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REFLECTIONS ON S 2(2) OF SINGAPORE EVIDENCE ACT AND ROLE OF COMMON LAW RULES OF EVIDENCE

New Discoveries on Intentions and Implications

It has been said that the question regarding s 2(2) of the Singapore Evidence Act and its effect on the extent common law rules of evidence can play a role here is perhaps the most controversial in the law of evidence in Singapore. In this piece, the author attempts to exhaustively relook at whether there is a better way to tackle this conundrum, only to find out that we have all along been mistaken as to the true draftsman of that provision. Based on this new finding, the author considers the intentions of that draftsman behind including the provision and propose a reconsidered approach to deal with any issue relating to relying on common law rules of evidence when applying the Evidence Act.

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I. Background and preliminary points

1 The law of evidence in Singapore is well-known among students, academics[1] and even judges[2] as being tough to grasp, quite

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1 Jeffrey Pinsler observed almost two decades ago that many law students remember the subject of the law of evidence as "notoriously difficult". See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at p xxiii; see also Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at paras 1.002 and 1.004: "the law of evidence is at once intriguing and frustrating".

2 Several years back, Chief Justice Chan Sek Keong (as his Honour then was) observed that "[e]vidence is one of the more difficult areas of law because of its

(*cont'd on the next page*)

technical, and often headache-inducing. Our rules of evidence are very predominantly found in our Evidence Act,[3] which was first introduced in Singapore in 1893.[4] It was essentially "the Indian [Evidence] Code adapted to the circumstances of [the Colony of the Straits Settlements]".[5] There are not many major differences between the two Acts. Every student of the law of evidence here would be familiar with Sir James Fitzjames Stephen. It was he who drafted the Indian Evidence Act[6] ("IEA"), which was passed as law in India in 1872.[7] In a few more years, it will be the 150th anniversary of the introduction of the IEA.

2 It is not unfair to say that the greatest source of controversy and difficulty stems from s 2(2) of the Evidence Act.[8] That provision, on its face uncomplicated, states that "[a]ll rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed". To those unfamiliar with Singapore's law of evidence, it may come as a big surprise how a single provision can lead to so much difficulty, and for some, so much frustration. Chief Justice Chan Sek Keong (as his Honour then was) alluded to the root of the difficulty when he elaborated that:[9]

> [The complexity is with] the extent to which the law of evidence in Singapore has remained frozen or static by reason of s 2(2) … Two subsidiary questions arise. The first is the scope of inconsistency contemplated by that provision. The second is whether it contemplates a cut off date for the repeal on unwritten rules of evidence (which presumably is a reference to the common law rules of evidence) …

To put it another way, the core question is: in light of s 2(2), to what extent can common law rules of evidence play a role when applying the

inherent complexity and the challenges which the courts often face in applying a 19th century statute in the 21st century court room": see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at p vii.

3 Cap 97, 1997 Rev Ed.

4 The now Evidence Act was first introduced as Evidence Ordinance (Ordinance 3 of 1893).

5 See the speech by the then-Attorney-General during the first reading of the Evidence Bill in Legislative Council, *Short Hand Report of the Proceedings of the Legislative Council of the Straits Settlements* (23 February 1893) at p B23; see also Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.043.

6 Act 1 of 1872.

7 See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.043.

8 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 1.050–1.062.

9 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at p vii.

Evidence Act? Jeffrey Pinsler has remarked that this question is "perhaps the most controversial in the law of evidence [in Singapore]".[10]

3 That is the key question because since about 150 years ago when Stephen drafted the IEA (and Singapore adopted it substantially), courts in other jurisdictions which did not codify their rules of evidence have developed, evolved, and even introduced many common law rules of evidence. Many of these changes were made to take into account developments in society, technological advancements, better understanding of psychology, *etc*.[11] This is but a natural state of affairs for common law rules. The common law is flexible and able to evolve as and when is necessary.

4 But the Evidence Act itself has been amended only nine times[12] during its 15 decades of existence. The bulk of these amendments are cosmetic, formal or technical.[13] Some of the recent amendments, although more significant, related to very specific aspects of evidence law.[14] The vast majority of the provisions in the Evidence Act have been untouched since they were first introduced. This state of affairs would not be that much of an issue if Singapore courts can look to the common law rules of evidence, in one way or another, to try and deal with possible inadequacies of the Evidence Act to respond to modern developments. This is where s 2(2) comes in. Everyone has so far viewed that provision as having the effect of stopping, or at least hindering, one from relying on the common law rules of evidence inconsistent with the Evidence Act's provisions, because s 2(2) has repealed these rules.[15] And, in most cases, the struggle is with *in what way, and to what extent*, s 2(2) bars the reliance.[16] Section 2(2) is a general provision and so it potentially rears its head in every issue that involves the Evidence Act.

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10 See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.062; see more generally paras 1.045–1.047 and see s 2(1) of the Evidence Act (Cap 97, 1997 Rev Ed) as to when the Act applies or does not apply; see also *ARX v Comptroller of Income Tax* [2016] 5 SLR 590, where the court observed, at [42], that there is "general conceptual confusion and lack of clarity that beset the operation of s 2 of the Evidence Act, which has given rise to an innumerable number of difficulties".

11 See Jeffrey Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365 at 365, para 1 and Chin Tet Yung, "Remaking the Evidence Code: Search for Values" (2009) 21 SAcLJ 52 at 52–55, paras 1–2.

12 This is not including consequential amendments following changes in other statutes.

13 See Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at p vii, "Preface" and Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.044.

14 Such amendments include those in 1996 and more recently in 2012.

15 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 1.050–1.062.

16 See the quotation by the former Chief Justice Chan Sek Keong at para 2 above.

As each day passes and the common law elsewhere develops further, it becomes more pressing to look to the common law to ensure our rules of evidence, where necessary, catch up. Yet, from the sources that we have up till now been looking at, there is reason to think that Stephen indeed intended for common law rules to play very little, if even any, role as regards issues concerning the Evidence Act.

5 So, as we approach the 150th anniversary of Stephen introducing the IEA, the present author thinks it fitting to deeply relook at this issue. In particular, given that s 2(2) is apparently the source of so much of the difficulties, it seems surprising that its genesis and purpose have never been exhaustively explored. After all, s 2(2), a provision of a statute, is itself subject to s 9A of the Interpretation Act[17] and therefore, it is essential to apply the purposive approach and find out what Parliament's intention[18] was in inserting s 2(2) into the Evidence Act. Did Stephen really intend, and if so, to what extent did he intend, for s 2(2) to bar a court from relying on common law rules of evidence? Perhaps most importantly, what did he mean by the word "inconsistent"? Have we looked at everything that may be relevant in helping us deal better with the conundrum?

6 As will be elaborated below,[19] this endeavour led to a very critical realisation,[20] which is that s 2(2) of our Evidence Act was *not* drafted by Stephen; *it was actually by the then Attorney-General of the Straits Settlements, Sir John Winfield Bonser*. And, it is in fact Bonser's writings that will illuminate the true intention of s 2(2) and what should the interaction be, if any, between common law rules of evidence and the Evidence Act.

7 In the next Part, the present author sets out in a bit more detail the key difficulties arising from s 2(2) and the role of common law rules of evidence in Singapore, and what we thought of that section up till now. In Parts III and IV, the author shows that Bonser was actually the draftsman of that provision, and discuss what he had to say about the role of common law rules of evidence with respect to the Evidence Act

17 Cap 1, 2002 Rev Ed.

18 See generally *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [39]–[57] and *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [16]-[21]; see also Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" (2009) 21 SAcLJ 97.

19 See paras 24–36 below.

20 Many of the late 19th century materials referred to in the following Parts, in particular the correspondences despatched between the Governor of the Straits Settlements and the Colonial Office in England, are by no means easy to locate or access. The present author would unlikely have found them but for the advent of technology and his gaining some familiarity with the workings of the lawmaking process in the Straits Settlements at that time.

and the IEA, and the implications of his position.[21] Then, in Part V, based on the discovery of the true intentions behind s 2(2), the author suggests what he believes should be the approach when one is considering to rely on a common law rule of evidence in Singapore.[22] In Part VI, the author provides examples of how this approach should be applied, and reconsider some of the major past cases that have had to deal with this issue.[23]

8 Before moving on though, it is imperative that the article deals with the issue of terminology. Because the issue regarding the role of common law rules of evidence has been challenging and multifaceted, moving forward, it would help significantly if we understand first that there are generally only two main ways in which a common law rule can play a role when the Evidence Act applies. On this, the present author adapts from the terminology and explanation provided by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[24] ("*Sembcorp*") with respect to construction of a contract.[25] In *Sembcorp*, the Court of Appeal explained that contractual *interpretation* involves trying to understand a term that parties have expressly included in a contract or, in other words, what the parties' intentions were in including that particular term. Contractual *implication* involves a situation where there is no express term in a contract, that is, there is a silence on a particular issue, but based on what it thinks would have been the parties' intention, a court inserts in the contract an unwritten and a presumed term. Contractual interpretation and implication are collectively known as contractual *construction*.[26]

9 So, too, in a case where a statute (or a code such as the Evidence Act) applies, the court will inevitably have to engage in statutory *construction*. First, where there is a provision that deals with the issue at hand, the court will have to interpret the words of the provision, and the common law may assist in this endeavour of trying to discern Parliament's intention with respect to those words. Second, where there is no express provision that deals with the issue and the court has to fill

21 See paras 24–41 below.
22 See paras 42–58 below.
23 See paras 60–77 below.
24 [2013] 4 SLR 193.
25 This is tenable, at least for present purposes, because a contract and a statute are both drafted by one or more persons, and in both contexts the court's core responsibilities include trying to ascertain the intentions behind the terms, and dealing with gaps in the instrument. The present author is certainly not, in the context of statutory interpretation, the first to draw analogies from the principles of contractual interpretation. See Goh Yihan, "Where Judicial and Legislative Powers Conflict – Dealing with Legislative Gaps (and Non-gaps) in Singapore" (2016) 28 SAcLJ 472 at 497–500, paras 61–68.
26 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [24]–[33].

in the gap, the common law may come in to supplement, which is a rough analogue of contractual implication. The rest of this piece will focus on examining the question as to what extent common law evidence rules can play a role (a) in *interpreting* and, (b) where there are gaps in the Evidence Act that need to be filled, in *supplementing*, the provisions in the Evidence Act.

II. Difficulties arising from s 2(2) of Evidence Act and reliance of common law rules of evidence

A. Section 2(2) of Evidence Act

10 Why has it been so difficult to apply s 2(2) to the issue of the role of common law evidence rules? We can safely assume that the phrase "rules of evidence not contained in any written law" refers to the common law rules of evidence,[27] and "repealed" means removed from existence, or no longer applicable as law.[28] Those terms are straightforward. So, on its face, s 2(2) simply says that all the common law rules of evidence that are inconsistent with the Evidence Act provisions are no longer law in Singapore. The trouble is with the word "inconsistent". As cases involving other contexts have shown, that word, without any other interpretative aid, is highly ambiguous.[29] But no definition of "inconsistent" can be found in the Evidence Act.

11 In the context of the Evidence Act, the first main uncertainty is whether a common law rule of evidence can be used to interpret an Evidence Act provision. Does the answer lie in the extent of "inconsistency" between the common law rule and the provision?[30] Two rules that directly contradict each other are clearly inconsistent (for instance, all students are permitted to enter this lecture hall and no student is allowed to enter this lecture hall). But are they inconsistent if they do not directly contradict each other, but they just cannot be applied together (for example, all students are permitted to enter this lecture hall and the lecture hall door shall be locked at all times)? What

27 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at para 1.005.

28 See "Repeal", Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/repeal> (accessed 20 July 2017).

29 See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.054. For the range of meanings of "inconsistent" in other statutes and contexts elsewhere, see Daniel Greenberg, *Stroud's Judicial Dictionary of Words and Phrases* vol 2 (Sweet & Maxwell, 8th Ed, 2012) at p 1419 and Anandan Krishnan, *Words, Phrases & Maxims – Legally & Judicially Defined* vol 9 (LexisNexis, 2008) at para I0649.

30 See the quotation by Chief Justice Chan Sek Keong at para 2 above; see also Ruth Sullivan, *Statutory Interpretation* (Irwin Law, 3rd Ed, 2016) at p 331–338.

if they can in fact be applied together, but they are still different rules (say, all students are permitted to enter this lecture hall and all humans are permitted to enter this lecture hall)? Do these still count as "inconsistent" rules? Another question is, what must the inconsistency be about? Is it merely the wording of the provisions? What if the inconsistency is with the wording, but there is consistency in the underlying rationale, purpose[31] or application of the two rules?

12 The other main uncertainty is whether it is "inconsistent" with the Evidence Act provisions to rely on a common law rule of evidence to supplement. This depends on whether the Evidence Act was intended to be a complete and exhaustive code that provides for all rules of evidence in Singapore, other than those found in other statutes.[32] If there is an issue concerning evidence law and no provision in the Evidence Act deals specifically with it, that is, there is a "gap" in the law, can we apply a common law rule that is devised to deal exactly with that issue? If the Evidence Act was intended to be complete and exhaustive, then we should not be able to bring in any other rules,[33] as doing so would be "inconsistent" with the Evidence Act provisions. Instead, we are to fall back on any default provision in the Evidence Act that applies, for instance, some general relevancy provision.[34]

13 These uncertainties will invariably lead to many difficulties over time mainly because: firstly, there will be ambiguous terms in the Evidence Act that require interpretation; secondly, there will be issues arising for which there is no provision in the Evidence Act that deals specifically with them; and, thirdly, developments may have occurred such that the relevant rule in the Evidence Act is outdated and applying it will lead to injustice.[35] And in all three situations, resort to common

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31 In relation to s 2(2), the Court of Three Judges held in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117] that "new rules of evidence can be given effect to only if they are not inconsistent with the provisions of the Evidence Act or their underlying rationale". Though s 2(2) does not explicitly say anything about considering inconsistency with the *rationale* of the provisions, s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) does require, when interpreting a provision in any Act, consideration of the underlying purpose or object, *ie*, rationale, of that provision.

32 On rules of evidence in other statutes, see generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.063.

33 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 1.051 and 1.057.

34 See ss 5–12 of the Evidence Act (Cap 97, 1997 Rev Ed).

35 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 1.050–1.062; see especially also D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th Ed, 2006) at para 8.8, The Honourable Mr Justice Scarman, "Codification and Judge-Made Law: A Problem of Coexistence" (1967) 42(3) Ind LJ 355 and H R Hahlo & L C B Gower, "Here Lies the Common Law: Rest in Peace" (1967) 30(3) Modern Law Review 241.

law rules of evidence may assist significantly. The biggest obstacle standing in the way (or so we thought) is s 2(2).

14 What we thought was Stephen's intention about s 2(2) supports *a very restrictive stance* on whether one can rely on common law rules. The main sources of his intentions have been for one, his *Introduction to the Indian Evidence Act*, which he completed very shortly after the IEA was passed in India, to explain some of his thoughts regarding the Act that he drafted,[36] and for another, *A Digest of the Law of Evidence*[37] ("*Digest*"). Stephen wrote this *Digest* a few years later in 1876. It was based on a model Evidence Code which he had hoped would be adopted in England (though it never was). Many of the articles in this model Evidence Code resemble the provisions in the IEA, and he appended much commentary to the articles in the *Digest*.

15 In his *Introduction to the Indian Evidence Act*, Stephen made clear that:[38]

> The Act speaks for itself. No labour was spared to make its provisions *complete* and distinct. As the first section repeals all unwritten rules of evidence, and as the Act itself supplies a distinct body of law upon the subject, *its object would be defeated by elaborate references to English cases* … [emphasis added]

That Stephen was trying to *codify* the rules of evidence in the IEA[39] adds further weight to the view that he intended that judges no longer refer to anything outside of the IEA, save for rules of evidence in other statutes.[40]

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36 James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872): With an Introduction on the Principles of Judicial Evidence* (Thacker, Spink & Co, 1872) at "Preface".

37 James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887). The first edition of this digest was written in 1876. See *Sembcorp Marine v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [41].

38 James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872): With an Introduction on the Principles of Judicial Evidence* (Thacker, Spink & Co, 1872) at p 175.

39 James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872): With an Introduction on the Principles of Judicial Evidence* (Thacker, Spink & Co, 1872) at "Preface". On codification, see generally Michael Zander, *The Law-Making Process* (Cambridge University Press, 6th Ed, 2004) at pp 484–507 and the materials cited therein.

40 See Jeffrey Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365 at 370, para 11: "[t]he counterpoint is that if a code [such as the Evidence Act (Cap 97, 1997 Rev Ed)], which is intended to be a comprehensive formulation of the law, does not express a principle, that principle should not be recognised (even if it was developed after the Act came into force)" see also, for a similar view, Goh Yihan, "Where Judicial and Legislative Powers Conflict – Dealing with Legislative Gaps (and Non-gaps) in Singapore" (2016) 28 SAcLJ 472 at 494, para 52.

In his 1872 speech to the Legislative Council in India when introducing his draft Evidence Code, we find more evidence of Stephen and the council's intention that the IEA is to be a complete and exhaustive code, which was intended to remove the need for judges to rely on common law rules of evidence. This, thus, arguably supports the argument that courts should not rely on such rules. For example, Stephen stressed that "[t]he general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, *comprehensive* and distinct knowledge, without unnecessary labour" [emphasis added].[41] One member of the council, Sir John Strachey, following Stephen's speech, seemed to assume that the IEA was a "complete code of evidence".[42] Another member, Mr J F D Inglis, likewise thought that the IEA "gave a complete, authoritative and concise manual of the law of evidence".[43] During a later session, Stephen, in response to some criticisms that his code was very incomplete, asserted that "the Bill does form a complete Code, and does deal with every subject which has been dealt with by English text-writers on evidence or by English legislation".[44]

16 Similarly, when Bonser introduced the Evidence Bill in Singapore in 1893 to the Legislative Council of the Straits Settlements, he explained that:[45]

> [T]he Law of Evidence now in force in this Colony is to be found in various volumes of text-books on the Law of Evidence, containing many hundreds of pages, and in various Acts of the Indian Legislature which are in force here and no longer in force in India. Under these circumstances it has been thought desirable to introduce here the Indian Evidence Code which is now in force in India. That Code has stood the test of more than twenty years' experience, and has been found an inestimable benefit to Magistrates and all persons concerned

41 Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol X (Office of Superintendent of Government Printing, Calcutta, 1872) at p 458.

42 Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol X (Office of Superintendent of Government Printing, Calcutta, 1872) at p 473.

43 Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol X (Office of Superintendent of Government Printing, Calcutta, 1872) at p 476.

44 Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol XI (Office of Superintendent of Government Printing, Calcutta, 1873) at p 122.

45 Legislative Council, *Short Hand Report of the Proceedings of the Legislative Council of the Straits Settlements* (23 February 1893) at p B23.

> in the administration of justice, *who have no longer to turn to reports of cases, and wade through Taylor on Evidence, but can find in the compass of a few pages the proposition of law which meets the case before them* … [emphasis added]

17 It is natural for one to infer from the tenor of the above quotes that both Stephen and the respective legislatures seemed to have intended that judges not rely on common law rules of evidence once the respective codes were introduced. If so, then arguably, *the broad answer to the two main questions raised above is basically that courts cannot and should not rely on common law rules whether to interpret or supplement Evidence Act provisions, and that for any issue, the answer is to be found within the provisions of the Evidence Act itself (or in some other statute).*

18 And, because the two Acts were intended to be codes, there is also the oft-cited 1891 House of Lords case of *Bank of England v Vagliano Brothers*[46] ("*Vagliano*"), a case concerning another well-known code in England at that time, the Bills of Exchange Act 1882.[47] That case was decided not long after the introduction of the IEA and the Evidence Act. Lord Herschell famously emphasised that:[48]

> [The proper course in construing a code] is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view … The purpose of such a statute was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was …

The last sentence likewise gives the impression that in interpreting a provision in a code such as the Evidence Act, one should refrain from referring to common law precedents.[49]

19 As a result, our courts have had to figure out how to manoeuvre between staying faithful to what appears to be Stephen and the Legislative Council's restrictive stance towards the applicability of common law rules of evidence and, as mentioned above, the often strong (and justified) inclination to rely on the common law. Our courts'

46 [1891] AC 107.
47 c 61 (UK).
48 *Bank of England v Vagliano Brothers* [1891] AC 107 at 144–145.
49 See Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd Ed, 2016) at pp 321–322.

attempts to do so, up to 2002, have been very helpfully summarised by Jeffrey Pinsler's seminal article, "Approaches to the Evidence Act: The Judicial Development of a Code".[50] He observed that the cases "reveal a level of abstruseness", and may give rise to a "perception of arbitrariness or idiosyncrasy".[51] In *Lee Kwang Peng v Public Prosecutor*[52] ("*Lee Kwang Peng*"), s 2(2) tested the Singapore High Court beyond its patience and willingness to accommodate. In that case, s 2(2) and Stephen's intention with respect to a provision in the Evidence Act stood clearly in the way of the court applying a common law exception regarding the admissibility of similar fact evidence ("SFE"). So, the court went so far as to ignore s 2(2) and Stephen's intention, in favour of adopting the common law rule, and controversially held that, in future, the Evidence Act is to be treated as a "facilitative statute as opposed to a mere codification of Stephen's statement of the law of evidence".[53] The High Court in a later case took a similar position.[54] However, that stance did not gain traction thereafter, and a decade later in 2007, the Court of Three Judges in *Law Society of Singapore v Tan Guat Neo Phyllis*[55] ("*Phyllis Tan*") explicitly disapproved of that position.

20 After 2002, putting aside the idea of treating the Evidence Act as a "facilitative statute", our courts continued to try their best to deal with s 2(2), though Pinsler's observations in relation to apparent abstruseness of the pre-2002 cases still seem applicable. There were several cases where the courts noted that there was no provision in the Evidence Act that dealt with the specific issue before them, and proceeded to simply apply common law rules to deal with the issue, though they did not explicitly say anything about the idea of "supplementing" the Evidence Act provisions.[56] In *Phyllis Tan*, the Court of Three Judges held that common law rules "would apply" and "can be given effect"[57] if they are not inconsistent with the provisions of the Evidence Act or their underlying rationale. Crucially, it is far from clear whether it meant that these rules can apply and be given effect *to interpret, or to supplement*

50 (2002) 14 SAcLJ 365. In that piece, Jeffrey Pinsler pointed out cases where courts have had to deal with the issue of relying on common law rules of evidence in cases involving: (a) vague and imprecise provisions in the Evidence Act (Cap 97, 1997 Rev Ed); (b) a complete omission or limitation of a common law evidence principle in the Evidence Act; and (c) a clash in the words or in the operation of principle of an Evidence Act provision and a common law rule.

51 Jeffrey Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365 at 366–367, para 5 and 385–386, para 36.

52 [1997] 2 SLR(R) 569.

53 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [34]–[47].

54 See *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 at [53]-[61].

55 [2008] 2 SLR(R) 239 at [126].

56 See, *eg*, the cases discussed at paras 66–69 below.

57 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]-[117].

the Evidence Act provisions, or both.[58] In the very recent case of *ARX v Comptroller of Income Tax* ("*ARX*"), for the first time, the Singapore Court of Appeal made clear that where there is a gap in the Evidence Act, common law rules will supplement the Evidence Act provisions, provided the rule is not inconsistent with the provisions (or rationale and spirit) of the Evidence Act.[59] Pertinently though, none of these cases considered or addressed in detail the materials highlighted above[60] that appear to show that Stephen and the Legislative Council likely intended that common law rules can neither be used to interpret nor supplement Evidence Act provisions.

21 In what appears to be an attempt to deal with the lack of clarity as regards whether common law rules can be used to supplement the Evidence Act provisions, in the 2007 case of *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* ("*Skandinaviska*"), the Court of Appeal hedged its bet by holding that litigation privilege exists in Singapore by virtue of the common law, and because it is *also* envisaged by s 131 of the Evidence Act, there is no inconsistency between the common law and the Evidence Act.[61] If, as held in *ARX*, the common law can simply supplement the Evidence Act where there is a gap, it would not have been necessary for the court in *Skandinaviska* to associate litigation privilege with one of the Evidence Act provisions as well. Indeed, it is extremely difficult to justify that s 131 covers litigation privilege, not lest because there is strong indication that Stephen could not have intended that provision to cover litigation privilege.[62]

22 Given the above, one cannot help but share Pinsler's observation that "[t]his area of law … has been plagued by inconsistent rulings and observations for half a century".[63] It is hence surely worth relooking at

58 Indeed, there was further uncertainty over the court's application of its position regarding the role of common law rules to the issue before it, *ie*, whether a general discretion to exclude prejudicial evidence exists. See *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [106]–[107] and its discussion of *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 therein; see also Goh Yihan, "The Case for Departing from the Exclusionary Rule against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAcLJ 182 at 199–200, para 30; *contra Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [51]–[68].

59 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [21]–[42].

60 See paras 14–18 above.

61 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [1], [34] and [67].

62 See below at para 74; see also Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 14.112 and "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365 at 373–374, para 16.

63 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.062.

this entire issue, specifically the genesis and purpose of s 2(2), to see if there is a more ideal solution.

B. Section 5 of Evidence Act

23 Apart from s 2(2), there is in fact another provision in the Evidence Act (and IEA) that, at least on plain reading, bars a court from relying on any common law rules *to admit* any evidence not otherwise stated to be admissible (or relevant) under the Evidence Act and IEA, and that is s 5. At least in Singapore, no one seems to have really paid attention *to the last few words* of that section, which states:[64]

> *Evidence may be given in any suit or proceeding* of the existence or non-existence of every fact in issue and of such other facts as are *hereinafter declared to be relevant, and of no others.* [emphasis added]

Read literally, especially the last four words, this provision suggests that courts cannot admit any evidence that is not rendered admissible pursuant to one or more provisions in the Evidence Act. Relatively speaking, s 5, on its face, is actually a far clearer bar, compared to s 2(2), to adopting common law rules to support the *admitting* of evidence.[65] If so, then does it mean that, on this ground, cases decided by our courts which relied on common law rules to justify the admitting of certain evidence would have all been erroneously decided?[66] Does it also mean that the position in *ARX* on common law rules supplementing the Evidence Act provisions cannot be applied in cases where the common law rule supports the admitting of evidence?

III. Actual draftsman of s 2(2) of Evidence Act – Bonser – And his intentions

24 On a preliminary note, over the years, when dealing with issues concerning the Evidence Act, in particular in relation to s 2(2) and the role of common law rules of evidence, courts, academics and practitioners have frequently looked to the intention of Stephen, who was the draftsman of the Evidence Act. Hence, there have been numerous references to his writings. But there *is* a difference between

64 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 2.001.

65 Section 5 of the Evidence Act (Cap 97, 1997 Rev Ed) is phrased in such a way that it can only be plausibly read to prohibit the *admitting* of evidence not declared relevant by the provisions in the Act, but it does not purport to bar the *exclusion* of evidence declared relevant by the provisions; see also E R S R Coomaraswamy, *A Textbook of the Law of Evidence in Ceylon* (Noel E Hamer, 1955) at p 13.

66 See, *eg*, *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [34]–[47] and other cases at paras 66–69 below.

the draftsman's intention and Parliament's intention, so what justifies the extensive reference to the draftsman's intentions? Indeed, in *Lee Kwang Peng*, the High Court pointed out that under s 9A(3) of our Interpretation Act,[67] the list of interpretative aids that we may use in applying a purposive approach does not include "academic texts and private works of draftsmen".[68]

25 However, in the specific context of the Evidence Act, in so far as one is dealing with a provision that was drafted by Stephen and which remained in substance unchanged, it is not only justified, but probably also very necessary, to refer to the draftsman's intentions. This is because firstly, the drafting of many of the provisions in the Evidence Act can be indubitably attributed to one particular draftsman, whose identity is known. We cannot say the same for very many other statutes. Secondly, as will be seen below,[69] save for certain instances, the Imperial Legislative Council in India and, in Singapore, the Legislative Council of the Straits Settlements, the then-analogue of our modern Parliament, were happy to adopt Stephen's code, and agreed with most of what he drafted.[70] In such circumstances, it is *generally* tenable to say that Parliament's intention was to adopt Stephen's intentions. And, as regards provisions elsewhere, in so far as these points apply, it is justified and sensible to look to the draftsman's intentions.[71]

26 Flowing directly from the preceding point and returning to s 2(2), one can understand why the focus has been on Stephen's intention as regards the role of common law rules of evidence. We do so because we seemed to have assumed that s 2(2) was drafted by him.[72]

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67 Cap 1, 2002 Rev Ed.

68 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46].

69 See para 25, n 70 below.

70 With respect to the passing of the Indian Evidence Act (Act 1 of 1872) in 1872, see the debates in Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol X (Office of Superintendent of Government Printing, Calcutta, 1872) at pp 457–477 and pp 757–778 and *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol XI (Office of Superintendent of Government Printing, Calcutta, 1873) at p 79 and pp 119–141. With respect to the passing of the Evidence Ordinance (Ordinance 3 of 1893) in 1893, see the debates in Legislative Council, *Short Hand Report of the Proceedings of the Legislative Council of the Straits Settlements* (23 February 1893) at p B23 (first reading on 23 February 1893), p B28 (2 March 1893), pp B33–B36 (16 March 1893) and pp B37–B40 (23 March 1893).

71 See generally *Bennion on Statutory Interpretation* (Oliver Jones ed) (LexisNexis, 6th Ed, 2013) at pp 447–449, especially the reference to *Ealing London Borough Council v Race Relations Board* [1972] AC 342.

72 See, *eg*, Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.051 and Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at paras 1.005.

27 But s 2(2) was *not* actually drafted by Stephen. Section 2(2), *as it is phrased in the Evidence Act*, is nowhere to be found in Stephen's IEA. Instead, Stephen's version of s 2 in the IEA provides:

> On and from that day the following laws shall be repealed:
>
> (1) All rules of evidence not contained in any Statute, Act, or Regulation in force in any part of British India,
>
> (2) All such rules, laws, and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861, in so far as they relate to any matter herein provided for, and
>
> (3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.
>
> But nothing herein contained shall be deemed to affect any provision in any Statute, Act, or Regulation in force in any part of British India and not hereby expressly repealed.

At first glance, it may look as if s 2(2) of the Evidence Act was just an attempt to paraphrase and simplify s 2 of the IEA. But on closer examination, it is clear that there are differences, the most significant of which is that s 2 of the IEA repeals all the laws as it details, including the common law rules of evidence, but s 2(2) of the Evidence Act repeals common law rules of evidence *so far as they are inconsistent* with the provisions of the Evidence Act. As underscored above, it is the word "inconsistent" that has led to much of the difficulties.

28 So, who was actually responsible for using the different phrasing and the word "inconsistent"? It turns out that it was the Attorney-General of the Straits Settlements at the time the Evidence Act was first introduced in Singapore, Bonser.[73] Although Bonser was the one who introduced the Evidence Bill to the Legislative Council during the first reading in February 1893, it was not mentioned in his speech (or, for that matter, anywhere else during the three readings)[74] that he was responsible for making some amendments to Stephen's IEA, in particular to its s 2. This can only be gleaned from the correspondence that he made through despatch to the then-Governor, Sir Cecil C Smith, and the Secretary of State of the Colonial Office,

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73 Sir John Winfield Bonser served as the Attorney-General of the Straits Settlements for a decade from 1883 to 1893. Shortly after the passing of the Evidence Ordinance (Ordinance 3 of 1893) as law in Singapore, Bonser was appointed Chief Justice of the Straits Settlements: see "Judges of the Past" *Supreme Court of Singapore* <http://www.supremecourt.gov.sg/about-us/the-supreme-court-bench/judges-of-the-past> (accessed 20 July 2017).

74 See para 25, n 70 above.

George Robinson, 1st Marquess of Ripon.[75] In the months leading up to the first reading of the Bill, Bonser drafted the Evidence Act using Stephen's IEA as a model.[76] He then sent it to the Secretary of State for his comments and approval. For our purposes, the most critical document was the first letter that he sent to the Secretary of State in September 1892, which reads:[77]

> Sir, I have the honour to send herewith (as suggested by you at an interview at the colonial office) the first of an Evidence Code which I have prepared on the instructions of Governor Sir Cecil Smith for introduction as a bill into the Legislative Council of the Straits Settlements.
>
> The Code is the Indian evidence code with … usual formal alterations as are necessary to adapt it for use in the Straits Settlements.
>
> I have also made a few alterations to which I have called attention and the reasons for which I have given in marginal notes. For some I am indebted to the last edition of Mr Justice Stephen's Digest of the Law of Evidence but the majority are the suggestions of Mr Whitley Stokes … legal member of the Viceroy's Council contained in the notes and introduction to the Indian Evidence Code in his edition of the Indian Codes published by the Clarendon press.
>
> I trust that these alterations will … the Secretary of State, but if further information is required on any points I shall be glad to furnish it

75 The Legislative Council of the Straits Settlements was a legislature but which was directly responsible to the Secretary of State for the Colonies, who was based in London. Although the bills were debated and passed through three readings in the Legislative Council, the drafts of the bills were *first sent* to the Secretary of State for his consideration (and also by his team of legal advisers in London) and approval. So, such correspondences between the Straits Settlements and the Colonial Office often reveal a lot more about the intention behind specific provisions than the debates in the Legislative Council.

76 See Colonial Office, *Straits Settlements Original Correspondence* (CO 273, 1838-1946):

(a) (CO 273/185, 1892) at p 165–167 (despatch no 18225 from Straits Settlements to the Colonial Office, dated 12 September 1892), where Sir John Winfield Bonser sent his draft Evidence Bill for the Secretary of State's consideration and approval, and no 349 dated 7 December 1892 from the Colonial Office to the Straits Settlements, where the Secretary of State stated that he had no objection to the Bill being passed subject to some remarks which are not relevant for our purposes;

(b) (CO 273/186, 1893) at p 166–177 (despatch no 4605; dated 13 February 1893, between Straits Settlements and Colonial Office), where Bonser responded to the Secretary of State remarks,); and

(c) (CO 273/186, 1893) at pp 600–603 (despatch no 7077 from Straits Settlements to the Colonial Office, dated 30 March 1893), reporting to the Secretary of State on the passing of the Evidence Bill in the Straits Settlements.

77 The present author is grateful to his colleague, Ivan Lee, for assisting to transcribe Sir John Winfield Bonser's handwritten letter. A few words are too illegible to be transcribed and are marked with ellipses.

> either by letter or at a personal interview at a time before I leave England for Singapore at the end of October.
>
> I have the honour to be … Your obedient servant, J. W. Bonser

29 Stephen did not mention anything about his s 2 in his *Digest*. So, that leaves us with the suggestions of Whitley Stokes. Bonser was referring to Stokes' two-volume treatise titled, *The Anglo-Indian Codes*, which Stokes wrote in 1887–1888, over a decade after Stephen introduced the IEA, and a few years before Bonser drafted the Evidence Act.[78] In his treatise, Stokes penned down his thoughts and provided extensive commentary to the major Anglo-Indian codes existing at that time, which included Stephen's IEA.

30 One of Stokes' specific comment to Stephen's version of s 2 was:[79]

> This [provision] repeals the English rules of evidence formerly in force … for which the Act is assumed to be an adequate substitute. The result is that no one of the numerous points omitted from the Act can be legally supplied by references to English law of evidence. It would have been better to frame the clause on the model of secs. 2 and 4 of the Penal Code, so that the repeal might only apply to the points dealt with by the Act.

This crucial remark by Stokes explains entirely the intention of Bonser in modifying Stephen's s 2 in the IEA to the phrasing of s 2(2) that we see in the Evidence Act. Bonser ultimately did not adapt from the phrasing of ss 2 and 4 of the Penal Code (which, in the present author's respectful view, would not really have achieved what Stokes was trying to effect). But it is *very clear* what his aim was – s 2(2) was phrased as it is because *Bonser agreed with Stokes that there were a number of points of evidence law which Stephen's IEA did not cover*, and if Stephen's s 2 was not amended, the apparent consequence is that the courts cannot legally rely on the common law rules of evidence to address the points not dealt with by the IEA. So, Bonser intended that *only common law rules relating to evidence law issues dealt with by the Evidence Act are repealed, and for the issues not dealt with, courts are (legally) free to rely on the common law rules*.[80]

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78 Whitley Stokes, *The Anglo-Indian Codes* (Clarendon Press, 1887–1888). Volume I of the treatise is available at https://archive.org/details/angloindiancodes01stokuoft (accessed 20 July 2017), while vol II is available at https://archive.org/details/angloindiancodes02stokuoft (accessed 20 July 2017).

79 Whitley Stokes, *The Anglo-Indian Codes* vol II (Clarendon Press, 1888) at p 850, fn 4.

80 Unfortunately, the present author was not able to locate the draft code that Sir John Winfield Bonser sent to the Colonial Office, which Bonser had said he appended in the marginal notes his reasons for making certain amendments to

(*cont'd on the next page*)

31 Moreover, it is reasonable to guess that in trying to come up with a phrasing to effect this intention, Bonser may have drawn inspiration from what were the three well-known codes that existed in England at that point in time – the Bills of Exchange Act 1882[81] ("BoEA 1882"), the Partnership Act 1890[82] and the Sale of Goods Act 1893.[83] For instance, s 97(2) of the BoEA 1882, titled "Savings", provided that "[t]he rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques". The two other English statutes also had savings provisions with a very similar phrasing.[84] It does not seem like a coincidence that the phrasing of the savings provisions of these English statutes ("so far as they are inconsistent with the express provisions of this Act") bear such an uncanny resemblance to that in s 2(2) of the Evidence Act. It is true that in these English statutes the savings provisions make clear which common law rules shall continue to apply, while s 2(2) makes clear which common law rules shall no longer apply. But the substantive and practical effect of the two are the same. They are basically two sides of the same coin, and the fact that Bonser phrased s 2(2) in this way *in response to Stokes' remark* confirms this conclusion. Of course, it may have been ideal if Bonser had phrased s 2(2) in a way more similar to that of s 97(2) of the BoEA 1882, but it may well be that he was then more focused on the *repealing* effect that Stephen had tried to emphasise in his s 2 of the IEA. That does not detract from the fact that Bonser's other clear intention was to achieve Stokes' above highlighted aim.[85]

32 It is also worth highlighting that during the second reading of the English Sale of Goods Bill[86] in May 1889, Lord Herschell emphasised that the Bill was intended to codify the law relating to sale of goods, and added that the Bill was drafted by the same persons who drafted the English BoEA 1882, and that he also played a role in its drafting.[87] The Lord Chancellor then intervened to say:[88]

Sir James Fitzjames Stephen's Evidence Act. The draft itself is missing and is not found attached to the letter that he sent. But the available evidence is more than sufficient to make clear what Bonser's intentions with respect to s 2(2) were.

81 c 61 (UK).

82 c 39 (UK).

83 c 71 (UK). Although this Act was only passed in England in 1893, the Bill itself had been debated in the English Parliament since 1888.

84 See s 46 of the Partnership Act 1890 (c 39) (UK), and s 61(2) of the Sale of Goods Act 1893 (c 71) (UK).

85 See para 30 above.

86 Bill 49 of 1889.

87 United Kingdom, House of Lords, *Parliamentary Debates* (20th May 1889) vol 336 at col 497 (Lord Herschell).

88 United Kingdom, House of Lords, *Parliamentary Debates* (20th May 1889) vol 336 at 497 (Lord Herschell).

> I desire to point out that there is nothing so dangerous as a codification of the law which is intended to be exhaustive. No human ingenuity can deal by anticipation with every case which may arise. The value of the Common Law, which consists in the application of principles to cases as they arise, and lies in its elasticity, but in the iron framework of legislation it very often happens that an unforeseen question arises, and then it is discovered that, while the Common Law has been excluded, the question which has arisen has not been included …

Lord Herschell, referring obviously to s 97(2), replied, "in the present Bill there is an express provision that the rules of the Common Law should be incorporated with it, save in so far as they were inconsistent with the express provisions of the Bill itself".[89] It is therefore clear that provisions such as s 97(2) of the BoEA 1882 were intended to enable courts to rely on common law rules to deal with unforeseen circumstances that arise post-enactment of the statute, and it is likely that s 2(2) was intended to effect the same.

33 Additionally, shortly before Bonser drafted the Evidence Act, the House of Lords heard the case of *Vagliano* in 1891. The present author has already set out above the famous passage from the case regarding the point that in construing a code,[90] if any point is specifically dealt with by a provision, then that should be the starting point, and the court should ascertain the meaning of the words of the provision, and not go through many previous authorities to discover what the law was.[91] Coincidentally, this passage was by none other than Lord Herschell, the very same law lord who spoke about s 97(2) of the BoEA 1882 in reply to the Lord Chancellor.[92] More crucially, it is sometimes forgotten that in *Vagliano*, Lord Herschell went on to make an important qualification, which is:[93]

> I am of course far from asserting that resort may never be had to the previous state of the law *for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate … I give these as examples merely; they, of course, do not exhaust the category. What,* however, *I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute* … [emphasis added]

89 United Kingdom, House of Lords, *Parliamentary Debates* (20th May 1889) vol 336 at 498 (The Lord Chancellor).
90 See para 18 above.
91 See para 18 above.
92 See para 32 above.
93 *Bank of England v Vagliano Brothers* [1891] AC 107 at 145.

Lord Herschell's words represents the position stated by the highest court in England on the issue of construction of a code,[94] just before Bonser introduced the Evidence Act to Singapore. It may be that in drafting and introducing the Evidence Act, he was aware of what Lord Herschell had said, and intended the exact same position to apply when any issue of construction of the Evidence Act arises. But even if he was not aware, the Evidence Act was introduced to Singapore when we were part of the Straits Settlements, a British Crown colony. The draft of the Evidence Act was also approved by the Secretary of State of the Colonial Office and his legal advisers.[95] There is hence basis to infer that when it was passed by the Legislative Council in 1893, short of evidence to the contrary, and there is none, the council's intention was to adopt the then-prevailing position in England.

34 Finally, during the first reading of the Evidence Act, Bonser also mentioned that the IEA had stood the test of more than 20 years' experience in India since it was introduced, and has been found to be an inestimable benefit to magistrates there.[96] So, what was the experience of the Indian courts, during those twenty-odd years, in respect of the role of common law rules of evidence and the IEA? It turns out that *even though they were faced with Stephen's s 2* (which, on plain reading, appears to have repealed the common law to a greater extent than s 2(2) of the Evidence Act), some of the high-level courts in India have held that where necessary, it was acceptable to rely on common law rules of evidence to either assist in interpreting a provision of the IEA, or to fill a gap left open by the IEA.[97] For instance, in the 1878 Calcutta High

94 See generally "Section 212 – Codifying Acts" in *Bennion on Statutory Interpretation* (Oliver Jones ed) (LexisNexis, 6th Ed, 2013) at pp 558–559; see also D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th Ed, 2006) at paras 8.7–8.11.

95 See Colonial Office, *Straits Settlements Original Correspondence* (CO 273, 1838-1946); (CO 273/185, 1892) at p 167 (despatch no 349, dated 7 December 1892, from the Colonial Office to the Straits Settlements, where the Secretary of State stated that "[t]he draft has been perused by my legal advisers", and he had no objection to the bill being passed subject to some remarks which are not relevant for our purposes).

96 Legislative Council, *Short Hand Report of the Proceedings of the Legislative Council of the Straits Settlements* (23 February 1893) at p B23 (first reading on 23 February 1893).

97 See generally Sudipto Sarkar & V R Manohar, *Sarkar Law of Evidence* (LexisNexis, 17th Ed, 2011) at pp 6–8, where the learned authors commented, based on various precedents in India, that:

> Sometimes, questions arise for which no adequate provision is to be found in the Act, and a reference then to the English or American cases may be essential … Even in cases which are specifically provided for in the Act, it is submitted that a reference to English or American decisions will be of immense help both to the judge and the advocate, for it is not uncommon to

(*cont'd on the next page*)

Court case of *The Empress v Ashootosh Chuckerbutty*, Jackson J commented:[98]

> [T]here can be no doubt that cases must arise for which no positive solution can be found in the [IEA] itself, and in such cases we shall probably be justified, and shall always be safe, in adopting English rules, in so far as they follow or are in accord with the general tenor of the Act. But in respect of matters expressly provided for in the Act, we must … start from the Act, and not deal with it as a mere modification of the Law of Evidence prevailing in England.

And in the 1889 Allahabad High Court case of *Palakhdhari Singh v Collect of Gorakhpur*, John Edge CJ noted:[99]

> No doubt cases frequently occur in India which considerable assistance is derived from the consideration of the law of England or of other countries. In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man, and may safely afford guidance to us here …[100]

In cases such as *Sourujmull v The Ganges Manufacturing Co*[101] and *Queen-Empress v Abdullah*,[102] the Indian courts relied on common law authority to assist in interpreting and understanding provisions in the IEA.

35 What this means is that introducing the Evidence Act to Singapore, since the Legislative Council had hoped to also bring into this country the two decades' experience of the Indian courts, is further evidence of its intention to allow the Singapore courts, in the circumstances explained by the Indian courts, to similarly be able to resort to common law rules of evidence when applying the Evidence Act.

> find the portions of the Act are not easy of comprehension owing to the insufficiency or ambiguity of language …

and pp 16–17, 28–29 and 36–39; see also, for similar views, Dr Shakil Ahmad Khan, *Ratanlal & Dhirajlal's The Law of Evidence* (LexisNexis, 24th Ed, 2016) at pp 3 and 5–6.

98 *The Empress v Ashootosh Chuckerbutty* (1879) ILR 4 Cal 483.

99 *Palakdhari Singh v The Collector of Gorakhpur* (1890) ILR 12 All 1.

100 In the same case, Syed Mahmood J expressed the following in strong terms:

> I cannot help holding that in cases of doubt or difficulty over the interpretation of any of the sections of that enactment we should refer for help both to the case law of the land which existed before the passing of the Act, and also to juristic principles, which only represent the common consensus of juristic reasoning.

101 (1880) ILR 5 Cal 669.

102 (1885) ILR 7 All 385.

36 Furthermore, two years after the Evidence Act was introduced, the Legislative Council of Ceylon also introduced an Evidence Ordinance in Ceylon,[103] another British Crown colony at that time. That Act, too, was modelled after Stephen's IEA.[104] The s 2(2) in the Ceylon Evidence Ordinance[105] ("CEO") is identical to that in the Evidence Act. But interestingly, there is an additional provision in the former which is not found in the Evidence Act. Section 100 of the CEO, titled "English Law of Evidence When in Force", provides:

> Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

One may immediately question whether the absence of such a provision in the Evidence Act meant that that position was not intended to apply with respect to the Evidence Act. But this cannot be so simply because there was absolutely no reason why the Colonial Office would intend a different position, with respect to the relevance of the common law, to apply in the two colonies. The implication must be that s 100 was inserted in the CEO to make it clear beyond all doubt the relevance of the common law, though the position is the same in both Ceylon and in Singapore.

IV. Implications of Bonser's intentions and remaining issues

37 In summary, the actual draftsman of s 2(2) is Bonser and not Stephen. His intentions behind s 2(2) are clear, and the Legislative Council had no issues whatsoever with adopting those intentions. There is also no later indication that the Legislature intends to depart from those intentions.[106] Firstly, that Bonser phrased s 2(2) in the way he did

103 Ceylon Evidence Ordinance (Ordinance 14 of 1895).

104 See generally T Nadaraja, *The Legal System of Ceylon in Its Historical Setting* (E J Brill, 1972) at pp 223–234 and accompanying footnotes and L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House Investments Limited Book Publishers, 1972) at pp 12, 29 and 32.

105 Ordinance 14 of 1895.

106 If anything, the more recent amendments to the Evidence Act go some way to show that Parliament's preference is to empower the courts to deal with issues regarding evidence law (and this presumably includes its relying on common law rules where appropriate). *Eg*, in 2012, Minister for Law, K Shanmugam, acknowledged that the Act does not govern the issue of privilege between foreign lawyers and their local clients, and that "that remains to be dealt with by common law": *Singapore Parliamentary Debates Singapore, Official Report* (14 February 2012) vol 88 at p 1143 (Mr K Shanmugam, Minister for Foreign Affairs and Minister for Law). At the very least, that is some indication of Parliament's intention that for some issues where there is no relevant Evidence Act provision, the common law rules may come in to supplement.

in response to Stokes' suggestion is indubitable evidence that he intended to allow courts to rely on common law rules of evidence to supplement, *though only when faced with an issue not dealt with by a provision in the Evidence Act* (or in Stokes' words, "points omitted from the Act"). Additionally, the position in England and in India prior to the introduction of the Evidence Act lends firm support to the point that Bonser and the Legislative Council's intention was that in the appropriate circumstances, courts can also rely on common law rules of evidence to either interpret an ambiguous provision, or to fill a gap (supplement) left in the Evidence Act. Put simply, where there is an express provision in the Evidence Act that deals with an issue, the court must apply that provision, and cannot resort to the common law to override or supplement. In that instance, the common law can *only* be used to interpret that provision, if there is any ambiguity in the provision. In interpreting an ambiguous provision which was intended to be a codification or a modification of a common law rule at the time of the provision's introduction (or amendment, as the case may be), resort to that common law rule may assist in shedding light on the meaning of the provision.

38 This should thus, from henceforth, put to rest any uncertainty as to whether our courts can legitimately rely on common law rules to interpret provisions, or fill gaps in the Evidence Act.[107] *Our courts should no longer be doubted or criticised for holding that it can, albeit in limited circumstances, rely on common law rules to interpret or to supplement. On a purposive interpretation of s 2(2), they can. They have the blessing from Bonser and the Legislative Council to do so.*[108] *The debate can now move*

107 See the materials discussed at paras 14–18 above.

108 Very interestingly, it turns out that on the role that common law can play with respect to a code such as the Evidence Act, we may also have misunderstood Sir James Fitzjames Stephen's intentions as regards s 2 of the Indian Evidence Act (Act 1 of 1872): see para 27 above. He may in fact have had the same intentions as Sir John Winfield Bonser, *ie*, that the common law may in limited circumstances be used to interpret or supplement the code. The clearest evidence of his true views is to be found in his three-volume treatise, *A History of the Criminal Law of England* (Macmillian and Co, 1883). In his chapter, "The Codification of the Criminal Law", Stephen responded to various criticisms that have been levelled against the idea of codifying areas of law. Two such criticisms were in effect what has been raised in relation to s 2(2) of the Evidence Act and the Act itself – that following codification, (a) it does not seem possible that the provisions will be able to deal with every potential issue relating to the code that arises, and (b) unlike common law rules, courts can no longer develop the codified rules of evidence to respond flexibly to unforeseen or changing circumstances. Stephen's response, in essence, was that *he never intended for his codes to deal with every potential issue that arises*. When he codified laws, he was *merely changing the form* of the rules. *The discretion of the judges to act in the interests of justice, which would presumably include relying on the common law position, subsists for issues not dealt with by his codes*: see Sir James Fitzjames Stephen, *A History of the Criminal Law of England*

(*cont'd on the next page*)

towards determining as precisely as possible what these limited circumstances are.

39 One may still have a nagging concern as to whether this (limited) role that common law can play with respect to the Evidence Act only applies to common law rules that existed when the Evidence Act was introduced to the Straits Settlements in 1893. This is because s 2(2) states that the inconsistent common law rules "are repealed". On its face, the word "repealed" suggests that it only has a once-off effect of removing as law rules that existed at the time the Evidence Act came into force.[109] Yet, for the past decades, it seems to have been assumed that the repealing effect is perpetual, and that is why even in many cases where the court had to consider whether it can rely on a common law rule that came about post-1872, it would consider s 2(2). Pinsler observed:[110]

> [Section 2(2)] was intended to exclude the operation of any court ruling inconsistent with the Act at the time it came into force. *It has also been applied so as to exclude subsequent inconsistent common law authorities* … [emphasis added]

Jayasena v R[111] ("*Jayasena*") was cited as a source authority for the latter point. But in *Jayasena*, not once did the Privy Council even mention s 2(2).

40 So, can the ongoing effect of s 2(2) be justified? We have to return to the point that in drafting s 2(2), Bonser's intention was to address Stokes' comments regarding Stephen's version of s 2 in the IEA. Although Stokes also viewed the word "repealed" (in Stephen's s 2) as affecting the English rules of evidence "formerly in force", in crafting

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vol III (Macmillian and Co, 1883) ch XXXIV, at pp 347–353 <https://archive.org/details/historyofcrimina03step> (accessed 20 July 2017). We can also gain enormous insight into Stephen's thinking about codification from one of his articles, which he penned shortly after the introduction of the Indian Evidence Act (Act 1 of 1872). In the postscript, he clarified his views regarding codification in general, including the fact that even after codification, *it will always still be necessary for judges to interpret the law in the code*: see James Fitzjames Stephen, "Codification in India and England" (1872) 18 *Fortnightly Review* 644 at "Postscript".

109 See Goh Yihan, "The Case for Departing from the Exclusionary Rule against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAcLJ 182 at 196, para 26 and fn 89, where the learned author stated that "[a]dmittedly, it is somewhat artificial to speak of the 'repeal' of a future development in the context of s 2(2), which seems to apply more naturally to the 'repeal' of an *existing* common law rule … the semantic unease is acknowledged" [emphasis in original].

110 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.051.

111 [1970] AC 618.

s 2(2) of the Evidence Act, Bonser was principally trying to ensure that for the points that the Evidence Act does not deal with, judges may resort to the common law rules of evidence. That *enabling effect* would naturally have been intended to be perpetual. In short, even though on its face, s 2(2) creates a disabling effect, that is, to state when common law may no longer be applied, its corresponding and true purpose is to *from then on* enable courts to rely on common law, though only in the limited circumstances.

41 Finally, as regards s 5 of the Evidence Act, Bonser and the Legislative Council's clear intentions about the role of common law rules should naturally be accorded more weight than what the plain words of s 5 seemingly suggests. In other words, the phrase "and of no others" are to be read *subject to these intentions*. It was meant simply to *reinforce* the point that in so far as there is a provision in the Evidence Act that deals specifically with an issue, that provision is a complete and exhaustive prescription of the rule it enshrines. In other words, the court does not have the discretion to freely admit evidence not declared relevant by the Evidence Act,[112] unless that evidence is rendered admissible by a common law rule applied in the intended appropriate circumstances.

V. Proposed framework to deal with issues of construction arising from Evidence Act

42 We are now able to properly reconsider a framework that we can: (a) *more consistently apply* when dealing with issues of construction arising from the Evidence Act; and (b) we know is based on a *much more accurate understanding* of the draftsman and Parliament's intentions. This should lead to decisions that are less abstruse, less susceptible to criticisms of arbitrariness, and that can be legitimately said to be based on a proper application of the purposive approach.

43 This article proposes below the salient broad questions and points to consider when dealing with any issue where the Evidence Act applies[113] and there is a question on the role of the common law. Whatever the issue, the court will have to apply the purposive approach and is ultimately trying to discern the relevant legislative intention. If the issue involves Evidence Act provisions left substantively untouched since they were drafted by Stephen, then it may be presumed that

112 See Whitley Stokes, *The Anglo-Indian Codes* vol II (Clarendon Press, 1888) at p 854, fn 1: "'and of no others'. This impliedly imposes a duty on the Court to exclude evidence of irrelevant facts, irrespective of objections by the parties".

113 For the applicability of the Evidence Act (Cap 97, 1997 Rev Ed), see s 2(1) of the Act, and more generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 1.045–1.047.

Parliament intended to adopt Stephen's intention.[114] Where the issue relates to provisions which have been subsequently introduced or amended, whether by Bonser or a later Parliament, then it is that Parliament's intention that is most relevant. *In every case, if there is any evidence of Parliament's intention to the contrary that would lead to a different conclusion from one when the suggested points are applied, the former should supersede.* In Part VI, the article applies the points in the framework to some past cases, including the more controversial ones,[115] as a way to illustrate the points that the present author is making, and also to re-rationalise some of these cases and see if their holdings are in fact justified on principle.

114 In discerning Sir James Fitzjames Stephen's intentions as regards any provision in the Evidence Act, apart from considering the plain words of the provisions he drafted, his writings and speeches may also assist greatly. Such materials, even if Stephen had produced them post-1872, may still be very relevant if there is some certainty that Stephen had the views he espoused therein back in 1872. Three of the most important are:

(a) James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872): With an Introduction on the Principles of Judicial Evidence* (Thacker, Spink & Co, 1872);

(b) James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887); and

(c) the debates in the Legislative Council in India in 1872, including Stephen's speeches therein: Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol X (Office of Superintendent of Government Printing, Calcutta, 1872) at pp 457–477 and Imperial Legislative Council, *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws and Regulations* vol XI (Office of Superintendent of Government Printing, Calcutta, 1873) at pp 119-141.

Some other very useful resources include:

(a) Whitley Stokes, *The Anglo-Indian Codes* vol II (Clarendon Press, 1888) at p 811–936, which is available at https://archive.org/details/angloindian codes02stokuoft (accessed 20 July 2017). Stokes provided extensive commentary to Stephen's Indian Evidence Act (Act 1 of 1872) and, in particular, at pp 827–841, he set out the differences between the position in certain rules in Stephen's Indian Evidence Act and the English law at that point in time; and

(b) J D Heydon, "The Origins of the Indian Evidence Act" (2010) 9(2) *Oxford University Commonwealth Law Journal* 1; John D Heydon, "Reflections on James Fitzjames Stephen" (2010) 29(1) *University of Queensland Law Journal* 43. In the former piece, Heydon very helpfully discussed various key differences between the position in certain rules in Stephen's Indian Evidence Act and the English law at that point in time.

115 See paras 60–77 below.

A. Where there is an express provision dealing with the issue – Interpretation

44 The paramount question is whether there is an express provision in the Evidence Act that deals with the issue. As distilled from the discussion in Parts II to IV, Parliament's clear intention is that if there is one or more such provisions, then the rule *must* be discerned from the provision, and the court *must* apply that rule to resolve the issue.[116] The starting point is the applicable provision, which is a complete and exhaustive enshrining of the relevant rule, and hence the only thing one can do is to *interpret* the provision. As a result, the common law can play one and only one role, which is to help in the *interpretation* of the provision – to illuminate or clarify what Parliament's intention with respect to the provision was, in particular, where the provision contains ambiguous words or phrases. This role is most likely to arise when it is known that in drafting a particular provision, Parliament was codifying, or codifying with modifications, a particular common law rule. As pointed out by Lord Herschell in *Vagliano*,[117] resort to the common law in such a situation is "perfectly legitimate". Another situation, which is likely less common and will mostly arise with respect to the newer provisions in the Evidence Act, is when Parliament desired to leave a part of the provision vague, and intended for a court to rely on the common law to help clarify its meaning. The fundamental point is that when common law is used to clarify the intended meaning of the provision, *it is ultimately still the rule in the provision that the court applies*.[118]

45 But what common law rules of evidence cannot be used to do is to vary (for example, to expand or limit) or worse, override the rule that Parliament intended to be enshrined in a particular provision.[119] Any common law rule that was not intended to be codified by a provision in the Evidence Act is simply irrelevant. For instance, if in drafting a particular provision, Stephen had modified a common law rule existing

116 See paras 10–41 above.

117 See para 33 above.

118 The Court of Three Judges in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117] cited the Malaysian Privy Council case of *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 for the point that "where any part of evidence was expressly dealt with by a statutory code, the courts must give effect to the provisions of that code regardless of whether or not they differed from the common law".

119 This is what the UK Privy Council meant when it stated in *Mahomed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575 at 581 that:

> The rule and principle of the Colony must be accepted as it is found in its own Evidence Ordinance, and … the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect …

in 1872,[120] it follows that the original rule cannot be applied because Parliament's intention is to enshrine the modified rule. What was intended will differ from case to case. In this regard, the word "inconsistent" in s 2(2) simply means that which is not intended to be relevant by Parliament.

46 There is one "exception". The default position is that common law can only be used to discern the draftsmen or Parliament's intention with respect to a provision at the time of the introduction (or as the case may be, amendment) of the provision.[121] But it has been accepted, both elsewhere and in Singapore, the principle that a statute is "always speaking", in that the meaning of a provision is ambulatory.[122] This principle was approved by our Court of Appeal in *AAG v Estate of AAH*,[123] though there are important conditions for when it can apply.[124] In this respect, the common law rules of evidence may in *limited* circumstances be used to "update" certain provisions in the Evidence Act, in light of unforeseen developments or advancements that arise after the introduction of a provision. After all, there is indication that Stephen himself was a pragmatic man who eschewed technicalities.[125] He would likely have supported courts adopting, within reasonable boundaries, such an approach. The need to apply an ambulatory

120 For an excellent list of examples, see Whitley Stokes, *The Anglo-Indian Codes* vol II (Clarendon Press, 1888) at pp 827–841 and J D Heydon, "The Origins of the Indian Evidence Act" (2010) 9(2) *Oxford University Commonwealth Law Journal* 1 at 31–75.

121 See generally "Section 288 – Presumption That Updating Construction to Be Given" in *Bennion on Statutory Interpretation* (Oliver Jones ed) (LexisNexis, 6th Ed, 2013) at pp 797–815.

122 See generally *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687; see also Ruth Sullivan, *Statutory Interpretation* (Irwin Law, 3rd Ed, 2016) ch 7. For an in-depth discussion of this approach, also known as the "dynamic approach" to statutory interpretation, see generally William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994), Suzanne Corcoran, "Theories of Statutory Interpretation" and "The Architecture of Interpretation: Dynamic Practice and Constitutional Principles" in Suzanne Corcoran & Stephen Bottomley, *Interpreting Statutes* (The Federation Press, 2005) at pp 8–51 and Mark L Humphèry-Jenner, "Should Common Law Doctrines Dynamically Guide the Interpretation of Statutes?" (2009) 3(2) *Legisprudence* 171.

123 [2010] 1 SLR 769 at [30]–[33].

124 See the materials cited in para 46, n 126 below.

125 See James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) at pp xviii–xix, where Stephen confessed to having "updated" his position on whether it is an improvement only if a code was definitely altered from time to time by the Legislature, after learning of the unwillingness of the Legislature to do so, and in the circumstances, indirect legislation, by judges and academics, "is very much better than none at all". For further examples on how Stephen viewed technicalities, see Sir Stephen James Fitzjames, *A History of the Criminal Law of England* vol III (Macmillian and Co, 1883) ch XXXIV at pp 347-348.

approach to provisions in the Evidence Act is greater than most other statutes given how old most of the Evidence Act provisions are. But even when one applies the ambulatory approach, it is not as if one is using the common law rule to vary or override the rule in the provision. One is *still interpreting* the words in a provision, and still giving effect to Parliament's intention, that is, to interpret the provision in light of new developments. The general conditions, limitations and examples of the ambulatory approach have been extensively canvassed elsewhere.[126]

47 In both cases above, the court is attempting to interpret a provision in the Evidence Act. The Evidence Act is a code, which is but a specific type of statute. Therefore, the usual principles of statutory interpretation and purposive approach will still apply.[127] For example, it is crucial to ensure that the provision is not interpreted, "in the name of a purposive approach, in a manner that goes against all possible and reasonable interpretation of the express literal wording of the provision".[128]

B. Where there is no express provision dealing with the issue – Supplementing

48 If the answer to the paramount question is that there is no express or specific provision dealing with the issue, then the next immediate question to ask is whether Parliament intended to leave the gap unfilled.[129] For example, is there indication that Parliament intended that the evidence in question simply cannot be admitted, or that an evidentiary rule or procedure is not to apply to a particular situation? If so, the corollary intention is that there is in fact no gap and the court cannot rely on a common law rule to supplement or fill that gap.[130]

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126 See generally "Section 288 – Presumption That Updating Construction to Be Given" in *Bennion on Statutory Interpretation* (Oliver Jones ed) (LexisNexis, 6th Ed, 2013) at pp 797–815, *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 and D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th Ed, 2006) at paras 4.9–4.12.

127 See generally *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [39]–[57]; see also Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" (2009) 21 SAcLJ 97.

128 *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [52] and [57]; *AAG v Estate of AAH* [2010] 1 SLR 769 at [7].

129 On filling gaps in the context of contractual construction, see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [29]–[30] and [93]–[101]; see also Goh Yihan, Where Judicial and Legislative Powers Conflict – Dealing with Legislative Gaps (and Non-gaps) in Singapore" (2016) 28 SAcLJ 472 at 497–500, paras 61–68.

130 See, *eg*, s 62A of the Evidence Act (Cap 97, 1997 Rev Ed). The wording of the provision ("other than proceedings in a criminal matter") makes clear that the

(*cont'd on the next page*)

49 If there is no evidence that Parliament intends to bar the court from filling the gap, then as mentioned above,[131] the presumption is that Parliament intends to leave it to the court's discretion to rely on a common law rule, or a modified version of a common law rule, to supplement and deal with the issue at hand.[132] If it helps, one may think of it as there being in the Evidence Act an unwritten analogue of s 6 of the Criminal Procedure Code[133] ("CPC"), which provides:

> As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted.

Given that there is clear blessing from Bonser and the Legislative Council[134] to so supplement, *in circumstances where it is clear that there is no express provision dealing with an issue*, and in particular, with respect to common law rules devised later to deal with new developments, the court should not feel so restraint in doing so. The threshold on when a court can supplement should not be that strict. In the author's view, the only overarching restriction is that *the supplementing with a common law rule should not have the effect of rendering some other provision(s) in the Evidence Act substantively otiose, inapplicable, or undermined*. If there is such an effect, that rule would be "inconsistent" with the provisions of the Evidence Act. Especially because the Evidence Act is a code, Parliament's clear intention is that the Evidence Act provisions are sacrosanct and should not be construed, in effect, out of existence. Hence, *broadly speaking, a common law rule can be used to fill a gap if that rule can stand together with the other provisions in the Evidence Act, that is, if there can be harmonisation and reconciliation between the two*.[135]

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court cannot rely on the common law to supplement and hold that in criminal cases witnesses outside Singapore may give evidence through video link.

131 See paras 37–38 above.

132 Our courts have at times alluded to this point: see *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [32], *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR(R) 509 at [39] and *Sembcorp Marine v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [38]: "the law of evidence in Singapore is governed primarily by the [Evidence Act], and secondarily by the common law".

133 Cap 68, 2012 Rev Ed.

134 And for that matter, it is probably from Sir James Fitzjames Stephen as well: see para 38, n 108 above.

135 This is adapted from the test of implied repeal by a later statute see D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th Ed, 2006) at paras 7.10–7.12 and "Section 87 – Implied Repeal" in *Bennion on Statutory Interpretation* (Oliver Jones ed) (LexisNexis, 6th Ed, 2013) at pp 279-281.

50 One likely immediate concern may be to what extent a common law rule may be used to fill a gap, specifically as *an exception* to a rule of evidence that is either expressly provided for (such as legal advice privilege)[136] or implicit (exclusionary rules such as rule against hearsay, SFE)[137] in the Evidence Act. After all, all exceptions are by definition in conflict with a general rule. Flowing from the point above that the threshold for supplementing should not be that strict, common law rules may come in to supplement as an exception to a general rule, if there is no express provision in the Evidence Act dealing with the specific issue that the common law exception covers. This is of course, again, provided the scope of the exception is not such that it would render the general rule, or any other provisions, nugatory in substance.

51 Finally, it is crucial to keep in mind that the above considerations go mainly towards the threshold question of whether a court *can* rely on a common law rule of evidence to supplement. There is still the equally important question of whether a court *should* in fact so rely. In answering the second question, the key consideration would be whether the common law rule is appropriate in Singapore circumstances.[138] Another salutary reminder is to keep an eye on other relevant provisions in the Evidence Act as they may provide guidance on which common law rule, or the scope of the rule to be used to supplement.[139] The court should be very slow to use a common law rule to supplement if it will lead to an irrational or arbitrary state of affairs when other provisions in the Evidence Act are taken into account.

C. Special category – Unwritten exclusionary rules of evidence

52 There is a unique category of rules we also have to consider, and that is the *unwritten* exclusionary rules of evidence. The main ones are the rule against hearsay and the rule against SFE. Those two rules, although cannot be found enshrined in any express provisions in the Evidence Act, do operate in the background. This is because, without them, it is not possible to determine when a piece of evidence that is relevant under one of the general relevancy provisions in the Evidence Act also needs to be found relevant under one of the specific relevancy

136 This is enshrined in ss 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed).

137 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 3.001 and 4.005–4.008.

138 See, *eg*, *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [30]–[31] and especially *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [58].

139 On this point on coherence and a "partnership" between statute law and common law, see Elsie Bant, "Statute and Common Law: Interaction and Influence in light of the Principle of Coherence" (2015) 38(1) UNSW Law Journal 367 and P S Atiyah, "Common law and Statute law" (1985) 48(1) *Modern Law Review* 1.

provisions, which are in essence representations of the exceptions to the exclusionary rules for that evidence to ultimately be admissible.[140]

53 Stephen did not set out these rules explicitly anywhere in his IEA, although for some reason he did do so in his *Digest* in Arts 10 and 14.[141] Bonser, despite having considered the *Digest*, curiously did not go on to insert those rules anywhere in the Evidence Act when it was introduced in Singapore. It is not known why he did not do so. It may be that both he and Stephen thought that those rules are so straightforward and well-known that it would not really make any difference whether to expressly provide for them in the two Acts.

54 The core form of the two rules are indeed very straightforward,[142] such that the present author doubts there will arise many situations where the court will need to *interpret* those rules. What is a lot more likely to occur is whether a court may supplement the Evidence Act by adopting into local law a common law-developed *exception* to the exclusionary rules, where there is no express provision addressing the situation the common law exception deals with. Examples of this may be the exception to the rule against hearsay as articulated by Mason J in *Walton v R*,[143] regarding an out-of-court assertion but which the appearance of reliability is extremely high, as well as the exception to the rule against SFE when the SFE is tendered not to support reasoning by propensity but merely to set the background of certain facts in issues.[144] If it is justified to supplement with a common

140 See especially Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 2.001 and 2.017–2.025; "[t]he exclusionary rules still operate, so to speak, behind the scenes because if the item of evidence does not come within any of the exceptions to them, it is not admissible": para 2.017.

141 Article 10 of James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887), titled, "Similar but Unconnected Facts" reads:

> A fact which renders the existence or non-existence of any fact in issue probably by reason of its general resemblance thereto and not by reason of its being connected therewith in any of the ways specified in articles 3–10 both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter.

Article 14, titled, "Hearsay and the Contents of Documents Irrelevant" reads:

> a) The fact that a statement was made by a person not called as a witness, and b) the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds, are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (a)) in the cases contained in the first section of this chapter, and except (as regards (b)) in the cases contained in the second section of this chapter.

142 James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) Arts 10 and 14.

143 (1989) 84 ALR 59 at 61–68.

144 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 3.048–3.049.

law exception to a rule expressly found in the Evidence Act,[145] it is illogical that the same cannot be done in respect of an *unwritten* rule operating in the background of the Evidence Act. This is as long as the abovementioned boundaries are adhered to. So, the court cannot, for example, supplement by relying on the South African rule that the court has the discretion to admit or exclude hearsay evidence,[146] because that will basically render completely otiose all provisions in the Evidence Act intended to effect exceptions to the exclusionary rule.[147]

D. Postscript on proposed framework

55 The present author hastens to add that the proposed framework does not purport to solve all problems arising from statutory construction of the Evidence Act. There will *invariably* still be grey areas in applying the framework, and the author foresees that the greatest criticism[148] will relate to the difficulty in answering the paramount question of whether for the particular issue at hand, there is an express provision in the Evidence Act dealing with the issue. There will be times when that question is very difficult to answer, in the main because what a provision deals with can be characterised at varying levels of generality and abstraction.[149] For example, if a provision in the Evidence Act and a common law rule deals with the same broad issue such as the admissibility of a dying declaration, so long as the two rules are even slightly different, one can say that there is no express provision in the Evidence Act dealing with that broad issue *in the specific context of the aspect that is different*, and therefore it is permissible to rely on the common law rule to supplement. There is the risk that one will be tempted to *always* say that there is no express provision dealing with an issue, because in most situations it will be easier to justify the use of a common law rule to supplement than to interpret an Evidence Act provision.

145 See para 50 above.

146 *Singapore Parliamentary Debates Singapore, Official Report* (14 February 2012) vol 88 at p 1139 (Mr K Shanmugam, Minister for Foreign Affairs and Minister for Law).

147 See, *eg*, ss 16–34.

148 Another reason why there will invariably still be difficulties is that the task in any case will involve statutory construction, and this means that one may also encounter general difficulties relating to statutory construction that are not exclusive to the Evidence Act (Cap 97, 1997 Rev Ed): see, *eg*, the recent split decision of *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373; see also generally Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" (2009) 21 SAcLJ 97 and "A Comparative Account of Statutory Interpretation in Singapore" (2008) 29(3) *Statute Law Review* 195.

149 See generally *Public Prosecutor v Lam Heng Hung* [2018] SGCA 7 at [68] and [169].

56 Having mulled over this at length, the present author has concluded that it is really not possible, nor is it even fruitful, to lay down any hard-and-fast rule on how to decide whether there is a relevant express provision or not. Each case will depend on its own facts and context. In so far as there is evidence of whether Parliament intended for a provision to lay down *the general rule* dealing with an issue, and hence that would be an express provision dealing with that issue, that would be a helpful guide. It may also be useful to ask whether the common law rule is merely an *extension* or *limitation* of a rule also enshrined in an Evidence Act provision. Another possible way is to searchingly ask whether finding that there is no express provision is really just to circumvent a particular express provision in the Evidence Act. If the response to either question is yes, chances are that provision is an express provision dealing with the issue and the common law may at most be used to interpret the provision. If the common law rule is a different *species* of rule from that found in a provision, then it is probable that there is no express provision in the Evidence Act dealing with the issue.

57 But the present author is of the firm view that, overall, there will be significant improvement in the area of statutory construction *vis à vis* the Evidence Act, because firstly, whatever approach we adopt from now on in relation to relying on common law rules will at the very least be based on a proper understanding of the true intentions of the draftsmen of the evidence codes; and secondly, we are now much better equipped to apply a more consistent and rational approach towards relying on common law rules when the Evidence Act applies, and remedy the quagmire that has beset us for decades.

58 It is worth stressing again that, in every case, the application of the broad points suggested above *is subject to any evidence of Parliament's intention to the contrary*. The suggested points are likely to be relevant predominantly for the provisions which were, in substance, left untouched since Stephen drafted them. For the provisions introduced or that have been amended more recently, we are likely to find in the relevant materials clearer and more specific evidence of Parliament's intention as regards the role of common law, regarding the interpretation or supplementing of the provisions. One example where there is evidence of intention that justified deviation from the proposed points is the case of *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd*.[150] There, the High Court had to consider whether it could rely on common law authorities to supplement the list of facts that a court can take judicial notice of. There is an express provision stating such facts, and that is s 59 of the Evidence Act. Thus, the default position is

150 [2009] 2 SLR(R) 587.

that what is stated in that provision is exhaustive of what facts a court can take judicial notice of. But V K Rajah JA (as he then was) rightly noted that Stephen has indicated that the list was not intended to be complete,[151] and so that is sufficient indication that he intended a court to have some liberty to rely on common law authorities to fill any gaps.

VI. Examples of application of suggested approach

A. Interpreting provisions with assistance of common law

59 Below are some examples to illustrate the role of common law in cases where there is an express provision in the Evidence Act dealing with the issue.

(1) Common law assists in determining meaning of words in provision

60 In *Sembcorp*, the Court of Appeal relied on pre-1872 common law authorities to clarify the scope of ss 94–96 of the Evidence Act, as regards the main type of extrinsic evidence Stephen had intended to preclude in the interpretation of a written document.[152]

61 In *Skandinaviska*, when dealing with a point as to whether to give rise to legal advice privilege under s 128 of the Evidence Act, the communication between the client and his legal adviser must have an element of confidentiality, the Court of Appeal referred to *O'Shea v Wood*,[153] which itself relied on the earlier case of *Gardner v Irvin*,[154] which held that there is such a requirement of confidentiality. That position is a clarification of that in *Greenough v Gaskell*,[155] a rule on which Stephen has based s 126 of the IEA (equivalent of s 128 of the Evidence Act).[156]

151 *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587 at [19]–[23].

152 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [52]–[65].

153 [1891] 1 P 286.

154 (1878) 4 Ex D 49.

155 (1833) 1 M & K 98 (where the court referred to the test as whether the information is "private"); see also *The Law of Privilege* (Bankim Thanki ed) (Oxford University Press, 2nd Ed, 2011) at para 2.85.

156 See James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) at p 184, note XLIII; see also *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [30].

62 In *Micheal Anak Garing v Public Prosecutor*,[157] the Court of Appeal relied on the High Court of Australia case of *O'Leary v R*[158] ("*O'Leary*"), to interpret when a fact is "so connected with a fact in issue as to form part of the same transaction" under s 6 of the Evidence Act, such that past similar attacks in the same night may be admitted as being part of the same transaction.[159] There may be concerns as to the court admitting SFE through a general relevancy instead of a specific relevancy provision.[160] However, Stephen made clear in Art 10 of his *Digest* that there is a distinction between past similar incidents that form *part of the same transaction* as the offence in question and thus could be admitted through s 6, and *those that do not*,[161] and which have to be admitted through some other means.[162] The question then is, when is a past similar incident "part of the same transaction"? Dixon J in *O'Leary* held that this would be when, without regard to the past incidents, the offence in question "could not be truly understood" and would be "an unreal and not very intelligible event".[163] He added that this test was based on cases such as *R v Cobden*[164] ("*Cobden*") and *R v Rearden*,[165] both of which were decided in the 1860s and which represented the state of law then on what amounts to "part of the same transaction", which Stephen codified in s 6. In *Cobden*, for instance, the offenders were charged for breaking into a booking-office at a railway station. The court admitted evidence of the offenders, on the same night, breaking into three other booking-offices belonging to three other stations in the same railway. This was because the earlier incidents helped to explain something relating to the offence the offenders were charged for, so that the court could understand what went on. In such a situation, the past incidents and the incident for which the offenders were charged for "are so intermixed that it is impossible to separate them".[166] To be clear though, if past similar incidents are admitted through this means, then the court may *only* rely on it to explain or understand something about the offence in question, and not for some other purpose.[167]

157 [2017] 1 SLR 748.
158 (1946) 73 CLR 566.
159 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [6]–[12].
160 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 2.001, 2.015 and 2.017–2.019.
161 See n 141 above. Article 3 of James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) corresponds to s 6 of the Evidence Act (Cap 97, 1997 Rev Ed).
162 *Eg*, ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed). For exceptions to similar fact evidence, see especially paras 75 and 77 below.
163 *O'Leary v R* (1946) 73 CLR 566 at 577–578; see also *R v M* [2000] 1 WLR 421 at 426–427.
164 (1862) 176 ER 381.
165 (1864) 176 ER 473.
166 *R v Cobden* (1862) 176 ER 381.
167 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [8].

(2) Common law to "update" provision

63 In *Skandinaviska*, the Court of Appeal considered the issue of whether legal advice privilege may be claimed over communication between a client and a third party for the purpose of obtaining legal advice between the client and his legal adviser, *but which the third party does not qualify as a conduit for the client and instead played a role in creating information for the communication*.[168] This is an example of a situation where it is difficult to decide whether there is an express provision in the Evidence Act dealing with *such an issue*.[169] Sections 128 and 131 immediately come to mind as such possible provisions. But on balance, given how broadly those sections are drafted and, in particular, Stephen's intention that s 128 "sums up the rule as to professional communications",[170] the present author thinks that Stephen intended those provisions, together, to encapsulate the general rule to deal with an issue relating to when legal advice privilege arises over communication between a client and his legal adviser for the purposes of seeking legal advice. It is sufficiently clear that at the time Stephen drafted the two sections, he intended to codify the English common law rule existing at that time, which is that the communication must either be directly by the client, or if there is a third party involved, he was merely a conduit for the client.[171] But as pointed out by the Court of Appeal, what was not foreseen by Stephen was that because of the increasing complexity of commercial dealings, the nature and scope of legal advice have changed, and the reality of commercial practice is such that clients will often need input from a third party when seeking legal advice from its legal adviser.[172] The Court of Appeal noted that in the case of *Pratt Holdings Pty Ltd v Commissioner of Taxation*[173] ("*Pratt Holdings*"), the Australian Federal Court held that legal advice privilege can cover communication by a third party not merely acting as a conduit *vis-à-vis* the client and his legal adviser, provided certain conditions are fulfilled. But the Court of Appeal ultimately did not have to decide on this issue and left the question open as to whether to adopt the rule.[174] When a case next arises where our courts need to resolve the issue definitively, the first question it needs to confront is whether in the

168 See generally *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [51]–[65].

169 See paras 55–56 above.

170 See James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) at note XLIII.

171 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [52].

172 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [47].

173 [2004] FCAFC 122.

174 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [63]–[65].

first place it *can* rely on the rule in *Pratt Holdings*, specifically, whether we can read that rule into the phrase "communication … by or on behalf of his client" in s 128, and "between him and his legal professional adviser" in s 131. As mentioned, the intention at the time Stephen drafted those provisions was not to cover the situation of a third party not acting merely as a conduit. But this is an appropriate situation to treat the provision as "always speaking", and rely on the common law rule in *Pratt Holdings* to update the provisions to deal with developments unforeseen by Stephen.[175] Because of the rising complexities of commercial dealings, there are *new forms and manners of communication* between a client and his legal adviser, which include input from a third party. Therefore, in future, a court *can* rely on the rule in *Pratt Holdings* to hold that that rule is intended to be captured in ss 128 and 131 of the Evidence Act.

(3) Common law irrelevant in determining meaning of words in provision

64 The test for admissibility of an accused's statement is found in s 258 of the CPC. That provision was ported over from the now-repealed s 24 of the Evidence Act, and among other things, states that the inducement, threat or promise ("ITP") must have "proceed[ed] from a person in authority". When Stephen drafted s 24, the common law position on the test of admissibility was notably stricter. The ITP can either be held out, or sanctioned by a person in authority.[176] But Stephen specifically made it less strict, by requiring that the test is made out only if the ITP proceeded from a person in authority. It is not enough if it was merely sanctioned by a person. For instance, if the ITP originated from an interpreter, and the investigating officer by his silence signals his sanction or approval, under Stephen's s 24 that would not have fulfilled the test, and the statement would remain admissible. So, the stricter common law rule cannot be used to interpret the phrase in s 24, because it was expressly rejected by Stephen. In the 2010 case of *Public*

175 See para 46 above.

176 See J D Heydon, "The Origins of the Indian Evidence Act" (2010) 9(2) *Oxford University Commonwealth Law Journal* 1 at 48:

> Section 24 differed from the [English law in 1872] in two ways. First, the word 'sanctioned' refers to the inadmissibility of a confession even if no inducement was offered by a person in authority: it sufficed if the inducement were held out in the presence of a person in authority who by silence sanctioned its being made. Section 24 widened admissibility by requiring the inducement to '[proceed] from a person in authority'.

See, for a similar view, Whitley Stokes, *The Anglo-Indian Codes* vol II (Clarendon Press, 1888) at p 827.

Prosecutor v Lim Boon Hiong[177] ("*Lim Boon Hiong*"), the High Court had to interpret that phrase in s 24, and it held that:[178]

> An interpreter … could in principle be regarded as a person in constructive authority if his inducement or promise to the accused was made in the presence of a person in actual authority provided the accused subjectively believed, on reasonable grounds, that the person in actual authority heard the inducement or promise made by the interpreter *and took no step to dissociate himself from it* … [emphasis added]

Inasmuch as what the High Court meant in framing that rule overlapped with the very common law rule that Stephen rejected, that holding needs to be reconsidered, because as mentioned, it was Parliament's specific intention to modify that common law rule, and thus that rule as it originally existed simply cannot be used to interpret the phrase in s 24. Section 24 has since been ported over to s 258 of the CPC, after *Lim Boon Hiong* was decided, and Parliament had not said anything regarding this issue. That should not be taken as Parliament's implicit approval of the position in *Lim Boon Hiong*, given that there is no indication that it had directed its mind to this issue in porting the provision over. If Parliament intends to revert to the original common law position, it will need to amend the relevant portion in s 258.[179]

B. Supplementing Evidence Act provisions with common law rules

65 Following this paragraph are some examples of relatively straightforward cases involving the courts rightly holding that it *could* rely on a common law rule to supplement a gap in the Evidence Act.[180] There was no express provision in the Evidence Act dealing with the specific issues that the courts were considering, and relying on the respective common law rules did not have the effect of rendering any other provision otiose or substantively inapplicable, *etc*.

66 *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd*[181] ("*China Insurance*") and *Sandar Aung v Parkway Hospitals*

177 [2010] 4 SLR 696.

178 *Public Prosecutor v Lim Boon Hiong* [2010] 4 SLR 696 at [41]–[47].

179 But in the interim, what the courts can do is to admit a statement tainted by an inducement, threat or promise that did not proceed from a person in authority but that person by his silence sanctioned it, but giving it little to no weight, if it is apparent that its reliability is severely doubted.

180 See paras 66–70 below.

181 [2005] 2 SLR(R) 509 at [29]–[63].

Singapore Pte Ltd[182] supplemented the Evidence Act with the common law rule that extrinsic evidence is admissible to aid the court in *establishing* the factual matrix and *assisting in construing* the contract concerned. On a side note, the court in *China Insurance* was absolutely right in holding that it cannot rely on the common law exception to the parol evidence rule that extrinsic evidence may be admitted to *vary* or *override* terms in a contract[183] because that is in direct conflict with certain portions of s 94 of the Evidence Act, and applying the common law rule would render those portions essentially otiose.

67 *Public Prosecutor v Liew Kim Choo*[184] supplemented the Evidence Act with the common law rule in *R v Turner*[185] on whether an offender's plea of guilt may be admitted as evidence *against an accomplice* to the crime. That English case was decided in 1832, but Stephen did not include any provision in the IEA dealing with this specific issue.

68 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd*[186] supplemented s 23 of the Evidence Act with the common law rule in *Rush & Tompkins Ltd v Greater London Council*[187] regarding the admissibility of "without prejudice" correspondence in a civil proceeding *involving third parties*.

69 *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik*[188] supplemented the Evidence Act with the common law rule in *R v Baskerville*[189] (though not in its strict sense) regarding what can amount to corroborative evidence, as the Court of Appeal noted that there is no provision in the Evidence Act dealing with this issue.

70 *ARX*[190] supplemented ss 128 and 131 of the Evidence Act with the common law rule in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*[191] as to when legal advice privilege arises between a client (an entity) *and its in-house counsel*.

182 [2007] 2 SLR(R) 891 at [28]–[37]. The position in these this case and *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR(R) 509 have been affirmed by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction* [2008] 3 SLR(R) 1029 at [105]-[109].

183 *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR(R) 509 at [42]–[44].

184 [1997] 2 SLR(R) 716 at [65]–[76].

185 (1832) 1 Mood 347.

186 [2006] 4 SLR(R) 807 at [22]–[28].

187 [1989] AC 1280.

188 [2008] 1 SLR(R) 601 at [42]–[43].

189 [1916] 2 KB 658.

190 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [21]–[42].

191 [1972] 2 QB 102.

71 An example of a specific issue which has yet to arise in Singapore but which can be readily resolved by applying the proposed framework is whether legal advice privilege in the Evidence Act is subject to the right of an offender to rely on evidence to support his defence.[192] The common law position in Canada, for instance, is that there exists such an exception to the privilege.[193] Section 128(2) provides for two "exceptions" to the privilege, but there is no mention of this particular exception. This is not surprising as the common law only considered this exception about a century after Stephen drafted the IEA,[194] and it can be presumed that Stephen had not even considered it. Relying on this limited exception would not render any other provision substantively otiose. The court can therefore apply such an exception, should it find it appropriate to do so, to fill the gap.[195]

72 There are some cases where the courts' reasoning have been considered controversial, but the respective holdings can in fact be re-explained and appropriately justified by applying the proposed framework and points regarding relying on common law rules to supplement.

73 In *Public Prosecutor v Knight Glenn Jeyasingam*[196] ("*Knight Glenn*"), the High Court had to resolve the issue of whether confidential representations made by an Accused to the Prosecution, as part of the plea negotiations process, are admissible as evidence at a criminal trial. The court noted that the common law position in Canada and the US is that such representations are privileged and inadmissible. It further noted that there is a similar rule as regards the inadmissibility of "without prejudice" admissions in civil context as provided in s 23 of the Evidence Act. The court stated that it was mindful of s 2(2), but went on to hold that, applying a purposive approach and also treating the Evidence Act as a facilitative statute, the rule in s 23 extended to cover confidential representations in the criminal context. This reasoning is with respect not tenable at all because the express words of s 23 make clear that its rule only applies in the context of civil cases. As the High Court itself noted, it was clear that plea negotiations process in criminal matters was "expressly outside the scope of Stephen's consideration".[197] This is so because such plea negotiations were unheard of when Stephen

192 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 14.075–14.082.
193 See, *eg*, *R v McClure* [2001] SCR 445.
194 In *R v Barton* [1973] 1 WLR 115.
195 See paras 49–50 above.
196 [1999] 1 SLR(R) 1165 at [53]–[61].
197 *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 at [60].

drafted the Evidence Act.[198] So, it would not have been possible to interpret s 23 by saying that Stephen intended it to also cover criminal cases.[199] The "updating" exception also cannot apply because there is no way to read the words of s 23 as extended to cover criminal cases. The approach in *Knight Glenn* ignored precisely the caution in *Public Prosecutor v Low Kok Heng*[200] that courts should guard against interpreting a provision, in the name of purposive approach, against all possible readings of the provision's plain words.[201] That said, while its reasoning was very much questionable, the court's holding in *Knight Glenn* is correct.[202] There is no express provision in the Evidence Act dealing with the admissibility of representations in a criminal trial, which is wholly natural because as stated, such a thing did not exist when Stephen drafted the IEA. So, the court can rely on the common law position in Canada to *supplement* and fill the gap. The result also would not render any other provisions substantively otiose or inapplicable. That is a far more principled line of reasoning.

74 In *Skandinaviska*, the Court of Appeal correctly held that, in Singapore, the rule governing litigation privilege exists by virtue of the common law, but added that s 131 of the Evidence Act also clearly envisages the concept of litigation privilege.[203] It is uncertain whether the court's later point is justifiable, or even necessary. It is doubtful if Stephen had intended for s 131 to cover not only legal advice privilege (from the client's perspective) but also litigation privilege. As explained by the court, Stephen clearly intended for ss 128 and 131 to complement each other and give full effect to legal advice privilege.[204] But as alluded to by the court, only the words of s 131, but not s 128, can be read to cover litigation privilege. It is very hard to imagine that if Stephen had truly intended for the Evidence Act to cover litigation privilege, he would draft it such that only *half* of that privilege (from the client's

198 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [122]: "[t]he reason why that was not the purpose of s 23 is that when this provision was enacted, plea bargaining was unknown".

199 See the criticisms of the Court of Three Judges in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [118]–[123] on the reasoning taken in *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165.

200 [2007] 4 SLR(R) 183.

201 See para 47 above.

202 Note crucially that the court in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 did *not* actually disagree with the *ultimate* holding in *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 on relying on the common law rule as regards admissibility of without prejudice negotiations at a criminal trial.

203 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [1], [34] and [67].

204 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [33].

perspective) is codified. Further, as mentioned by the court, litigation privilege applies to every communication, whether confidential or not.[205] But under s 131, it is a strict requirement that the communication be confidential.[206] The better approach is simply that there is no express provision in the Evidence Act dealing with the issue of litigation privilege. And, that is so because the concept of litigation privilege, which is a different *species* of professional communications privilege, had not really come into existence when Stephen drafted the IEA.[207] In Singapore, therefore, the rule regarding litigation privilege can be supplemented by the common law (only), and its existence does not render any provisions in the Evidence Act substantively otiose or inapplicable.

75 In *Lee Kwang Peng*,[208] the High Court had to decide whether it could apply an exception to the rule against SFE pertaining to proving the *actus reus* of a crime. That rule was formulated at common law in the case of *Director of Public Prosecutions v Boardman*[209] ("*Boardman*"). The High Court's approach was to say that the exception could be read into s 11(*b*) of the Evidence Act. And, it did so despite acknowledging that doing so would "therefore be contrary to the draftsman's intention to construe s 11(*b*) as admitting facts that Stephen never considered appropriate for admission".[210] The court then very controversially held that "this interpretation of s 11(*b*) would also pave the way for future treatment of the Evidence Act as a facilitative statute as opposed to a mere codification of Stephen's statement of the law of evidence".[211] The idea to treat the Evidence Act as a facilitative statute was disapproved by the Court of Three Judges in *Phyllis Tan*.[212] But again, while the High Court's reasoning gives rise to significant concerns, the holding that it *could* apply the common law exception to admit SFE to prove *actus reus*, where the probative value of the evidence outweighs its prejudicial

205 *Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [44].

206 For other indicators that Sir James Fitzjames Stephen unlikely intended for s 131 to cover the rule of litigation privilege: see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 14.112.

207 See especially Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 14.112 and accompanying fn 317; see also *The Law of Privilege* (Bankim Thanki ed) (Oxford University Press, 2nd Ed, 2011) at paras 3.03–3.04.

208 [1997] 2 SLR(R) 569 at [34]–[55].

209 [1975] AC 421.

210 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [45]; see also Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 3.027–3.045.

211 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46].

212 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [119]-[123].

effect, is in fact correct. Applying the proposed framework, it can be said that there is no express provision in the Evidence Act covering the *Boardman* exception to the rule against SFE (with respect to proving *actus reus*). When Stephen drafted the IEA, he had narrowly codified the only two exceptions then existing in ss 14 and 15, and both relate to the admitting of SFE to prove the *mens rea* of a crime. The exception relating to proving *actus reus* only arose much later in the common law.[213] Given that there is no express provision dealing with this new exception, our courts can rely on the common law rule to supplement.[214] The rule against SFE prohibits a court from inferring from a person's past behaviour that he has a propensity or tendency to behave similarly again, but the exception is to admit evidence that is independently and of itself relevant to the criminal liability of an offender, but which incidentally reveals that he has in the past exhibited similar behaviour.[215] The requirements of this exception are strict, and its scope is not such that the unwritten rule against SFE itself will be rendered in effect non-existent.

76 Perhaps the most controversial issue is that of the existence of the court's general discretion to exclude evidence which the prejudicial effect of its use at trial outweighs its probative value.[216] It has not been absolutely clear from the local authorities as to the existence of the discretion. There is clearly no provision in the Evidence Act enshrining such a discretion, and unsurprisingly so considering that this discretion, at least as it is specifically framed, was only crystallised several decades after Stephen drafted the IEA.[217] The co-existence of this discretion with the Evidence Act does lead to discomfort because Stephen expressly intended the provisions in his Evidence Act to state the evidence which may be admitted.[218] So, it seems out of place for such a discretion, which gives the court the power to exclude a piece of evidence otherwise declared relevant by a provision in the Evidence Act, to co-exist with the

213 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 3.006–3.013.

214 See paras 49–50 above.

215 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [35]–[36].

216 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ch 10.

217 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 10.027:

> The probative value/prejudicial effect balancing test did not arise from a developed legal principle but as a consequence of a longstanding practice of the courts to prevent injustice resulting from admissible evidence to which the jury might accord a degree of weight out of all proportion to its actual probative value … *R v Christie* [1914] AC 545 [is] the authority on the origin of this practice …

218 This is otherwise known as the "inclusionary approach". See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 2.017.

Evidence Act. That said, the origins of the discretion appears to be a long-held practice by the courts.[219] And, Stephen had indicated that in codifying an area of law, he had not intended to deprive the courts of whatever discretion they had, save where such a discretion is expressly stated to be removed.[220] It is therefore probably justifiable for a court to supplement by relying on this common law discretion. In any event, the discussion of its existence is moot, given that *recently, our Parliament has confirmed the existence of this common law discretion in Singapore*, albeit it seems to stem from the court's inherent powers.[221]

77 Flowing from the existence of the general discretion, the holding in another controversial case *Tan Meng Jee v Public Prosecutor*[222] can also be properly re-explained. In that case, the court held that the common law exception to SFE to prove *mens rea* of a crime, can be read into ss 14 and 15 of the Evidence Act. The exception applies when the probative value of the evidence outweighs the prejudicial effect of its use. That line of reasoning likewise goes clearly against Stephen's intention. For one, the balancing test was devised in the common law after 1872. For another, the plain words of the two sections simply do not even provide for the consideration of prejudicial effect, much less weighing it against probative value.[223] And, thus, the "updating" principle also cannot apply. But the holding of the court is nevertheless correct, when one *superimposes* the general discretion to exclude evidence just discussed over ss 14 and 15.[224] The consequential effect of the superimposition is the same as that when one applies the common law exception; in deciding whether a piece of SFE may ultimately be admitted, the court will have to consider the prejudicial effect of the reliance of that evidence at trial outweighs the probative value that it offers.[225]

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219 See para 76, n 217 above.

220 See para 38, n 108 above.

221 *Singapore Parliamentary Debates Singapore, Official Report* (14 February 2012) vol 88 at pp 1128 and 1140 (Mr K Shanmugam, Minister for Foreign Affairs and Minister for Law), where K Shanmugam emphasised that the court's discretion to "exclude hearsay or expert opinion evidence in the interest of justice … is … in addition to its general power to exclude prejudicial evidence at common law. Such a general power stems from the courts' inherent jurisdiction"; see also *ANB v ANC* [2014] 4 SLR 747 at [31]–[52]; [2015] 5 SLR 522 at [26]–[31].

222 [1996] 2 SLR(R) 178 at [33]–[55].

223 See generally Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 3.027–3.045.

224 The Court of Appeal in fact itself alluded to this line of reasoning at *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [52], though at that time the existence of a general discretion to exclude prejudicial evidence was far from firm.

225 See, for a similar view, Jeffrey Pinsler, "Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings" (2010) 22 SAcLJ 335 at 356, para 35.

VII. Optimism for future

78 Stephen, the putative draftsman of s 2(2), made known his views that his codes should be reviewed and amended where required by the Legislature about once every decade, to clarify ambiguities and rectify inadequacies, and remove the unnecessary.[226] That certainly did not happen to the Evidence Act (or for that matter, the IEA). And, so, for many decades, with respect to issues concerning reliance on common law rules and s 2(2), our courts have tried to deal with the issues that come before them as best they can. Some of the reasoning seems questionable, and may be said to have been inconsistent and hard to justify on principle. But the courts were, no doubt, doing their best to try to apply an over-century-old code in a way that accords fidelity to the provisions as far as possible, yet ensure justice is done on the facts of the case. The state of affairs has not been ideal, but the courts were faced with a herculean task, at a time where it was unclear what the genesis of s 2(2) and the true intentions of Parliament were. Section 2(2) was misunderstood, and bore the brunt of the blame. Serendipitously, the holdings in the bulk of the cases can in fact be consistently re-rationalised and justified by applying the framework, and in a way supported by Parliament's intention.[227]

79 Now, understanding the true purpose behind s 2(2) as regards the role of common law rules when the Evidence Act applies, we have arrived at a new launching point towards applying a far more consistent and principled approach towards relying on common law rules of evidence, and one that is undergirded by a much more accurate understanding of the true intentions of the draftsmen. There is also little need to worry that the provisions of the Evidence Act will be construed out of existence. Applying the framework, the present author is confident that most day-to-day issues arising from applying the Evidence Act can be readily resolved by resorting to the plain words of the relevant provision(s), or in other words, it can fulfil its purpose as a code. In the grand scheme of things, there will only be a small percentage of cases where the courts will have to rely more extensively on the common law either to interpret or supplement Evidence Act provisions. All considered, the author is very optimistic that our journey with the Evidence Act from here on, towards the Evidence Act's

226 James Fitzjames Stephen, "Codification in India and England" (1872) 18 *Fortnightly Review* 644 at 655 and 672; see also James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) at p xviii: "I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the Legislature, and were definitely altered from time to time as occasion required".

227 See paras 73–77 above.

150th anniversary and beyond, will be filled with a lot more confidence, a lot less dread, and one that Stephen would be very proud of.
