LITIGATION CONFERENCE 2022: Keynote Address

"Procedure, Practice and the Pursuit of Justice"

Thursday, 5 May 2022

The Honourable the Chief Justice Sundaresh Menon*
Supreme Court of Singapore

Distinguished guests,
Ladies and gentlemen,

1. A very good morning to all of you. This year's Litigation Conference comes as Singapore is emerging from the long shadow cast by the COVID-19 pandemic. For most of us gathered here in this virtual meeting today, as litigators, a mark of the return to normalcy will be the gradual return to more physical hearings, with the easing of safe management measures in our courtrooms. But as is the case with all upheavals, things will likely never quite be the same: we really are moving towards a "new normal" – one which combines what has worked in the past with innovations that served us well during the pandemic. A prime example of the latter is the virtual hearing, which has been a critical factor in ensuring the continued functioning of the court system. Indeed, among the most important lessons we have learnt from living through the pandemic, is the importance of the procedural aspects of the justice system to the effective delivery of justice.

---

* I am deeply grateful to my law clerk, Eugene Phua, and my colleagues, Assistant Registrars Reuben Ong, Huang Jiahui and Tan Ee Kuan for all their assistance in the research for and preparation of this address.

2. It is therefore fitting that as we start contemplating life beyond the pandemic, we do so against the backdrop of the most far-reaching set of procedural reforms that we have seen in a generation, in particular, the introduction of the Rules of Court 2021. In my address today, I will situate these reforms in their context: First, I will explain the importance of procedure and why it is central to the pursuit of justice. Second, I will explain how the 2021 reforms serve as the capstone of the efforts we have made over the past decade to ensure that our civil justice system remains fit for purpose. Finally, I will touch on the vital interface between procedure and the effective practice of law. In our system of justice, counsel are charged with the responsibility of wielding procedure in a way that accords with their ethical duties as well as the interests of justice. The success of the new Rules,[1] and ultimately the health of our justice system, therefore depends to a significant degree on how you will use them in your work as litigators.

I. The importance of procedure

3. Let me begin by saying a little about the function of procedure. When we think about justice, we usually focus on fact-finding and on the correct application of the substantive law to the facts. It is easy to think that justice is about this and little else.[2] Procedure, if it is thought about at all, is relegated to being part of the

[1] In this speech, the terms "old Rules" and "new Rules" are generally used to refer to the Rules of Court (2014 Rev Ed) and the Rules of Court 2021 respectively.

[2] JA Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000) at p 2.

"machinery of the law" or to serving as the "handmaid" of justice, to use some well-known aphorisms.[3] But this understates the importance of procedure in at least three ways, in that procedure regulates access to the courts, secures the legitimacy of our court process, and has a broader impact on society at large.

4. Taking these in order, first, procedure regulates access to the courts by controlling how claims can be brought to court and the costs of doing so.[4] For a start, lawsuits must be commenced in accordance with procedural rules on the filing and service of the originating process. This includes rules on whether litigants might be able to band together to bring a class action or representative suit. After the proceedings have been commenced, procedural rules determine the time and money that might have to be expended to get the dispute ready for adjudication. Depending on whether the rules promote reconciliation or confrontation, they also determine the costs of the litigation in terms of its impact on personal and business relationships. If the matter were to go to trial, procedural rules determine issues such as whether a party is able to obtain testimony from a witness located overseas, or the balance to be struck between open justice and the protection of privacy and confidentiality. After the court makes a decision, procedural rules dictate the availability of recourse to an appellate court. It will be readily evident that at every stage of the litigation

---

3 See *Kendall v Hamilton* (1879) 4 App Cas 504 at 525, *per* Lord Penzance: "Procedure is but the machinery of the law …"; *Re Coles and Ravenshear* [1907] 1 KB 1 at 4, *per* Collins MR: "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress".

4 Jolowicz, *On Civil Procedure* at p 61.

process, procedure can have a decisive impact on *whether* and *how* rights can be enforced. Seen in this light, procedure, in fact, serves as a *gatekeeper* of access to justice.

5. Second, good procedure is vital to securing the legitimacy of our court process. If all we wanted was efficiency and finality, a coin toss would be a viable way to settle a dispute; if all we wanted was a sensible outcome, we could leave our disputes in the hands of a respected Solomonic figure. But all of us, lawyers and laypersons alike, understand that a legitimate system of adjudication demands something more. Intuitively, we sense that a litigant has been wronged if she were subject to unfair procedures, regardless of the aptness of the outcome.[5] This commitment to procedural justice is foundational to the rule of law:[6] it differentiates adjudication from a coin toss or palm-tree justice, and it is critical to the legitimacy of the justice system in the eyes of the general public. Perhaps an even greater challenge is securing the legitimacy of the justice system from the perspective of unsuccessful litigants, whom we expect to abide by rulings that have not gone their way, even when they maintain a genuine belief that they were in the right. Since the justice system can never provide an absolute guarantee of the correctness of all decisions, no matter how thorough the process, its legitimacy in relation to unsuccessful litigants is ultimately founded on the fairness of its procedures: only just procedures can confer legitimacy on

---

5 See Ronald Dworkin, "Principle, Policy, Procedure" in *A Matter of Principle* (Harvard University Press, 1985) at pp 79–81.

6 See Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2011) 50 Nomos 3 at 6.

an outcome in the eyes of a party that genuinely believes that outcome to be incorrect.[7]

6. Third, procedure has a broader impact on society at large. This is because the costs and benefits of litigation do not accrue only to the parties to the dispute. The *costs* of litigation extend beyond the parties, as each set of proceedings also consumes a share of the finite resources of the legal system as a whole. A limitless pursuit of the truth at all costs is ultimately unsustainable, even if the parties in question were able to sustain the costs of their own action. Nor are the *benefits* of litigation limited to the parties: this is because the adjudication of disputes serves to publicly communicate and reinforce norms and rules. This encourages their general observance by members of society, which in turn reduces the need to take each and every matter to court.[8] Further, the court's judgments also clarify and develop the law for the benefit of all. Because of these broader societal consequences of litigation, it is also the task of procedure to manage and channel the resolution of disputes in a manner that acknowledges the limited resources of the legal system as well as the critical public function that adjudication plays.

---

7 See Lawrence Solum, "Procedural Justice" (2004) 78 Southern California Law Review 181 at 190.

8 See Hazel Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24 Yale J L & Humanities 397 at 397–398; Jolowicz, *On Civil Procedure* at p 71.

7. These important functions of procedure explain why we must pay careful attention to the procedural *architecture* of our legal system:[9] meaning the framework that determines how the law is actualised, applied and delivered into the hands of its users, how we can guide their conduct as they navigate the legal system, and how we can balance their needs against those of other users. This is as important a facet of justice as the final outcome of disputes.[10]

8. It also follows from what has been said that it is essential to have regard to the efficient allocation of limited resources. That is why the adversarial system in its purest form is unsustainable. Under such a system, the *parties* would be responsible for deciding how they wished to initiate, prepare and conduct civil proceedings, with the court coming into the picture as an umpire, only at their urging. On this view, civil procedure merely creates a roadmap of choices for the parties to navigate.[11] While party autonomy is an important value in dispute resolution, it will readily be seen that left unchecked, the parties' exercise of their initiative may be "hit and miss",[12] because their choices may be tactical and give rise to costs and consequences not just for themselves, but also for their

---

9 Sundaresh Menon, "Gateway to Justice: The Centrality of Procedure in the Pursuit of Justice", 36th Annual Lecture of the School of International Arbitration Lecture, 30 November 2021 ("SOIA Lecture 2021") at para 8.

10 In this regard, see Jacob, *The Fabric of English Civil Justice* at p 66: "[P]erhaps the true relation between substantive law and procedural law should be redefined in terms of the primacy of substantive law and the supremacy of procedure. The supremacy of procedure is the practical way of asserting the primacy of the law, the practical way of securing the rule of law…" Sir Jack Jacob's view of procedure is perhaps not surprising, considering that he had been the Senior Master of the English High Court.

11 See Jolowicz, *On Civil Procedure* at p 68.

12 See Sir Jack IH Jacob, *The Fabric of English Civil Justice* (Stevens & Sons, 1987) at p 16.

opponents, the court, the legal system and society as a whole – what economists call "externalities".[13] Some adjustments therefore need to be made to the pure adversarial model of justice to address these externalities.

9. How, then, can we approach the complex task of procedural design in a systematic way? In a recent lecture, I suggested a hierarchy of procedural norms that might provide a useful framework:[14]

(a) The foundational norm is fairness. Its application in particular contexts may be nuanced, but the principle must be inviolable. The many roles that procedure plays will mean that it may aspire to do *more* than just be fair, but it cannot be *less* than fair.[15]

(b) Next are three broad second-order considerations that we should consistently refer to: these are contextuality, proportionality and accessibility.

i. Contextuality means that the process should fit the nature of the dispute, including the type of interests engaged and the relationships between the parties.

ii. Proportionality involves a more granular view of the quantum and nature of the claims in a dispute, so that the complexity

---

13 See Steven Shavell, "The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System" (1997) 26 JLS 575 at 577–579; Ronen Avraham and William HJ Hubbard, "Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation" (2022) 89 U Chicago LR 1.

14 SOIA Lecture 2021 at paras 17–21.

15 An exhortation made by John Gardner for law as a whole: see John Gardner, "The Virtue of Justice and the Character of Law" in *Law as a Leap of Faith* (Oxford University Press, 2012) at p 29.

of the process bears a reasonable relation to the complexity of the dispute.

iii. And accessibility ensures that the procedural architecture of our legal system facilitates effective access to justice by members of the public.

(c) Finally, there are third-order considerations that we may have recourse to in specific contexts, such as the need for certainty and finality, or the balance to be struck between transparency and confidentiality.

II. Procedural reform in Singapore

10. I suggest that this framework could guide our thinking about our system for dispute resolution. Its hierarchy of norms underlines the importance of not adopting a one-size-fits-all approach to procedure because a single vision of litigation as was practised in the distant past cannot adequately respond to these considerations in every dispute. When we consider our civil justice system, we will see that the development of its procedural design has been undertaken with precisely these kinds of considerations in mind. This will become clear as I trace four key reforms to different facets of our court system over the past decade: the simplified process for proceedings in the Magistrate's Court, the development of our family justice system, the Rules of Court 2021, and the Singapore International Commercial Court Rules 2021 ("SICC Rules").

A. Simplified Process for Proceedings in the Magistrate's and District Courts

11. The simplified process for proceedings in the Magistrate's Court was introduced in November 2014.[16] The thinking behind it was simple: as I have already noted, the disproportionate costs of litigation when compared to the value of what is at stake can be a powerful disincentive against enforcing one's rights, or even against robustly defending a claim. This may routinely be the case in the Magistrate's Court, where claims are valued at $60,000 or less. We cannot expect the parties to litigate such disputes according to the same procedures that apply to multi-million-dollar mega-suits.

12. The simplified process was the product of procedural design focused on proportionality and accessibility: its key features include the upfront production of all relevant documents together with the pleadings, limits on the nature of interlocutory applications that can be filed, and the possibility of a simplified trial with strict time limits on the presentation of oral evidence, amongst other measures.[17]

---

[16] See O 108 of the Rules of Court (2014 Rev Ed) ("ROC 2014"), now O 65 of the Rules of Court 2021 ("ROC 2021"). The simplified process also applies to proceedings in the District Court where the parties agree: see O 108 r 1(1)(*b*) of the ROC 2014; O 65 r 1(1)(*b*) of the ROC 2021.

[17] See generally O 108 of the ROC 2014; O 65 of the ROC 2021.

B. Family Justice

13. In the same year, we also marked the establishment of the Family Justice Courts. This is another area where there has been rapid innovation with close attention to procedural design – in this case, centred around considerations of contextuality. We had come to realise that family justice is not simply another aspect of civil justice which could be administered according to the same rules of civil procedure, including a focus on adversarial truth-seeking presided over by a detached adjudicator. We therefore developed increasingly specialised procedures and tools for family justice. As we have carefully explained to family law practitioners and the general public, the central driver behind these reforms is the recognition that while family disputes may often be couched in the language of rights and liabilities, they are at their heart concerned with the preservation of relationships, the management of emotions, and the accommodation of the child's best interests.[18]

14. More recently, in 2020, we formally adopted therapeutic justice as the overarching philosophy of family justice.[19] This entails processes that are more attuned to and engaged with the deeper human elements that underlie family disputes. To this end, the practice of family justice today typically encompasses

---

[18] See SOIA Lecture 2021 at para 24; see also Sundaresh Menon, Q&A at the 8th Family Law & Children's Rights Conference World Congress 2021 (12 July 2021) at paras 10 and 11.

[19] See Sundaresh Menon, "From Family Law to Family Justice", The Law Society Family Conference 2020 (14 September 2020) at paras 33–39; Debbie Ong J, "Today is a New Day", speech at the Family Justice Courts Workplan 2020 (21 May 2020) at para 33.

such techniques as counselling, mediation and simplified procedures for uncontested cases, all with an overarching emphasis on the welfare of children.[20]

C. The Rules of Court 2021

15. Against that backdrop, let me turn to the focus of this year's Litigation Conference, the Rules of Court 2021. Its seeds were planted in 2015, with the intention of modernising the litigation process and enhancing the efficiency and speed of adjudication while maintaining costs at reasonable levels.[21] The new Rules achieve this by embodying the virtues of contextuality, proportionality and accessibility. Let me elaborate with reference to a few of the many innovations in the new Rules.

16. First, the new Rules are intended to be easier to understand and navigate, especially for litigants-in-person. At the most basic level, legal jargon has been replaced with language that is more familiar to ordinary people – for instance, we will now speak of an application made "without notice" rather than "*ex parte*", a hearing "in private" rather than "in camera", the "enforcement" rather than the "execution" of a judgment, and the "assessment" rather than "taxation" of costs.[22] The Rules have also been restructured to ensure that the core provisions are

---

20 SOIA Lecture 2021 at paras 25–26.

21 Response by Chief Justice Sundaresh Menon at the Opening of the Legal Year 2015 (5 January 2015) at para 45.

22 See "Digest 1: General overview of the new Rules of Court – what is new?" at para 6, available at <https://www.judiciary.gov.sg/new-rules-of-court-2021/digest-1>. Through the Courts (Civil and Criminal Justice) Reform Act 2021, the same changes in terminology are also made to existing laws.

more concise and logically organised.[23] Lawyers may not fully appreciate the significance of these reforms, because we are inured to the language and traditions of litigation. But mysterious language and complicated rules can be particularly alienating to litigants-in-person, who are increasingly significant stakeholders of the dispute resolution system today,[24] and the new Rules will help alleviate the burdens of litigation for them.

17. Second, under the new Rules, the court has the power to order affidavits of evidence-in-chief ("AEICs") to be filed before the production of documents.[25] The principle underlying this rule is that claimants should sue on the strength of their own case and not on the discovered potential weakness of the defendant's case.[26] This can also significantly reduce the extent and volume of discovery that is needed or sought. To complement this, the new Rules also narrow the parameters for discovery, such as by excluding "train of inquiry" documents.[27]

18. Third, there is also a new regime for appeals, which is split into two differentiated tracks. Appeals arising from *applications* within an action will be governed by Order 18 of the new Rules, and will benefit from significantly expedited timelines and simplified documentation, while appeals following a

---

23 For instance, a single order – Order 9 – covers most interlocutory applications, and a single order – Order 15 – covers the rules on trials and hearings.

24 See Jacob, *The Fabric of English Civil Justice* at p 17: "the adversary system envelops the machinery of civil justice with a kind of mystique, even mysticism, which alienates people and inhibits them from resorting to the courts for the resolution or determination of their disputes".

25 O 9 r 8 of the ROC 2021.

26 O 11 r 1(2)(*a*) of the ROC 2021. See also the Civil Justice Commission Report (29 December 2017) at Chapter 8, para 2; Report of the Civil Justice Review Committee at para 68.

27 "Except in a special case": O 11 r 5(1) of the ROC 2021.

judgment on the *merits of an action* will be governed by a separate set of rules under Order 19. This will reduce the scope for procedural skirmishes to add to the overall length and costs of litigation.[28]

19. Fourth, the court also has enhanced powers to promote the non-adjudicative resolution of cases where this is appropriate. Thus, the court may order the parties to attempt to resolve the dispute through mediation.[29] This is a power that will be exercised sparingly where mediation has clear promise, and where an order from the court may have the effect of overcoming the obstacles to mediation. It is nonetheless a valuable addition to the court's toolkit. Short of making an order, the court also has the latitude to advance other solutions for amicable resolution to the parties.[30]

20. In sum, the new Rules aim to equip the court with a more robust and versatile suite of case management tools that contemplate close attention to context and proportionality. In line with this, the court is also vested with broad discretion to depart from the requirements of the Rules in the interests of justice, and to take any appropriate course of action on matters not expressly provided for in the Rules.[31]

---

[28] See Civil Justice Commission Report at Chapters 13, 14, 15, para 3.

[29] O 5 r 3(1) of the ROC 2021.

[30] O 5 r 3(5) of the ROC 2021.

[31] O 3 r 2(1)–(2) of the ROC 2021.

D. The Singapore International Commercial Court Rules 2021

21. Let me also touch briefly upon the Singapore International Commercial Court Rules 2021 ("SICC Rules"). With these Rules, the SICC will for the first time have a standalone set of rules that are tailored to the resolution of international commercial disputes, drawing upon international best practices and innovations.

22. Under the SICC Rules, there is a single mode of commencement of proceedings,[32] which can then be channelled into one of three adjudication tracks.[33] This includes the memorials adjudication track,[34] which more closely resembles the procedure followed in civil law systems and which is familiar to many international arbitrators. This flexibility allows procedure in the SICC to be tailored to the needs of the diverse range of parties and disputes found in international commercial litigation.

23. In recent years I have spoken about the mounting technical and evidential complexity of disputes due to advances in technology.[35] This is keenly felt in many major commercial disputes. To this end, the SICC Rules incorporate a special set of provisions for the Technology, Infrastructure and Construction List ("TIC List"). One feature of the TIC List that addresses the complexification of disputes is the

---

32 O 4 r 1 of the SICC Rules.

33 O 4 r 6 of the SICC Rules (the three tracks are the pleadings, statements and memorials adjudication tracks).

34 O 8 of the SICC Rules 2021.

35 See Sundaresh Menon, "The Complexification of Disputes in the Digital Age", Goff Lecture 2021 (9 November 2021) at paras 8–22.

particularly close management of expert evidence by the court,[36] which tends to be an area of particular difficulty in such disputes. Another unique feature of the TIC List is the optional Simplified Adjudication Process Protocol, which provides a streamlined process for resolving disputes comprising many dozens or even hundreds of similar claims, as is increasingly common in infrastructure and construction cases.[37]

24. All of the reforms I have outlined are united by the common goal of contextualising procedure to serve the needs of different types of disputes. While some parts of our court system have received their own set of structures and processes that are attuned to context, proportionality, and accessibility, together, they form the procedural architecture of a justice system that we are readying for the challenges of today and tomorrow.

III. Procedure and the practice of law

25. But architecture is ultimately only a part of the story and can only take us so far. The delivery of justice ultimately depends on those of us who wield the tools that procedure provides – that is to say, judges, practitioners, and litigants.

---

[36] O 28 r 5 of the SICC Rules.

[37] O 28 r 10(6) and Appendix E of the SICC Rules. The Protocol divides claims into three categories: (1) Main Claims, (2) Higher Value Excluded Claims, and (3) Lower Value Excluded Claims. Main Claims are tried in the usual manner. Higher Value Excluded Claims are tried under a simplified process based solely on agreed documents and written submissions in tabular form (*ie*, a Scott Schedule), supported by tightly circumscribed expert evidence, with no other factual evidence permitted. Lower Value Excluded Claims are to be awarded without any adjudication, according to an agreed formula based on the proportion of recovery of Main Claims by each party.

And as much as we have sought to improve upon various aspects of our adversarial process, ours largely remains a system in which the parties retain the initiative. It is they who decide when and how to initiate and terminate litigation, and to exercise the procedural choices in between, even as these are increasingly subject to the superintendence of the court. When it comes to these matters of procedure, the actions of the parties will inevitably be dictated largely by the views of their legal advisers. It follows that how procedure works in practice will depend to a large extent on how practitioners choose to deploy the tools that are available to them. Properly and skilfully employed, procedure can serve all of the functions that I have outlined. But when wielded cynically or even abusively, procedure can be used to obstruct rather than facilitate.

26. In this way, procedure and the practice of law are deeply intertwined: procedural norms feed into the culture of litigation, and the culture of litigation in turn influences how procedure is wielded by counsel. It is only when procedural reforms take root in the culture of the legal profession that their benefits may be fully realised. I will discuss this interface between procedure and practice with brief reference to each of the three areas of civil, family, and criminal litigation.

A. The interaction between procedure and culture

27. In enacting the new Rules of Court, the hope is that the ambitious and far-reaching procedural reforms they introduce will catalyse positive changes in our culture of civil litigation. This is why the Rules are centred around a set of Ideals,

which very much reflect the procedural norms that I have set out earlier.[38] The Rules also remind the parties of their duty to conduct litigation in a manner that will help achieve the Ideals.[39]

28. A good example of this is the new option of AEICs before discovery. This drew inspiration from the approach pioneered by the Supreme Court of New South Wales in 2012.[40] When we considered this proposal, there were concerns that parties might try to "game" the system by filing a bare AEIC, and then supplement it after discovery had taken place.[41] The same concerns had also been raised in Australia.[42] But, with the benefit of experience, our judicial colleagues from New South Wales inform us that they did not in fact witness such tactics in their courts. On the contrary, they report that this simple measure has helped to significantly reduce the scope and expense of discovery, and has resulted in more authentic witness evidence. In short, this reform seems to have succeeded in shifting the culture of litigation at the commercial bar there. Given how much excessive discovery can contribute to the cost and inefficiency of litigation, there is real value to be had in our realising such a change.

---

38 O 3 r 1(2) of the ROC 2021. The Ideals are: (*a*) fair access to justice; (*b*) expeditious proceedings; (*c*) cost-effective work proportionate to (i) the nature and importance of the action; (ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and (iii) the amount of value of the claim; (*d*) efficient use of court resources; (*e*) fair and practical results suited to the needs of the parties.

39 O 3 r 1(4) of the ROC 2021.

40 Report of the Civil Justice Review Committee at para 66; New South Wales Supreme Court Practice Note No. SC Eq 11, "Disclosure in the Equity Division" (22 March 2012).

41 Report of the Civil Justice Review Committee at para 69(d).

42 See fn 15 to the Report of the Civil Justice Review Committee at para 69.

29. This also underscores the point that successful procedure cannot be attributed just to good design. It depends to a large extent on the attitude that counsel bring to the rules and whether they seek to comply only with their form or also with their spirit: simply put, well-intended procedures can be scuppered by poor practice.

30. A good example of this was the long-standing form that was in the old Rules of Court for the summons for directions. That had been intended to promote the fast and cost-efficient preparation of the matter for trial.[43] The form contained a list of more than 30 possible directions that could be sought from the court, including numerous interlocutory applications. Before the days of electronic filing, the paper form came with instructions to strike out the prayer numbers which were not required.[44] Over time, many practitioners fell into the routine of filling up the form in precisely the same way for every case, unthinkingly seeking the same standard set of orders. Needless to say, that rendered this potentially useful procedure utterly pointless.

31. The single application pending trial under the new Rules is a modern attempt at a similar objective of promoting effective case preparation. It requires all the relevant interlocutory issues to be identified so that the single application can be filed.[45] This requires counsel to think more carefully about their case at a

---

43 See O 25 r 1(1)(*b*) of the ROC 2014.

44 See the note to Form 46 of the Rules of Court 1996 (SL 71/1996); Form 44 of the ROC 2014.

45 See O 9 r 9(2)–(4) of the ROC 2021. Applications that fall within the scope of the single application pending trial cannot be filed outside of the single application without the court's permission: O 9 r 9(7)–(8).

suitably early stage. But this again can only be a nudge in the correct direction. What ultimately will make all the difference is a change in the mindset of litigators: we must all internalise the lesson that putting as little thought into a case for as long as possible will invariably be a penny-wise, pound-foolish approach.

32. Nowhere is the relationship between culture and procedure more critical than in the area of family justice. The adoption of therapeutic justice is the prime instance of how we have sought to shift the culture of litigation through procedural norms. To understand this, we must appreciate that therapeutic justice is not a new system of law that achieves therapeutic outcomes by diktat, but a novel *approach* towards the use of the law:[46]

(a) First, it places the responsibility of resolving the issues primarily on the parties because it is *their* family, *their* children and *their* assets that need to be dealt with.

(b) Second, it requires parties to move away from a win/loss mentality, and to think instead of the best possible compromise in the circumstances.

(c) Third, it is forward-looking because in the context of family justice, there is little to gain, and a great deal to lose, by embarking on a microscopic examination of past rights and wrongs.

[46] See *VVB v VVA* [2022] SGHCF 1 at [28]: "The notion of therapeutic justice *operates within* the framework of the law and does not prevail over the law."

(d) Fourth, in all this, the law should remain at a helpful distance from the family, to be resorted to if, but only when, all else fails.

33. When therapeutic justice is properly understood, it will be seen that it can only be effective if family law practitioners see the value of adopting the lens of therapeutic justice and advise their clients through this lens.[47] While procedural mechanisms, such as mediation and counselling, have been put in place to serve therapeutic objectives, it is the shift in culture and frame of mind, as embraced by family practitioners and their clients, that will enable these initiatives to reach their full potential.

34. By the same token, in the absence of a culture of therapeutic justice, its procedural norms will be that much more difficult to abide by: if one party insists on taking an uncompromisingly adversarial stance in a family proceeding, the natural instinct will be for the other party to respond in kind for fear of otherwise being on the back foot – especially when one's client is watching.[48] But the advantages of such a stance are entirely illusory, for its end result will be to harm both the bonds of family that will often survive the end of the marriage, and also the prospects of recovering from the emotional trauma of familial breakdown.

---

47 See Debbie Ong J, "Through the TJ Lens: A Balanced Application of the Law", keynote address at the Law Society Family Conference 2020 (15 September 2020) at para 79.

48 See Debbie Ong J, "Family Justice in Singapore: A Defining Moment", keynote address at the 8th Family Law & Children's Rights Conference World Congress 2021 (12 July 2021) at para 51.

B. The offensive and abusive use of procedure

35. This does not mean that procedure cannot be used offensively but reasonably in order to advance the interests of one's client. Once again, attention must be paid to context. For instance, many of the procedural tools of civil litigation are designed to be used offensively, and for good reason. An application for summary judgment or striking out is an obvious example: if successful, it ensures that a hopeless case will not go to trial. And even if the application is not ultimately successful, it can be an effective means of compelling the opposing party to rectify unsatisfactory pleadings or clarify an unclear case.

36. That said, the offensive use of procedure can easily become over-zealous.[49] It might then cross the line into the *abusive* use of procedure. In international commercial arbitration, much has been written about the use of 'guerrilla tactics' ranging from the dilatory all the way to the criminal.[50] This includes delay tactics and frivolous challenges which make use of the procedural machinery of the arbitral rules to obstruct or sabotage the proceedings.[51] Robust case management can play an important role in preventing such practices from taking hold within our courts, particularly in the context of civil litigation.

---

[49] In the words of Sir Jack Jacob, the adversarial system can introduce "an element of … gamesmanship into the conduct of civil proceedings, and it develops the propensity on the part of the lawyers to indulge in procedural technical manoeuvres" (Jacob, *The Fabric of English Civil Justice* at p 16).

[50] See, *eg*, *Guerrilla Tactics in International Arbitration* (Kluwer Law International, 2013) (Gunther J Horvath and Stephan Wilske eds) ("*Guerrilla Tactics*").

[51] See *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101 at [201]–[203], referencing *Guerrilla Tactics*.

37. The challenge can be even greater in the context of criminal proceedings, because procedural safeguards in the criminal process weigh in favour of protecting the accused person from prejudice. Because of the primacy accorded to the determination of the truth in the criminal process, the Court of Appeal ruled in *Kho Jabing* that it had the inherent power to reopen a concluded criminal appeal.[52] An equivalent statutory power may now be exercised with the court's permission under s 394H of the Criminal Procedure Code 2010 (which I will refer to as a "s 394H application").

38. Even in the criminal context, however, procedure must be deployed appropriately. This is because, as was noted in *Kho Jabing*, "[i]t would be impossible to have a functioning legal system if all legal decisions were open to constant and unceasing challenge".[53] Moreover, "[n]othing can be as corrosive of general confidence in the criminal process as an entrenched culture of self-doubt engendered by abusive and repetitive attempts to re-litigate matters which have already been decided."[54] Thus, the procedural safeguards in our criminal process do not permit concluded cases to be reopened just for the same arguments to be repeated or repackaged:[55] instead, such an application must be premised on new evidence or a change in the law.[56] This requirement cannot be circumvented by

---

52 *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") at [46] and [77].

53 *Kho Jabing* at [47].

54 *ibid*.

55 Likewise, the mere hope that new and favourable evidence might serendipitously emerge during the course of a delay does not provide a legitimate interest to postpone the execution of the sentence: *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [68].

56 See s 394J(3)–(4) of the Criminal Procedure Code 2010 ("CPC").

drip-feeding existing evidence so that successive applications are mounted on ostensibly new grounds.[57]

39. Unfortunately, the abusive use of criminal procedure has featured more commonly in our courts in recent times, as will be evident from a perusal of some of the case law arising from s 394H applications.[58] We most recently saw this in the *Nagaenthran* case, which concerned a blatant and egregious abuse of process.[59] Regardless of the underlying motivations, the courts cannot countenance such clear abuse of process.[60]

40. This brings me back to the relationship between procedure and practice. Whether in civil or criminal litigation, counsel cannot conduct themselves with the mindset that every fork in the procedural roadmap is "fair game" in every situation. This ignores the purposes for which these procedures were designed, and prevents those purposes from being fulfilled, despite our best efforts at procedural

---

57 In this regard, see the requirement under s 394J(3)(*b*) of the CPC: the material must not have been possible to have been adduced in court earlier, even with reasonable diligence.

58 See, *eg*, *Roslan bin Bakar and others v Public Prosecutor* [2022] SGCA 18 at [30]; *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 at [19], *Murugesan a/l Arumugam v Public Prosecutor* [2021] SGCA 118 at [23]; *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159 at [13]; *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [3], [16].

59 *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] SGCA 26 ("*Nagaenthran*") at [2].

60 See *Nagaenthran* at [68]: "Counsel may well have passionate views that run counter to imposition of the death penalty. At a societal level, the proper recourse for them and indeed for anyone similarly situated is to seek legislative change if they are minded to do so. But as long as the law validly provides for the imposition of capital punishment in the specified circumstances, it is improper for counsel to abuse the process of the court and thereby bring the administration of criminal justice into disrepute by filing one hopeless application after another and by drip-feeding the supposed evidence."

design. What is more, it breaches the responsibility placed in the hands of counsel, as officers of the court, to use process but never to abuse it.[61]

IV. Looking ahead

41. Looking ahead in our modern iteration of the adversarial system, the court and counsel must expect to work together on matters of procedure. We should speak not just of effective case management by the court, but by counsel as well. If counsel refuse to cooperate, the range of viable case management tools available to the court narrows significantly. The tools that remain will often involve adverse costs and even other more serious consequences; but an escalating series of increasingly punitive measures is no substitute for the productive, sensible and collaborative management of a case in the first place. It is therefore critical that litigators themselves appreciate the thinking behind the procedural architecture that they are working within, and internalise its salutary goals and ideals. The growing recognition of the importance of procedure means that practitioners will have to make a real effort to master the rules and processes that make up the procedural architecture of their chosen areas of practice.

42. As you review the new Rules of Court, I hope that you will do so in the spirit of trying to understand how they can be applied to achieve the Ideals that they embody. I hope that in the years to come, with your cooperation and

---

[61] See r 9 of the Legal Profession (Professional Conduct) Rules 2015; *Zhou Tong and others v Public Prosecutor* [2010] 4 SLR 534 at [13], [18]; *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [72]; Sundaresh Menon, "An Essential Dedication to Honour and Service", SAL Annual Lecture 2018 (11 October 2018) at para 39.

collaboration, the new Rules of Court will form the solid foundations of a procedural architecture that is just, efficient and effective.

43. I wish you all a very fruitful and fulfilling Litigation Conference. Thank you.