new may perhaps be of some comparative value to these jurisdictions.

The roadmap of the paper is as follows: Part 1, as just traversed, sets out the introduction. Part 2 is an exploration of the key features of the Evidence Act as regards relevance and admissibility. Part 3 explains why the 2012 amendments are confusing – specifically, an oddly phrased and normatively unjustified exclusionary discretion has been introduced to some, but not all of the relevancy provisions. Part 4 contains some suggestions on what could have been done (including amendments to similar fact which did not take place), while Part 5 is where concluding remarks reside. Part 6, the postscript, analyses a couple of Singapore High Court decisions discussing the 2012 amendments that were only released shortly after the conclusion of this paper.

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10 For a seemingly opposing view, see HALSBURY'S LAWS OF SINGAPORE (2013) (*supra* note 5) – the first post-2012 local evidence text – which did not appear to take any issue with the potentially negative implications of the 2012 amendments.

11 Even before the amendments, there had been calls to have the Evidence Act overhauled or rewritten. See, e.g. Jeffrey Pinsler: *Approaches to the Evidence Act: The Judicial Development of a Code*, 14(2) SING. ACAD. L. J. 365 (2002); Chin Tet Yung, *Remaking the Evidence Code: Search for Values*, 21(1) SING. ACAD. L.J. 52 (2009). See also Robert Margolis, *The Concept of Relevance: In the Evidence Act and the Modern View*, 11 SING. L. REV. 24, 41 (1990): "Stephen's concept of relevance and the way in which it is embodied in the Evidence Act… is fundamentally different from the currently accepted and… theoretically sound approach to the admissibility of evidence. The unique paradigm of admissibility in the Evidence Act is not useful nor is it used by the courts. Furthermore, Stephen's paradigm in the Evidence Act has been disregarded by Parliament."

12 These include Bangladesh, Brunei, Burma, Malaysia, Pakistan and Sri Lanka, and (outside of Asia) Nigeria, South Africa and Tanzania: *Reforming the Law of Evidence of Tanzania, supra* note 3, at 225. Legislation in Kenya, Nigeria, Uganda and Zanzibar were similarly influenced by the rules and principles of the Indian Evidence Act. Certain jurisdictions such as Australia that have since reformulated their evidence legislation were also influenced by Stephen's ideas at some point.

2 Understanding the basic features of the admissibility paradigm of the Evidence Act

The provisions affected by the 2012 amendments to the Evidence Act were those relating to legal professional privilege, hearsay, expert opinion, computer output and impeachment of the credit of rape victims.[13] Pertinent for present purposes are the amendments to the relevancy provisions found in Part I of the Evidence Act, i.e. the hearsay[14] and expert opinion[15] evidence provisions. The admissibility for these two types of evidence was broadened considerably so as to take into account the practices and realities of modern litigation (the exact details in this regard need not unduly detain us in the present endeavour),[16] but at the same time, two subsections were introduced to curtail admissibility and abuse.[17] Section 32(3) states that certain hearsay statements "shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant". Likewise, s. 47(4) states that an expert opinion that is admissible under the Evidence Act "shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant".

Before examining why these particular amendments are said to have caused confusion in terms of the structure and principles of the Evidence Act and why the state of evidence law in Singapore is now even more unclear than ever, one must first appreciate the fundamental but problematic features of the Evidence Act (and the consequences of such features) as regards its framework for

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13 Evidence (Amendment) Act 2012, *supra* note 7.

14 A useful definition for hearsay evidence is that of an assertion of a person made out of court, whether in oral or documentary form or in the form of conduct, tendered to prove the facts that it refers to: Jeffrey Pinsler, Evidence and the Litigation Process, 121 (2013).

15 A useful definition for expert opinion evidence is that of an expert stating an inference or opinion based on facts that he may not necessarily have directly perceived or have personal knowledge of: *id*. at 295.

16 Additional "exceptions" to the hearsay rule were introduced, while the general test for admitting expert opinion evidence was widened. With respect to the former, s. 32 was amended by removing the general precondition of unavailability of witness and increasing the number of situations where hearsay evidence can be admissible, such as when parties agree. With respect to the latter, the amended s. 47 replaced the old categorization approach with a broader touchstone of likelihood of assistance to the court, replaced the old requirement of special skills with a broader requirement of training, study or experience in the area in question, and abolished the common knowledge rule. However, nothing was done to clarify the applicability or non-applicability of the ultimate issue rule.

17 Singapore Parliamentary Reports, Evidence (Amendment) Bill, (Mr. K. Shanmugam) 14 February 2012.

relevant and admissible evidence. While these points have already been extensively documented elsewhere,[18] the key points bear reiteration and can be summarized as follows:

(1) It remains unclear even after the 2012 amendments if every piece of evidence (i.e. regardless of its contentiousness)[19] sought to be admitted must pass muster under the Evidence Act.[20] One may quite permissibly take the legalistic view that "*only* evidence of facts in issue and of other facts deemed to be 'relevant' by the Act may be adduced" and that "[u]nless evidence comes within an express inclusionary rule in the Evidence Act… that evidence cannot be received by the court",[21] but in modern litigation where there is voluminous and myriad types of evidence more often than not, and where evidence of questionable relevance is often re-characterized as potentially useful circumstantial evidence,[22] the (modern) common law

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18 See generally Chen Siyuan, *The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction*, 16(4) Int'l J. Evid. & Proof 398 (2012); Chen Siyuan and Nicholas Poon, *Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings*, 24(2) Sing. Acad. L. J. 535 (2012); Chen Siyuan, *The 2012 Amendments to Singapore's Evidence Act: More Questions than Answers as Regards Expert Opinion Evidence?*, 34(3) Stat. L. Rev. 262 (2013); Chen Siyuan, *The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction*, 6(3) Nat. u. Jur. Sci. 361 (2014).

19 See Jeremy Gans and Andrew Palmer, Uniform Evidence, 3 (2010): "In the vast majority of civil and criminal proceedings, the main point of disagreement… will not be about the legal consequences of an agreed set of facts; it will be about what the facts actually are. This is the province of the law of evidence… Ascertaining true facts has been a central human endeavour throughout history, but many scholars… have long recognised it as a highly problematic one. Just as courts and lawyers typically give only occasional thought to the deep debates about the nature of 'law', evidence law practitioners and scholars generally eschew questions about what 'facts' are and what it means for them to be 'true'. In doing so, they uncritically adopt a tradition of promoting a set of *principles* about legal proof" (emphasis in original).

20 *Cf.* Sir James Fitzjames Stephen, An Introduction on the Principles of Judicial Evidence, 53–54 (1872): "The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof."

21 Report of the Law Reform Committee on Opinion Evidence, *supra* note 5, at 8–9 (emphasis in original). See also *Basil Anthony Herman v. Premier Security Co-operative Ltd*, 3 S.L.R. 110, [25] (2010): "A litigant only has the right to adduce *relevant* evidence, as defined by the Evidence Act… irrelevant evidence is inadmissible and will not be considered by the court" (emphasis in original).

22 See also John Heydon, *The Origins of the Indian Evidence Act*, 9(2) Oxf. U. C'wealth L.J. 1, 29–31 (2010), where the author makes the claim that Stephen had in effect codified

position of a presumption that (relevant) evidence is admissible unless caught by a legal rule is by far more practical, and indeed, has been preferred by the Singapore courts on countless occasions.[23] And while it is true that s. 60 of the Evidence Act states that facts that have been admitted need not be proved, s. 31 (which unlike s. 60 is a relevancy/admissibility provision) states that admissions are not conclusive proof and may only have an estoppel function.[24] Further, even though allegations may be expressly or impliedly admitted to during the pleadings phase for civil disputes, the basis of this evidential dispensation is the Rules of Court, a subsidiary and subordinate source of law to the Evidence Act.[25] Perhaps, then, it is not surprising that even the Singapore Law Reform Committee on Hearsay Evidence had opined that evidence that does not establish a relevant fact in accordance with the Evidence Act is inadmissible.[26]

(2) Regardless of whether the answer to the previous question is yes or no, in my opinion the jurisprudence of the court suggests that it is unclear ex-post facto whether a piece of evidence that is being sought to be admitted under the Evidence Act must satisfy both the general relevancy provisions (set out in ss. 6–11) and specific relevancy provisions (set out in ss. 12–57), or just any of the relevancy provisions. The specific relevancy provisions were meant to capture the exceptions to the exclusionary rules under the common law (as they stood in the 1870s), but it should be noted that:

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circumstantial evidence in his relevancy provisions. To the extent that ss. 6–57 are "relevant fact" as opposed to "fact in issue" provisions, that is true.

23 *Cf.* An Introduction on the Principles of Judicial Evidence, *supra* note 20, at 122: "facts are irrelevant unless they can be shown to stand in the relation of cause or in the relation of effect to facts in issue, every step in the connection being either proved or of such a nature that may be presumed without proof. The vast majority of ordinary facts simply coexist without being in any assignable manner connected together… difficulty arises in dealing with facts which are apparently relevant but are not really so." See also Report of the Law Reform Committee on Opinion Evidence, *supra* note 5, at 7: "Modern evidence law makes no attempt… to define what is 'relevant'. The word 'relevant' is today used not in this closed sense but in a broad general sense to mean 'rationally probative'… and is not susceptible to being enumerated in legislation."

24 See also *Bogart Malls Pte Ltd v. Enets Pte Ltd*, S.G.H.C.R. 7, [33] (2014).

25 Supreme Court of Judicature Act (Cap. 322, R. 5, 2014 Rev. Ed.), O. 18 r. 13. The provision states in paragraph 1: "any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue… operates as a denial of it."

26 Philip Jeyaretname S.C., Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings, 8 (2007).

a. The general relevancy provisions, apart from defining probative value very widely,[27] serve no distinct purpose[28] in principle or practice (in that neither practitioners nor courts invoke them) and are worded broadly enough to effectively have most of the specific relevancy provisions subsumed,[29] and there is also no legitimate objection in statutory interpretation to applying a general relevancy provision over a specific relevancy provision (or vice versa).
b. Some aspects of the exclusionary rules have been interpreted by the courts to be found in the general relevancy provisions,[30] such as *res*

27 See also *The Origins of the Indian Evidence Act*, *supra* note 22 at 20–21: "Stephen was closely familiar with Bentham's arguments for codifying the law generally. He agreed with Bentham's dislike of the disorganised nature of the law of evidence, only to be extracted from large numbers of decided cases and piecemeal statutes. But he differed from Bentham in a fundamental respect. Bentham concluded that almost all rules excluding evidence were evil, because they diminished the chances of convicting the guilty. He thought they should be abolished. He adhered to a doctrine of what is now called 'free proof'. Stephen disagreed… He had a higher opinion of the judicial role than Bentham. While he was dissatisfied with some rules of evidence, he thought that their complete abolition would be foolish. They kept inquiries within reasonable limits. They prevented trials from resting on mere personal discretion."

28 *Cf.* An Introduction on the Principles of Judicial Evidence, *supra* note 23, at 55: "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings… These sections are by far the most important… as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved."

29 For instance, ss. 14 and 15 of the Evidence Act are the so-called *mens rea* provisions for admitting similar fact. However, the general relevancy provisions in the form of ss. 6 (facts that are part of the same transaction), 8 (facts showing a motive) or 9 (facts necessary to support an inference) could very well admit such evidence as well. See also Evidence and the Litigation Process (2010), *supra* note 8, at 41: "it is arguable that the scope of ss. 6 to 11 is extensive enough to encompass facts not declared to be relevant by ss. 14 to 57 thereby rendering the latter provisions redundant." *Cf.* Sudipto Sarkar and V.R. Manohar, Sarkar Law of Evidence, 432 (2010), commenting on s. 11, the final general relevancy provision that is often described as a catch-all residual provision: "This section has been expressed in very wide language, but it does not mean that any and every fact which by a chain of reasoning may be shown to have a bearing, however remote, on any fact in issue [that is, s. 5] or relevant fact [that is, all other circumstantial evidence as defined by the Evidence Act], is relevant. That would do away with the theory of relevancy propounded in the previous sections and bring in a mass of collateral facts creating confusion, embarrassment and prejudice… Though the terms of [s. 11] are wide, they are controlled by the provisions regarding relevancy contained in the other sections of the [Evidence Act] and the fact relied on must be proved according to the provisions of the [Evidence Act]."

30 Evidence and the Litigation Process (2010), *id*. at 42–43; V.R. Manohar, Ratanlal & Dhirajlal The Law of Evidence, 90, 102 (2011). *Cf. Lim Mong Hong v. Public Prosecutor*, 3 S.L.R.(R.) 88, [33]–[37] (2003).

gestae for hearsay (see ss. 6[31] and 8(2)[32]) and the *actus reus* element of the similar fact rule (see ss. 9[33] and 11(b)).[34] This has resulted in confusion as to whether the general or specific relevancy provisions should be applied in given circumstances. In addition, there has neither been a legislative nor judicial response to this despite the availability of ample opportunities for it.

c. The common law has long ventured beyond the traditional rules to develop a greater number of and variety of means to exclude relevant evidence or to have them considered inadmissible,[35] but the largely static Evidence Act has never been amended to follow suit, rendering the relevancy provisions even more anachronistic, and prompting the courts to develop the law by an alternative means.[36]

(3) Regardless of the answers to the two preceding questions, it remains unclear even after the 2012 amendments if a Singapore court has the residual discretion to exclude evidence even if it is found relevant under the Evidence Act. In my opinion the language of the Evidence Act and

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31 The provision states: "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places."

32 The provision states: "The conduct of any party or of any agent to any party to any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

33 The provision states: "Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

34 The provision states: "Facts not otherwise relevant are relevant… if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

35 Paul Roberts and Adrian Zuckerman, Criminal Evidence, 99 (2010); Colin Tapper, Cross & Tapper on Evidence, 65–74 (2010); Adrian Keane and Paul Mckeown, The Modern Law of Evidence, 20–31 (2012).

36 *Cf. Public Prosecutor v. Low Kok Heng*, 4 S.L.R.(R.) 183, [57] (2007): "The purposive approach takes precedence over all other common law principles of interpretation. However, construction of a statutory provision pursuant to the purposive approach… is constrained by the parameters set by the literal text of the provision. The courts should confine themselves to interpreting statutory provisions purposively with the aid of extrinsic material within such boundaries and assiduously guard against inadvertently re-writing legislation… The general position in Singapore with respect to the construction of written law should be the same whether the provision is a penal or civil one."

recent authorities[37] would suggest that the answer is no, and while the 2012 amendments ostensibly confer (via ss. 32(3) and 47(4)) express judicial power to (at least in effect) exclude certain types of hearsay evidence and expert opinion evidence, the amendments were oddly phrased. This will be elaborated in due course,[38] but suffice to say for now the definition, operation and justification for the basis upon which a court can exercise its exclusionary discretion are plagued by inconsistent judicial application[39] to which the 2012 amendments have only exacerbated. Moreover, prior to the 2012 amendments, "modern legislative additions to the Evidence Act do use the word 'relevant' in the modern sense in contradiction to 'admissible'. This means that those newer provisions cannot be read in the same way as the Act's original provisions."[40]

(4) The relevancy provisions (and their accompanying explanations and illustrations) in the Evidence Act are largely agnostic to whether the evidence in question is being adduced in civil or criminal proceedings.[41] This can be contrasted with the modern common law position in many other jurisdictions where either inter-party agreement (i.e. party autonomy) can

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37 See, e.g. *Law Society of Singapore v. Tan Guat Neo Phyllis*, 2 S.L.R.(R.) 239, [124]–[126] (2008) (in particular, at [126], the court said that "all relevant evidence is admissible unless specifically expressed to be inadmissible"); *Public Prosecutor v. Mas Swan bin Adnan*, S.G.H.C. 107, [107] (2011). See also B.M. Prasad and Manish Mohan, Woodroffe & Amir Ali Law of Evidence, 680–681 (2012): "The court must, therefore, ignore any other consideration, and confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the relevant provisions of the Act, regardless of the fact whether the conclusion at which one ultimately arrives is in accordance with what is generally characterised to be a common sense view of things. It is not open to any judge to exercise a dispensing power and admit evidence not admissible by the statute, because to him, it appears that the irregular evidence would throw light upon the issue. Conversely, he cannot, on the ground of public policy, exclude evidence legally admissible under this Act. Nor can he exclude such evidence on the ground that it is not admissible under English law… the court should, of itself and irrespective of the parties, take objection to evidence tendered before it which is not admissible under the provisions of the [Indian Evidence Act]."

38 See *infra*, note 69. See also Jeffrey Pinsler, *Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach*, 25(1) Sing. Acad. L. J. 215 (2013).

39 See, e.g. *Cheng Swee Tiang v. Public Prosecutor*, M.L.J. 291, 293 (1964); *How Poh Sun v. Public Prosecutor*, 2 S.L.R.(R.) 270, [21] (1991); *Tan Guat Neo Phyllis*, *supra* note 37, at [126]–[129]; *Muhammad bin Kadar v. Public Prosecutor*, 3 S.L.R. 1205, [140]–[147] (2011).

40 Report of the Law Reform Committee on Opinion Evidence, *supra* note 5, at 8–9.

41 See also, albeit on the separate question of standard of proof, s. 3(3) of the Evidence Act: "A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

circumvent established exclusionary rules for civil claims or some exclusionary rules have simply ceased to apply to civil proceedings;[42] some jurisdictions have even gone as far as to create separate evidence statutes for criminal proceedings.[43] Moreover, the 2012 amendments to the Evidence Act appear to be motivated predominantly by civil/commercial sensibilities, without due consideration of the implications on criminal proceedings.[44]

This is problematic because not only should a higher standard of proof be required in criminal proceedings, there should be greater caution when admitting evidence that is potentially unreliable or prejudicial (broadly conceived) as well.[45] To briefly illustrate, whereas the most commonly adduced "exclusionary" evidence in civil proceedings (in the form of hearsay and expert opinion evidence) will at worst suffer from the single-dimensional problem of unreliability, the same cannot be said for criminal proceedings when it comes to similar fact evidence, the distortive effect (as opposed to its inherent reliability) of which due to the emotive errors it engenders affects the fact-finder. This is all the more important in a criminal justice system such as the one found in Singapore, where it is the prosecution and not the accused who is adducing the overwhelming majority of the evidence and whereby the rules of procedure are tilted in the state's favour.[46] This imbalance is exacerbated by the fact that most

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42 See, e.g. in England and Wales the CIVIL EVIDENCE ACT 1995; in Australia the EVIDENCE ACT 1995; in New Zealand the EVIDENCE ACT 2006.

43 A prominent example would be England and Wales with the POLICE AND CRIMINAL EVIDENCE ACT 1978 (and subsequently the CRIMINAL JUSTICE ACT 2003). In Singapore there is the CRIMINAL PROCEDURE CODE (CAP. 68, 2012 REV. ED.) to regulate procedural aspects of criminal cases, but the compatibility and synergy with the Evidence Act is far from satisfactory (though there has been no judicial pronouncement to this effect).

44 See the comments in SINGAPORE PARLIAMENTARY REPORTS, EVIDENCE (AMENDMENT) BILL (Ms Sylvia Lim) 14 February 2012. These may have unintended knock-on effects on the quality of the criminal justice system: see generally Chen Siyuan, *A Preliminary Survey of the Right to Presumption of Innocence in Singapore*, 7 LAWASIA J. 78 (2012). But for a different account on how the criminal justice landscape in Singapore is gradually liberalizing, see Chen Siyuan, *The Limits on Prosecutorial Discretion in Singapore: Past, Present, and Future*, 2(1) INT'L REV. L. 1, 15–18 (2013).

45 Thus, in other jurisdictions, there is often the requirement of substantially higher probative value (relative to prejudicial effect) before the exclusionary discretion is withheld.

46 See generally Melanie Chng, *Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010*, 23(1) SING. ACAD. L. J. 23 (2011); Denise Wong, *Discovering the Right to Criminal Disclosure: Lessons from Civil Procedure*, 25(2) SING. ACAD. L. J. 548 (2013); Michael Hor, *The Future of Singapore's Criminal Process*, 25(3) SING. ACAD. L. J. 847 (2013).

accused persons in Singapore do not have legal representation even though it is an adversarial system. Thus, whereas there is, as a starting point, an assumption that parties in civil cases are at arms' length, the opposite is true in criminal cases where the court ought to be constantly equalizing the accused's much more vulnerable position relative to the state machinery and its abundance of resources.[47]

(5) The Evidence Act, in so far as it was inspired by English evidence law in the 1800s, was based on rules to be used in jury trials, but Singapore abolished trial-by-jury more than 40 years ago.[48] It can be said that the rules of evidence regarding admissibility exist largely so that the judge can shield the jury from even seeing unduly prejudicial or simply unreliable evidence.[49] Accordingly, in bench trials, judges have no choice but to become filters and fact-finders at the same time; they will be exposed to the potentially negative effects of bad evidence regardless of the existence of exclusionary rules.[50] Be that as it may, it may be better for them to be

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47 See *Sakthivel Punithavathi v. Public Prosecutor*, 2 S.L.R.(R.) 983, [78]–[81] (2007); *AOF v. Public Prosecutor*, 3 S.L.R. 34, [314]–[315] (2012). See also Audrey Wong, *Criminal Justice for All? Wrongful Convictions and Poverty in Singapore*, 28 Sing. L. Rev. 67 (2010).

48 See generally Andrew Phang, *Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution*, 25 Mal. L. Rev. 50 (1983).

49 See also Andrew Choo, Evidence, 20–23 (2011); Singapore Parliamentary Reports, Evidence (Amendment) Bill (Mr Hri Kumar) 14 February 2012: "[The 2012 amendments to the Evidence Act] would save significant legal time and costs for litigants by preventing unnecessary technical challenges on the admissibility of certain kinds of evidence. It would also help ensure that all the relevant evidence is before the court hearing the matter, whether criminal or civil, thus enhancing access to justice… our judges are capable of appreciating the subtleties of expert opinion evidence and according the appropriate weight to it… The considerations that were applied to lay people in the 19th century who sat in the jury box are completely out of place in our legal system… It is for this reason that I think there is some merit to re-examine whether the hearsay rule should be abolished completely. What we have introduced by these amendments are rules that allow for broader admission of hearsay evidence but keep in place some of the technical rules which may keep out some evidence. Instead of making incremental changes that leave these technical rules and then add layers of discretion, we should just do away with the rules regarding hearsay evidence altogether… It is for the Judges to decide what weight to allocate to that piece of evidence, and they are equipped to make that assessment and, in fact, do this all the time… confidence is already placed in Judges on a matter of admissibility, and to trust Judges on admissibility and not on weight is spurious. A Judge has undergone years of legal training and is entirely capable of exercising his discretion and according weight to each evidence based on the circumstances of the case, factoring in considerations such as reliability… If the Judge gets it wrong, the appellate court is there to put it right."

50 See also Ho Hock Lai, *Similar Facts in Civil Cases* 26(1) Oxf. J. Leg. Studies 131, 140–141 (2006) (commenting on the similar fact rule): "If the true foundation of the rule is indeed psychological, it is *conceptually incoherent* to apply it at a bench trial. First, in deciding on admissibility,

apprised of the fuller evidentiary picture if exclusionary rules are relaxed or removed altogether, especially since judges are supposed to have greater immunity than juries to adverse effects of bad evidence.[51] Separately, "unlike a juror whose deliberation and ratiocination are hidden from view, the trial judge may be made to state his evaluative and ratiocinative processes and an appeal on the facts may be entertained to correct any fundamental error of mis-appreciation or mis-evaluation of the evidence."[52] Perhaps all of this has led to the former Attorney-General of Singapore (who later became the Chief Justice) to remark that: "in bench trials… the judge can simply give whatever weight is appropriate to the evidence. There is no need for a judge to go through the formal process of declaring the evidence inadmissible."[53]

However, an important distinction should be made between professional judges having an epistemic advantage over juries and the epistemic advantage of judges over juries being significant enough to allow for the

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the judge must, on a literal reading of the conventional theory, predict whether she has the psychological fortitude to guard herself against being swayed unduly by the evidence. If the answer is 'no', it must be excluded. But, for the very same reason (the admitted lack of fortitude), the exclusion would be largely pointless since the judge has already been exposed to the evidence. We are thus led to the paradoxical position that, in a bench trial, the precaution can only be taken after the harm is done. Second, if the judge decides to exclude the evidence, she must not allow it to influence her deliberation on the verdict. We put faith in the judge's willingness to comply with the law and in her ability to completely banish the excluded evidence from her mind. But should not the same faith in the judge's ability lead us to admit, rather than exclude, the evidence?" (emphasis in original).

51 With respect to similar fact at least, see also Robert Margolis, *Evidence of Similar Facts, The Evidence Act, and the Judge of Law as Trier-of-Fact*, 9 Sing. L. Rev. 103 (1988); Chen Siyuan, *Revisiting the Similar Fact Rule in Singapore*, Sing. J. Leg. Studies 553 (2011).

52 Halsbury's Laws of Singapore (2013), *supra* note 5, at [120.028]. See also *Thong Ah Fat v. Public Prosecutor* 1 S.L.R. 676, [15] (2012): "Judicial decisions that are bereft of reasoning are, of course, impervious to scrutiny and challenge, effectively making judges unaccountable for their decisions. This is plainly unacceptable in any modern society. We note that historically, as the role of juries in fact-finding declined, it has been acknowledged in all mature common law jurisdictions as an elementary principle of fairness that parties are not only to be given a fair opportunity to be heard, but also apprised of how and why a judge has reached his decision."

53 Chan Sek Keong, *The Criminal Process – The Singapore Model*, 17 Sing. L. Rev. 431, 456 (1996). See also cases such as *Tan Meng Jee v. Public Prosecutor*, 2 S.L.R.(R.) 178, [48] (1996) that have echoed this sentiment. Or perhaps the Singapore courts have adopted this approach instead: "Evidence must be *relevant* before it can be used in court. If it is relevant and does not infringe any exclusionary rule, it will be *admissible*. Admissible evidence can, however, be excluded in the exercise of *judicial discretion*. Any admissible evidence that is excluded in the exercise of discretion will be admitted, and the *weight* to be attached to the evidence is then a matter for the trier of fact" (Evidence, *supra* note 49, at 2 (emphasis in original)).

admissibility of the evidence in question – the first does not necessarily allow us to conclude the second, in light of the existence of cognitive tricks to which even professional judges are vulnerable as well. In this light, rules of evidence should not be seen as technical impediments, but facilitators of justice, whether or not the fact-finder is a layperson or a professional adjudicator.[54]

Then of course there is s. 2(2) – which other Indian Evidence Act jurisdictions have or are assumed to have repealed – and which states that "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed." This "freezing" of evidence law as it stood in the 1800s has in theory, and in practice, constituted the challenge impediment for the Singapore courts as far as evidence law is concerned – and in an indirect sense, the legislature – to develop Evidence Act jurisprudence in tandem with common law developments.[55] Though Parliament has had countless opportunities over the years to amend or remove this rigid provision, it never did – nor did it ever "refresh" the Evidence Act in any meaningful way.[56] As a result, for the larger part of the history of evidence law in Singapore, practitioners and the courts seemed to have routinely interpreted the Evidence Act so as to facilitate the application of a more flexible common law instead. This is in spite of the fact that statutory law trumps

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54 See also Roderick Munday, *Case Management, Similar Fact Evidence in Civil Cases, and a Divided Law of Evidence*, 10(2) INT'L J. EVID. & PROOF 81 (2006).

55 See generally *Approaches to the Evidence Act*, *supra* note 11.

56 See also *Remaking the Evidence Code*, *supra* note 11, at 95: "The current Evidence Act, even with its amendments, is not suited to a modern legal system, particularly as it was enacted at a time when criminal evidence in particular was poorly developed, if at all, and where the code was meant for a totally different legal and social environment… The approaches of the local courts to the relationship between the common law and the Act have not been consistent, and that this is inevitable, given the fact that the Evidence Act is a loose though systematic collection of rules enacted in the later part of the 19th century, which meant that it could not take advantage of the innovative decisions at common law in the 20th century… There is a need to identify a set of contemporary values that could be used to remake the code; the basic concept recognised (by Legislature, courts and public alike) is that of procedural fairness, or the concept of 'a fair trial'… The justifying aims of a law of evidence – that of… legitimacy in adjudication… and… principle of maximum individualisation… could be used to guide a remaking of the code… The concept of 'fairness' may in fact be a constraint to fact-finding, and that fact-finding must be done in a context where the judge is seen as impartial and independent – a proper judicial value… should be inculcated… Fairness as equality is an important value… in the case of criminal cases there must be an attempt to reduce the inequality as between the Prosecution and the Defence."

common law as a source of law.[57] It could be argued that the effect of this is to mitigate the potential difficulties that the statute has imposed, but in the overall scheme of things, the Evidence Act – and inconsistencies in the jurisprudence of the courts – has added to the lack of clarity in Singapore evidence law.[58] Some hope emerged on the horizon in 2008, when the Court of Three Judges[59] and the Court of Appeal[60] reversed long-standing case authority that sanctioned the circumvention and upending of the Evidence Act,[61] but it seems that this was not taken into account by Parliament in the 2012 amendments. The reports of the Law Reform Committees were also probably not taken into consideration – no explicit reference was made to their contents in the debates. Even more unfortunately (or fortunately, depending on the perspective adopted), the amendments have probably sounded the death knell for the most important part of the Evidence Act.

3 The effect of the 2012 amendments

3.1 Introduction of an ill-conceived discretionary power?

So what exactly were the issues with the 2012 amendments to the Evidence Act? It is appropriate to swiftly return to what was previously said to be front and centre of the 2012 amendments: the introduction of ss. 32(3) and 47(4), which appear to give the courts the power/discretion to treat certain types of relevant hearsay and expert opinion evidence as irrelevant if "it is in the interests of

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57 See also An Introduction on the Principles of Judicial Evidence, *supra* note 20, at 129: "The Act speaks for itself. No labour was spared to make its provisions complete and distinct… its object would be defeated by elaborate references to English cases… If it is turned into an abridgment of the law which it was meant to replace, it will be injurious instead of being useful…"

58 See generally *Remaking the Evidence Code*, *supra* note 11; Ho Hock Lai, *An Introduction to Similar Fact Evidence*, 19 Sing. L. Rev. 166 (1998); Chen Siyuan, *Evidence and Criminal Procedure: Gradual Developments towards Clarity in a Maze of Statutory Enactments* in Goh Yihan and Paul Tan (eds.), The Development of Singapore Law: 20 Years of the Application of English Law Act (2014).

59 *Tan Guat Neo Phyllis*, *supra* note 37, at [118]–[124]. The Court of Three Judges is the apex court for disciplinary proceedings against lawyers. The Court of Appeal is the apex court in the land.

60 *Lee Chez Kee v. Public Prosecutor*, 3 S.L.R.(R.) 447, [75], [116] (2008). See also *Muhammad bin Kadar*, *supra* note 39, [51].

61 See *e.g.*, *Syed Abdul Aziz v. Public Prosecutor*, 3 S.L.R.(R.) 1, [35] (1993); *Lee Kwang Peng v. Public Prosecutor*, 2 S.L.R.(R.) 569, [46] (1997); *Public Prosecutor v. Glenn Knight Jeyasingam*, 1 S.L.R.(R.) 1165, [53]–[58] (1999). See also *Tan Meng Jee*, *supra* note 53, at [49].

justice". It did not take long for academic criticisms of this new test to emerge. For instance, one commentator described the new test as "unnecessarily vague", being "silent as to the mechanism that the court might apply and the factors it would take into account in exercising its discretion", and introducing a "legal fiction" that facts found relevant under ss. 32 and 47 could somehow lose their relevance pursuant to the court's discretion.[62] Another commentator described the new test as being "phrased in the highest generality", susceptible to contravening the rule of law if misinterpreted, and endorsed the view that it may be "so open-ended as to be almost useless".[63]

At any rate, before the 2012 amendments, there had emerged – despite Stephen's overt intention to simplify the framework – at least three ways to interpret the admissibility paradigm as envisaged by the Evidence Act. These approaches were largely mutually exclusive:

(1) Only evidence that is declared relevant under the (either general and specific or general or specific) relevancy provisions of the Evidence Act may be admitted, and once it is found relevant and admitted, the court cannot exclude the evidence, but may give it less weight (or even no weight) if necessary.[64]

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62 *Admissibility and the Discretion to Exclude Evidence*, *supra* note 38, at 235–236.

63 *Hearsay Reforms*, *supra* note 5, at 430. The same author goes on to note (at 430–431): "While evidence is strictly admissible *according to the rules of evidence*, so the party proffering such evidence may think, the exercise of the discretion to exclude it may trump such rules, and that may result in adverse consequences on the party relying on the 'excluded' evidence. The uncertainty… provides no sure guide beforehand, and will lead to not just uncertainty but also confusion, and most likely in the long run, a lack of cohesion in the law. This is because of the 'highly subjective' nature of the phrase… Judges may reasonably differ in their views as to what constitutes 'in the interests of justice' in a particular case. It has been observed that appellate courts are reluctant to overturn decisions based on discretion, limiting themselves to whether the trial judge took into account the proper criteria or guidelines and did not act capriciously and irrationally. However, even that angle may not be open" (emphasis in original).

64 See *e.g.*, *Cheng Swee Tiang v. Public Prosecutor*, M.L.J. 291 (Ambrose J. dissent) (1964); *Tan Guat Neo Phyllis*, *supra* note 37, at [124]; *Mas Swan*, *supra* note 37, at [102]–[107]. *Cf.* s. 5 of the Evidence Act: "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others." However, the argument that s. 5 does not mandate admissibility is not convincing, for reasons explicated in the main text below. Under the Evidence Act, the question that deserves fullest attention is what should count as admissible evidence, rather than what is not. But to return to the point about the number of ways in which the admissibility paradigm of the Evidence Act operates – the more precise number may be said to be eight rather than three or four: (1) satisfaction of a general relevancy provision only; (2) satisfaction of a specific relevancy provision only; (3) satisfaction of a general relevancy provision as well as a specific

(2) The Evidence Act is inapplicable unless the evidence sought to be admitted is caught by one of its provisions reflecting an exclusionary rule (albeit expressed in inclusionary terms), but even after the Evidence Act is triggered, there can still be recourse (whether constrained by s. 2(2) or otherwise) to the common law to determine the admissibility/inadmissibility and/or exclusion of the evidence.[65] If the nature of the evidence does not engage any provision that reflects an exclusionary rule (for instance, circumstantial evidence to show motive), it is unclear if it is mandatory for it to satisfy one of the general relevancy provisions to be admissible.[66]
(3) The Evidence Act is applicable but even if evidence is found relevant and admissible under any of its relevancy provisions, the court has the discretion[67] to exclude it; the traditional test that applies to this exercise of discretion is the weighing of probative value and prejudicial effect.[68]

What has been the effect of the 2012 amendments – even if not entirely intended? To this end, it is best to consider what was said by the Minister for

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relevancy provision; (4) satisfaction of a general relevancy provision subject to an exclusionary discretion; (5) satisfaction of a specific relevancy provision subject to an exclusionary discretion; (6) satisfaction of a general relevancy provision as well as a specific relevancy provision subject to an exclusionary discretion; (7) any or none of the above, depending on the type of evidence sought to be admitted (for instance, whether an exclusionary rule is triggered), and (8) no relevancy provision needs to be satisfied if the evidence can be re-characterized as (relevant) circumstantial evidence.

65 See, e.g. *Lee Kwang Peng*, *supra* note 61, at [35]–[52]; *Muhammad bin Kadar*, *supra* note 39, at [53].

66 *Supra*, note 18.

67 *Cf*. Criminal Evidence, *supra* note 35, at 99: "Lawyers frequently refer to the judicial 'discretion' to exclude evidence, but this usage can be misleading. Admissibility standards vary in the extent to which they call for an exercise of 'discretionary' judgement in their application. The effect of some rules is almost automatic, once the conditions for their application have been found to exist, whilst others leave trial judges with much greater room for manoeuvre in deciding whether to admit or exclude contested evidence. The difference, however, is a matter of degree, inadequately expressed by a categorical distinction between *rules* of admissibility and judicial *discretion*. Provided that is understood that rules come in different shapes and sizes and require more or less fine-grained contextual applications to the facts of the instant case, there is no need to insist on a further, superfluous subdivision of admissibility standards" (emphasis in original).

68 See, e.g. *Public Prosecutor v. Teo Ai Nee*, 1 S.L.R.(R.) 450, [77]–[79] (1995); *Tan Meng Jee*, *supra* note 53, at [49]–[50]. In Malaysia – another Indian Evidence Act jurisdiction – this is the test as well: see, e.g. *Kesavan a/l Petchayo @ Balakrishnan v. Public Prosecutor* 2 M.L.J. 209, 215D–F (2003); *Wan Mohd Azman bin Hassan @ Wan Ali v. Public Prosecutor* 4 M.L.J. 141, [28]–[33] (2009). See also Tan Yock Lin, *Sing a Song of Sang, A Pocketful of Woes?*, Sing. J. Leg. Studies 365, 366–371 (1992).

Law in Parliament with respect to the hearsay amendments (which because of the similarities between ss. 32(3) and 47(4) apply to the expert opinion amendments as well):[69]

> What we have done is to introduce more flexible exceptions to the hearsay rule… [However] the Court is given a *residual discretion to exclude* hearsay evidence in the *interests of justice*. This ensures that the expanded exceptions are not *abused*. This is *in addition* to the Court's *inherent jurisdiction to exclude prejudicial evidence*… This set of amendments represents today what we believe to be the best balance that we can strike between the use of *helpful* hearsay evidence and the risk of presenting *unreliable* evidence before the courts. The net result of these amendments will be that the courts will have *a broader but still structured discretion* to deal with hearsay evidence… What we are doing now is *not therefore to allow in what was previously not allowed* but to give the courts the discretion to sieve through the evidence to see which part should be allowed if the judge believes that to be in the interests of justice in the particular case.[70]

From this passage, there is now at least an additional approach to interpreting the admissibility paradigm of the Evidence Act:

(4) The Evidence Act is applicable but even if evidence is found relevant under its relevancy provisions, it may be excluded if it is in the interests of justice not to admit it (to reiterate, the amendments say very little if anything about points (1)–(5) in the previous section).

A number of connected issues arise for serious examination. First, does this approach extend to all the relevancy provisions (whether general or specific) in the Evidence Act or is it (literally) only limited to certain hearsay and expert opinion evidence? Secondly, is there a difference between excluding evidence and not admitting evidence at all *ab initio*, notwithstanding the fact that the Minister for Law seems to have used the concepts of exclusionary discretion and inadmissibility interchangeably? Thirdly, does "the interests of justice" refer to the cause of fairness and equity that is used when a judge has discretion to

69 In this regard, s. 9A(1) of the Interpretation Act (Cap. 1, 2002 Rev. Ed.) states: "In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object." Case law has also made it clear that the purposive interpretation trumps any other canon of statutory interpretation: see, e.g. *OpenNet Pte Ltd v. Info-communications Development Authority of Singapore*, 2 S.L.R. 880, [15] (2013); *Dorsey James Michael v. World Sport Group Pte Ltd*, 3 S.L.R. 354, [17]–[18] (2013).

70 Singapore Parliamentary Reports, *supra* note 17 (emphasis added). See also *Teo Wai Cheong v. Crédit Industriel et Commercial*, 3 S.L.R. 573, [33]–[55] (2013).

make a ruling in a particular situation, the balancing of probative value and prejudicial effect, or does it mean something else? Fourthly, is this discretion, as claimed, founded on the court's "inherent jurisdiction", or is it normatively justified on some other basis?

These questions will now be considered in turn and, for structural convenience, over two parts. Following which, the impact on the similar fact[71] provisions (an "exclusionary" rule found in the Evidence Act but not in the 2012 amendments) will be considered, before we turn to possible ways forward for Singapore as regards how the Evidence Act can be improved.

3.2 Problems of consistency with the new discretionary power

Quantitatively and qualitatively, the 2012 amendments did not receive very robust debate in Parliament.[72] This suggests that the modern attitude towards adjectival law (but not distinct procedural law)[73] in Singapore seems to be of less regulation, increased pragmatism and more (trust in) judicial discretion.[74] Given the quality and reputation of the Singaporean judiciary[75] – and factoring in the generally fair presupposition that judges make better fact-finders than juries – this is not necessarily an unreasonable position to adopt. But if that is

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71 A useful definition of similar fact evidence is that of evidence of a person's previous misconduct being used to support the inference that the person is now guilty of a present offence: Evidence and the Litigation Process (2013), *supra* note 14, at 77–78.

72 During the Second Reading of the bill to amend, only 6 (out of 99) Members of Parliament spoke for a total of one and a half hours. It should be noted that in Singapore, the First Reading of a bill only entails the introduction of the bill and there is no debate. Following the Second Reading, a bill will be subjected to a Third Reading and this provides the opportunity for the House to propose any final amendments but in this case, no amendments were proposed after the Second Reading.

73 Civil Procedure reform receives far greater attention in Singapore, with the rules and principles being constantly revisited by the entire spectrum of the legal profession, and a far richer body of jurisprudence that considers the law in its proper terms.

74 In perspective, however, the Ministry of Law did consult many stakeholders before tabling the amendments and also considered evidence law reform proposals that had spanned a couple of decades. Perhaps the result that eventuated only goes to confirm the general attitude towards evidence law.

75 For a consolidation of the latest international rankings of the Singapore judiciary as regards its efficiency and quality of justice, see Subordinate Courts Annual Report 2012 (http://app.subcourts.gov.sg/Data/Files/file/AR%202012/AR%202012.pdf); Supreme Court Annual Report 2012 (http://app.supremecourt.gov.sg/data/doc/managepage/44/AnnualRpt2012/main.swf). See also *Tan Meng Jee*, *supra* note 53, at [48]–[49]; *Wong Kim Poh v. Public Prosecutor*, 1 S.L.R.(R.) 13, [14] (1992); *Attorney-General of Hong Kong v. Siu Yuk-Shing*, 1 W.L.R. 236, 241 (1989).

the case, then it is better to overhaul the Evidence Act rather than to retain an ambiguous set of laws or to introduce piecemeal changes that do not cohere and cause more confusion.[76] The burden of token laws, mostly anachronistic by now, should simply not continue to hang on the public.[77]

Nonetheless, to return to the first issue of whether the new admissibility framework brought about by the 2012 amendments applies only to certain relevancy provisions or all relevancy provisions in the Evidence Act, a Member of Parliament had astutely asked why there was not "a broad statutory power in a standalone provision of the [Evidence Act] allowing the court to exclude, in the interest of justice, any evidence that would otherwise be relevant and admissible" instead.[78] He must have been aware that under the common law, the exclusionary discretion can be used to exclude almost any type of so-called prejudicial evidence[79] and was trying to point that out to his colleagues.

The Minister for Law's response was that as ss. 32(3) and 47(4) of the Evidence Act were "in addition" to the court's "general power to exclude prejudicial evidence at common law" and "stems from the courts' inherent jurisdiction", it was not necessary to specifically legislate for the judicial discretion to exclude.[80] In any event, he concluded, he wanted to see how the courts would react to the amendments before deciding on any further changes down the road.[81]

In this respect, this response is very difficult to follow in many ways. First of all, it is "a fundamental rule of statutory interpretation that Parliament shuns tautology and does not legislate in vain";[82] moreover, creating new sources of

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76 As mentioned earlier, there is also an irony that whereas Singapore cannot wait to shake off the shackles of its antiquated Evidence Act and migrate to a rule-free evidence regime, the experience of some of the other common law jurisdictions (see, e.g. Australia and New Zealand) appears to replicate what Stephen was trying to do almost 150 years ago: consolidate and clarify the messy common law into coherent codification.

77 In this regard see also *Jet Holding Ltd v. Cooper Cameron (Singapore) Pte Ltd*, 3 S.L.R.(R.) 669, [48]–[50] (2006), where the Court of Appeal discussed the importance of adhering to the best evidence provisions of the Evidence Act despite them being in discordance with the practices of modern litigation.

78 Singapore Parliamentary Reports, Evidence (Amendment) Bill, (Mr. Desmond Lee) 14 February 2012. However, the Member of Parliament did go on to add that having that standalone provision "would put existing case law on a firm statutory footing". This would necessarily presuppose that "existing case law" was not bereft of irreconcilable inconsistency.

79 Evidence, *supra* note 49, at 13–15.

80 *Supra* note 17.

81 *Id.*

82 *BFC v. Comptroller of Income Tax*, 4 S.L.R. 741, [47] (2013). See also *JD Ltd v. Comptroller of Income Tax*, 1 S.L.R.(R.) 484, [43] (2006).

authority parallel to those already in existence will only result in confusion, and the way of the written word is surely preferable to that of "inherent jurisdiction" for fundamental reasons of clarity and guidance in interpretation.

But even if ss. 32(3) and 47(4) do not add anything but merely clarify the existence of the court's power to exclude legally relevant evidence, it would have made more sense to adopt the Member of Parliament's suggestion to have a standalone provision that applies to other relevancy provisions in the Evidence Act as well.[83] By isolating the power to just certain types of hearsay and expert opinion evidence, the only reasonable inference to be drawn is that the Evidence Act now only permits the judicial exclusion of such evidence alone. This may perhaps be justifiable *vis-à-vis* the non-exclusionary relevancy provisions, but the non-application of the power to similar fact evidence[84] – ironically the definitive candidate for the exercise of exclusionary discretion[85] – is most glaring.

Further, without a standalone provision, the problems relating to Stephen's bifurcation of the relevancy provisions continue to persist. For instance, evidence admissible under ss. 32 or 47 can simply be re-characterized and admitted under the broad general relevancy provisions which do not attract the application of ss. 32(3) and/or 47(4).[86] Similarly, illegally obtained evidence (which presently may be assumed to include entrapment evidence), while largely inadmissible or excludable in many common law jurisdictions,[87] can under certain circumstances conceivably fit under the general relevancy provisions.[88] The very uncertain state of evidence law in Singapore certainly makes this route a possible (and maybe even plausible) one, and something should have been done about it.

In this light, this latest attempt to modernize the Evidence Act has, in some respects, the ironic consequence of accentuating the negative aspects of the statute's antiquity. It also fails to address pronouncements in recent seminal evidence law cases that unequivocally contradict the claims by the Minister for

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83 As is done in the evidence legislation of some other common law jurisdictions.

84 See ss. 14 and 15 of the Evidence Act.

85 See Evidence and the Litigation Process (2010), *supra* note 8, at 65–75.

86 *The 2012 Amendments to Singapore's Evidence Act*, *supra* note 18, at 272, 273. See also *Public Prosecutor v. Heah Lian Khin*, 2 S.L.R.(R.) 745 (2000); *Admissibility and the Discretion to Exclude Evidence*, *supra* note 38, at 240: "ss. 6 to 11 of the [Evidence Act] are extremely broad provisions that could conceivably admit any fact of minimal probative value, regardless of the existence of forceful countervailing factors in both civil and criminal proceedings."

87 Evidence, *supra* note 49, at 170–176.

88 *The Judicial Discretion to Exclude Relevant Evidence*, *supra* note 18, at 403–405. See also Simon Bronitt, *Sang Is Dead, Loosely Speaking*, Sing. J. Leg. Studies 374 (2002).

Law, i.e. "all relevant evidence is admissible unless specifically expressed to be inadmissible [by the Evidence Act]"[89] and "there is no residual discretion to exclude evidence which is otherwise rendered legally relevant by the [Evidence Act]".[90] Arguably, it even renders cases that have excluded evidence on the basis of procedural improprieties (i.e. not on the basis of the Evidence Act but on other bases such as the Criminal Procedure Code) uncertain as well, given that such cases use the test that may be the same as the one introduced by the amendments (this will be elaborated upon in the third issue).[91]

Turning then to the second issue of inter-changeability of terms, although the words of ss. 32(3) and 47(4) may suggest that the court is not being asked to exclude the evidence after it has been admitted but simply not to admit it in the first place, this is unlikely to be the intended interpretation. The Minister for Law said at one point during the parliamentary debates that "irrelevant and unreliable evidence should not be [admissible under the Evidence Act] *in the first place*."[92]

In other words, before the 2012 amendments, the relevancy provisions in the Evidence Act acted as the only gatekeeper to admissibility and precluded any inadmissibility on non-relevancy bases and/or any option for the judge to refuse admission.[93] This must be the case as "the fact that a court needs to be conferred discretion [via ss. 32(3) and 47(4)] to reverse the relevance of a piece of... evidence that is found relevant... would... suggest that the fulfilment of relevance must lead to admissibility; otherwise, the conferral of this discretion would be completely unnecessary".[94] Moreover, why else would the discretion be described as "residual" if it was exercised at the admissibility stage? And why would "admissible" not mandate admission (with or without the exclusionary

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89 *Tan Guat Neo Phyllis*, *supra* note 37, at [126].

90 *Lee Chez Kee*, *supra* note 60, at [106].

91 The prime example would be *Muhammad bin Kadar*, *supra* note 39, which involved the question of whether the recording of statements from an accused that had egregiously breached the procedural requirements of the Criminal Procedure Code and Police General Orders (which did not have the force of law but were internal guidelines for the police) could be excluded from the evidentiary record. The Court of Appeal held (at [60]) that "the court should not be slow to exclude statements on the basis that the breach of the relevant provisions in the [Criminal Procedure Code] and the Police General Orders has caused the prejudicial effect of the statement to outweigh its probative value".

92 *Supra* note 17 (emphasis added).

93 See also s. 138(1) of the Evidence Act: "When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise."

94 *The 2012 Amendments to Singapore's Evidence Act*, *supra* note 18, at 271.

discretion) if "inadmissible" does not provide for the (inclusionary) discretion to admit?[95] The Ministry of Law, with respect, should have anticipated this litany of fundamental doubts and contradictions.

But perhaps one may wonder if there is really any practical consequence in differentiating between not admitting and excluding evidence. There are at least three possible responses to this, especially when one casts the eyes beyond the trial proceedings. For one, if a piece of evidence is not part of the evidentiary record at all, the option of weight assignment is completely foreclosed; an appellate court may also be deprived of sight of such evidence.[96] For another, an appellate court has much less, if not virtually no room to interfere with what is not part of the evidentiary record, as fact-finding is not its province.[97] Finally, an appellate court is less likely to interfere with a judge's exercise of discretion (which is only done if the evidence is "excluded" after it was deemed admissible by virtue of a provision in the Evidence Act) than a judge's application of a rule (that is, the interpretation of an admissibility provision in the Evidence Act).[98]

It is therefore of some importance, quite apart from the need to interpret the principles and structure of the Evidence Act in its proper terms, to know if a piece of evidence is even going to be part of the record in the first place (for it will not be if it is inadmissible *ab initio*) and whether it can or cannot be "excluded". Indeed, the fact that the Minister of Law said that ss. 32(3) and 47(4) are to be applied "in addition" to a court's inherent powers only makes matters more confusing as to when the discretion is to be exercised.

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95 THE MODERN LAW OF EVIDENCE, *supra* note 35, at 43. See also *Sembcorp Marine Ltd v. Aurol Anthony Sabastian*, 1 S.L.R. 245, [11]–[12] (2013). Of course, it may be argued that a piece of evidence lacking in relevance should never be admissible, in so far as it cannot possibly have any meaningful influence on the fact-finder; if it influences the fact-finder at all, it will only do so in a tangential sense, such as through any prejudicial effect it may contain.

96 Not all court proceedings are transcribed, and even if they are, not all matters of evidence can be translated into words.

97 See, e.g. *ACU v. ACR*, 1 S.L.R. 1235, [12] (2011).

98 This is generally true for all exercises of discretion by trial judges – unless it can be shown that the trial judge had misdirected himself on a matter of principle, taken into account matters that he ought not to have taken into account, failed to take into account matters that he ought to have taken into account or his decision was plainly wrong. Relatedly, it may be helpful to think of the matter this way: suppose, in the middle of a trial, a party seeks to adduce new evidence in the form of expert opinion. On its face, it is relevant. Is it better to not admit it (say, for want of reliability as it happens to be hearsay evidence as well) or to exclude it only after it has been admitted – and the trial judge has been "exposed" to it? The same consideration would apply if the evidence is not admitted on the basis of detraction of proceedings – one of the variants of "prejudice".

3.3 Problems relating to the meaning and justification of the new discretionary power

As for the third issue of what the new subsections mean, given that there are no clues in the parliamentary debates, one can only guess: one possibility is that the phrase "in the interests of justice" is modelled after certain provisions found in the United Kingdom's Criminal Justice Act 2003[99] – notwithstanding the fact that the Evidence Act applies to both civil and criminal proceedings, and notwithstanding the fact that no proper court would ever not act "in the interests of justice" in any given context.[100]

But what this phrase is supposed to mean is not clear from the parliamentary debates, and certainly was not what the Law Reform Committee on Opinion Evidence had recommended (while it did not commit to any particular test, it did not recommend this test either)[101] nor what the Minister for Law had alluded to.[102] What is clear is that if Parliament intended this test to be the same as the traditional test of balancing probative value and prejudicial effect – considering that the Minister of Law did make reference to prejudicial evidence – there was no lack of legislation precedent elsewhere to model after, even if there are some differences in expressing why the court should exclude relevant evidence.

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99 See, e.g. ss. 44, 46, 51, 52, 61, 71, 80, 82, 114, 116, 127, 137, 151. Other possibilities include South Africa's Law of Evidence Amendment Act 45 of 1988 and Hong Kong's Evidence Ordinance (Cap. 8, 1997). Interestingly, it may even be possible that Parliament may have taken a leaf out of the contiguous Criminal Procedure Code (*supra* note 43), where the phrase "as the justice of the case may require" features. Case law is also not bereft of examples that have used the phrase "in the interests of justice" (for instance, where a party seeks to adduce new evidence on appeal), but the widely different contexts in which it has been used (which have nothing to do with exclusionary discretion) is not illuminating for present purposes.

100 *The 2012 Amendments to Singapore's Evidence Act*, *supra* note 18, at 275–276. *Cf.* s. 114(2) of the Criminal Justice Act 2003 (a provision on admitting hearsay evidence), which attempts to enumerate some factors for deciding what is in the interests of justice.

101 Report of the Law Reform Committee on Opinion Evidence, *supra* note 5, at 4–5. Specifically, the committee said that the amended s. 47 "should also be subject to an express exclusionary discretion permitting the court to exclude otherwise admissible evidence if it is unfairly prejudicial, misleading or confusing or will lead to an undue waste of judicial time. However, as that exclusionary discretion will cut across all categories of admissible evidence, we have not suggested the shape that the exclusionary discretion should take."

102 That is to say, the language of prejudicial evidence and inherent jurisdiction that he used would point more towards the traditional balancing test.

For instance, the United Kingdom's Police and Criminal Evidence Act 1984 uses the phrase "adverse effect on the fairness of the proceedings";[103] Australia's Evidence Act 1995 uses the phrase "if its probative value is outweighed by the danger of unfair prejudice to the defendant";[104] New Zealand's Evidence Act 2006 factors in unfair prejudice and needless prolonging of proceedings;[105] Hong Kong's Evidence Ordinance requires the opposing party to formally object to admission and show that "the exclusion of the evidence is not prejudicial to the interests of justice";[106] and in the United States the Federal Rules of Evidence extends the balancing exercise to include confusion, misleading the jury, undue delay and unnecessary evidence as negative factors as

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103 Section 78(1). See also Evidence, *supra* note 49, at 100–101: "The appellate courts have exhibited a marked reluctance to provide guidelines for the exercise of the s. 78(1) discretion… An examination of the cases reveals, however, that a number of general principles have indeed emerged: A "significant and substantial" breach of the rules will weigh heavily in favour of exclusion… Exclusion is unlikely to be ordered if the defendant is not considered to have been actually disadvantaged by the breach… A breach may, by its very nature, be significant and substantial; in other words, it will be significant and substantial even if the police acted in good faith… Section 78(1) is not to be used directly to discipline the police."

104 Section 137. See also s. 11 ("The power of a court to control the conduct of a proceeding is not affected by this Act… In particular, the powers of a court with respect to the abuse of process"); s. 135 ("The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time"); Uniform Evidence, *supra* note 19, at 317–318: "The probative value of evidence can be contrasted with the 'prejudicial effect' that the admission of the evidence might have. Evidence is prejudicial when there is a risk that it might be given more weight than it rationally warrants, or when it might cause the tribunal of fact to behave in an emotive, rather than rational, manner… As a judge is unlikely to concede that he or she could have be made to behave in such a manner, the discretion to exclude on grounds arising from the danger of prejudice is only likely to apply in trials involving a jury… evidence is not prejudicial to a party merely because it would damage their case or support the case of their opponent… In order to be prejudicial there must be 'a real risk that the evidence will be misused by the jury in some unfair way'."

105 Section 8(1). See also s. 8(2) ("In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence"); Don Mathieson, *Fair Criminal Trial and the Exclusion of "Unfair Evidence"*, New Z. U. L.R. 739, 739 (2013): "This is the statutory successor of the common law discretion, exercisable in criminal cases, to exclude relevant and otherwise admissible evidence if its illegitimate prejudicial effect upon the accused would outweigh its probative value – if its possible effect on the jury 'would be out of proportion to its true evidential value'."

106 Section 47(1). Section 49(2) then lists a number of factors that determine the weight of the evidence after it has been admitted. Notably, however, these two provisions are found under

well.[107] This is not to suggest that adopting any of the aforementioned tests would have been fully appropriate for the Evidence Act, however, especially since on closer inspection there are important nuanced differences between the legislation that require further investigation. But even assuming that "interests of justice" is the same as balancing probative value and prejudicial effect (which is essentially what is required to be done in the legislation just highlighted), it has been pointed out before that this test faces definitional, conceptual and operational problems:

> Although the balancing test as currently formulated has been around for decades, few attempts have been made to properly delineate the scope and operation of this test... One may argue that probative value is quite easily understood or less contentious, but the same cannot be said for prejudicial effect. There is more than some trifling doubt as to what prejudice really means... A possible comprehension of the balancing test is to conceive it as protecting against a "logically unwarranted inference of guilt"... *Ergo*, a highly prejudicial piece of evidence is one that has a high propensity to influence the mind of a fact-finder into making an inference of guilty which he would *not* have made if he had not factored in the tainted evidence. One wonders, however, if prejudice and probative value are actually two sides of the same coin... The probative value of a piece of evidence is, theoretically, objectively ascertainable and independent of the idiosyncrasies of the fact-finders. this must be so if the truth of a fact is absolute... If probative value is then taken to mean the likelihood of inferring guilt, whilst prejudice refers to the degree of risk that an unwarranted inference of guilt may result... the probative strength of the evidence should correlate positively to the degree of prejudice... Given this positive correlation... there is, in theory, no need to balance prejudice and probative value. The *reality*, however, is that the same piece of evidence can be perceived as having both low and high probative value by different people at the same time... prejudice only occurs when human behaviour results in undeserved weight being attached to a piece of evidence. Yet, *at the same time*, one can only determine if weight is attributed undeservedly... after the probative value has been factored in... Simply put, the balancing test is *subsumed* within the concept

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Part IV of the statute, entitled "Hearsay Evidence in Civil Proceedings" and therefore does not necessarily have general application.

107 Rule 403. See also the notes of the Advisory Committee: "The case law recognises that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission... Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law."

of prejudice and it is illogical to then balance this prejudice against the probative value of the evidence a second time.[108]

Furthermore, a balancing exercise is only conceivable if the entities on the two opposite sides of the scale are antithetical to each other and not have a positive co-relationship.[109] But if "prejudice" can encompass factors such as undue delay, unfairness, distortive perception of recidivism and undue emotivism, how is it the direct opposite of probative value (which can only be lack of probative value) such as to justify an actual balancing exercise?[110] If "prejudice" was largely developed in the criminal justice realm, does it operate in the same way in the civil justice realm?[111] In civil proceedings, to "prejudice" the other party is often taken to mean as putting the other party at an undue disadvantage. For instance, if an appeal is lodged by the losing defendant only after the deadline for lodging an appeal, an extension of time should not be granted easily as this would prejudice the winning plaintiff by unduly delaying his right to harvest the fruits of the litigation.[112] To use another example, a party that is

108 *Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings*, *supra* note 18, at 540–543 (emphasis in original). See also *Revisiting the Similar Fact Rule in Singapore*, *supra* note 51, at 560–561; *An Introduction to Similar Fact Evidence*, *supra* note 58, at 167–170; Michael Hor, *Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics*, Sing. J. Leg. Studies 48, 51 (1999). *Cf. Admissibility and the Discretion to Exclude Evidence*, *supra* note 38, at 225–237.

109 See also *Admissibility and the Discretion to Exclude Evidence*, *id*. at 242: "The probative value/prejudicial effect balancing test… has long been regarded by the Singapore courts as being fully definitive of the common law discretion to exclude evidence. However… it is not appropriate as an all-encompassing standard and its application should be limited to situations in which the probative value and prejudicial effect of the evidence can be measured in the balancing scale."

110 For instance, in the context of the similar fact rule, prejudice can be considered from at least four angles: "First, there is a danger that the fact-finder will treat the evidence of previous misconduct as more damning than it actually is. Commonsense assessment of the evidence, even though made in good faith, may be off the mark. Call this the *risk of cognitive error*… Secondly, it is believed that evidence of the accused's bad character has the potential to sway the fact-finder unduly against him. Let this be called the *risk of emotivism*… The first moral constraint, broadly stated, is this: the court ought, because it is unfair, to hold a person responsible for his action if he lacks the capacity of reflective self-control… The second moral constraint comes from this settled principle of criminal justice: the accused is to be tried specifically on his responsibility for the criminal act that the prosecution alleges he has committed; it is not the point of the trial to judge him generally for the person that he is, on the life that he has lived" (Ho Hock Lai, A Philosophy of Evidence Law: Justice in the Search for Truth, 290, 291 and 295–296 (2008) (emphasis in original)).

111 See *Admissibility and the Discretion to Exclude Evidence*, *supra* note 38, at 225–226.

112 See, e.g. *Falmac Ltd v. Cheng Ji Lai Charlie*, S.G.C.A. 42, [12] (2014).

granted discovery would not be given leave to be released from its implied undertakings unless it can be shown that the other party will not be prejudiced in the sense of having the documents used for extraneous purposes.[113] Or, in the scenario of raising new issues after the pre-trial stage, the court will not want the other party to be prejudiced in the sense of being taken by surprise at trial.[114] In all these examples, clearly, prejudice is conceived with the overarching idea of equality of parties in an adversarial system in mind. This makes sense in civil proceedings, but criminal proceedings are very different and in my opinion the amended Evidence Act does not clearly reflect this.

Perhaps most importantly of all, up until the 2012 amendments, there was nothing in the Evidence Act that contemplated any form of prejudice as conceived in modern jurisprudence.[115] All of the relevancy provisions, general or specific, only speak of probative value (assuming one equates that with relevance) – and probative value may sometimes only be ascertained when the evidentiary record is examined as a whole, particularly if the evidence is circumstantial (but relevant under the Evidence Act) in nature.[116] Therefore, a throwaway reference (in the form of ss. 32(3) and 47(4)) to "interests of justice" – or the balancing test, as assumed in this analysis – is most unhelpful. The lack of a clear statement on the point at which the test applies, and whether it should be applied in conjunction with any other test, or if any other steps of any other test, leads to confusion.[117] All of this is without first mentioning that the balancing test has been severely criticized by commentators over the years, not least because as mentioned, probative value and prejudicial effect do not always share a directly inverse relationship.[118]

Finally, with respect to the fourth issue of the basis in which the test is normatively justified, there are several possibilities, of which only the two most plausible ones will be considered here.[119] The first is fairness of trial, but while

113 See, e.g. *Beckkett Pte Ltd v. Deutsche Bank AG*, 3 S.L.R.(R.) 555, [19] (2005).

114 See, e.g. *Susilawati v. American Express Bank Ltd*, 2 S.L.R.(R.) 737, [48] (2009).

115 See, e.g. *Festa v. The Queen*, H.C.A. 72 (2001); *O'Brien v. Chief Constable of South Wales Police*, U.K.H.L. 26 (2005); *Regina v. Faraz*, E.W.C.A. Crim. 2820 (2012). See also New Zealand Law Commission, Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character, 122–141 (2008).

116 See also Evidence and the Litigation Process (2010), *supra* note 8, at 89–91.

117 *The 2012 Amendments to Singapore's Evidence Act*, *supra* note 18, at 265–266.

118 See, e.g. Adrian Zuckerman, *Similar Fact Evidence – the Unobservable Rule*, 103(2) L. Quart. Rev. 187 (1987); Michael Mee, *Similar Fact Evidence: Still Hazy After all these Years*, 16 Dub. U. L. J. 83 (1994); Rajiv Nair, *Weighing Similar Fact and Avoiding Prejudice*, 112(2) L. Quart. Rev. 262 (1996); Mike Redmayne, *Drugs, Money and Relevance*, 3(2) Int'l J. Evid. & Proof 128 (1999).

119 See Evidence, *supra* note 49, at 171: "First, there is the *reliability* principle… Secondly, the *remedial principle* sees exclusion as a remedy provided to the defendant for the infringement of

this "may be conceived to include broader, non-epistemic considerations such as rights protection and… moral legitimacy", the case law on this has varied greatly as to extent and content of such fairness – and this is, again, without first mentioning that these cases are almost always from the realm of criminal law the principles from which are not always fully transposable to the civil context, given long-standing (but fair) assumptions about party autonomy and party parity in civil cases.[120] More crucially, the justification of fairness of trial is often linked to the courts' so-called inherent jurisdiction or inherent powers[121] – one no doubt recalls that these were terms used in the 2012 parliamentary debates – in the sense that even though the Evidence Act (at least prior to the 2012 amendments) does not expressly empower a court to exclude (legally) relevant evidence, a court may exercise its inherent powers to exclude such evidence if it ensures a fair trial in some degree or form. A leading academic in Singapore evidence law argues it this way:

> [T]he court derives [inherent powers] from its status and authority to control its own process… As the law of evidence is adjectival in nature, and has a fundamental role in the court's process by governing the scope and presentation of information which a court is to rely upon, the court is justified in exercising its inherent power to exclude evidence which, if admitted, would cause injustice and consequently compromise its process. There is nothing in the [Evidence Act] which excludes the application of this doctrine [since] the court's inherent power… is derived independently from the court's status. Furthermore, s. 5 of the [Evidence Act], the governing provision on admissibility, does not compel the court to admit relevant evidence.[122]

However, several counterpoints can be raised in response to this line of reasoning:

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his or her rights… Thirdly, the *disciplinary principle* sees exclusion as a means of deterring… future improprieties… Finally, the *integrity principle* sees exclusion as a means of repudiating the impropriety and thus preserving the purity of the court" (emphasis in original).

120 *The Judicial Discretion to Exclude Relevant Evidence*, *supra* note 18, at 410–412. See also Katherine Grevling, *Fairness and Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act*, 113(4) L. Quart. Rev. 667 (1997).

121 For a short discourse on the difference between the two terms, see Chen Siyuan, *Is the Invocation of Inherent Jurisdiction the Same as the Exercise of Inherent Powers?*, 17(4) Int'l J. Evid. & Proof 367 (2013). *Cf. Muhammad Ridzuan bin Md Ali v. Public Prosecutor*, S.G.A.A. 32, [96] (2014).

122 Jeffrey Pinsler, *Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings*, 22(2) Sing. Acad. L. J. 335, 361 (2010). These arguments were made before the 2012 amendments, but essentially maintained in a post-2012 article: *Admissibility and the Discretion to Exclude Evidence* (*supra* note 38) and a revised post-2012 edition of his textbook (Evidence and the Litigation Process (2013), *supra* note 14, at 389–391).

> First, the argument effectively presupposes that relevance under the Evidence Act does not amount to admissibility, but this remains a contentious point. Secondly, extreme caution is always urged in the exercise of a court's remedial powers justified under the auspice of inherent jurisdiction, in that the precondition is the circumstances of the case must be "exceptional". Thirdly, such a constrictive requirement of "exceptional" circumstances plainly does not square with the fact that… the exclusionary discretion as presently conceived can be applied expansively in the context of all common law exclusionary rules and executive improprieties, whether captured by the Evidence Act or otherwise. Fourth, while it is probably less controversial (but not without problems) to suggest that the court's inherent jurisdiction can be invoked to prevent an abuse of the judicial process so as to preserve its moral legitimacy… [equating] inherent jurisdiction with the prevention of injustice is a substantially different and broader idea, and may constitute going one step too far (in terms of expanding what is supposed to be a narrow ambit of powers exercised pursuant to inherent jurisdiction). Fifthly, even if inherent jurisdiction is limited to the power to prevent an abuse of process, there is reason to believe that power can actually be used to remedy entrapment issues – a paradox arises though, when one considers that the defence of entrapment has been categorically rejected in Singapore.[123]

In other words, clear limits on inherent judicial powers should be identified. Then there is the justification of minimum standards of law enforcement, or the so-called disciplinary rationale. Already, from its label, it is clear that this justification emanated from and is limited to criminal proceedings, and bears no obvious relevance in civil proceedings. But in so far as the Evidence Act applies to criminal proceedings as well, this justification might as well be put to rest too:

> It can be said, of course, that the judiciary has a duty to keep law enforcement officers in check and to prevent the courts from abetting flagrant improprieties by the police or to be perceived as instruments of illegalities… Be that as it may, this consideration cannot be flipped around to justify a deliberate decision to acquit an accused even in the face of evidence with high probative value pointing towards guilt. It should not be assumed that law enforcement officers will be punished just because a guilty person escapes conviction as a result of procedural impropriety on the part of the law enforcement officers. Such an assumption rests on untenable premises. The first is that law enforcement officers inevitably derive some satisfaction at obtaining a conviction of an accused. The second is that upon being informed that it is their non-compliance with procedural rules which resulted in the court's decision to acquit an accused who would otherwise have been convicted, the

123 *The Judicial Discretion to Exclude Relevant Evidence*, *supra* note 18, at 406. These arguments were also made before the 2012 amendments, but also essentially maintained in a post-2012 article: *The 2012 Amendments to Singapore's Evidence Act*, *supra* note 18. A quick note on entrapment is perhaps in order. Under Singapore case law interpreting the Evidence Act, evidence obtained by entrapment, is legal and must be admitted. The courts in those cases did not see it fit to resort to their inherent powers to exclude the evidence. This is why the paradox arises.

> law enforcement officers would suddenly strive to comply with procedural rules... there are many other avenues which are more appropriate in resolving improper conduct, such as civil proceedings, prosecution of miscreant law enforcement officers, and internal disciplinary proceedings.[124]

Without even a discernible normative justification for this very powerful tool now expressly made available to the courts, all ss. 32(3) and 47(4) have done, as canvassed above, is to fracture the relevance and admissibility paradigm of the Evidence Act and to render the provisions confusing, it is simply impossible to have two diametrically opposed admissibility paradigms existing simultaneously in the same statute. However, the 2012 amendments have failed to clarify and repair the defects in the Evidence Act despite the fact of Parliament having been put on notice about them for a number of decades: the state of law on similar fact is a good example of this.

3.4 Ignoring and perpetuating the cracks in the law on similar fact

It was mentioned earlier in the paper that leaving the similar fact provisions (i.e. ss. 14 and 15, and arguably 11(b) of the Evidence Act) unamended was a glaring omission, even if only for the reason that the similar fact rule is (as is hearsay and opinion) one of the most important exclusionary rules in the common law tradition and was intended by Stephen to be covered in the Evidence Act.[125] Moreover, it was not as though the law on the similar fact rule in Singapore is crystal clear and devoid of serious problems – it was and remains in need of reform. One such problem is that the Evidence Act may only have contemplated limited aspects of the rule. A perusal of ss. 14 and 15 makes it quite clear that the *mens rea* aspect of the rule is readily covered in some way:[126]

> 14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing

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124 *The Judicial Discretion to Exclude Relevant Evidence*, *id.* at 413.
125 An Introduction on the Principles of Judicial Evidence, *supra* note 20, at 122. In Singapore, similar fact retains its own domain and has not been subsumed under character evidence. Limited provisions on character evidence can be found in ss. 54–57 of the Evidence Act.
126 Section 16 ("When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact") is also considered a similar fact provision, but it is not pertinent to the present discussion.

the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.[127]

15. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.[128]

But the *actus reus* aspect of the rule is suspect, in the sense that the Evidence Act provides no answer. Yet according to Singapore case law,[129] that aspect can be found in s. 11(b), which states that "Facts not otherwise relevant are relevant… if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable." However, as mentioned previously, whereas ss. 14 and 15 are specific relevancy provisions, s. 11(b) is a general relevancy provision – this means that structurally speaking, it is not meant to reflect an exception to any common law exclusionary rule. In addition, whereas ss. 14 and 15 trigger the operation of s. 122(5) of the Evidence Act,[130] s. 11(b) does not, thus suggesting that s. 11(b) is not meant to be

127 See also illustration (o): "*A* is tried for the murder of *B* by intentionally shooting him dead. The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*. The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant." Likewise illustration (p): "*A* is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant." Sections in the Evidence Act are to be interpreted in the light of illustrations: Evidence and the Litigation Process (2010), *supra* note 8, at 22–23.
128 See also illustration (a): "*A* is accused of burning down his house in order to obtain money for which it is insured. The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant as tending to show that the fire was not accidental." Likewise illustration (b): "*A* is employed to receive money from the debtors of *B*. It is *A's* duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is whether this false entry was accidental or intentional. The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant."
129 See, e.g. *Lee Kwang Peng*, *supra* note 61, at [41]–[47]; *Public Prosecutor v. Radhakrishna Gnanasegaran*, S.G.H.C. 107, [124] (1999). See also *Letts Charles v. Soh Kim Wat*, S.G.H.C. 202, [48] (2007); *Re Teoh Beng Hock*, 1 M.L.J. 715, [56] (2010). Notably, Indian case law has not associated their equivalent of s. 11(b) with the similar fact rule: Ratanlal & Dhirajlal The Law of Evidence, *supra* note 30, at 133–140; Woodroffe & Amir Ali Law of Evidence, *supra* note 37, at 987–1016.
130 Section 122 is a provision relating to the cross-examination of witnesses. Section 122(4) states that "Where in any criminal proceedings the accused gives evidence… he shall not in cross-examination be asked, and if asked he shall not be required to answer, any question tending to reveal to the court (a) the fact that he has committed, or has been charged with or

used in conjunction with ss. 14 and 15, at least not for the purposes of admitting similar fact evidence. Worse yet, the classic judicial passage (per the High Court in *Lee Kwang Peng*) that justifies the use of s. 11(b) for similar fact evidence dovetails with the central objections made in this paper:

> [B]efore a judge may consider a similar fact relevant by virtue of s. 14 or s. 15, that fact must first satisfy the test for the admissibility of similar fact evidence… namely, that the probative value of the evidence must exceed it prejudicial effect… [however] the similar facts recounted by [the witnesses] did not establish the appellant's *mens rea* but only the *actus reus* of the offences charged. The similar facts thus did not qualify for inclusion under ss. 14 and 15… As ss. 14 and 15 contemplate the inclusion of certain similar facts, other similar facts must also be admitted under a provision of the [Evidence Act]. If similar facts were admitted other than under one of the relevancy provisions, it would make a mockery of the [Evidence Act] and extend the ambit of the similar fact rule beyond the extent intended by the Legislature. A… solution would be to declare that such facts would be relevant by virtue of s. 11(b)… The principal difficulty with this approach is that to construe s. 11(b) in such a manner is at odds with the draftsman's commentary… However… I do not think it appropriate to sustain an artificial distinction between similar facts which are probative of intention (or other states of mind) and similar facts which are probative of acts done by the accused, nor do I consider such a distinction to have been intended by Parliament.[131]

One would recall that under the modern common law paradigm of admissibility of evidence, there are multiple questions to be asked – the concept of balancing probative value and prejudicial effect is the test used to answer the final question of whether a court has residual discretion to exclude relevant evidence.[132] The genesis of the application of this test specifically to similar fact evidence (that is, before it was applied in the context of other types of evidence) can popularly be traced to the House of Lords decision of *Boardman v. Director*

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convicted or acquitted of, any offence other than the offence charged; or (b) the fact that he is generally or in a particular respect a person of bad disposition or reputation." Section 122(5) then states that s. 122(4) "shall not apply to a question tending to reveal to the court a fact about the accused… if evidence of that fact is (by virtue of ss. 14 or 15 of this Act…) admissible for the purpose of proving the commission by him of the offence charged."

131 *Lee Kwang Peng*, *supra* note 61, at [38] and [41]–[46]. This was endorsed in the Court of Appeal in *Tan Meng Jee*, *supra* note 53, at [48]–[49].

132 See, however, The Law Commission (Law Com No 273), Evidence of Bad Character in Criminal Proceedings: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965, 14 (2001): "The courts have traditionally had a discretion to exclude similar fact evidence even if it passes the test of admissibility… There is no room for any discretion which entails the weighing of probative value against prejudicial effect, because that is itself the test of admissibility."

of Public Prosecutions.[133] *Boardman* was considered an intellectual breakthrough, and superseded the Privy Council decision of *Makin v. Attorney-General for New South Wales*, where Lord Herschell had opined that similar fact evidence is inadmissible if adduced merely to show propensity to commit a crime, but may be admissible if it is relevant to disproving intent or to rebut a defence otherwise open to the accused.[134] But is either *Makin* or *Boardman* consistent with ss. 14 and 15 of the Evidence Act? The following view is particularly instructive:

> [W]hereas in a number of English cases propensity evidence was admitted via the second limb of the *Makin* rule, this approach is not possible under ss. 14 and 15 because of the scope of these provisions does not extend to the rebuttal of "any defence" raised by the accused. The result is that even extremely probative evidence which virtually confirms that the accused committed the offence charged will not be admissible because *actus reus* is excluded from the ambit of those sections... whereas *Boardman* lays emphasis on the degree of probity of evidence irrespective of the purposes for which that evidence is adduced, ss. 14 and 15 assume that evidence will only be sufficiently probative if it comes within one or other of the fixed categories. Thus, whereas evidence of propensity to prove the commission of the crime would be admissible under the *Boardman* formulation, if sufficiently probative, such evidence is not so regarded by ss. 14 and 15 because the purpose for which it is adduced is outside the scope of those sections. Secondly, whereas the consideration of the prejudicial effect of the evidence is a vital aspect of the *Boardman* approach, it plays no part in the determination of admissibility under the sections...[135]

Indeed, even if *Boardman* is consistent with, or somehow found in, ss. 14 and 15 of the Evidence Act, there is still the troubling question of whether it is meant to be applied before or after the statute is considered,[136] given that the court in *Lee Kwang Peng* had suggested in the passage above that it should be applied before the Evidence Act is considered (that is, as an admissibility rather than

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133 A.C. 421, 442 (1975). It should be noted that while it is true that the subsequent House of Lords decision in *Director of Public Prosecutions v. P*, 2 A.C. 447 (1991) clarified that there need not be any striking similarity in the facts before the evidence can be considered admissible, it did not change Lord Wilberforce's formulation of the balancing test. The balancing test also famously reared its head again in *R v. Sang*, A.C. 402 (1980), a case involving entrapment.

134 [1894] A.C. 64, 65.

135 Evidence and the Litigation Process (2010), *supra* note 8, at 79, 81. See also *Mas Swan*, *supra* note 37, at [107]: "Based on these observations in *[Tan Guat Neo Phyllis]* and *Lee Chez Kee*, it is clear that the admissibility of similar fact evidence has to be determined according to the categories of relevance under ss. 14 and 15 and *Tan Meng Jee* is inconsistent with the [Evidence Act] in so far as it allows for the exclusion of similar fact evidence that is otherwise deemed relevant under those provisions."

136 *The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction*, *supra* note 18 at 368.

exclusionary device). This is significant because applying the balancing test as an admissibility device may prematurely render the evidential picture incomplete. If we return briefly to the context of hearsay, it may be said that the 2012 amendments to the Evidence Act have only weakened a party's basic right to cross-examination and confrontation by expanding the scope admissible hearsay. If a court were to ameliorate this by ruling such evidence out (albeit on the basis of "in the interests of justice" rather than on the application of the balancing test) from the outset rather than give it less weight only upon examining the evidential record as a whole, this defeats the principal purpose of the amendments. As will be seen, the better way is to confine the analysis to relevance, reliability and weight as a post-admissibility calibration device.

As for s. 11(b), on the one hand, the court in *Lee Kwang Peng* attempted to locate a relevancy provision in the Evidence Act to admit the *actus reus* evidence of similar fact. On the other hand, it was aware of the problem of using a general relevancy provision in the form of s. 11(b) to do so, but went ahead anyway.[137] Even assuming this was permissible, it cannot be said that the balancing test is inherent in s. 11(b). While "highly probable or improbable" is consistent with the idea of probative value, there is nothing in s. 11(b) that is similar to the idea of prejudicial effect. And while it has been argued that "if a fact makes the fact in issue 'highly probable', the prejudicial effect of that fact will correspondingly be lowered",[138] this can easily be refuted, given that: as mentioned, probative value and prejudicial effect are not necessarily always on opposite ends of a scale; the requirement of "highly" is not found in the *Boardman* test; s. 11(b) has not been applied in the context of other exclusionary rules; s. 11(b) is expressed in inclusionary and not exclusionary terms and if s. 11(b) were to be resorted to, what objection is there against it to be used for the *mens rea* aspect of the similar fact rule as well (thereby rendering ss. 14 and 15 otiose)?[139] In light of what has

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137 See also Halsbury's Laws of Singapore (2013), *supra* note 5, at [120.060]: "Strictly speaking the relevance of similar facts in the Evidence Act is extremely limited. The drafter warned against the drawing of inferences from one transaction to another simply because one resembled the other and insisted that they should be linked together by the chain of cause and effect in some assignable way before inferences could be drawn. Accordingly, there was no necessity to draft special provisions to provide for the exclusion of similar fact evidence, since the absence of any provision *ipso facto* meant its exclusion whilst there was no necessity to provide specially for the so-called exceptions, since the assignable ways were already stipulated in the various relevancy provisions. The drafter apparently also though that there were but two assignable ways for the admission of similar fact evidence, namely, sections 14 and 15."

138 Evidence and the Litigation Process (2010), *supra* note 8, at 81.

139 See also Lui Chun Fai and Roland Samosir, *Approaches to the Admissibility of Similar Fact Evidence*, 8 Sing. L. Rev. 206, 227–229 (1987); Tan Yock Lin, *Stephen's Hearsay – Does it Matter?*, 12 Sing. L. Rev. 128, 129–130 (1991).

been considered so far, the omission to address the various issues relating to similar represents an additional, yet foreseeable, failing in the 2012 amendments to the Evidence Act.[140]

4 Possible ways forward

4.1 Going back to the key touchstones: relevance and reliability

In this paper I have tried to show how a seemingly simple but probably well-intended change to the relevance and admissibility paradigm of the Evidence Act will have severe repercussions in how all evidence (and not just hearsay and expert opinion evidence) is received, even to the point of rendering the most important part of the statute (that is, on relevancy) unusable. The first step to be taken when evaluating and rectifying the problems caused by the 2012 amendments – assuming one does not want to repeal the Evidence Act (or all of the relevancy provisions) – is to go back to first principles that cohere with the Evidence Act's paradigm for admissibility of evidence:

> [I]nstead of using the balancing test… to determine if a piece of evidence should be admitted or excluded; instead of asking whether there is any unfairness or injustice to be prevented; and instead of calling upon the court's residuary discretion and inherent powers to exclude otherwise admissible evidence, the appropriate (and narrower) question to ask after a piece of evidence is deemed relevant (as determined by the Evidence Act) is whether that evidence is also reliable. The reliability of a piece of evidence will depend on the facts of each case, with references to the requirements established by statute (such as the Evidence Act and [Criminal Procedure Code]). In contrast, the balancing test, in asking whether there is any unfairness or injustice to be prevented and relying on the court's residuary jurisdiction will depend on vague notions of prejudicial effect, unfairness or injustice conceptualised broadly, and the hazy sense of when recourse to the court's inherent jurisdiction is acceptable. Under my proposed framework, once the threshold of reliability is satisfied, the evidence is admissible – there is no residual discretion exercisable to deny admissibility of the evidence… where there is some doubt, unease, or sense of unfairness, the trial judge can

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140 Notably, so far as similar fact/character is concerned, the balancing test has not been adopted in all established common law jurisdictions (at least prior to their attempts to codify their evidence laws). The weighing of probative value and prejudicial effect has even been compared to weighing "apples against Thursdays": Peter Mirfield, *Bad Character and the Law Commission*, 6(3) INT'L J. EVID. & PROOF 141, 148 (2002).

> always attach less or very little weight to the piece of evidence in question and explain so accordingly in the grounds of the judgment or oral verdict.[141]

That relevance should be one of the touchstones cannot be seriously contended, given that almost a third of the provisions in the Evidence Act are definitions of relevance. It will also not matter whether Stephen was referring to logical or legal relevance in his definitions – what only matters is that the Evidence Act must be complied with. Moreover, it will not be fanciful to suggest that the Evidence Act, in taking a narrower and less permissive view of relevance than logical relevance, necessarily obviates "institutional" concerns commonly but oddly parked under the rubric of prejudice or as an opposing force to probative value:[142] that of the raising of tangential or immaterial issues which lead to the unnecessary protraction of proceedings and the wasteful incurring of resources. As for reliability, I had pointed out that:

> Singapore courts routinely refer to reliability as the most crucial consideration when admitting evidence. Reliability focuses the inquiry into the safeness of using the particular evidence in arriving at its verdict; if ensuring that the right person is convicted is a fundamental objective of the criminal justice system, it follows that reliability must be a touchstone for the admissibility of evidence in criminal proceedings… a close and thorough examination of the Evidence Act will reveal that Stephen's conception of relevance is best understood as something that is rationally probative, but undergirded by considerations of reliability at the same time… For instance, it has been said that the statute's hearsay provisions exist to guard against the "danger of unreliability" of evidence not directly perceived or given under a conflict of interest, while its opinion provisions exist to guard against a witness's "subjective reaction [that] may be unreliable". But even if the consideration of reliability resonates throughout the Evidence Act, how does this impact the applicability of the exclusionary discretion? We need look no further than another exclusionary rule – that of similar fact… a similar fact only has requisite probative value, and is therefore relevant, if it corresponds to the specific charge in question or demonstrates specific *modus operandi*… There is no need to balance probative value and prejudicial effect and indeed, it is illogical to balance since similar fact evidence is inherently always prejudicial… Reliability becomes a relevant consideration if there is reason to question the veracity of the similar fact evidence…[143]

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141 *The Judicial Discretion to Exclude Relevant Evidence*, *supra* note 18, at 416, 424. Ironically, I had advocated (at 422–423) that if the admissibility paradigm should be changed to mirror what is done in the common law, it can only be done by Parliament.

142 See *An Introduction to Similar Fact Evidence*, *supra* note 58, at 167.

143 *The Judicial Discretion to Exclude Relevant Evidence*, *supra* note 18, at 417–418. I further argued (at 418–422) that this approach will create parity with the rules and principles of the Criminal Procedure Code (for instance, the requirements for statements to be recorded without threat, inducement or promise), remove any lingering uneasiness over potential double standards (see *infra*, note 152) between entrapment evidence (which is allowed in Singapore) and other types of improperly obtained evidence (which may not be admissible if unreliable, for

Indeed, one would recall that the Minister for Law had stated quite categorically (and correctly) during the parliamentary debates that reliability has always been a key consideration for Singaporean courts in the admissibility of any type of evidence.[144] Be that as it may, one may argue that admissibility considerations must go beyond relevance and reliability. For instance, a potential issue in the criminal justice system of Singapore is whether evidence obtained by unauthorized wiretapping or unauthorized surveillance should be admissible. Certainly there is no question of relevance or probative value if such evidence clearly establishes that the accused had committed a crime. There is arguably also no issue of reliability, since (unlike, say, entrapment[145] or blood and breath samples obtained without consent)[146] the accused was not induced in any way to commit the crime – he was simply caught through improper or even illegal means – and so the question is not whether the integrity of the evidence was compromised.

In this connection, there is perhaps a possible defence for the 2012 amendments: namely, that the broader requirement of "in the interests of justice" acts as a safeguard of sorts, against blind-spot situations such as the example described above. To be even more precise, the Minister for Law described ss. 32(3) and 47(4) of the Evidence Act as a check against "abuse" – which may reasonably be taken to mean abuse of process (for instance, seeking to sneak in clearly unreliable evidence by admitting a voluminous amount of evidence, or to subvert the integrity and fairness of the process by adducing evidence that is obtained in circumstances that causes the public to lose confidence in the enforcement authorities).[147] As referred to previously, in civil proceedings, this is not an alien concept but something that features with considerable regularity. The basic idea is that since the court is the master of its own process, it has a broad range of powers and prerogatives (regardless of whether they are

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instance if the recording of the evidence was tainted by flagrant breaches of procedural requirements) and obviate any need for a distinct test that applies to all the so-called exclusionary rules, since reliability is capable of being a basis for the exclusionary rules and a test in and of itself.

144 *Supra* note 70.

145 To be clear, there can be a distinction drawn between discriminate entrapment (where an accused such as a syndicate operative was always likely to commit a crime and the provocateur merely facilitates the transaction) and indiscriminate entrapment (where an accused, but for the inducement by the authorities, would never have committed a crime). In the latter category of cases, from an epistemic viewpoint or otherwise, the evidence should not be admissible.

146 Some of the earlier cases on the balancing test involved such a scenario.

147 The alternative interpretation – that judges should assume an epistemic, internal (rather than external) point of view of evidence law (see generally A Philosophy of Evidence Law, *supra* note 110) – was probably far from the minds of Parliament.

expressly conferred by statute) to prevent an abuse of its process so as to, *inter alia*, preserve its moral legitimacy as a tribunal.[148] For example, in civil proceedings, vexatious claims can be considered an abuse of the court's process and can be struck out in their entirety.[149] Similarly, parties that refuse to comply with unless orders to (for instance) produce documents pursuant to discovery obligations can have their cases thrown out, on the basis that they have disrespected the court's process in an extreme sense.[150]

Again, is this concept transposable then to the criminal justice realm? In principle, there should be no serious objection, since generally speaking no one would argue against the proposition that greater rights and liberties are at stake in prosecutions, and the court is meant, even with some limitations, to be a guardian of such rights and liberties.[151] Briefly, however, the main objections to this are essentially the same as the ones raised previously as regards an expansive reading of inherent jurisdiction, and such an expansive reading is inevitable with a concept as wide as "in the interests of justice".[152] Taken to the logical extreme, one might as well condense the relevancy provisions into one single provision: "the court may receive any evidence as long as it is in the interests of justice to do so, and may accord less weight to any evidence if necessary."[153]

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148 See, e.g. *Wellmix Organics (International) Pte Ltd v. Lau Yu Man*, 2 S.L.R.(R.) 117, [81]–[102] (2006); *UMCI Ltd v. Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd*, 4 S.L.R.(R.) 95, [89]–[96] (2006); *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd*, 1 S.L.R. 998, [55]–[57] (2011); *Aurol Anthony Sabastian v. Sembcorp Marine Ltd*, 2 S.L.R. 246, [67]–[68] (2013).

149 Supreme Court of Judicature Act (Cap. 322, 2006 Rev. Ed.) Rules of Court, O. 18 r. 19.

150 *Id*., O. 34A r. 1.

151 Thio Li-ann, A Treatise of Singapore Constitutional Law, 451, 452 (2012). Singapore, of course, is not constrained by any regional human rights instruments (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms E.T.S. 5 (1950)) and has consistently taken a parochial view of human rights (see, for instance, *Yong Vui Kong v. Public Prosecutor* 3 S.L.R. 489, [94]–[99] (2010)).

152 There is also the secondary objection in the form of adverse authority in that the court in *Tan Guat Neo Phyllis* (*supra* note 37, at [138]–[139]) had declined to find that evidence procured through inappropriate means (such as entrapment) would amount to an abuse of process of court. The court also rejected the notion that the prejudicial effect of entrapment evidence would exceed the probative value. Read together, it seems difficult to use abuse of process as a basis to overcome the admissibility paradigm of the Evidence Act.

153 This way, another potential objection to my proposal of reducing the calculus to just relevance and reliability – which presupposes that there is a positive correlation between probative value and prejudicial effect that renders the balancing test problematic – is neutralized. Specifically, even a piece of evidence lacking logical relevance can have a relatively high prejudicial effect, such as evidence pertaining to an exceptional sexual orientation. Similarly, testimony given in good faith can be said to be evidence that has a high probative value, but

However, to return to resolving the example above of obtaining evidence via wiretapping or surveillance, as mentioned above the Singaporean courts have been very consistent in refusing to adopt the role as a gatekeeper of improperly obtained evidence and for the disciplinary rationale to be used as the normative justification for excluding evidence. Perhaps implied in this as well is a simple but sound argument from democracy: in Singapore, Parliament is put in place by the people (while the courts are not), and to the extent it wishes to continue to perpetuate the goals of crime control by refusing to criminalize unauthorized wiretapping or surveillance or by refusing to even state that such evidence should be inadmissible through other legislative means,[154] this is but a reflection of the will of the people. From this perspective, the prevention of injustice, prevention of unfairness or prevention of abuse of process as allegedly embodied in the phrase "in the interests of justice" have to be read constrictively.

4.2 Candidates for repeal

In the premises, instead of going to the extreme of reducing the relevancy provisions into a single admissibility provision or to give the courts an utterly vague provision in the form of "in the interests of justice" to interpret, the better way forward, as I have tried to demonstrate in this paper, is to simply repeal ss. 32(3) and 47(4) of the Evidence Act – regardless of whether "in the interests of justice" is the same as the balancing test of probative value versus prejudicial effect. Removing these two subsections will not in any way lead to an over-expansion of the admissibility of s. 32 hearsay and expert opinion evidence; in other words, it is not necessary to reverse any of the 2012 amendments that broadened the scope of ss. 32 and 47 evidence.[155] This is because in accordance

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low prejudicial effect. Seen from this perspective, Rule 403 of the Federal Rules of Evidence, which does not require a balancing exercise but a consideration of various factors (such as low/high probative value, confusion and waste of time), may be a better approach. See also Goh Yihan, *The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal*, SING. J LEG. STUDIES 395 (2008).

154 On this point between the conflict of crime control and due process, see Chen Siyuan, *Singapore's New Discretionary Death Penalty for Drug Couriers*, 18(3) INT'L J. EVID. & PROOF 260 (2014).

155 Having said that, it may be necessary, as far as expert opinion evidence is concerned, to consider if the ultimate issue rule (whether an expert should be prohibited from abrogating the functions of a judge by deciding on a point of law or fact that resolves the dispute) should be statutorily abolished or not: see *The 2012 Amendments to Singapore's Evidence Act*, *supra* note 18, at 278–279. The recent Court of Appeal case in *Eu Lim Hoklai v. Public Prosecutor* 3 S.L.R. 167, [44] (2011) would suggest that this rule, though having lost its force in some other jurisdictions

with the (suggested) proper admissibility paradigm, unreliable evidence will not even be admissible to begin with. And even if potentially unreliable evidence is admitted, the judge can always give less weight to such evidence, and in the ideal scenario, explain this in the judgement (whether oral or written). The option of weight is also available to evidence that, while not caught by any of the "exclusionary" provisions (or the specific relevancy provisions) in the Evidence Act, may be of questionable relevance (for instance, broadly defined circumstantial evidence).[156] In this light, it is ironic that Parliament also introduced s. 32(5) to the Evidence Act, which states that the court is free to "assign such weight as it deems fit" to evidence admitted under s. 32. This is because "trial judges might be tempted not to exercise the discretion [under ss. 32(3)] at all, given the vagueness in the phrase, seeking rather to rely on determining the weight… but if every judge were to take that view, the discretion becomes just a meaningless (and useless) power."[157] Separately, there is the question of whether the invocation of ss. 32(3) or 47(4) should be considered the application of a rule or exercise of discretion, since with a rule "the appeal court must reach

(including jury-driven ones), should still be preserved. In addition, it is also noteworthy that the fact that Parliament saw fit to introduce s. 47(3) to the Evidence Act (which expressly states that the common knowledge rule shall not be a bar to admitting opinion evidence) only goes to show that it truly did not understand the rules and structure of the statute, given that common knowledge evidence would have passed muster under the general relevancy provisions anyway.

156 Of course, if the strictures of the Evidence Act did not exist, the recommended paradigm may well be different. From a statutorily agnostic viewpoint, it may be said that if a piece of evidence is found to be logically relevant in the sense that it carries epistemic value relating to a point of contention, then there must be an automatic assumption of admissibility; hence, the burden of raising objections, bringing conflicting evidence or claiming inadmissibility of evidence that is otherwise deemed relevant, is on the claimant. It is incumbent on him to show that, despite the evidence's relevancy on the probative-epistemic plane, there is nonetheless another consideration that negates the evidence's relevance (see Richard Friedman, *Irrelevance, Minimal Relevance, and Meta-Relevance*, 34(1) Hous. L. Rev. 55 (1997); Jonathan Cohen, *Subjective Probability and the Paradox of the Gatecrasher*, 1981 Ariz. St. L.J. 627 (1981); Richard Eggleston, *The Probability Debate*, 1980 Crim. L. Rev. 678 (1980)), such as its relevance being negligible or the conclusions that would be drawn from it being excessively abusive or inclusive rendering the evidence worthy of disqualification; or the evidence's inductive probability being very low; or where the evidence is intended only to enrich the life experience of the decision makers as opposed to entrapping them with personal, contingent evidence which could not be merely deuced a priori from common sense. In addition to this there exists the plane of general rules of admissibility, such as those argued to be strategic, probative and reasonable (such as hearsay), or drawn from considerations outside the realm of proof (such as the disqualification of evidence obtained illegally). This may be the better build of a considered discretion in stages – a build that is either entirely lost or blurred when there is an attempt to condense the equation into the single plane of relevancy and non-relevancy.

157 *Hearsay Reforms*, *supra* note 5, at 431.

its own judgment and, if opposite to the judge's, overturn the judge's decision... with a discretion, it may properly disagree with the judge, yet leave his decision in place because not perverse or wholly unreasonable".[158] If ss. 32(3) and 47(4) are to remain, it may be better to consider them as rules if they are to be given any meaning in the scheme of things.

Another possible candidate for repeal is the set of general relevancy provisions found in ss. 6–11 of the Evidence Act. Given that their co-existence with the specific relevancy provisions is confusing, and given that the Evidence Act maintains an inclusionary rather than exclusionary approach towards the admissibility of evidence, it may make more sense to repeal the general relevancy provisions as they are overly broad and potentially render the specific relevancy provisions otiose.[159] The specific relevancy provisions should then be updated, expanded and further enumerated as is necessary; general relevancy provisions that have been used to admit *de facto* exceptions to exclusionary rules may be ported over as well (such as ss. 6 and 8, two potential gateways to *res gestae* evidence).[160] One possible downside to removing the general relevancy provisions, however, is the curtailment of the admissibility of useful circumstantial evidence that do not engage any of the "exclusionary" rules – and as mentioned, sometimes the exact utility of evidence can only be ascertained after the evidentiary record has been examined as a whole.[161] Thus, perhaps instead of jettisoning all of the general relevancy provisions, these provisions can be reduced to an omnibus general relevancy provision that

158 *Bad Character and the Law Commission*, *supra* note 140, at 149.

159 Although an argument can be made that for civil proceedings, part of the problem of over-admitting evidence may be mitigated by the pre-trial discovery process, such a process is not as robust in criminal proceedings: see generally *Discovering the Right to Criminal Disclosure – Lessons from Civil Procedure*, *supra* note 46.

160 This particular aspect of the recommendation is a mammoth endeavour to say the least, and to the extent that there has hitherto been no known attempt at rewriting all of the specific relevancy provisions, my aim in this paper is relatively more modest. Likewise, it will also be too ambitious to establish specific parameters for a separate criminal evidence statute (whether it takes the form of the Criminal Procedure Code or otherwise – though it should be said that it will make more sense to add criminal evidence law to the existing provisions in the Criminal Procedure Code).

161 On the other hand, circumstantial evidence can also be abused. For instance, in *Ng Beng Siang v. Public Prosecutor*, S.G.C.A. 17, [42] (2003), evidence that packages of drugs found in a car – an incident that was not related to the accused's charge – was allowed to be admitted for the sake of "completeness". Likewise, in *Public Prosecutor v. Radhakrishna Gnanasegaran*, S.G. H.C. 107, [131] (1999), evidence of the accused's previous imprisonment for assaulting his former wife was allowed to be admitted to provide "a time frame". On balance, therefore, repealing the general relevancy provisions would prove to be beneficial, at least in the criminal context.

essentially states that evidence is generally admissible if the court deems it to be (logically) relevant and reliable, provided that the evidence does not fall under any of the specific relevancy provisions.[162] This will also help avert the current uncertainties as to whether evidence can be conveniently re-characterized, and/or whether it needs to fulfil both general and specific relevancy under the Evidence Act.

Finally, s. 2(2) of the Evidence Act has long outstayed its welcome (and usefulness) and should be repealed as well. Other Indian Evidence Act jurisdictions that had similar provisions have not kept them, and it is not difficult to see why: it no longer serves its original purpose of ensuring that Stephen's codification efforts are not undermined by distracting and confusing English evidence law as it then was, and in getting around it courts have distorted the provisions and structure of the Evidence Act beyond recognition so as to accommodate modern developments in evidence law. There may be a fear that repealing s. 2(2) will – just as what was happening on a wide-scale level before 2008[163] – give the courts *carte blanche* to cite and apply foreign sources of law in an unprincipled manner, but this has never been a real problem in other statutory contexts devoid of s. 2(2)-type provisions, not least because statutory law is already by definition a superior source of law to case law. As Singapore continues to develop its autochthonous legal system in all facets of the law, the arbitrary invocation and reliance on foreign law has become less and less of a concern as well.[164] The courts should at least be given freer rein to consider foreign developments in evidence law without being unduly hampered by a complicated analysis of whether such developments are strictly consistent or not with the Evidence Act. Moreover, the effects of the absence of s. 2(2) would probably be neutralized if the Evidence Act is properly amended the next time round, and if the courts apply the correct admissibility paradigm.

4.3 A specific suggestion for similar fact: taking a leaf from the Australian approach

Having addressed possible reforms for two of the "exclusionary" rules as well as other aspects of Part I of the Evidence Act, we turn to the question of whether

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162 This will broadly be something like s. 7 of New Zealand's Evidence Act 2006, without of course the references of exclusion of evidence.

163 *Supra*, note 59.

164 See generally Goh Yihan and Paul Tan, *An Empirical Study on the Development of Singapore Law*, 23(1) Sing. Acad. L. J. 176 (2011).

the current similar fact provisions – left untouched in the 2012 amendments, it should be remembered – should be changed. A model jurisdiction worth considering is Australia, which has been trying to harmonize its various state evidence legislation for some time now. The so-called uniform evidence law essentially comprises fairly recent evidence legislation from the majority of Australian states in terms of jurisdictional reach and population.[165] Some of these laws have been influenced by some of the rules and principles found in Stephen's Indian Evidence Act.[166] These laws have also received extensive attention from law reform commissions on both the state and national level (often with the benefit of hindsight from failed evidence law codification experiments in other jurisdictions), enhancing Australia as an appropriate candidate to be considered here. The preliminary issue that arises is whether ss. 14 and 15 of the Evidence Act should be retained. In so far as they only cover the *mens rea* aspect of the similar fact rule, they should be repealed and replaced with a new provision that covers both the *actus reus* and *mens rea* aspects of the rule – this also solves the current problem of courts misusing the general relevancy provision in the form of s. 11(b) to fill the gap of *actus reus* similar fact evidence.

The recommended replacement provision, modelled in part after ss. 97 and 98 of Australia's Evidence Act,[167] would essentially comprise two components most commonly associated with similar fact scenarios:[168] one pertaining to tendency (or propensity) and the other pertaining to coincidence (which would include extreme similar facts like *modus operandi*).[169] This also means the

165 Uniform Evidence, *supra* note 19, at 1.

166 See generally John Heydon, *Reflections on James Fitzjames Stephen*, 29 U. Queensland L. J. 43 (2010).

167 These provisions should not be confused with the statute's contiguous provisions on credibility and character, though it should be pointed out that the statute does say that the *prima facie* prohibition against tendency and coincidence evidence will not apply when it relates to the credibility of a witness (see ss. 94 and 101A).

168 See also A Philosophy of Evidence Law, *supra* note 110, at 316: "The rule regulates trial deliberations in two ways. First, it does not allow the court to reason that it is likely that the accused is guilty because his past shows that he is the sort of person who, in appropriate circumstances, cannot help committing the kind of crime in question. There is a lack of integrity in using this reasoning covertly to secure a guilty verdict… Secondly, the court must not hold the accused's discreditable past directly against him for to do so is to be dismissive of his moral autonomy. His bad history can only be used against him indirectly, as evidence of his motivational disposition, to support an explanation of his action that is suggested by other available evidence."

169 See also Uniform Evidence, *supra* note 19, at 185–186: "Tendency reasoning involves using evidence about a particular person to infer the likelihood that a pattern of behaviour will follow. Coincidence reasoning proceeds in the other direction, using evidence about a particular

replacement provision can apply to either civil or criminal proceedings. The touchstones of relevance and reliability will be built into the replacement provision, together with the acknowledgement that similar fact reasoning is inherently circumstantial in nature, and it could tentatively look something like this:[170]

1. Evidence of the past conduct of a person or a tendency that a person has or had is admissible to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind if the court thinks the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value and is reliable.
2. Evidence that two or more events occurred is admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally if the court thinks the evidence will, either by itself or having

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pattern of behaviour to infer that a person was behind it. What sort of reasoning is used depends largely on what is otherwise known about the pattern in question... the tendency and coincidence rules do not regulate whether such evidence is *admissible*, but only when such evidence can be used to support, respectively, tendency reasoning or coincidence reasoning" (emphasis in original). As can be seen, in the suggested modified provision, a slightly different approach is taken.

170 The current illustrations to ss. 14 and 15 of the Evidence Act can be retained, but new illustrations should be created to address the *actus reus* aspect of the rule. See also Evidence of Bad Character in Criminal Proceedings, *supra* note 132 at 105: "The court, when deciding on admissibility of... character evidence, should be assisted in making its decision on the extent of its probative value by being required to have regard to all relevant matters... These factors include: (i) the kind of events or other things the evidence is about; (ii) how many of these there are; (iii) when they are alleged to have happened... (iv)... the nature and extent of the similarities and dissimilarities between each of the alleged instances of misconduct; (v)... where... the identity of the person responsible for the misconduct alleged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time." Of note as well is this passage from *Sheowitz v. Attorney-General*, P.D. 19(3) 421, 453 (1965): "if the evidential weight of the (offered) testimony on similar fact – while considering what question it is meant to provide answer for and what it is not, meaning that the testimony indicates only the defendant's capability of being a criminal or to carry out the specific act attributed to him – is so great that it would be perverse not to consider it, then it would just to allow that testimony, in spite of the harmful impact". Such a formulation would also escape one of the weaknesses of the balancing test – that is, evidence that has both high probative value and prejudicial effect may be excluded under the latter.

regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value and is reliable.

3. The party seeking to adduce either of the above evidence must give reasonable notice in writing to each other party of the party's intention to adduce the evidence.[171]

Although s. 101 of the Australia's Evidence Act goes on to state that the balancing test may be applied to exclude admissible tendency or coincidence evidence, this section will not be adopted for the reasons that have been set out in this paper as to why the balancing test has no place in the Evidence Act (notwithstanding the fact that the purpose of s. 101 is to act as an extra check in criminal proceedings).[172] In this regard local cases that have followed the *Boardman* line of reasoning should also be considered statutorily abolished by implication. In addition, some guidance as to what constitutes "significant probative value"[173] may be gleaned from Australian cases that have interpreted the legislation that has inspired this reformative proposal.[174] There are three main factors: the cogency of the evidence relating to the conduct of the relevant

171 For criminal cases, see also ss. 32(4), 32(5), 32(6) and 32(7) of the EVIDENCE ACT (s. 32 is on the admissibility of certain types of hearsay evidence).

172 UNIFORM EVIDENCE LAW (AUSTRALIA LAW REFORM COMMISSION REPORT, part 11 (2006): "ss. 97 and 98 provide a preliminary admissibility screen which operates in both civil and criminal proceedings and that, in criminal proceedings, there are other requirements that must be satisfied. In particular, tendency or coincidence evidence tendered against an accused that satisfies ss. 97 or 98 must satisfy the requirement of s. 101–that the probative value substantially outweighs the prejudicial effect." A possible further complication lies in the Australian rules on the use of credibility evidence (ss. 101A–108B), but the details of those rules need not unduly detain us for present purposes.

173 See also *id.*: "Experience of the application of the uniform Evidence Acts indicates that there was some debate initially about the different meanings of these terms, but the debate has been resolved. It has been held that 'significant' means something more than mere relevance but less than a substantial degree of relevance. To be significant it must be of consequence and this will depend on the nature of the fact in issue and the importance of the evidence in establishing the fact."

174 See also Nicholas Lennings, *Assessing Significant Probative Value for the Purposes of Admitting Coincidence Evidence*, 17(2) INT'L J. EVID. & PROOF 202, 204–205 (2013): "In terms of the admission of evidence for a coincidence purpose… more is required than mere relevance… The U.E.L. is silent on the question of how significant probative value is to be determined. The position at common law retains substantial relevance in this respect. For example, the similarity between the events and the number of alleged instances will need to be considered in assessing probity. Despite this, the nature of the inquiry that must be undertaken to establish whether evidence possesses significant probative value for the purposes of s. 98… remains a vexed issue."

person (thus, the evidence should not be inherently vague or non-contextual); the strength of the inference that can be drawn from the evidence as to the tendency to act in a particular way (thus, the evidence cannot only weakly indicate that the alleged tendency exists) and the extent to which the tendency or absence of coincidence increases the likelihood that the fact in issue occurred (thus, the proof of the alleged pattern must contribute to resolving the particular factual dispute in question).[175] Needless to say, even if probative value is in doubt,[176] there is always the final fall-back of weight, especially if one accepts the presupposition that judges make better fact-finders than juries.[177] Then there is the subsidiary question of whether parties can be allowed to circumvent the similar fact restriction by agreement or by waiver. The 2012 amendments to the Evidence Act already permit this for certain types of hearsay evidence.[178] In so far as the Evidence Act continues to apply to both civil and criminal proceedings, dispensation by agreement or waiver should not be so readily introduced into the provision without some meaningful safeguards.

5 Concluding remarks

Have the 2012 amendments truly sounded the death knell for the Evidence Act? Has Singaporean evidence law (to the extent that the Evidence Act is supposed to be relied upon) really reached a point of no return? In this paper I have suggested that the answer to these questions may be in the affirmative. However, there may also be several possible ways forward to make the Evidence Act internally consistent again, notwithstanding the fact that rectify the problems discussed given the fact that the statute may not be amended in the near future (nor will a separate criminal evidence regime be created in the foreseeable future). Despite the issues raised pragmatists and practitioners may

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175 Uniform Evidence, *supra* note 19, at 190–191. See also A Philosophy of Evidence Law, *supra* note 110, at 304: "the probative value of the accused's disposition depends on the availability of evidence, not only of its existence and precise nature, but also of the presence of conditions in the circumstances of the case that would activate the first-order desire to act in the alleged manner. It also depends on the existence of other relevant traits that might be elicited by the situational features and of the effect they have on each other."

176 For instance, if the evidence emanates (in a criminal context) from an accomplice or a co-accused: Halsbury's Laws of Singapore (2013), *supra* note 5, at [120.065]–[120.066].

177 *Supra*, notes 49–53.

178 Section 32(1)(k) states: "statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts… when the parties to the proceedings agree that for the purpose of those proceedings the statement may be given in evidence."

maintain that evidence law has always been about open-ended, case-by-case common sense that should not (and cannot) be unduly shackled by legislation,[179] whether expressed in general or specific terms.[180] Further, in any event, the lawyers and judges can be trusted to only submit and admit the best evidence possible;[181] even if certain pieces of evidence lie on the periphery of reliability, they can be considered useful circumstantial evidence or be given less weight if necessary. If these propositions are accepted, however, then the argument is that the Evidence Act should simply be repealed[182] and evidence

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179 See also A Philosophy of Evidence Law, *supra* note 110, at ix: "The law of evidence has suffered much abuse. Harvey described it as a 'slapdash, disjointed and inconsequent body of rules'; Salmond saw it as 'one of the last refuges of legal formalism'; Bentham found it to be 'incompetent on every occasion to the discovery of truth… incompetent, therefore, on every occasion, to the purposes of justice'; and Cross reportedly looked forward to the day when the subject is abolished. There is… more of value in our common law heritage of evidential rules than critics allow. Many of the rules express, at the core of their operation, principles integral to the epistemic and ethical justification for the court's findings."

180 See also Uniform Evidence, *supra* note 19, at xi (where the authors were commenting on the challenge of harmonizing Australian evidence law): "The fact that the very people who actually apply the law of evidence are able to remain ignorant of many of its provisions can be explained in various, contradictory ways: by its overlap with common sense, by its overwhelming generality and, conversely, by its complexity, and by the process through which rules of law can slowly evolve into rules of practice and rules of thumb. Relatively few practitioners, therefore, ever find the need to truly engage with the law of evidence in an intellectual way after their (frequently bewildering) encounter with the subject at university." *Cf.* Ian Dennis, *Codification and Reform of Evidence Law in Australia*, Crim. L. Rev. 477, 489 (1996): "Its treatment of almost any topic in the law of criminal evidence will interest comparative lawyers and law reformers, and it ought to be closely studied… The Act is also a valuable reminder that it is possible to achieve a significant measure of codification in the criminal justice area, provided that the political will is present to push through the legislation. Perhaps the most impressive feature of the Act is that, despite its uncertainties and its lack of radicalism in some areas, it generally manages to combine commitments to rationality and to principle."

181 See, e.g. Singapore Parliamentary Reports, *supra* note 49, where the Member of Parliament, a Senior Counsel, argued that a relaxation of evidence rules will not lead to a flood of unreliable evidence as lawyers tend to rely on the best evidence possible and will seldom tender evidence that is inherently unreliable. However, there are a number of presuppositions in this line of logic. First, that the lawyers' competence – either with regard to the tendering or the objecting to the tendering of the evidence – can be trusted, though one may say this is exactly what an adversarial common law system entails. Secondly, that the lawyers will act in good faith and not use other various tactics to "slip in" or re-characterize the evidence. Thirdly, that the judges will be alive to the actual legal framework concerning the admissibility of evidence – but, as has been argued, the formalistic application of evidence law in Singapore has hardly been consistent enough to be considered properly principled.

182 To be clear, the (albeit limited) evidence provisions in the Criminal Procedure Code need not be retained as well if this route is taken. During the 2014 Criminal Law Conference, in a

law should be governed entirely by the common law (or just common sense or the professional judgement of judges), which does have the virtue of faster course-correction and arguably greater fact-sensitive justice; after all, many cases are disposed of without written judgements, and unnecessary adjectival rules would simply be an impediment to efficiency and (sometimes) justice.[183] But if such a proposition is rejected either in whole or in part, then the legislature and courts would do well to re-examine the impact the 2012 amendments have had on the rules, principles and structure of the Evidence Act.

Before departing completely, however, there remains a response to be made to perhaps the most plausible rejoinder concerning the non-use of the Evidence Act. That is, the Evidence Act – or at least the most important portions of it – only deals with the admissibility or reception of evidence. It says nothing about how the evidence, upon reception, is to be treated. In this regard the jurisprudence is clear and consistent in that before making a finding of liability, the entire evidentiary record needs to be carefully sieved and considered, and checks for internal and external consistency, completeness logic and integrity must still be made by the judge. The factual narrative must cohere and hold up to scrutiny according to the relevant standard of proof, or judgement will not be awarded in favour of the party bringing the claim. In other words, the safeness of a finding of liability is still secure, notwithstanding the complete bypassing of the first gate of reliability – that of admissibility. The trade-off for the bypass, however, is that a more detailed evidentiary record is presented to the judge for weighing and consideration. The adversarial process also enables adversely affected parties to attack the record as necessary. All of this is difficult to refute in so far as it is already accepted (and sound) practice, but it does not change the fact that the Evidence Act is still not being understood and used in its proper terms, structure and principles. Accordingly, under this view, maybe the better

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speech by Recorder of London Judge Brian Barker QC entitled “Rethinking our Conventional Paradigms – Has the Adversarial System Become Outmoded in the Reception of Expert Evidence?”, he too noted that while the admissibility paradigm of the Evidence Act “contrasts with a fairly universal approach in other jurisdictions, and in particular [England and Wales], where [evidence] is freely admissible subject to exclusionary rules the major one being to prevent unfair prejudice”, the 2012 amendments have only exacerbated existing problems by failing to address the Evidence Act on its own unique terms. He added that “it would assist fairness and forward thinking if a way were to be found to properly allow an environment where [relevant evidence] ‘would expect to be in unless it was properly ruled out’.”

183 In this regard, while the Singapore courts have for the larger part of their history been associated with expediency and efficiency (*supra* note 75), it will not be fanciful to suggest that a fundamental aspect of the concept of the rule of law is that existing laws must be adhered to: Chan Sek Keong, *The Courts and the “Rule of Law” in Singapore*, Sing. J. Leg. Studies 209, 218 (2012).

way forward is to focus on how the evidentiary record is evaluated, since the ship to consider matters at the preliminary, exclusionary stage has long sailed and docked in oblivion.[184]

At any rate, whichever paradigm one views evidence law and the Indian Evidence Act and its progeny, it is hoped that this paper will provide a spark or even some insight for other Indian Evidence Act jurisdictions (particularly, but not limited to, those in Asia) that have not amended their antiquated evidence legislation but may intend to do so in the future.[185] In so far as there have been no Singapore High Court or Court of Appeal cases that have interpreted the amended relevancy provisions, it is also hoped that this paper will be of useful guidance to those who can implement the necessary changes.

6 Postscript

As a minor correction to the preceding paragraph, very shortly after this paper was completed, the Singapore High Court handed down two decisions that shed the first known judicial light on what "in the interests of justice" under the

184 Perhaps for a more optimistic account as to how the Evidence Act can be distilled, salvaged and married to modern law conceptions of the key rules of evidence, see Ronald Allen *et al.*, *Proposed Final Draft: Tanzania Evidence Act 2014 from the Chief Consultant and Drafting Committee* (2014). The criticisms of the Tanzanian Evidence Act were patently scathing in preface of the report: "The [Tanzanian Evidence Act] is a by-product of colonial imperialism… it treats some problems that no longer exist and ignores many that do. In the 140 years since the [Indian Evidence Act] was written, there have been vast strides in the fields of evidence law and trial procedure. The [Tanzanian Evidence Act] reflects none of these developments. Furthermore, the [Indian Evidence Act] embodies the idiosyncratic ideas about the law of evidence and how it should be structured… Although Fitzjames Stephen's ideas were quickly rejected by virtually the entire Anglo-American world, the [Tanzanian Evidence Act] still incorporated these peculiarities. Indeed, even Indian legal scholars have complained that the [Indian Evidence Act's] language and concepts are convoluted at best and counterproductive at worst… it is no longer compatible with technological innovation and the cultural context of the United Republic."

185 Resolving the problems of the Evidence Act will also be helpful in establishing the exact rules of evidence that will govern the up-and-coming Singapore International Commercial Court; the authorities tasked to look into the matter have yet to decide if the Evidence Law would apply to the proceedings of this new court. It should also be noted that at the time of writing, no (local) case has applied any of the amended relevancy provisions, which may again underscore the limited utility of evidence law in Singapore generally and the Evidence Act specifically.

Evidence Act entails. The first case, *ANB v. ANC*,[186] involved divorce proceedings. The husband alleged that his wife had hacked into his computer while he was overseas, while the wife said that the computer was not password-protected when she accessed it. While accessing the computer, she noticed some files that supposedly revealed a plot by her husband to frame her during the divorce hearings. She hired a private investigator to remove the hard drive so the files could be copied, and thus there was an issue of whether these files were admissible evidence as the wife could have committed an offence under certain penal laws. The court ultimately declined jurisdiction to rule on the matter for a technical reason that need not unduly concern us, but it did make several important observations on ss. 32(3) and 47(4) of the Evidence Act and the court's general inherent powers to exclude evidence after an extensive survey of the law: first, the new test of "in the interests of justice" does involve the weighing of probative value and prejudicial effect; secondly, this exclusionary discretion is justified on the basis of the court's inherent jurisdiction to prevent injustice at trial, which must therefore be invoked sparingly; and thirdly, the balancing test should be exercised more stringently in criminal cases, since the presumption of innocence is paramount.[187] Accordingly, the court suggested that had it been properly seized of jurisdiction, the evidence would have been admissible.

The second case, *Wan Lai Ting v. Kea Kah Kim*,[188] involved a dispute over the transfer of shares. The applicant wanted to admit two affidavits of evidence-in-chief pursuant to s. 32(1)(j) of the Evidence Act[189] of a key witness as the latter was too old and ill to travel from Hong Kong to testify in court, and taking her evidence via video-link would be too costly. The court held that though it was prepared to accept that it was impracticable for the witness to travel to Singapore, the video-link option was not an unfeasible one. Notably, the court held that the applicant was probably attempting to admit the evidence via s. 32 for "ulterior reasons" as the applicant must not have been confident that the witness's evidence could withstand cross-examination, and in the circumstances, the prejudicial effect of the evidence in the affidavits far

186 S.G.H.C. 172 (2014).

187 *Id.* at [31]–[51].

188 S.G.H.C. 180 (2014).

189 The provision states: "statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts… when the statement is made by a person in respect of whom it is shown – (i) is dead or unfit because of his bodily or mental condition to attend as a witness; (ii) that despite reasonable efforts to locate him, he cannot be found whether within or outside Singapore; (iii) that he is outside Singapore and it is not practicable to secure his attendance; or (iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so."

outweighed the probative value and it was not in the interests of justice to admit them.[190]

Do these two decisions alter the arguments and conclusions of this paper? In my opinion they do not. For a start, both decisions readily presupposed that "in the interests of justice" refers to the balancing test, but as argued in this paper, this is not without fundamental obstacles and not necessarily obvious, and even if such equation can be made, there are important unanswered questions. The court in *ANB* also referred to the idea of preventing injustice at trial, and though it did not refer to it as the basis for its decision, O. 92 r. 4 of the Rules of Court which governs civil proceedings in Singapore does provide that "nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court". The problem is that the courts have simply not developed any meaningful contours for this in the criminal context – especially at the pre-trial and interlocutory stage, which is where the Rules of Court feature mostly – and accordingly, the supposedly limited circumstances justifying invocation are far from clear.[191] Arguably, the same uncertainty does not exist in civil cases, where the well-established bases for invoking the court's inherent powers are to prevent oppression, vexation and abuse of process[192] – but none of which find immediate or established equivalents in the criminal realm. Indeed, the court's reference to "ulterior reasons" in *Wan Lai Ting* is simply a specific example of abuse of process in civil cases.[193] As to the suggestion in *ANB* that the balancing test ought to apply more stringently in criminal cases, this cannot be refuted in so far as greater matters and consequences are at stake in the criminal realm, but a close perusal of the judgement reveals that the court had effectively equated prejudicial effect solely with the absence of probative value. As highlighted in this paper, given that prejudicial effect means different things in different contexts and is not limited to the absence of probative value, the better approach may be to consider matters strictly from the point of view of relevance and reliability.

Indeed, if the twin touchstones of relevance and reliability had been applied in either *ANB* or *Wan Lai Ting*, the admissibility outcomes would have been the same. In *ANB*, short of there being an allegation that the contents of the hard drive had been manipulated, the evidence was relevant and reliable,

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190 *Wan Tai Ling*, *supra* note 188, at [17]–[19].

191 *Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings*, *supra* note 122, at 351–353.

192 See, e.g. *Alliance Management SA v. Pendleton Lane P*, 4 S.L.R.(R.) 1, [6]–[14] (2008).

193 See, e.g. *Chee Siok Chin v. Minister for Home Affairs*, 1 S.L.R.(R.) 582, [34] (2006).

notwithstanding the impropriety of the means in which it was obtained (in this regard, it should be borne in mind that there is nothing to stop the Attorney-General's Chambers from prosecuting the wife separately for illegally accessing the computer if there is sufficient evidence). Likewise, in *Wan Lai Ting*, the evidence was denied admissibility not because it was prejudicial in the sense of it being improper or improperly obtained in any way, but it was prejudicial because the evidence (and bearing in mind its importance to the dispute) could not be tested by the respondent for its accuracy and reliability via cross-examination, which remains a cornerstone in Singapore's justice system.[194] Of course, since *ANB* and *Wan Lai Ting* are only civil cases, my proposed approach remains to be tested by the Singapore courts in the realm of criminal proceedings.[195]

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194 *Teo Wai Cheong*, *supra* note 70, at [33]–[54]. Apart from proving a case, cross-examination can also be used to disprove a case, for instance by pointing out inconsistencies in a testimony or impeaching the credibility of a witness.
195 *Wan Tai Ling*, *supra* note 188, at [14].