REMAKING THE EVIDENCE CODE

Search for Values

This article seeks to consider whether there is a case for "remaking" the Evidence Act, which codified the 19th century English law of evidence, and if so, what values a new code should embrace. It argues that the current Act lacks a coherent value system and examines the various judicial approaches to reconcile the code with modern common law. Meta-theories justifying a modern law of evidence are also useful. Finally, the article outlines an argument that the concept of "procedural fairness" should have a central role in remaking the code.

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> "Procedural justice tends of its nature to be imperfect and not ideal, being the untidy outcome of past political compromises … So disputes about the just and fair political procedures and institutions will continue indefinitely, punctuated by occasional compromises."[1]

I. Preliminary issues stated

1 If any statute deserves iconic status, it is the Evidence Act.[2] At the turn of the century, it would have been in force for over a

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1 Stuart Hampshire, *Justice is Conflict* (Princeton NJ: Princeton University Press, 2000) at pp 32 and 97.

2 Cap 97, 1997 Rev Ed.

hundred years[3] with relatively few major amendments.[4] This sharply contrasts with the massive (and sometimes frenetic)[5] efforts of other jurisdictions[6] to restate the law of evidence both in terms of structure and content. English case law as at the time of enactment (1872) had been the basis for the original code.[7] Given the fact that much of the law was restated in the 20th century, altering not just the scope but the very nature of the rules as well in major areas such as standards of proof, hearsay and character evidence (including similar fact evidence), it is surprising how resistant the code is from change. A number of the 19th century rules were shown to be based on falsifiable psychological assumptions, dubious epistemic premises or outdated political or social mores: these were modified, overruled or repealed not just by judicial decision alone but also by legislation in other jurisdictions. However, the changes in the law of evidence here have been few and far between, and through judicial decision[8] rather than legislation, though civil procedure law has undergone several important institutional changes.[9] With whatever few changes that were made, the code resembles very much an historic artefact preserving much of its structure, but with new

3 The original Ordinance was enacted in 1893, and was a re-enactment of the Indian Evidence Act 1872, with minor differences other than being the first enactment to allow the accused to give evidence on his own behalf. It preceded the English Criminal Evidence Act 1898 and was not in the Indian Evidence Act 1872.

4 Though there are about 30 amendments in all since its enactment, the significant amendments were in 1976, when the recommendations of the UK Criminal Law Revision Committee in its 11th Report (HMSO 4991) were enacted both in the Evidence Act and the Criminal Procedure Code, giving the law of hearsay especially a "split personality": see *Lee Chez Kee v PP* [2008] 3 SLR 447.

5 Roderick Munday observed that in England, the rules of evidence are being altered at a "giddy pace" (*Evidence* (OUP, 4th Ed, 2007) at p 2), and that the "legal rules mutate at bewildering speed" (at p 16). He continued: "… if one sets out to write on the law of evidence, then one finds oneself shooting at a rapid-moving target." (at p 16). See also: *Cross & Tapper on Evidence* (Oxford: OUP, 10th Ed, 2007), *Murphy on Evidence* (Oxford University Press, 10th Ed, 2007); Dennis, *Law of Evidence* (Oxford: Oxford University Press, 3rd Ed, 2007). Due to the enormous amount of legislative activity on this subject, care must be taken in placing reliance on English authorities applying the "new" legislation.

6 US: Federal Rules of Evidence (1975) (adopted not just in Federal courts but in most states); Australia: Evidence Act 1995 (under review again); England: Civil Evidence Act 1995; Criminal Justice Act 2003; New Zealand: Evidence Act 2006.

7 There was, however, a significant difference: the accused person was made competent to testify on his own behalf (now s 122). This rule predated a similar rule in England as established by the Criminal Evidence Act 1898. For a history of this rule in England, see Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997) ch 5.

8 See *Law Society v Phyllis Tan* [2008] 2 SLR 239, where the High Court examined the relationship between the common law and the code. For a useful article detailing and examining the various judicial approaches to the Act and common law, see J Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365.

9 The civil procedure rules are revised regularly and extensively. In particular, they embody ideas of case management that facilitate the efficient disposal of cases.

additions by different artisans[10] showing little concern for connectivity to the design and purpose of the original legislation.[11] A holistic view of the whole enterprise is missing, making the task of judges and lawyers difficult in understanding and interpreting it and raising the question whether the Evidence Act – this statutory icon – should remain standing or be deconstructed and remade. Both internal and external incoherence exists in the current code, which requires attention.[12] Applying the code in a modern legal system has been difficult – its provisions pose more problems than they resolve. While one cannot say that the code has "failed" to guide lawyers and courts in the admissibility of evidence, it seems that judges have struggled to make sense of some of the rules (such as the similar facts rule, the burden of proof rules, the hearsay rule) in the light of developments in the subject, both at common law and in modern legislation.[13]

2 Indeed, developments in the law of evidence and procedure in the common law world have gone far beyond judicial or legislative restatement. Since the ground-breaking works of William Twining on theorising about evidence and fact-finding,[14] there has been an enormous expansion of writings on the subject, especially on criminal

10 The original architect was Sir Fitzjames Stephen. The architect for the significant reforms to the Act introduced in 1977 was actually the English Criminal Law Reform Committee, which in its 11th Report (HMSO 4991) introduced substantial amendments to the doctrines of hearsay, character and made major inroads into the accused person's right to silence.

11 The amendments to the Act have a bad "fit": admissibility provisions such as the exceptions to hearsay in the case of previous consistent and inconsistent statements, and statements used for refreshing memory are inserted in the third part of the Evidence Act entitled "Proof" when they ought to be in the first part of the Act (relevancy) as they deal with the admissibility (relevancy in "Stephen-speak") of facts.

12 "Internal coherence" refers to the normative structure of the legislation, and whether the provisions are consistently drafted and rationally linked in the appropriate parts, such as the illustration given in footnote 12 above, and to shaping the anachronistic provisions to "fit" the common law changes in areas such as burdens, similar fact evidence and hearsay. External coherence refers to the normative correlation between the legislation and the prevailing legal and political morality of the time: "the coherence of norms … is a matter of their 'making sense' by being rationally related as a set, instrumentally or intrinsically, to the realisation of some common value or values" (Neil McCormick, *Rhetoric and The Rule of Law*, (Oxford: Oxford University Press, 2005) ch 10 at p 193).

13 But the encouraging signs are that the Singapore courts are meeting head on the challenges of clarifying the rules of evidence: see, in particular, the recent decision of *Lee Chez Kee v PP* [2008] 3 SLR 447; *Law Society v Phyllis Tan* [2008] 2 SLR 239.

14 See, especially, William Twining's works – *Theories of Evidence: Bentham & Wigmore* (London: Wiedenfeld & Nicholson, 1985); *Rethinking Evidence* (Cambridge: Cambridge University Press, 2nd Ed, 2006); *Analysis of Evidence* (Cambridge University Press, 2nd Ed, 2005) (with co-authors Anderson & Schum). See also, "Taking Facts Seriously – Again" in *Innovations in Evidence & Proof* (Roberts & Redmayne ed) (Hart Publishing, 2007) ch 2.

evidence,[15] and the work has also extended to the criminal trial[16] and, even further, to the criminal process.[17] These scholarly works employing related fields of behavioural sciences, economics, epistemology, political philosophy, probability theory and sociology all add to the general knowledge base on the subject of procedural law, including evidence law.[18]

3 Given these developments, why is so little attention paid to remaking the code in Singapore? To answer this, we need to evaluate the present code, the legislative and judicial ideology, and to examine whether the present values as reflected in the code would still apply in the new century. We not only have to know where we are, we need a sense of where we ought to be. As so very aptly put by Paul Roberts:

> Law reform is always supposed to make things *better*, which implies that there must be some criterion for differentiating between states of affairs as better, the same or worse than before. Ideally, one should be able to conceptualise a pattern or model … of how things ought to be …[19]

4 But even if changes were made, they must still have an ideal, a direction, otherwise "every two strides taken forward might be cancelled out by two retrogressive steps in the opposite direction". One might add that this also includes judicial development of case law, but, more importantly, it makes the point that legislative reforms need to be structured and based on sound values and policies adopted consciously and rationally. The radical changes in the law of evidence in other

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15 See now the major work by Roberts & Zuckerman, *Criminal Evidence* (Oxford University Press, 2004). See also Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Thomson, 2nd Ed, 2006).

16 A valuable collection of essays on the criminal trial (vols 1, 2), culminating in a theory of the criminal trial (vol 3): Duff, Farmer, Marshall, Tadros, *The trial on trial* (Oxford: Hart Publishing, vol 1: 2004, vol 2: 2006, vol 3: 2007) ("Duff, vols 1–3"). Local works on the subject include Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (Singapore: Lexis-Nexis Butterworths, 2nd Ed, 2003); Tan Yock Lin, *Criminal Procedure* (Singapore: Butterworths Asia, 1997).

17 The classic work is Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) ("Ashworh & Redmayne").

18 Prominent examples are: Alex Stein, *Foundations of Evidence Law* (OUP, 2005); Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: OUP, 2008); Larry Laudan (non-lawyer), *Truth, Error and The Criminal Law* (Cambridge University Press, 2006); Richard Posner, *Frontiers of Legal Theory* (Harvard University Press, 2001) Pt IV chs 10–12); Comparative works include: Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press, 1997). Some general texts on evidence also address the broader issues: *eg*, Ian Dennis, *The Law of Evidence* (3rd Ed, 2007) esp ch 2; Peter Murphy, *Murphy on Evidence* (10th Ed, 2008) esp ch 1.

19 "Rethinking the Law of Evidence" in *Innovations in Evidence & Proof: Integrating Theory, Research and Teaching* (Paul Roberts & Mike Redmayne eds) (Hart Publishing, 2007) at p 39.

common law jurisdictions have all been in the direction of a liberal tradition reinforced by norms from international conventions (especially the European Convention on Human Rights). This "rights based" approach (also associated with Packer's "due process" model)[20] is perceived to be at odds with the more conservative rules that held sway during the Victorian era,[21] which corresponds more to Packer's "crime control" model so-called.[22] The latter approach is regarded as more acceptable in Singapore, which prides itself on its policy of "Asian values", stability, safety and security and low crime, and which might be labelled communitarian values.[23] The crucial question is simple enough to state, but any answer remains at best a compromise: it is whether a modern adversarial system as developed is so welded to individualism and rights discourse that it takes precedence over communitarian values, or whether communitarian interests could be fitted to exist coherently with rights, or even whether they could, in certain situations, override rights. This probably is the first task – to identify the value system that underlies the code, and then to analyse the judicial ideology towards it, and to see whether there is a case for remaking the code, and if so, what are the values that should underlie the evidence code for the 21st century.

5 Yet another reason for explaining the absence or relative slowness of change is institutional: the law of evidence is referred to famously as a "child of the jury system"[24] so that there is a perception that without the jury, it could be applied more loosely, or conveniently ignored in the belief that judges could assess evidence and give it its proper weight better. In other words, in a bench trial, the goalpost is moved from admissibility to weight of evidence, and in the main, the rules of evidence governs admissibility with few rules on weight. Simply stated, the second set of "preliminary" issues concerns the issue that, absent the jury, is there a need for a law of evidence? If so, what rules should be repealed, and of those remaining, which of them needs to be

20 H Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

21 As to which see Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997). See also, Sherman J Clark, "'Who Do You Think You Are?' The Criminal Trial and Community Character" in Duff vol 2) ch 5, for the link between the criminal trial and community character. For a recent analysis of the development of the criminal trial from the Victorian age to the full blown adversarial trial with an emphasis on "fair trial" and "due process", see Duff vol 3 at pp 40–53.

22 H Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968). See now MacDonald, "Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes" (2008) 11 New Crim Law Rev 257, for a recent critique of Packer's models.

23 See paras 32–57 of this article.

24 J B Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898) at p 296.

modified to operate in bench trials?[25] Yet another problem that has received attention of late is the nature of the rules – should the rules be "bright-line", that is categorical and specific in nature such that the judge is given only a very weak discretion – namely that of interpreting the highly specific norms and applying them to the fact-finding process,[26] or should she be given a stronger discretion, and consequently the code worded in such a way as to state principles rather than rules from which a judge could be guided in the exercise of her discretion in working out the appropriate response in each case?

6 Following from the extended role of the judge as a fact-finder in addition to her traditional role as a trier of law, another problem is: what principles and rules should guide her in her fact-finding? The stock characteristic of the adversarial system of trial by jury is the alleged impartiality of the judge, in her only role of determining issues of law, and admissibility of evidence, leaving the parties to present their evidence, and the jury to weigh the evidence and decide on the facts. In fact, this raises several issues, the first of which is whether judges are more "suitable" at determining the truth than laymen. Secondly, in becoming a fact-finder, is the judge still subject to the rules that she must remain as passive and dispassionate as possible[27]? If she has a duty to find facts, and thinks that she has doubts not cleared by counsel, can she intervene with her own questions? What are the limits to judicial intervention in fact-finding? Another worrying related issue is whether the judge is able to keep the two functions of fact-finder and trier of law separate, or whether her decisions, including findings of fact, would be "tainted" by evidence she had ruled "inadmissible" earlier; in other words, a covert leakage into the fact-finding process of the judge of evidence that ought not to have been considered?[28]

25 Chan S K, AG (as he then was) bemoaned the fact that little academic attention has been paid to this issue: see Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 451. But see J Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed 2003) at pp 6–8. This issue is beyond the scope of this article and will be addressed in a forthcoming article.

26 The classic examples of this in the current code would be the "relevancy" rules so called in ss 6–16.

27 As judges are to be fact-finders, should they be given greater licence to ask questions and "descend into the arena", just as an inquisitorial system judge would? See now, *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 as to the limits of judicial conduct in the fact-finding process. This issue is beyond the scope of the present article, and will be dealt with in a forthcoming article.

28 This issue could turn into a "chicken and egg" situation – *ie*, the judge, having viewed the evidence from her role as trier of law, might realise that the evidence objected to is so strong that to exclude it might result in a failure to find a significant fact affecting liability. One might argue that this is not really a problem so long as the facts she finds and articulates in her "grounds of decision" bear out the Prosecution's case beyond reasonable doubt. This issue is further discussed in a forthcoming article.

7 These "preliminary" yet fundamental issues sketched above need to be resolved in shaping a law of evidence for a modern legal system. There are other local issues, of course, not least the problem of retaining the inclusionary approach adopted in the Act and the well-meaning but ill-conceived reliance solely on the concept of "relevancy". The case for distinguishing between relevancy, admissibility and weight is well made out in modern evidence law. A wider issue – that of retaining the code as distinct from adopting another vehicle for the rules of evidence is a practical matter, to be decided by the appropriate legislative or judicial institution. What can be observed is that there seems to be a move to state rules of evidence (in whatever form) in subsidiary legislation, which would allow for them to be put together with other rules of court – ensuring a more coherent procedure code.[29]

8 It is worth noting that the modern law of evidence is very much focused on criminal cases.[30] One of the reasons why this is so is that the integration of civil procedure and evidence[31] has progressed far smoother than its criminal counterpart and is more attuned to the needs of a modern legal system. The role of the law of evidence in civil cases is much reduced due to the pre-trial discovery process, case management practices and presumed equality of parties[32] in terms of resources. Many civil cases are now settled using alternative methods such as mediation or arbitration, which avoid the formal use of evidence rules. Criminal evidence, on the other hand, has still a large part to play – and as outlined above, issues from the broadest in terms of the policy adopted in the criminal process to the more concrete rules of evidence dealing with accused persons, *eg*, the rules on allocating legal burdens to accused persons, admissions and confessions, and discretions to ensure fair trials, remain to be resolved.[33]

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29 As is the case now in English practice.

30 As Paul Roberts pointedly observed: "Whilst orthodoxy still insists on the fiction of a single Law of Evidence in principle applicable equally to civil and criminal proceedings, in reality the modern subject is at least four-fifths criminal evidence, with a rump presence on the civil side centred on legal professional privilege and 'public policy'": "Rethinking the Law of Evidence" in *Innovations in Evidence & Proof: Integrating Theory, Research and Teaching* (Paul Roberts, Mike Redmayne eds) (Hart Publishing, 2007) at p 37.

31 See the excellent discussion in Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Thomson, 2nd Ed, 2006) ch 1.

32 Although the parties may not in fact be equal, *eg*, major retailer *versus* consumer, it seems that the substantive law would take care of this: see, for example, the allocation of burdens in consumer legislation like the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), the Supply of Goods Act (Cap 394, 1999 Rev Ed) and the Misrepresentation Act (Cap 390, 1994 Rev Ed). Special public law remedies are available against the government or state agencies. The Legal Aid Bureau also provides legal aid in certain civil matters to people who cannot afford them, but a means test is employed.

33 But the task to remake the evidence code is essentially a daunting one, as succinctly summarised by well-known jurist, Neil MacCormick: "To construct or rationally

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II. Code, common law and legalism – Past and present

9 There is a perceived gap between the principles and doctrines of the common law of evidence found in other more "rights conscious" jurisdictions and Singapore's laws, largely based on a consequentialist policy based on utilitarian principles of safety and security for the general happiness of the greatest number of "law-abiding" citizens. The consequentialist treats persons suspected of crime as "objects" in the overall aim to control crime, rather than as "subjects" having substantial rights and demands – this "rights based" approach treating each individual worthy of protection and humane treatment based on "respect for human dignity and human freedom"[34] is seen as "Western liberalism" and does not find ready acceptance in Singapore in preference to the community values of safety and security.[35]

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reconstruct an account of some branch of the law in some jurisdiction, one must of course expound the value-elements essential to that body of law, and one must indicate what are the possibilities for developing new arguments that would further develop these values. One must be candid about deficiencies and about the possibility of their amelioration or rectification … One has to elucidate essential concepts … One has to consider statutes and preparatory materials … One has to consider the judicial decisions and the dicta of judges expounding principles and values they consider to be essential … One has to, or at least one may, seek to provide a more sympathetic or comprehensive rationale for the legal materials so far developed in this domain. One may certainly draw attention to comparative materials from other legal systems that express, or perhaps, better express, a convincing view of the underlying rationality for the matter in hand. Relevant lessons may also be derived from legal history. Given this rich range of materials, a rational reconstruction yields a critical account of the governing rules in the light of the principles and values that underpin them." Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007) ch 16 ("Laws and Values: Reflection on Method") at pp 291–292. This article is a first step in the "journey of a thousand miles" (attributed to Lao Tzu).

34 Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. For a succinct account contrasting both the consequentialist approach and rights-based approach, see Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) ch 2.

35 PM Lee Kuan Yew's address to the Singapore Academy of Law: "The basic difference in our approach springs from our traditional Asian value system, which places the interests of the community over and above that of the individual. In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with customs and values of Singapore society. In criminal law legislation, our priority is the security and well being of law-abiding citizens rather than *the rights of the criminal to be protected from incriminating evidence*." (1990) SAcLJ 155 [emphasis added]. The italicised part is unfortunate: a suspect put on trial is labelled a criminal and to be presumed guilty; a criminal should not have rights, at least not rights that would hinder her conviction. But this begs the question: if she did have rights that could have blocked the admissibility of evidence against her, then she would not be convicted, *ie*, not a criminal. She would then be entitled to rights? So the argument presumes that those put on trial are factually guilty, a feature of the so-called "crime control" model: Chan Sek Keong, "The Criminal

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10 The starting point, as we are considering the code, is legislative policy (the "will and intent of Parliament") – what was the policy that could be said to underlie the Evidence Act as originally conceived? Undoubtedly, Sir James Fitzjames Stephen, the code's draftsman, intended it to be used in British India by administrators, many of whom were not legally trained, and where lawyers or judges or primary legal resources like law reports were lacking. Though an adherent to Bentham's views of codification, Stephen was more enamoured with the law of evidence as developed in the courts, and by the treatise writers such as Taylor.[36] As to the state of the law of evidence at the time Stephen drafted the code, one could say that it was very much more a "work in progress"[37] than a finished product, especially in criminal evidence. But there was no doubt that the code was intended to be used in a vastly different legal and social environment than what it is now.

11 Stephen's evidence code then was really no more than a restatement of 19th century case law, the subject still in its nascent form. True it was the time of Bentham and utilitarianism, but Bentham was highly critical of the common law of evidence at that time, favouring a return to Free Proof, based on "everyday experience and common sense reasoning"[38] and on the principle of utility (using the *felicific calculus*) to justify any rule that curbed "free proof". Stephen, on the other hand, wrote in 1876 that Bentham's influence had waned and, in any case, unlike Bentham, he regarded the common law cases as "full of sagacity and practical experience".[39] He therefore sought to "reduce it into a compact systematic form"[40] as a step towards the codification of the common law of evidence in England, without examining the merits of the codified law. He accepted that the common law rules displayed the collective wisdom of judicial decisions accumulated over centuries. Attempts to find a general theory to explain or justify the body of rules in the code, therefore, are bound to fail. According to Keeton and

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Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 440–441.

36 See Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997) ch 2 esp at pp 14–25. He noted that by 1855 when the second edition of Taylor was published, "evidence law was clearly perceived as a system of rules developed by the judges" (p 22).

37 Wigmore noted the surge of cases after 1830, when "established principles began to be developed" (*A Treatise on the System of Evidence in Trials at Common Law* vol 1 (Tillers ed) (Boston Mass, 1983) at pp 609–610).

38 William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Wiedenfeld & Nicolson, 1985) at p 3.

39 Stephen, *A Digest of the Law of Evidence* (Harry Lushington Stephen and L F Sturge eds) (12th Ed, 1948) at p xxii. He went on to say that the law "is capable of being thrown into a form at once plain, short and systematic". Stephen's view of the laws of evidence in his time was not a universally shared belief, as witness Bentham's severe critique of the law at that time.

40 Stephen, *A Digest of the Law of Evidence* (12th Ed, 1948) at p viii.

Marshall, the almost entirely judge-made law of evidence had the following characteristics:[41]

> Not all its rules were clearly understood, the origins of a number of them were obscure, and the application of others was uncertain. There were, moreover, wide variations between the rules of evidence applied in Common Law Courts and those enforced in Courts of Equity. Some parts of the law … for example … that which relates to documentary evidence … was still primitive and unsystematic. Finally the rules had grown up in isolation. They were the product of our own peculiar legal history …

12 The common law of evidence at that time was, to put it mildly, an unsystematic body of rules, no doubt some wise ones, and others not so: Wigmore came to the same conclusion, referring to it as a body of "rules and precedents of minutiae relatively innumerable in comparison with what has gone on before".[42] But there is no doubting Stephen's achievement in putting the rules into a systematic form. In this context, what seems to be underrated is the significance of the illustrations inserted to aid in determining the scope of each provision. Most, if not all, of these illustrations[43] were based on actual cases, and in *Mohamed Syedol Ariffin v Yeo Ooi Gark*,[44] the Privy Council emphasised the importance of the illustrations in construing the sections – the only exception seems to be where the illustrations were "repugnant" to the sections to which they were attached. These illustrations are to be regarded as "superior" to other "ideas … derived from another system of jurisprudence". If the illustrations were given the prominence they deserved, and used more widely in interpreting the provisions, the common law as at 1872 would probably be better reflected in modern case law. But as Roberts observed: "The foundations of modern English

41 Keeton and Marshall, *Bentham's Influence on the Law of Evidence* (1948), quoted in William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Wiedenfeld & Nicolson, 1985) at p 22. This description was also echoed in Thayer's writings, but he more or less attributed the growth of the subject to the jury, the effects and relevance of which will be discussed below. Bentham's influence on the modern law of evidence is still evident: the abrogation of the "right to silence" in the 1970s was said to be influenced by his critique of the so-called "right": see I H Dennis, *Reconstructing the Law of Criminal Evidence* (1989) 42 CLP 21 esp at pp 26–27.

42 *A Treatise on the System of Evidence in Trials at Common Law* vol 1 (Tillers ed) (Boston Mass, 1983).

43 The cases that formed the basis of the illustrations were identified in the last edition of Stephen's *Digest of the Law of Evidence* (Harry Lushington Stephen & L F Sturge eds) (12th Ed, 1948)). Not many of the decisions on the Evidence Act refer to these illustrations, but they, even more than the language of the provision, would limit the extent of the rules – see especially the illustrations to ss 14 and 15 and ponder how they would have constrained the similar fact evidence rule. Some illustrations were included in subsequent amendments and were not all referable to actual cases.

44 [1916] 2 AC 575.

criminal trial procedure were laid in the later eighteenth and nineteenth centuries, and the law of criminal evidence is largely a twentieth-century creation."[45] It is no surprise that one could hardly discern an underlying legislative intent regarding the rules in the code, and that much of the controversy between the code and common law surfaced in criminal cases. It is made even worse by subsequent amendments obviously following the policies of another era and of a modern foreign Legislature.[46]

13 If one were to look at judicial approaches to the code,[47] one is tempted to say that, in the main, the rules seem to have been interpreted with an eye on present legislative policy (more inclined to "crime control" than that in other modern jurisdictions) than on what the law was at the time of original enactment of the code. The difficulty of the task facing those who need to interpret and apply the code, especially the burden on the Judiciary, seems to have been understated. Tribe neatly describes the complexity of the general problem in interpreting constitutions and codes:[48]

> Meta-questions about how to read and integrate the several parts of any such text impress themselves on anyone charged with interpreting and applying it: What are we to make of provisions that appear to be superseded by others but have not been erased? How should we address apparent conflicts, gaps or inconsistencies between some parts of the text and others? How are we to understand the history and controversy surrounding the various parts of the text? How should that understanding bear on the way those parts are construed and enforced? Against what baselines and expectations should we

45 "Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication" in Duff vol 2 ch 3 at p 62.

46 See, for example, the Court of Appeal decision in *Lee Chez Kee v PP* [2008] 3 SLR 447, which considered the complicated relationship of the provisions of hearsay in the Criminal Procedure Code (introduced in 1976) to the confession provisions in the Evidence Act. To Stephen's credit, his code in its original form repealed all rules not found in it, and not just rules "inconsistent" with the code. But as the legal system evolved, large gaps appear and modern courts have no option but to adopt them. The Legislature provided a simple method of incorporation by just amending s 2 to repeal only rules "inconsistent" with the code: see, for example, *Sarkar on Evidence* (Wadhwa & Co, 2007). Also, the modern amendments were based largely if not solely on English drafts that were amending common law rules as developed in the 20th century, which did not provide a suitable "fit" to an anachronistic code that was never enacted in England. For the fate of Stephen's Bill in England, see Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997) ch 2 esp at pp 272–278.

47 See the excellent article by J Pinsler, "Approaches to the Evidence Act: the judicial development of a code" [2002] 14 SAcLJ 365 and his work, *Evidence, Advocacy and the Litigation Process* (Singapore: Butterworths, 2nd Ed) at pp 16–19.

48 *The Invisible Constitution* (New York: Oxford University ress, 2008) at p 151 (Pt V: Visualizing the Invisible).

> understand the institutions put in place by the text and the limits of their powers?'

14 In trying to answer such questions, it is necessary first to look at the environment in which the code operates. Singapore political leaders frequently and publicly claim to have a modern legal system in the common law mode, with an international reputation.[49] On closer examination, however, we see that Singapore in fact departs sometimes substantially from its counterparts in Australia, Canada, England, NZ and the US,[50] principally in criminal justice and criminal evidence. A recent formulation of the generic characteristics of a criminal trial might provide a convenient way to point out the main differences between the local system and the other common law systems. Hildebrandt stated the generic characteristics of a trial as follows:[51]

> (1) The judge … is impartial and independent, (2) the trial is public, (3) the defendant will not suffer punitive actions as long as her guilt is not legally established (presumption of innocence), (4) the defendant is provided with equality of arms, (5) the judgment will be based on evidence presented in court (principle of immediacy, connected with a normative preference for oral testimony), and (6) the proceedings are contradictory (either adversarial or contradictory in the continental sense).

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49 The legislative and executive approaches towards crime are beyond the scope of this article except where they impact on the law of evidence. Reference is often made to the annual PERC (Political and Economic Risk Consultancy) surveys, which basically show expatriate perceptions about the Judiciary on commercial matters (enforcement of intellectual property rights, control of corruption and commercial crime). In 2008, 1,537 business executives across Asia were polled and Singapore was placed second, after Hong Kong: see *Asiaone*, 20 August 2008. But this accolade does not measure, and is not intended to measure, the quality of a legal system generally. Access to legal services, *etc*, is not a factor taken into account.

50 One of the less benign legacies of colonial government has been to institute a preventive detention process in its fight against communism, which paved the way for legislation like the Criminal Law (Temporary Provisions) Act, the Internal Security Act and the Misuse of Drugs Act, for detaining people suspected of drug trafficking, drug addiction, organised crime, and terrorism. It is said to be legitimate in the eyes of the citizenry – "There is a large degree of acceptance of these laws" (Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 439). Given these laws, Singapore can be described as a "preventive State" (as well as being a "reactive" State), where detainees under these laws are not brought to trial (and hence outside the scope of laws of evidence). But for an interesting insight into the "right to silence" in a "preventive State", see Alan Dershowitz, *Is there a right to remain silent? Coercive Interrogation and the Fifth Amendment after 9/11* (New York: Oxford University Press, 2008).

51 Hildebrandt, "Trial and 'Fair Trial': From Peer to Subject to Citizen" in Duff vol 2 at p 25. The sixth element might be puzzling, and re-interpreted by Duff as the right to confront accusers: see Duff vol 3 at p 51.

15 Admittedly, this formulation, according to Hildebrandt, reflects "constant reconstruction" over a few hundred years and culminating in Art 6 of the European Convention on Human Rights. Duff adds to this formulation the observation that "the principles governing the conduct of the trial and criminal process are increasingly conceived in the form of rights or constitutional guarantees, available to the accused, enforceable against the state".[52] Such a formulation of the trial would be regarded as protective of the accused person, which reflects the so-called liberal philosophy of Western societies.[53] Singapore's model of trial may claim to have the same characteristics, but it differs from its other common law counterparts in material respects.

16 For example, judges and officials all maintain a laudable commitment to the presumption of innocence as a foundational principle (characteristic (3)). V K Rajah JA only recently affirmed in *XP v PP*:[54] "the presumption of innocence is the cornerstone of the criminal justice system and the bedrock of the law of evidence."[55] In fact, on closer examination of existing law, its "strength" is another matter – as the accused person shoulders legal (and not just evidential or tactical) burdens for her defences, and may be the subject of adverse inferences if she keeps silent either when she is charged, or when the Prosecution makes out a *prima facie* case against her at her trial. One could surmise from these limitations that the presumption is considerably "weaker" than its counterparts in other common-law jurisdictions.[56]

17 External factors such as the lack of a properly developed law of discovery in criminal cases, which currently deprive accused persons of

52 Duff vol 3 at p 51.

53 Characteristics (1) and (2) are considered later in this article.

54 [2008] 4 SLR 686 at [90].

55 This was also recently reiterated by the Law Minister in a Parliamentary Sitting: 25 August 2008 (see below).

56 Duff points out that the presumption of innocence *simpliciter* does not of itself require the standard of proof on the Prosecution to be beyond reasonable doubt. That depends on the values attached to the presumption, the main one being the significance of a "guilty" verdict, which usually attracts condemnation and loss of liberty as distinct from the compensatory role of civil litigation (Duff vol 3 at p 89). But even when we have a "thin" version of the presumption, that is, limiting it to merely stating the incidence of proof being on the Prosecution, it may be weakened to vanishing point especially in specific legislation and cases where legal presumptions or reverse burden provisions make the burden on the Prosecution much lighter: see, for example, the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). The "bedrock" would be quite thin and porous in this case. On the presumption of innocence in Singapore, see Michael Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Sing JLS 365; and *cf*, Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 (a succinct and thoughtful account of the whole criminal process in Singapore from an "official" viewpoint).

access to statements made by them in the course of investigation,[57] will also adversely affect their ability to conduct their defences. Though common law has always recognised that the judge has an inherent duty to ensure a fair trial,[58] the discretion of the court to restrict otherwise admissible evidence is rather weak: in *Law Society of Singapore v Tan Guat Neo Phyllis* ("*Phyllis Tan*"),[59] the High Court (of three judges) affirmed that no wide discretion exists, as being inconsistent with the Evidence Act,[60] and that a much narrower discretion (that of regarding evidence as "unfair" only if its prejudicial value outweighs its probative value) as formulated by the House of Lords in *R v Sang*.[61]

18 Another characteristic of the criminal trial is that the defendant must be provided with "equality of arms". Paradoxically, as observed by Hildebrandt, to ensure "equality of arms" between the Prosecution and the Defence, it is necessary for the State (who seeks to prove the accused guilty of the offence with which she is charged) to provide resources to the accused, so that she can realistically conduct her defence properly including, in a modern legal system, having the assistance of counsel. The adversary has to lend a hand to the other, so as to ensure that it will be a "fair fight". This characteristic may also be seen to be "rights-based": more specifically, it refers to an accused person's rights to be provided, for example, with information in the hands of the State that could assist in the defence or for the accused to be provided with counsel. This

57 Criminal Procedure Code (Cap 68, 1985 Rev Ed) s 122(5) statements of accused persons made in custody or course of investigation; the so-called exculpatory statement made under Criminal Procedure Code s 122(6), when the accused is charged or informed that she is charged for an offence, is given to the accused. Confessions and statements by accused persons feature prominently in criminal prosecutions in Singapore.

58 See *Lim Seng Chuan v PP* [1977] 1 MLJ 171, Wee Chong Jin CJ said, "fairness to the accused … is a fundamental principle of the administration of justice".

59 [2008] 2 SLR 239. A detailed analysis of this case lies elsewhere, but following the court's reasoning, even the *Sang* type of discretion (probative value *versus* prejudicial value) would not be sanctioned either, as the Act did not contain any provision allowing the court to balance probative value against prejudicial effect: so, does that mean "inconsistency"?

60 Section 2(2). It is very odd why s 2(2), which is a repealing provision and duly noted to be so by the court, would then be used as a "prospective" limitation rule, excluding all common law rules subsequent to the original enactment. Surely the rule of interpretation is that any common law inconsistent with a statute would not be law – but that is a common law rule of interpretation. See also J Pinsler, "Approaches to the Evidence Act: the judicial development of a code" [2002] 14 SAcLJ 365 at 371, suggesting that a statutory provision should be included in the Act for such a discretion. This is a pragmatic approach, which deserves consideration, especially if judges favour textualism.

61 [1980] AC 402. One view is that it is by no means clear that the court endorsed the *Sang* discretion. On a strict interpretation of s 138, and of the passage from *Halsbury's* that it cited, it seems that there is no discretion at all. On the other hand, the court at one point did endorse *Sang* as being consistent with the Evidence Act. The court's view is, to say the least, ambivalent.

paradox has given rise to difficulties: the State may be reluctant to inform an accused of relevant information that may be useful to the Defence, as it may make it more difficult to proceed successfully against the accused.[62] The adversary in a dominant position would be reluctant to concede an advantage: it is a self-imposed handicap in the interest of fairness to the "weaker" party.

19 To deal with this paradox, it is common to provide "rights" (so as to impose duties on authorities to comply) to the accused person who in exercising her rights can demand such information or to seek the advice and help of counsel. For example, in Singapore, the right to counsel is a constitutional right (Art 9(3)).[63] However, in reality, the denial of state legal aid in criminal cases except in capital cases weakens this constitutional right considerably. The so-called "right" may be no more than a privilege, and only if an accused *knows* that he has a right to legal representation,[64] can afford a lawyer or rely on the Law Society's legal aid scheme would she be in a position to realise the right, and she must reasonably exercise her right in good time though not during the process of investigation.[65] In a recent parliamentary

62 There is no public data as to whether this happens in practice in Singapore.

63 Constitution of the Republic of Singapore (1999 Rev Ed) Art 9(3) states "where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice". Though the right to counsel is strictly speaking not a matter for the law of evidence, the significance of counsel in a case where evidence is being gathered cannot be dismissed lightly. The limits of right to counsel should be considered in drafting realistic and fair rules of evidence, especially in the evidence gathering stage.

64 See *Rajeevan Edakalavan v PP* [1998] 1 SLR 815, where Yong CJ decided that the constitutional right to counsel does not, and cannot, include, a duty on the authorities to inform an accused person that she has such a right. That would amount to "judicial legislation". He also held that a judge has no duty to advise an unrepresented defendant of her options, including possible defences. It would be too onerous on the judge, and her impartiality and independence would be "gravely undermined". See also, *Sun Hongyu v PP* [2005] 2 SLR 750. No mention is made of the duty of the judge to ensure a fair trial, as to which see Lord Bridge in *Ajodha v The State* (1981) 73 Cr App R 129 and the unanimous judgment of the High Court of Australia in *MacPherson v R* (1981) 55 AJLR 594 at 602where Mason J said: "A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, my prove to be advantageous to him, can hardly be labelled as 'fair'." See also, Michael Hor, *The Right to Counsel – the Right to be Informed* (1993) 5 SAcLJ 141.

65 For a review of Singapore, Commonwealth and US law, see *Tan Chor Jin v PP* [2008] 4 SLR 306 where an accused (charged with murder) having dismissed assigned counsel, and refused to appoint others despite being reminded of his right by the trial judge, was held not to be able to do so when at the stage of closing submissions, he realised he could not cope and asked for counsel. The right to counsel, though a constitutional right, is not absolute and could not be exercised if to grant it would amount to an abuse of process (which includes being unfair to the Prosecution, delaying the trial, and when counsel at that stage would not be of much help). The accused in the case could be said to have waived his right to

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debate,[66] the Home Affairs Minister replied that access to counsel is allowed only when the police have finished with their investigations, and presumably that means not at any time when the accused person demands to exercise her right. He said:[67]

> Giving the accused person immediate access to legal counsel or family members could compromise Police investigations, especially in cases where the prosecution relies primarily on the testimony of witnesses and accused persons to lead them to crime scenes, accomplices and other corroborating evidence. Permitting an accused person to communicate with third parties before the Police can wrap up their investigation may result in evidence being destroyed or accomplices being alerted.

20 The "right to counsel", though a constitutional right, is limited by judicial decision and executive practice.[68] It is consistent with the consequentialist "crime control" model of criminal justice, but what is unclear is how the development of the law in this area reflects the exalted status of the right being regarded as a fundamental liberty and "constitutional" right. Surely the fact that it is a constitutional norm sets it apart from other rights found in statutes or common law? As Karthigesu JA said in *Taw Cheng Kong v PP*:[69] "Constitutional rights are enjoyed … as fundamental liberties – not stick and carrot privileges. To the extent that the Constitution is supreme, those rights are

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counsel, to his detriment. *Cf*, *Murray v UK* (1996) 22 EHRR, where the European Court of Human Rights held that the right to access to legal advice is of special significance when the suspect's silence during police investigation might be the subject of adverse inferences, which is the case in Singapore: see Criminal Procedure Code ss 122(6)–122(8).

66 10th Parliament Sitting of 18 October 2005. Question addressed to Home Affairs Minister by NMP Eunice Olsen on rights to counsel, and how this constitutional right is protected during the investigative process.

67 It is not immediately apparent why the Minister included "family members" and later "third parties" in his answer: professional counsel surely cannot be put in the same category – they would be risking disbarment at least (apart from facing criminal charges for obstructing justice) if they were to help accused persons conceal crimes or intimidate witnesses. In any case, there seems to be an assumption that the suspects are "guilty", the lawyers and "third parties" deceitful and likely to obstruct justice. On this view, there seems to be a factual presumption of guilt, once a person is "suspected" of an offence, let alone when put on trial: see Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 440–441 and 478–480. The view is inherent in the so-called "crime control" model where lawyers are treated mainly as obstructionist.

68 For a succinct account of the commonalities and differences between statutory interpretation and constitutional interpretation, see Kent Greenawalt, "Constitutional and Statutory Interpretation" in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J Coleman & S Shapiro eds) (Oxford: Oxford University Press, 2002). ch 7.

69 [1998] 1 SLR 943 at [56]. Admittedly, the dictum was part of a rebuttal on a "social contract" argument advanced by defence counsel.

inalienable."[70] It follows that courts of the land must first and foremost safeguard constitutional rights even against adverse legislation or executive practices. Any derogation from such rights must meet the charge of unconstitutionality.[71]

21 Another characteristic – (6) – is the right of the accused person to confront her accusers.[72] In *R v Davis*,[73] the House of Lords reiterated the importance of a "right of confrontation", which did not have the constitutional status that it has in the US.[74] Nonetheless, the Lords agreed that the common law right is not to be derogated from except by statute. Lord Bingham cited an oft-quoted dictum from Richardson J in *R v Hughes*[75] that "the right to confront an adverse witness is basic to any civilised notion of a fair trial" and that this must include "the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue".[76] There is no local authority denying the existence of such a right, but that depends on whether the right is, so to speak, consistent with the evidence code. It is likely, following the reasoning adopted in *Phyllis Tan*, that where the effect of protecting the "right" would lead to the exclusion of relevant evidence, which might be admissible by virtue of the Act, the right in such circumstances would be regarded as "inconsistent" with the Act.[77] Finally, as mentioned before,

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70 See also, on principles of constitutional interpretation, *Constitutional Reference No 1 of 1995* [1995] 2 SCR 201. It is pertinent to note that as a matter of interpretation, the State's views may be defended on the ground that the words "as soon as may be" appears only in relation to the limb concerning informing the accused of the charge, and not qualifying the limb on allowing him access to counsel.

71 A valuable discussion of constitutional issues can be found in Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at Pt III p 478 *et seq*.

72 Here the author is adopting Duff's reinterpretation of Hildebrandt's sixth characteristic.

73 [2008] UKHL 36. This case contains valuable surveys of the law – from canon law (in medieval ages) to modern law as mandated by international conventions.

74 Amendment VI, US Constitution. One of the "right of confrontation" issues that is under review by the Supreme Court in the 2008 session is in relation to the need for "live testimony" in relation to evidence from crime labs: see *New York Times* (10 November 2008).

75 [1986] 2 NZLR 129. The cases in other jurisdictions where this "right" is asserted is in trials with anonymous witnesses. In the US, it has become an issue with regard to hearsay: see *Crawford v Washington* (2004) 124 S Ct 1354. See David Lusty, "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials" (2002) 24 Syd LR 361.

76 [2008] UKHL 36 at [8], *per* Lord Bingham.

77 The reasoning by the High Court concerning "inconsistency" with the code is just a slippery slope once adopted, for if the test is that once the recognition of such a right would hinder the admissibility of "relevant" evidence, it is inconsistent with the code, and hence should not exist. Rights of the type under consideration are common law rights precisely to disallow evidence that would be relevant and admissible; otherwise their existence would be meaningless and devoid of content.

the criminal discovery process in Singapore still needs improvement, particularly in relation to supplying the defendant with information that she might need to conduct her defence properly.[78]

22 The brief account of these characteristics in the local context shows that the judicial ideology[79] in so far as one could be ascertained seems to be very much consequentialist and utilitarian despite the rhetoric, with a nodding acknowledgment to rights.[80] The so-called rule of statutory interpretation that "statutes in derogation of the common law should be interpreted narrowly to minimise inroads into that law"[81] may be less relevant when one is considering an exhaustive code, but when the code is found to be non-exhaustive, what could fill the "gaps" other than the common law, barring other specific written laws?

23 The recent retreat from applying the purposive approach to interpret the code has left doubtful a string of authorities that used that approach to adopt 20th century common law rules, such as that for similar fact evidence in *Boardman v DPP*.[82] Relying on the textual rule, the three-judge High Court in *Phyllis Tan* frowned on regarding the code as a "facilitative" statute, and as a licence to incorporate common law without regard to the plain meaning of the provision under consideration. Admittedly, the disapproval was focused on the decision in *PP v Knight Glenn* ("*Knight Glenn*")[83] where despite the plain

78 See now, the Criminal Procedure Code Bill 2009, especially draft provisions in Pt IX, Div 3.

79 The use of the word "ideology" here is not meant to be an opprobrious word: it means "political preferences" and even "emotional reactions, both negative and positive, to direct social experiences and to the views of others" (Judith Shklar, *Legalism: Law, Morals, and Political Trials*, (Harvard University Press, 1964) ch 1 at p 4). Another definition of the word is that it refers to "elaborating and advocating conceptions of the good life, and of describing the forms of social action and organization necessary for their achievement" (P H Partridge, "Politics, Philosophy, Ideology" in *Political Philosophy*, (A Quinton ed) (Oxford: Oxford University Press, 1967) ch II.

80 Ashworth and Redmayne observed that it is common to find human rights instruments proclaiming the presumption of innocence "whereas on a utilitarian calculus it may often benefit the community more if defendants were required to prove, for example, any defence they wished to raise". (Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) at p 43).

81 R A Posner, *How Judges Think* (Boston: Harvard University Press, 2008) at p 191. *R v Davis* [2008] UKHL 36 (discussed above) illustrates this approach.

82 [1975] AC 241.

83 [1999] 2 SLR 499. Yong CJ in this case recognised the antiquity of the evidence rules, and applied Interpretation Act s 9A, an amending section introduced in 1993, providing the use of the purposive interpretation rule as a primary rule and displacing the literal rule. This facilitative statute approach might be defended as having a statutory basis. The crucial question is: under what circumstances can the purposive rule validly displace the textual (or literal interpretation) rule? See also *Constitutional Reference No 1 of 1995* [1995] 2 SCR 201, where the Tribunal (on the

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meaning of s 23, which refers only to admissions in civil cases, the court applied it to criminal cases on a purposive interpretation. The fact that the code is non-exhaustive does not give "an unrestricted licence to import 21st century notions of the common law into the 19th century code".[84] The gravitation towards textual fidelity is understandable especially when there are express provisions, but not so in the case of "gaps". "Rulelessness"[85] is anathema to an ideology based on applying rules and it does reinforce and lend urgency to the case that there must be a serious attempt made to reshape the code and to examine the extent to which current principles of common law should be adopted. In *Lee Chez Kee v PP*,[86] V K Rajah JA further clarified the limits of regarding the Evidence Act as a "facilitative statute" following the decision in *Phyllis Tan* – he said:

> [T]he [Evidence Act] is not a facilitative statute in the sense of assisting in the application of new evidentiary rules. It cannot facilitate the application of common law rules if those rules are inconsistent with the will and intent of Parliament. However the [Evidence Act] *does have the opposite facilitative role* of enabling the decision maker to identify the applicable rules of evidence by simply referring to [it]. [emphasis added]

24 As indicated earlier, this is a return to first principles of applying a statute of which a code is a sub-species – the primary source of legal rules on the law of evidence *is* the code. The first task is to apply the rules there unless there is a lacuna, that is, where the code is silent. To fill that gap one must *ex necessitae*, look to the common law as a source.[87] The purist advocating "originalism" may argue that it should be the common law *circa* 1893, but this would really, as it were, put a huge spanner in the works.[88] The following major common law rules are

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Constitution of Singapore) stated that there was no need to show ambiguity and inconsistency before applying the purposive approach.

84 [1999] 2 SLR 499 at [117]. This dictum seems to suggest that the judge should refer back to the state of the law as at the time the code was enacted (the "originalism" principle below). But the rejection of the idea of a "facilitative" statute is clearly right if, by describing a statute as "facilitative", the court imports common-law without regard to the text of the statute.

85 The word is Cass Sustein's, in his illuminating article, "Problems with rules" (1995) 83 Calif LR 953.

86 [2008] 3 SLR 447 at [116].

87 A distinction is sometimes made between interpretation of a provision in a statute (which is clearly within the "core" of the judicial function) and filling in "gaps", which may be seen as a legislative function and hence undertaken with care: "The problem of interpretation is to supply meaning to the norm; that of lacunae is to supply the norm." (Merryman, "The Italian Legal Style III: Interpretation" (1996) 18 Stan LR 583). Of course, one could argue that this is a thin line indeed, and that the distinction is one of degree rather than kind.

88 It would seem that Lord Diplock in *Ong Ah Chuan v PP* [1981] AC 648 adopted the "originalism" approach in his reading of the Constitution, and said that any reference to the word "law" means "a system of law which incorporates those

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basically 20th century developments and local decisions have incorporated and applied them:

(a) Incidence of proof in criminal cases (*Woolmington v DPP*[89] – the golden thread in English criminal law was "seen" only in 1935, as placing the burden of proof squarely on the shoulders of the Prosecution, subject to exceptions, and other authorities that involve construing the incidence of burdens in statutes, like *R v Hunt*.[90]

(b) The meaning of "corroboration": *R v Baskerville*,[91] which defined true corroborative evidence as independent of the source to be corroborated, whereas the Evidence Act accepts previous consistent statements as "corroborative", a view comprehensively rejected in *Baskerville*.[92]

(c) The meaning of "hearsay": *Subramaniam v PP*[93] (though this case, being a Privy Council appeal from Malaya, which has the code as well, would probably be applicable as local law).

(d) The "spontaneity test" in *res gestae*: *Ratten v The Queen*,[94] *R v Andrews*.[95]

(e) The similar fact evidence cases, especially *Boardman v DPP*,[96] importing a "balancing" test for the admission of similar facts.[97]

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fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution". This means the common law in England as at 9 August 1965, which is rather different from the common law as at 1893. If one were then to read that the date at which we should look at the common law is 1965; that would cast a very different shadow on the use of the common law circa 1893. For one thing, many of the 20th century cases on criminal evidence would be included. See also, Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at Pt III where at p 484, he stated the fundamental principles of natural justice that were part and parcel of England as at 16 September 1963. But the Constitution itself states that the commencement of the Constitution shall be 9 August 1965.

89 [1935] AC 462.

90 [1987] AC 352.

91 [1916] 2 KB 658.

92 See also *R v Whitehead* [1929] 1 KB 99 (CCA).

93 [1956] 1 WLR 965.

94 [1972] AC 378.

95 [1987] AC 281.

96 [1975] AC 421.

97 This area of the law is contentious in that the balancing test was never properly formulated until 1975, and that the code in fact contained an extremely narrow rule – similar fact evidence is admissible to show intent (s 14) or to rebut accident (s 15) or as part of the *res gestae* (ss 7–9) and is not allowed to the extent that it is allowed now after adopting the *Boardman* test. In fact, one could say that the

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25 Legal terms such as "corroboration" and "hearsay" changed over time, and to return to the original meanings with its case law would be ill advised. But on the "originalism" theory of interpretation, that is what is required. Yet, if one were to look at the legislative history in order to ascertain "legislative will and intent" in the case of the code, one would be disappointed. The colonial administration simply accepted the application of the Indian Evidence Act 1872, with some changes to accommodate for local circumstances. If there were any resources that could be utilised, it would be Stephen's own works on the Indian Evidence Act[98] and his *Digest of the Law of Evidence*.[99] Again, it would be difficult to rely on them to address modern issues in evidence. For example, no discussion would be found on hearsay and implied assertions, doctrine of oppression in the voluntariness test (under s 24), no discussion on rules that were not imported in the code though they existed *before* the enactment of the Singapore Ordinance 1893, but *after* the Indian Evidence Act 1872. One such rule, for example, is *Wheeler v Le Marchant*,[100] concerning legal professional privilege attaching to communications made to third parties in contemplation of litigation.[101] Taking the textual view might put in doubt the incorporation of such rules into local law, exposing a huge gap in the law of legal professional privilege. In any case, those who view the common law as a seamless evolving institution or a dynamic organism would find it antithetical to settle for a "cut-off date" if by that it means that the judge would not refer to cases that are decided after that date. Applying the common law to a case requires taking the "latest version" so to speak, so long as it is not "tainted" by statutory considerations.[102]

26 As far as interpretation of the code is concerned, judges may employ any or a combination of three theories of interpretation in

approach is totally different – it is not one of balancing prejudicial effect against probative worth, rather it is whether the similar fact evidence tends to show intent or rebut the defence of accident.

98 *An Introduction to the Indian Evidence Act* (Calcutta: Thaker & Spink, 1904).

99 Stephen, *A Digest of the Law of Evidence* (Harry Lushington Stephen & L F Sturge eds) (12th Ed, 1948).

100 (1881) LR 17 Ch D 675.

101 Does the fact that the case existed but not included in the code imply that the Legislature did not intend to include it? It would limit legal professional privilege unduly.

102 One could defend the decision in *Knight Glenn* [1999] 2 SLR 499 on this basis. But if the "common law" right is, for example, influenced by human rights legislation or any legislation, which is not applicable in Singapore, then the judge may recognise it more as a statutory construct than a common law right and not give effect to it. *Jayasena v The Queen* [1970] AC 618could also be criticised on this ground, that Lord Devlin and the Privy Council missed the opportunity to declare a principle that could allow for the careful importation of common law (as it evolves) – the case really only decided that common law cannot be imported if *inconsistent* with the code. But it does not answer the question of "gaps" where the code is silent.

construing provisions in the code – "textualism" (textual fidelity)[103] and "originalism" (the rule that the code must be interpreted historically, namely, at the time of enactment)[104] on the one hand, and "dynamic" or "purposive" interpretation (the code must be interpreted pragmatically and current policy developments must be taken into account) on the other. Inherent in the decision of the High Court in *Phyllis Tan*, for example, is a combination of both the textual and "originalism" approaches, but it also rebutted the policy arguments (relevant in the purposive approach) used by the court in *Knight Glenn*. Consequently, it refused to approve and follow the case. But there is no doubt that the court took the textual approach as the first approach.

27 This discussion shows the constant tension that the judges have to face in interpreting a provision of the code – it is very much like being in a murky sea of authorities (both legislation and case law) without a safe harbour in sight, and the ship being blown this way and that, by the winds of history on the one hand, and fresh winds of modern common law on the other – or to use the phrase of a distinguished comparative scholar in evidence law – it is truly "evidence law adrift".[105] There seems to be a loss of faith in the code, not only on the part of the Judiciary but also in the profession – in some decisions, a loss of faith in the code as it looks increasingly anachronistic in a modern legal system and hence is ignored or re-interpreted, and in others, a loss of faith that the modern common law can provide satisfactory solutions, now that it has been affected so much by

103 R Dworkin's term, as discussed in *Justice in Robes* (Harvard University Press, 2006) Ch 5 "Originalism and Fidelity".

104 A code on this view is like a photo (as distinct from a video) taken at the time of enactment – it is frozen in time, unlike the common law: see *Jayasena v The Queen* [1970] AC 618 at 625 where the Privy Council noted that the "common law is malleable to the extent that the code is not …". The Privy Council continued: "The code … cannot be construed in the light of a decision that has changed the common law." This is a classic *dictum* emphasising the 'originalism" approach. This approach weakens considerably as the statute under construction shows its age, which is clearly the case with the Evidence Act where the environment in which it now operates is totally different from the one when it was first enacted.

105 Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press, 1997). Another glaring example of the law being all at sea is the interpretation of s 30 – the use of a co-accused's confessions against the accused. However, this issue is not within the scope of this essay as it would take a much more elaborate analysis. The short point is that when such confessions are used against an accused person, she may have no way to confront the accuser directly – as the co-accused, being on trial herself, is only competent but not compellable. English law, to take one example, restricts the use of such statements substantially – see, for example, *R v Hayter* [2005] 1 WLR 605, and generally, Adrian Keane, *The Modern Law of Evidence* (Oxford University Press, 7th Ed, 2008) at pp 399–402. For a critical analysis of local law, see Michael Hor, "The Confession of a Co-accused" [1994] 6 SAcLJ 366; "Confessions of Co-accused: The Third Anniversary" [1996] 8 SAcLJ 323. It is encouraging that V K Rajah JA in *Lee Chez Kee v PP* [2008] 3 SLR 447 at [113] expressed a willingness to re-consider this area of the law.

legislation in other jurisdictions, which traditionally provided sources of common law, like England, Australia and to a lesser extent New Zealand and Canada.

28 The judicial developments mentioned here might just illustrate Roberts' warning that we have to be careful otherwise "every two strides taken forward might be cancelled out by two retrogressive steps in the opposite direction"; one might not agree that it is a "retrogressive" step to return to textual fidelity in applying the code, but it certainly is a step in another direction. It would not be fair to criticise the judiciary for inconsistency; if no overarching principles are available for the Judiciary to work on, no clear statement of legislative intent discernible, it is no wonder that the Judiciary are obliged to use conceptual devices like "facilitative statute" to make the law of evidence work in a modern environment, only to find that it is not easy to draw the line between legitimate and illegitimate use. However, the current facilitative principle should not be the uncertain and semantic one of absorbing common law only when it is "not inconsistent" with the code – it should be based on sound principles and values of procedural law.[106] For instance, from the discussion above, one might suggest that we should have interpretative principles such as there should not be any derogation of common law rights unless the statute expressly or by necessary implication says so. Another that should be non-controversial is that constitutional rights are inalienable, and should be supported in the spirit of the Constitution, not viewed with suspicion and circumspection.[107]

29 An important point was made recently by Lord Hoffman regarding the role of the Judiciary: it is that by virtue of their constitutional position, judges, unlike the Legislature or the Executive, should concern themselves with rights and duties as laid down by law. In this regard, it is apposite to note the relationship between the Judiciary, Legislature and Executive. In *R (on the application of Prolife Alliance) v BBC*,[108] Lord Hoffman pointed out:

> In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal

106 Other principles justifying intervention is that the law of evidence is usually not politically controversial, or that Parliament or the Executive are allocating resources and taking the lead to change the law.

107 See H Jefferson Powell, *Constitutional Conscience – The Moral Dimension of Judicial Decision* (Chicago: University of Chicago Press, 2008) where he claims that values such as faith, integrity, candour and humility underlie the decisions of the Supreme Court justices – even if such decisions are politically controversial, they were accepted by the general population as validly and fairly made, as the justices decided in good faith.

108 [2004] 1 AC 185 at 240.

> limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable … The principles upon which decision-making powers are allocated are principles of law … Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle … On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law …

30 Legal (and hence judicial) ideology is characterised by the language of rights and duties; judges and lawyers operating on a case-by-case basis need to analyse jural relations of parties, or of the Prosecution and accused and those of witnesses and victims. Such "jural relations" are in terms of their rights, duties, privileges, powers, liabilities and immunities.[109] It is not, and cannot be, the same ideology as an elected Parliament or Executive unless reflected in statutes. In Posner's quaint phrase, judges are not "politicians in robes".[110] Judges must apply the legislation by interpreting how it would affect the rights and duties of parties. But judges cannot be expected to rewrite provisions in the code in the guise of interpretation. They may consider it their duty to "fill" in the gaps of the code, where the statute is silent. Their constitutional role is clearly separate from and independent of both the Executive and Legislature, so that when V K Rajah JA spoke of the code as not facilitative of "the application of common law rules if those rules are inconsistent with the will and intent of Parliament" this probably means the "will and intent of Parliament" *as expressed through legislation* – in the case before him, the Evidence Act and the Criminal Procedure Code.[111] The constitutional duty of the Judiciary is

109 For the classic statement, see Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Conn: Yale University Press, 1923).

110 R A Posner, *How Judges Think* (Boston: Harvard University Press, 2008) at p 8.

111 In *Knight Glenn* [1999] 2 SLR 499 at [70], Yong CJ also remarked that according to the Constitution, the courts have "the wider responsibility in the administration of justice that involves decision making following a system of evidential rules to bring about justice to each case". He continued (at [71]) that extending privilege to plea bargaining correspondence is one that the Judiciary is not only entitled, but has a duty to make as "the process of plea negotiation brings immeasurable benefit to the criminal justice system". However, the policy relied on is the utilitarian one of saving costs. Nonetheless, it could be part of a "criminal process value", namely,

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discharged, not through being an ideologue aligned to the executive or legislative policies of the day (except that indicated in legislation in issue) but through applying their own ideology of legalism[112] (of which justice[113] dispensed according to rules and principles in individualised cases is regarded as the most "legal of virtues").

31 Thus far, the intention was to show, first, the lack of a coherent value system in the current code (as being no more than a systematic collection of discrete 19th century common law rules), that the code was enacted in a very different legal environment than what it is now, and that it is unsuited to meet the demands of a modern legal system; second, that there is some difficulty in deciding how to interpret the code in the light of common law developments and constitutional considerations, in particular, which theory of interpretation is best suited for the purpose; third, while declaring adherence to certain fundamental principles such as the presumption of innocence, there are clear divergences between the local version and other versions in more "rights conscious" jurisdictions in several important characteristics and that such divergences should be re-examined; and finally, the judicial ideology is identified as essentially one that is different from the political ideology adopted by the Legislature or Executive except in so far as such policies are reflected in legislation, and that the Judiciary's duty is one that essentially deals with parties' jural relations. Once these points are recognised, it becomes imperative to examine how the code might be remade to reflect current values and policies. As it currently stands, the code is much more a hindrance than a help, both in practical terms and in terms of concepts and policies.

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trial avoidance – Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) chs 10 and 13.

112 Judith Shklar's study of legalism (*Legalism: Law, Morals, and Political Trials*, (Harvard University Press, 1964) (first published in 1964, with minor amendments in 1986) is regarded as a classic – in 1986, she offered two versions of "legalism" – one described as "the dislike of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counterclaims under established rules" (p 10) and the value of impartial judgment. Her other sense is grounded in group beliefs – through educating lawyers, some of whom will be judges, and through legal practice there is a distinctive belief system of the group (as to which, see Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 450: "The influence of English due process thinking persists until today, in the judiciary, in the criminal bar and in the NUS Law School."

113 Shklar's conception of justice (pre-Rawls) is simply described as "a commitment to obeying rules, to respecting rights, to accepting obligations under a system of principles". (Judith Shklar, *Legalism: Law, Morals, and Political Trials*, (Harvard University Press, 1964) at p 113). She agreed with H L A Hart that "justice is the most legal of virtues".

III. Values in evidence

32 As seen above, the Evidence Act offered little in terms of a coherent value system, and the grafts made on it subsequently only serve to make matters more confusing.[114] It is clear that the code should not remain in its current form. But what value system should be adopted and how would it be reflected in a reshaped code? Conventional thinking in evidence utilises a three-dimensional, inter-related structure, as expressed by the oft-cited dictum of Knight Bruce VC in *Pearse v Pearse*:[115]

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means … Truth, like all good things, may be loved unwisely – may be pursued too keenly – may cost too much.

33 The normative structure must embrace the epistemic (seeking to know the truth), the economic (subject to costs and resources) and the moral (subject to acceptable notions of fairness and justice). It is, as Stuart Hampshire pointed out, likely to be an untidy compromise among them.[116] It is useful also at this stage to note that there is a need to keep separate three issues: first, the problem of identifying and defining the scope of the subject (what is evidence law); second, the values that should shape an evidence code as defined (what are its aims and what *good* does it serve); and third, the allocation of rights or duties to parties (including in criminal cases, the Prosecution and victims) (what rights/duties should be recognised, and how should they be distributed) according to the values ascertained. It is important initially to keep these questions separate (especially the third) because, all too often, it is tempting to argue that rights discourse is not suitable for a system that prioritises communitarian values.[117] Rights and duties are assigned or

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114 See the analysis of V K Rajah JA in *Lee Chez Kee v PP* [2008] 3 SLR 447 on the relationship between the hearsay exceptions in the Evidence Act and the Criminal Procedure Code, which were introduced in 1976. Reference was made to the 11th Report of the Criminal Law Revision Committee, as the draft Bill was virtually adopted *in toto*. At least the judge was able to rely on Parliamentary Debates and Select Committee reports on the amendments, as well as the English Committee's Report.

115 (1846) 63 ER 950 at 957. *Dictum* approved in *Minet v Morgan* (1872-3) 8 Ch 361.

116 Refer to quotation from his work, *Justice is Conflict* (Princeton NJ: Princeton University Press, 2000), at the beginning of this article.

117 Of course, once such rights are "concretised" in the Constitution, legislation or superior case law, it would, as a matter of law, be *right* to give effect to them. Some would argue that rights discourse should not be abandoned by simply referring to the instrument that contains them, *eg*, international convention, constitution, legislation, *etc*; to do so would be to lose the ethical dimension of rights – see

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ascribed according to the values adopted by the particular system,[118] in this case, Singapore's political and legal system and they may be weighed differently according to those accepted values.[119] As mentioned before, rights discourse is part of legal ideology and not to be treated lightly; the only question is as to the relevance and intensity of it in the justification process.

A. Defining evidence law

34 If one were to characterise the scope and purpose of the law of evidence today, it is in the phrase "regulating fact-finding in adjudication". A fairly detailed description is that of Roberts and Zuckerman: "… the law of evidence regulates the generation, collection, organization, presentation, and evaluation of information ('evidence') for the purpose of resolving disputes about past events in legal adjudication."[120] Defined so broadly, it would include other parts of procedure law, and even substantive law, for example, presumptions of law affect the "presentation" and "evaluation" of evidence, but their existence might be explained by reasons extraneous to evidence law proper and peculiar to the substantive law in question.[121] Similarly, the parol evidence rule is mainly, if not totally, developed in contract law, and estoppels, in both contract and equity.[122] The province of evidence

J Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) at p 19. However, rights discourse is not eschewed in this case, merely postponed.

118 See the useful discussion of rights and ethnocentricity in J Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) ch 7 esp at para 7.3.

119 See Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) at pp 45–48, where the authors point out that in the Human Rights Convention, rights are designated non-derogable, strong and qualified. Singapore was a party to the Bangkok Declaration 1993, where APEC countries acknowledged the universality of human rights but no domestic legislation similar to the Human Rights Act in England was enacted in Singapore.

120 Roberts & Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) at p 2.

121 This is not to say that the nature of presumptions, and the ways presumptions work are not within the domain of evidence law. Presumptions of law such as those found in specific statutes, *eg*, the presumptions in the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), are created to achieve specific statutory objectives such as controlling drug trafficking and consumption. There are numerous examples of such presumptions in many statutes. See also, Andrew Phang JA's comments on presumptions in *Re Wong Sook Mun Christina* [2005] 3 SLR 329.

122 The Evidence Act contains provisions that should not be there, as well as missing provisions that should be. For example, the parol evidence rule, doctrines of estoppel and *res judicata* might properly find their places in various parts of the substantive law like contract law and equity. Rules on judicial discretions especially on improperly obtained evidence and privilege, especially legal professional privilege, should be included or expanded. How much should the code cover, given that there are other procedural codes for both civil and criminal procedure? Should there be an integration of the procedural codes? (One could propose a single Criminal Procedure and Evidence Act for criminal proceedings, and likewise, another integrated code for civil proceedings, an issue discussed in a forthcoming

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law has since shrunk from its earlier 19th century conceptions, of which the Evidence Act is a fair reflection of a substantially larger "empire". Needing to find coherence and principle, scholars have in recent years attempted to whittle down the subject and, even then, some have taken to sub-dividing that which is left to civil and criminal evidence in the search for a manageable coherence.[123]

B. Identifying values

35 Recently, an attempt was made in English codes of civil and criminal procedure and evidence to provide principles of interpretation for the more specific rules in the respective codes.[124]

Rule 1.1 Civil Procedure Rules 1998	**Rule 1.1 Criminal Procedure Rules 2005**
(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly – (2) Dealing with a case justly includes, so far as is practicable – (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.	(1) The overriding objective of this new code is that criminal cases be dealt with justly. (2) Dealing with a criminal case justly includes – (a) acquitting the innocent and convicting the guilty; (b) dealing with the prosecution and defence fairly; (c) recognising the rights of a defendant, particularly those under Art 6 of the European Convention on Human Rights; (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case; (e) dealing with the case efficiently and expeditiously; (f) ensuring that appropriate information is available to the court when bail and sentence is considered; and (g) dealing with the case in ways that take into account –

article.) For a modern evidence code, see the Australian (federal) legislation, the Evidence Act 1995 (compilation 2007), where such doctrines are left out.

123 This is most evident in English jurisprudence and legislation. In fact, Ian Dennis is of the view that there are many "laws of evidence" due to the impact of substantive laws on the procedural laws.

124 Source: SI 1998/3132 (under authority derived from Civil Procedure Act 1995); SI 2005/384 (under authority derived from Criminal Justice Act 2003).

	(i) the gravity of the offence alleged; (ii) the complexity of what is in issue; (iii) the severity of the consequences for the defendant and others affected, and (iv) the needs of other cases.

36 This is a sea change in so far as rules of interpretation are concerned, but it shows the growing importance of values and principles in the interpretation of specific rules. They also show a clear difference in emphasis between the principles applicable in civil and criminal cases. The idea of dealing with cases "justly" is common, but the principle of justice as *equality* is much more evident in civil cases, as is the attention paid to the more economic use of resources.[125] However, as Zuckerman points out, economic considerations must be considered against the backdrop of procedural fairness, "such as impartiality, publicity, the right to be heard, or treating litigants on an equal footing must be observed regardless of considerations of economy, of efficiency, or indeed, of whether they help or hinder the ascertainment of truth".[126]

37 Procedural fairness is also prominent in criminal proceedings although equality is not mentioned as such: there seems to be recognition that there will be an asymmetrical relationship in this case, with the state Prosecution having the superior resources, and also the heavier burden to discharge. The interesting point, however, is in the principle that the court must, in interpreting the code, treat both the Prosecution and Defence "fairly" – this seems to direct the courts to take account of the State's interests as well in a "fair manner"; how this will work out in relation to the rights of the accused person remains to be seen. Procedural fairness in the accurate ascertainment of facts constitutes the concept of procedural justice, and the fundamental values for an evidence code. As Lord Carswell puts it in *R v Davis*: "Ensuring fairness is a fundamental obligation of judges presiding in criminal trials, as the means of achieving their ultimate objective of achieving justice, whatever other factors or demands they have to

125 Dennis uses the phrase "equilibrium and harmony" to describe the objective of civil proceedings, where "truth-finding" may be a "less urgent imperative": Ian Dennis, *The Law of Evidence* (3rd Ed, 2007) at para 2.28.

126 *Zuckerman on Civil Procedure* (London: Sweet & Maxwell, 2nd Ed, 2006) at para 1.10. In his view, procedural fairness is an end in itself, and is timeless. Ascertaining the truth is not stated explicitly – but it is regarded as so obvious that it need not be incorporated as one of the principles; ascertaining the truth in civil cases now is conditioned by the need for proportional use of resources and also the need to resolve the case within a reasonable time.

balance."[127] An argument will be made that the rules in the code should be based on values inherent in "procedural fairness" and that the main task is to determine what are the elements of "procedural fairness" and how far such values are suited to Singapore.[128]

C. Justifying aims in evidence

38 Process rights and duties seem to be more in the consciousness of those involved in the legal system – the accused persons or parties in civil litigation of course, the investigators, the prosecutors, the victims and witnesses, the lawyers and the judges.[129] It is up to them, and how they interact with each other that can determine what norms are needed, including settling the jural relations among themselves, with the judiciary at the apex,[130] either developing the "common law" or interpreting legislation such as the evidence code. Ian Dennis argues that the "legitimacy of adjudication" is the aim of the law of evidence,[131] the goal of legitimate adjudication attained by employing two strategies: first, "rectitude of decision making" – finding the "truth" as to the facts of a case and applying the right legal rules; second, to secure the right decision only through evidence not otherwise excluded by the fundamental values found in either the criminal system (if a criminal trial) or the civil system (for a civil proceeding). The "moral authority" of a decision depends very much not only on the correctness of the fact-finding, but also on paying heed to the other values, such as the presumption of innocence, the notion of a fair trial (according to natural justice) and "probity on the part of state authorities entrusted with coercive powers".[132]

39 Ian Dennis's theory of "legitimacy of adjudication" is admittedly in the liberal mould, but its value lies in emphasising that not only the result (in terms of fact determination) must be right, it must be fairly reached and that the values of the substantive law in question might

127 [2008] UKHL 36 at [47].

128 It is well accepted even among more liberal theorists that there may be certain characteristics of a trial that may be peculiar to the history and culture of one jurisdiction and may not suit another, *eg*, the jury.

129 This comment also applies to civil proceedings, *mutadis mutandis*. In the case of criminal proceedings, one may also add penal officers and after-care personnel, but they may not have much significance in relation to the law of evidence.

130 If one were dealing with legislation, then the Judiciary would have to interpret the norms supplied by the Legislature according to its ideology and the Constitution.

131 See Ian Dennis, *Law of Evidence* (London: Thomson Sweet & Maxwell, 3rd Ed, 2007) ch 2 esp at pp 49–58.

132 Ian Dennis, *Law of Evidence* (London: Thomson Sweet & Maxwell, 3rd Ed, 2007) ch 2 at p 54. His view was that the law of evidence was tied to the purposes and values of the criminal law, or presumably civil law (at p 55).

affect the rules of evidence. In *Phyllis Tan*,[133] Chan CJ expressed a similar view with respect to criminal laws:

> [We] must give primacy to the objectives and values of our criminal justice system … The common law is infused with common or universal values which are applicable in all common law jurisdictions, but, in the field of criminal law, national values on law and order may differ not only in type, but also in the intensity of adherence.

40 The implication of this *dictum* is that the substantive criminal law, which has to do with law and order, has an impact on the rules of evidence.[134] For example, there may be crimes that are regarded as such a threat to society, *eg*, drug trafficking or terrorist-related activities, that the general rules of evidence might have to give way. Such situations should as far as possible be provided through specific legislation and after careful scrutiny by the Legislature.[135]

41 Recently, Alex Stein proposed a justificatory theory of evidence based on accepting the existence of the risk of errors in fact-finding and evolving principles (the main one of which is "the principle of maximum individualisation" ("PMI"), followed by two other principles, "equal best" for criminal trials, and "equality" for civil trials) to explain and justify the rules of evidence.[136] Central to his thesis is that there will always be a risk of error in fact-finding (as ascertaining absolute truth is not possible), a gap that requires "'risk allocation", and which makes demands on fact-finders to have case-specific "evidence" rather than make generalisations of the type that says, for example, "if 80% of the town's buses are blue, the chances of the victim being hit by a blue bus is 0.8 probability".[137] Such class generalisations (*eg*, class of "blue buses") are "*unevidenced*", meaning information that cannot be used as evidence without more. What is needed is more individualised information to bridge the epistemic and probability gaps, *eg*, the characteristics of the driver in the actual bus involved in the accident

133 [2008] 2 SLR 239 at [58].

134 This view supports the enactment of separate codes for civil and criminal proceedings. Other jurisdictions such as Australia and the US preferred a unified approach, more akin to the Evidence Act; in Australia, the Evidence Act 1995 (Cth) and in the US, the Federal Rules of Evidence 1975. But there is sufficient differentiation between the two types of proceedings to justify considering them separately, particularly as the role of evidence is greatly reduced in civil cases. The use of affidavit evidence in lieu of examination-in-chief in civil proceedings accentuates the difference even more.

135 For example, the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).

136 Alex Stein, *Foundations of Evidence Law* (New York: Oxford University Press, 2005).

137 Alex Stein, *Foundations of Evidence Law* (New York: Oxford University Press, 2005) at p 85. The so-called legal paradoxes are the "blue bus" paradox and the gatecrashers paradox. Other "non-legal" paradoxes – the Lottery and Preface paradoxes are also discussed.

(whether she was a novice, had a bad driving attitude, *etc*). In other words, the more individualised the information, the greater the weight and may constitute genuine evidence.

42 Stein also has different principles for civil and criminal cases.[138] A principle of equality governs civil cases – equality in terms of risk allocation between parties (primary equality) with regards to establishing facts in a case, and equality in assuming the risks of each party's forensic conduct (corrective equality).[139] More interesting is his principle applicable to criminal cases – the principle of "equal best" that states not just an epistemic but also a moral position: "the legal system may justifiably convict a person only if it did its best to protect that person from the risk of erroneous conviction and if it does not provide better protection to other individuals."[140] It is said that the high standard of proof on the Prosecution and the presumption of innocence are reflections of this principle. An illustration of this principle (as distinct from the civil principle) is in the test that is accepted for conviction where the evidence is entirely circumstantial: in *Nadasan Chandra Secharan v PP*,[141] Yong CJ stated that a conviction on circumstantial evidence is justified if and only if the evidence "drives one inevitably and inexorably to the one conclusion and one conclusion only" – that the accused committed the crime. The rule requires the judge to rule out any other reasonable explanations as to the accused person's guilt: this sets the bar substantially higher than, say, a preponderance of probability, accepted in civil cases, and sets the probability to the "beyond reasonable doubt" standard.[142] The PMI could have an

138 It is beyond the scope of this article to critique the theory or to show how Stein derives his principles. Suffice it to say that it is an extremely involved thesis that uses probability theory, epistemology and economics to establish his thesis – and his differentiation of civil and criminal cases do seem to have some resemblance to the English codes discussed above (with apologies for oversimplification).

139 Alex Stein, *Foundations of Evidence Law* (New York: Oxford University Press, 2005) ch 7 at pp 214 *et seq*.

140 Alex Stein, *Foundations of Evidence Law* (New York: Oxford University Press, 2005) ch 6 at p 175. Deliberately convicting a person wrongfully is simply "unjust" (Risk I error) but there may be cases of "accidental" conviction, where the defendant is just "unlucky" or unfortunate (Risk II). The theory is intended to "immunize" defendants from Risk I error.

141 [1997] 1 SLR 723. See also *R v Hodge* (1838) 2 Lewin 227, where Baron Alderson stated that a conviction is justified where "not only that the circumstances were consistent with (the accused) having committed the act, but (the jury) must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person".

142 But see Stein's difficulties with *The Popi M* [1985] 1 WLR 948, [1985] 2 All ER 712, where the House of Lords refused to grant relief when the claimants could not prove that the ship sank due to a "peril at sea" even though the judge ruled out the fact that the ship was unseaworthy and the fact that the crew was negligent and caused the sinking. The Lords refused to accept a "nameless peril": Alex Stein, *Foundations of Evidence Law* (New York: Oxford University Press, 2005) at

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appreciable effect on what could constitute reliable evidence, and, in that sense, could provide a degree of protection to parties and accused persons not found in some of the current rules. Stein's thesis of individualisation impels him to reject the Benthamite theory of "free proof" and also to disagree with the recent thinking and legislation that confers stronger forms of judicial discretion in place of more specific rules.[143] If his thesis holds, it may be necessary to consider its impact on the nature of evidence rules.

43 Such theories on the general justifying aims of the laws of evidence are useful and relevant to the remaking of the code in that they force a re-evaluation of the current rules from a principled point of view. They may also determine the contours of the subject, as well as the contents.[144] If there is anything common that one can derive from these theories of justifying aims, it is that the law of evidence should provide the fact-finder not only with the norms of determining the relevancy of evidence, but also with the means of ensuring a "fair trial". The legitimacy of a verdict does not only require the fact-finder to be as accurate as she can be in fact-finding, but also in reaching the verdict in a moral fashion, conscious of the risks of error. Fairness in adjudication is as important as fairness in outcome and lends moral authority to the outcome, whether it is a civil or criminal case. But what does the term "fairness in adjudication" entail? Three aspects of adjudicative fairness require more attention: fairness in fact-finding; fairness as equality; and finally, fairness as integrity.

(1) Fairness in fact-finding

44 The problem of the judge as a fact-finder as well as a trier of law requires careful consideration because of the general characteristic that the judge in an adversarial system should ensure procedural fairness by remaining impartial and independent, with the parties being primarily

pp 128–131 and 239–240. One would have thought this case illustrates Stein's PMI, but he argues that the case was wrongly decided and that the evidence of the nameless peril should have been accepted as "evidence".

143 See Alex Stein, *Foundations of Evidence Law* (New York: Oxford University Press, 2005) ch 4, where (at p 109) he bemoaned the repeal of "archaic rules": "Anglo-American laws of evidence have been much richer in the past than they are at present." He is of the view that "the abolition of evidentiary rules and the flowering of discretion in adjudicative fact-finding" while influential in current thinking is flawed.

144 There are other attempts to identify such aims; one useful account is that of Roberts & Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) at p 18 *et seq* in describing "five foundational principles of criminal evidence": the principle of promoting factual accuracy; the principle of protecting the innocent from wrongful conviction; the principle of liberty or minimum state intervention; the principle of humane treatment; and the principle of maintaining high standards of propriety in the criminal process.

responsible for introducing evidence and making their respective cases. Though the judge has a duty to consider the evidence and "find the facts",[145] she has to be extremely circumspect and, generally speaking, only act on the evidence as proffered, except that she may clarify ambiguous or confused answers, or invite a witness to explain answers she has not understood (especially in the case of an expert witness), but it would seem that fairness would be compromised if the judge, as it were, were to assume a "quasi-inquisitorial" role and cross-examine a witness (especially the accused) to the extent of taking over the role of counsel. In the recent decision *Ng Chee Tiong v PP*,[146] the trial judge appears to have done precisely that by "excessive questioning" of the accused even though, on the face of it, s 167 of the Evidence Act permits her to "ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant".[147] It is difficult to draw the line between legitimate questioning by a judge and excessive questioning that would lead to the fairness of the trial being compromised: while the number of questions may be a "litmus test", it is not of itself decisive.[148] Neither is the fact that the questions were directed at the merits of the case.[149] It would seem that a more important consideration would be the time of intervention – preferably after allowing counsel to present her case and the other party to cross-examine. Fairness in this case can be seen to demand limiting the powers of a judge, even though she is designated as the only fact-finder; she has to "find" the facts as proffered by the parties, and has little discretion to do much more. Judicial powers to question witnesses and intervene in proceedings will need to be defined with more care, as a zealous judge charged with the duty to find facts might overreach herself in an effort to discharge the duty – the principle is that the judge in questioning must not only not lose her "objectivity" or "fairness" but also be seen not to lose that, and it seems the best time to do that is after

145 See Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1973) who took the view that facts are actually "made" by judges subjectively after listening to the evidence: see especially pp 17–24.

146 [2008] 1 SLR 900. For an excellent judgment analysing these issues, see Menon JC's judgment in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 47, which was followed in the instant case.

147 This is an interesting restriction on the width of a code – the restriction justified somewhat loosely on the basis that in an adversarial trial, a judge cannot take on an inquisitorial stance and "descend into the arena".

148 See the discussion by Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (Oxford: Oxford University Press, 2nd Ed, 1990, reprint 2003) at pp 98–102.

149 Pattenden mentions the case of *Herbert Rowse Armstrong* (1922), recorded in Hodge, *Famous Trials* (London: Penguin Books), where after counsel had cross-examined and re-examined the accused, the judge "who, in a few masterly and persistent questions" "shook the prisoner and shattered the defence". The accused was found guilty of murdering his wife by poison, and hanged.

counsel has made their case. She must not take on the mantle of an advocate.

45 Recently, Ho Hock Lai proposed a moral dimension to judicial fact-finding and decision-making: "to promote a particular philosophical point of view" in a "value-centred analysis of the trial".[150] He subjected fact-finding to an elaborate epistemic analysis[151] and advocated a need for fact-finders to adopt an internal point of view: justice must not only be done in finding the right facts and applying the right law, the judge must show empathic care for the parties in the process. The gist of his thesis may be found neatly summarised in his work:[152]

> A party has not merely a right that the substantive law be correctly applied to objectively true findings of fact, and a right to procedure that is rationally structured to determine the truth; she has, more broadly, a right to a just verdict, where justice must be understood to impose ethical demands on the manner in which the courts conducts the trial, and … on how it deliberates on the verdict. Findings of fact must be reached by a form of inquiry and process of reasoning that are not only epistemologically sound but also morally defensible … The ethical demands of justice … require the fact finder to manifest empathic care for the parties by exercising appropriate caution and to treat them with respect and concern.

46 This approach is said to do "justice beyond fairness",[153] the judge must "acknowledge the humanity of the person (Gaita), exercises a sense of justice (Dubber) and responds to her with empathic care (Slote)".[154] Such a point of view, if internalised in judges, may lead to an even higher standard of fact-finding. This moral standpoint can only be internalised in the judicial culture – it is probably not a matter on which rules can be formulated, though its impact on subjects like the burden of proof, hearsay and similar fact evidence should be pertinent as seen, for example, in his conclusions on the standard of proof: "Exercising the right degree of caution is what the standard of proof is about.

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150 Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008).

151 See Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008) chs 1–3 (probably the most exhaustive philosophical analysis of fact finding to date).

152 Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008) at pp 79 and 339. Again, apologies for oversimplification of the author's extremely intricate and profound analysis.

153 Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008) at p 81. It seems that this could be more of a supererogatory act or attitude, but it is accepted that it is not seen as such by the author.

154 Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008) at p 83.

Understood as a 'standard of caution', the standard of proof should vary from case to case."[155]

(2) Fairness as equality in the trial process:

47 At first sight, one would have thought that placing parties on an equal footing might be a requirement of a "fair" trial, especially if it was an adversarial trial. But this seems only to be so with respect to civil cases, and not so in criminal cases according to the respective English codes[156] and with respect to Stein's principles discussed above. In her characteristics of a "fair" criminal trial, Hildebrandt observed that the defendant "is provided with equality of arms" – what does this entail? There is an acknowledgment implicit, for example, in the English rules that in criminal cases there could not be "equal footing" but that fairness could be attained, presumably, by reducing the "inequality of arms", and not by ensuring that the State and the accused person be placed on equal footing. Roberts and Zuckerman call the criminal trial, especially with defendants who cannot not afford counsel, "a gross adversarial mismatch, as well as subverting the adversarial theory of truth-finding" and "would strike most people as intrinsically unfair".[157] What rules of evidence and procedure could make the adversarial trial less of a foregone conclusion ("callously … abandoning the powerless to their fate")[158] and more of a genuine contest designed to discover the truth from the two parties? First, there is undoubtedly the presumption of innocence, which places a higher standard on the Prosecution to discharge. The Prosecution can use the relatively vast resources of the State's law enforcement agencies to collect, generate, organise and present the evidence against the accused.[159] However, as discussed above, the presumption of innocence is not as strong in Singapore as in other common law jurisdictions principally because of the placing of a legal burden on the accused person to prove the defences she is relying on. The fairness of requiring the accused to shoulder a legal burden can be questioned, not only as a moral issue, but also in terms of a declared

155 Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008) at p 229. But there is of course a danger in that a standard expressed in this way might be wrongly applied by a judge that does not share the attitude. However, the author has pointed out that he also argued that there is a second dimension to the standard of proof which requires civil and criminal trial deliberation to be conducted with two different attitudes. All criminal cases should be approached with a "protective attitude", and that is not a floating standard. This author is grateful to him for this clarification.

156 See above table of English codes – Civil Procedure Rules s 1.1(2)(a), and Criminal Procedure Rules s 1.1(2)(b).

157 Roberts & Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) at p 53.

158 Roberts & Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) at p 53.

159 There is, however, regular reliance on confessions, which is what makes disclosure of such statements an important issue.

policy to prevent the innocent from being convicted just as much as convicting the guilty.

48 True, there is simply no data on which to build an empirical argument that the current system leads to more false positives (convicting the innocent, hence unjust) by requiring the accused to bear a legal burden.[160] But it is not unreasonable to point out that the risk of false positives would definitely increase where the accused is required to prove facts that would make out a defence on a balance of probability.[161] If she fails to do so, the court is under a duty to presume the absence of such circumstances, thus finding "facts" that negate the defence. This is quite different from the situation where the accused merely shoulders an evidential burden to raise a defence, and where following such evidence, the Prosecution is under a duty to disprove it, which is how the "presumption of innocence" is normally understood in other jurisdictions.[162] Even in such jurisdictions, the spectre of convicting the innocent looms large – and if one were to take seriously the problem of avoiding conviction of the innocent, one would have to relocate the nature and incidence of the burden of proof, not as giving rights to accused persons, but as doing the right thing to avoid convicting the innocent. Sections 107 and 108 of the Evidence Act, for example, stand out as particularly needful of revision if one were to place as much weight on ensuring that the innocent are acquitted as on convicting the guilty, if not more. There are also reasons (not based on probabilities) that would justify relocating the legal burden – most accused persons

160 However, in the US, which is undoubtedly committed to "due process" and accuseds' rights, there appears to be empirical data that the percentage of known false positives is not small: see Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit The Innocent?* (1997) 49 Rutgers L Rev 1317. There is also data in the UK concerning wrongful convictions.

161 Section 107 of the Evidence Act (Cap 97, 1997 Rev Ed). The defences in s 107 include all "exceptions" in the Penal Code and written laws, but does not include alibi, which as Victor Tadros succinctly puts it, is not a *substantive* defence, but rather an "evidential defence": "Evidential defences are merely formalised elements of the law of evidence concerning offence conditions" (*Criminal Responsibility* (Oxford: Oxford University Press, 2005) at p 103). It is right, therefore, that the Prosecution needs to disprove alibi, and that the only burden on the accused is to give notice of it under the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ss 155 and 182 (repetitive sections for trials in the High Court and Subordinate Courts) and to provide evidence that she was elsewhere at the time of the offence, which she would do if she were to comply with the notice requirements.

162 The law on this subject rests on the distinction (claimed by M Hor to be unjustifiable) between defences that adversely affect the proof of constitutive facts in the Prosecution's case (such as accident, mistake) and defences that "admit" the constitutive facts of the offence, but plead justificatory or excusatory conditions (such as private defence, provocation): see Tan Yock Lin, "The Incomprehensible Burden of Proof" [1994] Sing JLS 29; Michael Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Sing JLS 365; Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 491–503.

are unrepresented and the complexity of legal burdens, which have puzzled even professionals in the field, would simply be beyond them.[163] Added to this, the fact that there is a high percentage of accused persons who are foreign and would have no understanding of the Singapore legal process, let alone their rights, one would need to see that in the interest of procedural fairness, placing legal burdens on accused persons should be re-examined, together with the pre-trial process, especially the process dealing with informing accused persons of charges and of their "rights" and duties while being questioned.[164] Reducing the inequality of arms might require a redrawing of the line in terms of the burdens of proof at least.

49 Second, there is the practice in other common law jurisdictions of disclosing evidence helpful to the Defence, even if inimical to the Prosecution's case. The Prosecution has not only much better investigative resources; they also have the advantage of the rules, some of them judicially sanctioned.[165] But in Singapore, this is one aspect that requires a great deal of re-examination: there is little disclosure to speak of. For example, disclosure of the accused person's statements to the police while being interviewed, whether in custody or not, is generally not granted by the Prosecution, even if an application is made by virtue of s 58 of the Criminal Procedure Code.[166] By contrast, investigation and disclosure of information that would assist the Defence is a matter of law in England, let alone statements made by the accused person herself.[167] While these are matters that are better suited for the procedure codes, nonetheless they are pertinent in the discussion whether a trial can be fair when something as basic as the defendant's own statements are not subject to disclosure before trial. This makes it extremely difficult to conduct the defence – one could argue that the accused person always knows what she told the investigation officers, but this is

163 In *Tan Chor Jin v PP* [2008] 4 SLR 306, the accused seemed to have realised this far too late – at the stage of closing speeches. For the complexities of the burden of proof and the meaning of reasonable doubt, see V K Rajah's judgments in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45; *Sakthivel Punithavathi v PP* [2007] 2 SLR 983; *XP v PP* [2008] 4 SLR 686.

164 This is not to say that the Legislature cannot provide for the accused to have a legal burden in specific cases where circumstances require.

165 See *Kulwant Singh v PP* [1986] SLR 239 and *Tan Khee Khoon v PP* [1995] 3 SLR 724.

166 For disclosure in criminal cases generally, see J Pinsler's excellent account in *Evidence, Advocacy and the Litigation Process* (Singapore: Butterworths, 2nd Ed) at pp 372–386, esp pp 376–37-8. Also see now, the Criminal Procedure Code Bill, Pt IX, Div 3 which provides for some form of disclosure though there seems to be reluctance to require the Prosecution to disclose evidence or witnesses to the accused, which might help the Defence, but which the Prosecution does not intend to use or call.

167 See Ian Dennis, *Law of Evidence* (London: Thomson Sweet & Maxwell, 3rd Ed, 2007) at paras 9.6–9.20.

hardly ever a solution as the circumstances in which such statements are made could be stressful, and the accused might not recall exactly what was said. The only disclosure regularly allowed is of the s 122(6) statement – *ie*, the exculpatory statement so called. This is hardly useful to the defence.[168]

50 Third, there is the provision of legal counsel to those who need it. Enough has been mentioned above with regard to the right to counsel to show that again, in this vital aspect, the entitlement to legal counsel as a means of reducing the inequality of arms is not realised in terms of the majority of defendants in Singapore. In the case of unrepresented defendants, due to the fact that the judge has to remain impartial and independent, she can at most remind the defendant of the latter's rights, for example, to a *voir dire*, or to object to evidence that might be inadmissible or to bring in evidence to support her defence, but a distinction is drawn between informing her of her rights and helping her strategise as to her defence, which would affect the impartiality and independence of the judge.[169] Fairness then with respect to equality is more of a value for civil cases. In the case of criminal cases, there can only be a reduction in inequality of arms, and the extent to which this can be done is circumscribed by other criteria of fairness, such as the judge having to remain impartial and independent.

(3) Fairness as integrity in the trial process[170]

51 When we talk of "procedural fairness", it is common to associate it with the idea of integrity, in that procedural rules that not only do not promote integrity but accept evidence that is obtained through illegal or improper means might be regarded as "unfair" and "unjust" in the sense that the judge and the legal system are somehow complicit when she makes use of the evidence. However, this is usually countered by the argument that to leave out evidence that is highly probative of the defendant's guilt might affect the integrity of the system in that it may well lead to false negatives (acquitting the guilty). Views like the ones expressed above reveal that "integrity" may be used in several senses, and as Duff points out, "the integrity principle has been an influential but also a puzzling principle of criminal justice".[171] It is influential because it is often intuitively felt to be part of "justice" – very much like

168 Having seen dozens of such statements, one could say they are hardly helpful: they normally consist of "I have nothing to add" or "I have nothing to say" or "I have nothing to do with this offence"!

169 See *Rajeevan Edakalavan v PP* [1998] 1 SLR 815; *Soong Hee Sin v PP* [2001] 2 SLR 253; *Saravanan s/o Ganesan v PP* [2003] SGHC 273.

170 See especially Andrew Ashworth, *Exploring the Integrity Principle in Evidence and Procedure* in *Essays for Colin Tapper* (P Mirfield & R Smith eds) (London, LexisNexis, 2003); Duff vol 3 ch 8.

171 Duff vol 3 at p 256.

a "clean hands" approach and is linked to a moral standpoint that the courts should not be tainted by the illegality, especially if the perpetrator is a state official, but one could also apply it to private entrapment. A second and equally important sense in which integrity is used is as a standard of integration between the various parts of the civil or criminal process – *eg*, the investigation of crime and the discovery of evidence (albeit by illegal means) are linked to the use or rejection of it at the trial – a form of system coherence, which does not of itself attract much comment except that system incoherence is a situation that needs correction.

52 The integrity principle comes very much to the fore when a prosecution is based on entrapment evidence or illegally obtained evidence.[172] In *Phyllis Tan*,[173] a case on entrapment and decided not on the merits of the integrity principle, but rather on the separation of powers and the constitutional position of the courts and the Attorney-General concerning prosecutions, an opportunity was lost to apply the principle. The court also held that there was no need to distinguish between the entrapment rule (regarding stay of process) and the rule relating to admissibility of illegally obtained evidence – there is no discretion sanctioned by the Evidence Act to exclude relevant and probative evidence even if illegally obtained. At any rate, it seems to be a weaker principle than those already discussed (such as presumption of innocence and equality of arms). Even supporters of the principle accept that it could be traded off in the sense that where a crime revealed by entrapment evidence or illegally obtained evidence is particularly serious, the proceedings might not be stayed or evidence rejected. The degree that this value could be recognised in the remaking of the evidence code, therefore, needs to be determined with some care.

D. Relevance of public opinion

53 Procedural fairness is a concept that is often articulated by judges and lawyers but, if one were to ask whether the public approved of such a concept in the trial process, the response would probably be muted or unknowing. Much has been made of the point that the public in liberal societies not only scrutinise the legal system for fairness, but play a part in protesting against perceived injustices and take seriously their role to serve in the jury if called on. Public approval of the trial process is seen as particularly important. But will such values be consciously accepted by the public in Singapore, which is not regarded as a liberal society in the Western mould?

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172 It is revealing that the Evidence Act does sanction the obtaining of confessions and statements by tricks or deception: Evidence Act s 29.

173 [2008] 2 SLR 239 (three-judge HC).

54 It must be remembered that as a matter of historicity, the modern trial as described by Hildebrandt[174] and discussed above, evolved over the centuries in Europe beginning probably around the 12th century,[175] but in terms of cultural experience, societies (like Singapore) that "inherited" the adversarial form of trial (from the British) have virtually little or no cultural experience of this form of trial before that. More probably than not, they were more used to the inquisitorial form, in which people saw themselves as "subjects" to an absolute Government and that "breaking the law is not only a negation of the normative and imperative aspect of legal norms as they function between citizens, but also the negation of the authority of the state",[176] that is to say, a wrong against the State itself. Indeed, in Singapore, with the abolition of the jury,[177] the one major institution that provided a direct link for citizens' participation in the trial process, other than as parties or witnesses, was cut.[178]

55 In terms of citizens' perceptions about the legitimacy of the trial process, there is, quite simply, no reliable survey data for empirical confirmation or denial. Presumably, the public in general conceive the trial system and the Judiciary as part and parcel of the governing process, and would most likely be unfamiliar, to say the least, with the language of "rights" especially in relation to suspects *vis-à-vis* against the Government. The public mind set, in Hildebrandt's phraseology, is probably that of a "vertical relationship" (Government -> subjects) rather than one where citizens expect they have rights especially when

174 Hildebrandt, "Trial and 'Fair Trial': From Peer to Subject to Citizen" in Duff vol 2 at p 25.

175 See J B Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898) chs II–IV; and a succinct synopsis in Duff vol 3 at pp 40–53.

176 Hildebrandt, "Trial and 'Fair Trial': From Peer to Subject to Citizen" in Duff vol 2 at p 23. The Judiciary was seen very much as an extension of absolutist sovereign power (*eg*, sultan, maharaja or emperor). Punishment, in the case of a convicted felon, is not only exacted as retribution or satisfaction for the victim of the crime but also for the ruler as well. See Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) at p 27 and especially sources cited in footnote 15 there.

177 See the classic study of the abolition of the jury in Singapore and Malaysia by A Phang, "Jury Trial in Singapore and Malaysia: the Unmaking of a Legal Institution" (1983) 25 Mal L Rev 50.

178 Given the problems with empanelling juries and instructing them as to the evidence put before them (especially the burden of proof), and the jury not giving reasons for their findings, all of which have been raised by scholars as worrying, it is probably right that the institution, which has no cultural links to the citizenry, was abolished. This is not to say that a case cannot be made out for the use of lay assessors to help judges in cases, or even lay magistrates where suitably qualified people (not necessarily in law) might be employed: see, for jury problems and reform, Mike Redmayne, "Theorising Jury Reform" in Duff vol 2 ch 6, and B Schäfer & O Weigand, "It's good to talk – Speaking Rights and the Jury" in Duff vol 2 ch 7.

facing governmental investigation and prosecution – a horizontal relationship (Government <-> People).[179] Therefore, if one were to base reform of procedural law on political culture or public opinion in Singapore, there would be a reluctance on the part of the Government to concede too much in terms of "rights" for accused persons,[180] and the general public would most probably not have a clear view on the matter either.[181]

E. Basic political values – Community safety and security

56 Though Singapore is a constitutional democracy with fundamental liberties provided for in the Constitution, it is seen as less "liberal" than other constitutional democracies, especially on the subject of an accused person's rights, even those provided in the Constitution. According to its political leaders and other government officers, Singapore officially adopts a consequentialist approach to the legal process, especially the criminal process and, by extension, to the trial and rules of evidence; by that measure, the approach has been consistently applied. As far as the criminal process is concerned, Chan Sek Keong, while as Attorney-General, echoed the policy of putting community safety and security before individual rights in a public lecture:[182]

> The process requires a trial in accordance with the fundamental rules of natural justice. It is arguable that in principle these rules do not require that the criminal process must favour the accused, in whatever degree. But, as developed, they require the court to give him every consideration so that if there is a reasonable doubt about his guilt, he is to be acquitted. It is also arguable that the rules do not prohibit the criminal process from preferring crime control in the larger interest of

179 Of course, this is guesswork, as much as assertions that the public in general accepts the treatment of offenders and suspects as legitimate in the current system. There is likely to be a change in expectations especially when the populace becomes more educated and influenced by other more liberal sources such as films, sources on the Internet, *etc*, from countries like the US and Western Europe.

180 Ashworth and Redmayne pointed out that remarkably, in England (which had adopted human rights conventions) government pronouncements "contain virtually no reference to human rights issues" (Ashworth & Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd Ed, 2005) at p 57). Singapore's then PM Lee in 1992 declared that giving rights to accused persons that would prevent admissibility of evidence is not government policy.

181 Hardly any attention is paid in the media on issues like wrongful convictions leading to the view that the verdicts are always right. Sometimes this problem is also referred to in the literature as "the invisible innocent": see Daniel Givelber, "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit The Innocent?" (1997) 49 Rutgers L Rev 1317.

182 Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 438.

> the community, *so long as they are not obviously unfair to the accused*. [emphasis added]

57 These views contain an assertion that community safety and security interests should override individual rights, especially if individuals stand accused of wrong-doing, and that if suspects were given such rights, it would result in more "guilty" accused persons being set free to further threaten public safety, as the admission of otherwise incriminating evidence would be hindered.[183] In terms of the italicised words, the concept of "procedural fairness" seems to be turned on its head: we only have to ensure that the procedures must *not* be *obviously unfair* to the accused This "double negative" seems to be drawing the line rather low, and even if the reluctance to grant accused persons rights is intuitively felt, it is difficult to see what would constitute acceptable "unfairness" which is *not obviously unfair*. Indeed, it could be argued that the amendments to the two codes, the Evidence Act and the Criminal Procedure Code, in 1976 already sought to redress the issue of imbalance in favour of the Prosecution. Requiring the accused person to mention any circumstances in her defence when she is formally charged or informed that she will be charged with an offence otherwise an adverse inference might be drawn, and warning the accused person on trial that she should give evidence otherwise an adverse inference could be drawn, already redrew the lines in favour of the Prosecution. Coupled with the decisions referred to above concerning the restrictions on the constitutional right to counsel, one would be hard put to say that the system still unduly favours the accused. More importantly, the "floodgates" argument that there would be an unacceptable increase in crimes should the accused person be afforded rights seems to be empirically unfounded – it may lead to an increase in contested trials over guilty pleas, but even this is not by any means putting the public to unreasonable risks of danger from "criminals" wrongly acquitted; though, of course, if there is a high number of false negatives, this means that these criminals will be at large and could engage in more criminal activity and this might require a reconsideration of the rules.

183 There is no empirical data to back up such assertions – one could, however, point to communities in various parts of the world, including countries like Japan or even certain parts of the US, where the crime rate is low despite being more "liberal" societies. Do so-called criminals get "deterred" by contemplating how many "rights" they have before they commit crimes? Or how much evidence could be "blocked" by the exercise of such rights in planning crimes? The deterrence is more likely to be in the types of punishment (incarceration, corporal punishment and the death penalty) than in denying accused persons rights.

IV. Coda

58 This article seeks to discuss the preliminary issues that need to be tackled before one can look at the evidence rules proper with a view to rewriting the code. It is prompted by the extraordinary renaissance seen in the works of Legislatures, courts and scholars abroad on the subject in recent years. To this end, this article identifies the issues to be examined, which are the status of the present code, the basic values that underlie the code, the absence of jury trial and how that impacts on the rules of evidence, the nature of rules and principles in evidence, and how they should be re-enacted. The following conclusions may be tentatively suggested:

(a) 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.

(b) 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.

(c) The various elements of a "fair trial" are examined and the disparity between Singapore law and other constitutional democracies are highlighted.

(d) 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".

(e) The justifying aims of a law of evidence – that of Ian Dennis (legitimacy in adjudication) and Alex Stein (principle of maximum individualisation, sub-principles of equality and equal best as the means to allocate risk of error) could be used to guide a remaking of the code.

(f) 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 (that of empathic consideration for the defendant and others involved in the trial) should be inculcated.

(g) Fairness as equality is an important value – while it is more likely to be realised in civil cases, in the case of criminal

cases there must be an attempt to reduce the inequality as between the Prosecution and the Defence.

(h) Fairness as integrity is a value that needs clarification, and it is used in two senses – one as a moral standard, and two, to mean system coherence and links between various parts of the civil and criminal processes.

(i) Integrity is a value that is relevant, especially in the cases of entrapment and illegally obtained evidence, and its weight depends very much on what is measured against it; if it was a serious crime or wrong for example, and where the perpetrator would otherwise escape justice, it would not be applied.

(j) The views and opinions of the public concerning the fairness and integrity of the legal processes including the law of evidence are important, but in the context of Singapore, it has to be realised that rights discourse and the institutions of a fair trial are inherited, and that the public might not be as critical as their counterparts in other countries where such systems naturally evolved. This fact should be borne in mind when determining whether the public concerns of safety and security should prevail over other values in determining the rules of the evidence code.