36th ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION IN DISPUTE RESOLUTION

"Gateway to Justice: The Centrality of Procedure in the Pursuit of Justice"

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Supreme Court of Singapore

Members of the arbitration community, including arbitrators, judges, counsel and professors,

Ladies and Gentlemen,

I. Introduction

1. Let me begin by expressing my gratitude to the Queen Mary School of International Arbitration, Freshfields Bruckhaus Deringer, and Professor Julian Lew QC for inviting me to deliver this lecture. This a great honour for me. The lecture was launched in the same year that I graduated from law school, and since then, it has become among the most significant in the international arbitration calendar. The lecture famously went virtual last year, and while many hoped that that would be an exception, I am most grateful that it paved the way

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* I am deeply grateful to my law clerk, Wong Hee Jinn, and my colleagues, Assistant Registrars Kenneth Wang, Reuben Ong, and Huang Jiahui for all their assistance in the research for and preparation of this address.

for us to proceed with this year's lecture despite the seemingly unceasing disruptions caused by the COVID-19 pandemic. We owe this especially to the assiduous efforts of the organisers, which I gratefully acknowledge.

2. My address today is principally concerned with situating the importance of procedure in the pursuit of justice. While it is uncontroversial to say that the procedural architecture of a legal system is among the most pivotal elements that determine its ability to deliver justice, we have tended not to accord procedural issues and reforms the attention that is commensurate with their significance. Over the past few decades, our lives have been transformed dramatically with new innovations and technologies. In response to those changes, we have witnessed a host of new regulatory measures, the evolution of legal doctrines, and the proliferation and development of legislation. In all these however, we have been predominantly fixated on *substantive* law. The unspoken but commonly held assumption appears to be that procedure, while necessary, is ultimately an insignificant and bothersome detail that needs to be accommodated only so that we can get on with the real work of the substance. Perhaps the most significant *procedural* innovation of the past few decades has been the tremendous growth of arbitration as a means of dispute resolution.[1] While this *is*

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[1] See for example, Andre Yeap SC, Kelvin Poon and Alessa Pang, "The rise of arbitration in the Asia-Pacific" The Asia-Pacific Arbitration Review 2022, 7 July 2021, accessible at <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2022/article/the-rise-of-arbitration-in-the-asia-pacific>. The authors note the increasing number of case filings and arbitration institutions across the region. To date,

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remarkable, it may *also* evidence a sense that traditional court procedures have proved inadequate to meet evolving legal needs, perhaps precisely because they have failed to attract sustained attention towards their thoughtful reform.

3. In this context, the pandemic has served as a timely wakeup call for the profession. For one thing, it manifestly demonstrated the *importance* of a modernised and robust procedural framework as justice systems around the world nearly ground to a halt when physical travel and interactions were severely curtailed. For another, it highlighted the tremendous *potential* of procedure as jurisdictions swiftly rallied to implement a generational update of their procedural frameworks including, for instance, the broad shift to virtual hearings and the acceptance of electronic signatures and attestations. Necessity, as the adage goes, has truly been the mother of these innovations.

4. But while we should celebrate the fact that most legal systems were able to respond quickly to the pandemic, it would be a grave mistake if we did not introspect and draw some lessons from this. For instance, we should wonder why

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there have been 168 state signatories to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with the Republic of Iraq being the latest signatory. This is perhaps neatly encapsulated by the observation of Professor Pieter Sanders, principal drafter of the New York Convention that "[b]usiness is grateful to the United Nations for having provided it with this instrument in a world where arbitration is resorted to for the resolution of international commercial disputes": see Pieter Sanders, Honorary President, International Council for Commercial Arbitration, Keynote Address at International Council for Commercial Arbitration Congress Series No 9: The History of the New York Convention (May 3, 1998) in *Improving the Efficiency of Arbitration and Awards: 40 Years of the Application of the New York Convention*, 1998 ICCA Congress Series No 9 11 (Albert Jan van den Berg ed, 1999).

technological features like video calls and electronic signatures are being heralded as achievements for their adoption into our legal processes, when they have long been part of common and commercial life. And more importantly, are we content with these innovations that have largely been limited to using technology to approximate or analogise our physical experience in a virtual space? Is that really the limit of our imagination?

5. *This* is what I hope to explore today. In the wake of the pandemic, there is now a greater openness to consider the structural reform of our dispute resolution systems, and we should ride this momentum to redefine how we think about procedure. Let me illustrate this with an example where technology has transformed its analogical precedent. When we think of virtual maps, like Google or Apple maps, we no longer imagine the mere representation of paper maps on digital screens; instead, by deploying the available technologies, these virtual maps can help users navigate their surroundings, plan their trips and itineraries, and bring together relevant information about traffic conditions, flight timings, operating hours, hotel prices, and so on. In the same way, our goal in the law and in procedural design should *not* be just to replicate virtually what we have already been doing physically; rather, it *must* be to review and where appropriate, reimagine old practices, so as to achieve a degree of reliability, convenience, and accessibility not previously possible.

6. In speaking about this issue of procedure, I will divide my address into

three parts:

(a) First, I briefly outline the importance of procedure and process engineering in the pursuit and delivery of justice, focusing specifically on dispute resolution. I will also offer some thoughts on why procedure has often been overlooked or relegated within the hierarchy of our considerations.

(b) Second, I will put forward a few foundational principles that I suggest should guide us as we assess, design, and implement the procedural frameworks for dispute resolution. I will then illustrate their application by showing the impact of procedure in a few distinct fields of substantive law and practice.

(c) Third, I will identify a few trends affecting dispute resolution that I think signal the urgent need for procedural reform, and outline how we might go about pursuing this.

II. The paramount importance of process thinking and design

A. Situating the problem

7. Let me begin with the observation that most of our greatest jurisprudential achievements have emerged from the relentless study of the demands of justice on the *substance* and *content* of our legal frameworks. The theories of utility,

liberty, and property, or the requirements of the Rule of Law debated by generations of scholars from Aristotle,[2] to Montesquieu,[3] to Fuller,[4] are all products of *deep* legal thinking, and they seek essentially to address *what* the ideals of the law are and should be, and the *substantive norms* that a fair and just system of laws should embrace in order to advance those ideals.

8. Yet, as Jeremy Waldron has observed,[5] there is one dimension of the justice dialogue that is often overlooked in contemporary discourse, but which is no less important – and that is *procedure*, or more generally, the question of *how* any given legal system should seek to achieve its intended ends of justice. Procedure is concerned with the mechanisms, structures, and processes through which the law is actualised, applied, and delivered into the hands of its users.[6]

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2 Aristotle, *The Politics* (c. 350BC), Stephen Everson (trans.) (Cambridge University Press, 1988).

3 Charles Montesquieu, *The Spirit of the Laws* [1748], A. Cohler, C. Miller and H. Stone eds (Cambridge University Press, 1989).

4 Lon Fuller, *The Morality of Law* (Yale University Press, 1964).

5 Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2010) NYU School of Law, Public Law Research Paper No 10-73 (available on SSRN) ("Waldron on Procedure"). As he observes at p12: "[A] procedural conception of the Rule of Law helps bring our conceptual thinking about law to life. There is a distressing tendency among academic legal philosophers to see law simply as a set of normative propositions and to pursue their task of developing an understanding of the concept of law to consist imply in understanding what sort of normative propositions these are".

6 For example, Sir John Salmond has opined that the "law of procedure may be defined as that branch of the law which governs the process of litigation. It is law of actions-jus quod ad actions pertinent … All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural deal with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself, the former determines their conduct and relations in respect of the matters litigated": *Salmond on Jurisprudence* (C.A.W Manning ed) (Sweet & Maxwell London, 8th Ed, 1930), at p495.

These individual processes come together to form a structural whole, which I refer to as the procedural *architecture* of a legal system.[7] A wide range of questions fall within the realm of procedure, including whether there should be a right of appeal on issues of law arising from an arbitral decision, whether we should allow the consolidated hearing of related cases or the filing of class action lawsuits, whether there should be mandatory mediation prior to the commencement of divorce proceedings, or whether the victim of a sexual offence may have his or her identity protected in criminal proceedings.

9. At first glance, these questions of procedure might appear somewhat less grand and universal. But it would be wrong to think that the means by which justice is conceived and delivered are any less important than the theories of justice themselves. Indeed, it might be said that a sound procedural architecture is *necessary* if we are to transform a set of *laws* into a system of *justice*. This should not come as a surprise. After all, the law does not exist in a theoretical vacuum, and its practical application is necessarily put to the test in a given social and economic milieu. Even the best substantive rights and rules will prove hollow without an accessible and effective set of procedures through which they may be realised.

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[7] For example, one aspect of this is the suggestion that every judicial body has the inherent jurisdiction to establish its own procedures for dealing with cases justly, as has been held in cases such as *Attorney-General v Leveller Magazine Limited* [1979] AC 440 and *Taylor v Lawrence* [2003] QB 528.

10. Let me briefly mention just two examples to illustrate this point. The first is the growing phenomenon of mandatory consumer or employee arbitration, which has led to a host of legal issues and policy concerns.[8] Fundamentally, the discomfort among critics of this practice arises out of the sense that arbitral procedures are being misused to frustrate the *effective* vindication of consumer or employee rights. They argue that while arbitration may be suitable for the resolution of *some* disputes, especially those between consenting parties at arms' length with comparable bargaining power, it is *not* appropriate for such disputes as small value consumer and employee claims, because of the disproportionate costs and often insurmountable jurisdictional obstacles that it places on the consumer or employee. Yet, the law itself may not recognise this as a legitimate concern. In the United States for example, a series of decisions issued by the Supreme Court have upheld the validity of *mandatory* consumer arbitration clauses containing class action and group arbitration waivers, thereby precluding collective action and obliging prospective litigants to pursue their

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[8] See for example, "The problem with the craze for mandatory arbitration" The Economist, 27 January 2018, accessible at <https://www.economist.com/leaders/2018/01/27/the-problem-with-the-craze-for-mandatory-arbitration?fsrc=rss>. See also, Michael S Barr, "Mandatory Arbitration in Consumer Finance and Investor Contracts" (2015) 11(4) NYU J L & Bus 794, highlighting the disparities in parties' respective bargaining power, with consumers presented with contracts on a "take it or leave it" basis, with no ability to negotiate over terms. For a different perspective, see Miles B Farmer, "Mandatory and Fair? A Better System of Mandatory Arbitration" (2012) 121 Yale L.J. 2348 which argues in favour of how institution-level protections can preserve both fairness and efficiency in mandatory arbitration.

claims through expensive individual arbitrations.[9] This, some critics contend, have all but rendered consumer and employee rights illusory in practice.

11. The second example is in the context of criminal justice, where a failure of process can lead to miscarriages of justice. In his seminal study titled "The Process is the Punishment", Professor Malcolm Feeley observed that for many criminal defendants, it is often the costs inherent in the legal *process* rather than the *substantive* outcome that is their overriding concern when deciding whether to exercise their legal rights.[10] For instance, when one considers minor misdemeanours which make up the bulk of the cases in a criminal court, sentences are usually not onerous. On the other hand, the costs of obtaining bail, missing work to attend court, and retaining a lawyer can far outweigh what is at

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9 Three decisions are of particular note. In *AT&T Mobility LLC v Concepcion* 562 US 333 (2011), the respondents had sued AT&T Mobility over contract in a claim for US$30.22, which later became a class action suit. The Supreme Court held that the Federal Arbitration Act of 1925 (the "FAA") preempts state laws that prohibit contracts from disallowing class-wide arbitration. Subsequently, In *American Express Co v Italian Colors Restaurant* 563 US 333 (2011), the majority of the Supreme Court held that an arbitration clause prohibiting class action suits was enforceable and that the FAA does not permit invalidation of a contractual waiver on the ground that the claimant's cost of individually arbitrating a federal statutory claim may exceed the quantum for potential recovery. In the recent decision of *Epic Systems Corporation v Lewis* 138 S. Ct. 1612 (2018), the majority of the Supreme Court held that arbitration agreements mandating employees to submit all work-related disputes to individual arbitration did not violate the National Labor Relations Act (the "NLRA") and rejected the argument that the NLRA creates a right to group arbitration that prohibits such a clause.

10 Malcolm M. Feeley, *Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979). See also, Jennifer Earl, "The Process is the Punishment: Thirty Years Later" (2008) 33(3) Law & Social Inquiry 737 and Jennifer Earl, "The Process is the Punishment Revisited" in *The Lower Criminal Courts* (Alisa Smith & Sean Maddan eds) (Routledge, 1st Ed, 2019), which argues that Professor Feeley's core arguments relating to pre-trial processes being more punishing than lower court sentences that may induce defendants to fail to appear or plead guilty, is more useful than ever, and hypothesises a positive and reciprocal relationship between punishing pretrial processes and mass incarceration.

stake. The system may thus create a perverse incentive for defendants to plead guilty because the costs associated with asserting their due process rights are disproportionate to their potential benefits. Viewed through this utilitarian calculus, it will become evident that the real value of legal rights is often dependent on the procedural costs of invoking them.[11]

B. Dissecting the causes

12. I will return to some of these examples later, but the point I wish to emphasise here is that the procedural architecture of our justice system, whether through inadvertence, neglect, or a lack of consideration, has perhaps become its weakest link. And there are at least three reasons that might contribute to this.

13. First, as I noted earlier, there has historically tended to be a focus among legal thinkers on the formal and substantive aspects of the Rule of Law. The concentration on *what the law is* and *what it should be* has inevitably come at the expense of critical interest in exploring the procedural aspects of how the law's ideals may be delivered into the hands of ordinary persons, and the relationship between the procedural and the substantive.

14. Second, this is reflected in our legal pedagogy and the demands of legal practice, which tend to be somewhat mutually reinforcing. The legal profession

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[11] Michigan Law Review, "The Process is the Punishment: Handling Cases in a Lower Criminal Court" (1980) 78 Mich L Rev 805.

gravitates towards substantive law; and law school curricula and law firms alike are commonly structured according to areas of substantive law, such as company, intellectual property, and public law, with relatively few areas or practices dedicated to expertise in the field of procedure. Even in deal-making, we commonly hear of anecdotes where, after months of negotiations, the choice of law and jurisdiction clauses are tacked on without significant thought or discussion, and with a sigh of optimistic relief, which has then helped drive a wellspring of litigation over dispute resolution clauses.[12] We tend to assume that things will work out so long as the "substance" has been dealt with, without acknowledging the reality that even the best negotiated contract or the most carefully drafted legislation will be worthless if the selected jurisdiction, law, or process cannot realistically or readily deliver the envisaged end.

15. Third, the exponential growth in the number, scale, and complexity of disputes – particularly cross-border commercial disputes – has resulted in a phenomenon referred to as the "industrialisation" of dispute resolution, with two

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[12] See Jane Y Willems, "The Arbitrator's Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements" in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer* (Patricia Shaughnessy & Sherlin Tungs eds) (Kluwer Law International, 2017) at para 2, referring to dispute resolution clauses as midnight clauses, as it is normal for parties to leave it till the end of negotiations for its contemplation. In a recent decision of the New South Wales Court of Appeal in *Inghams Enterprises Pty Ltd Limited v Hannigan* [2020] NSWCA 82, Bell P observed at [50] that "[d]ispute resolution clauses are just as capable of generating litigation as any other contractual clause, and the law reports are replete with cases concerned with the construction of such clauses". For example, in *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998, Thomas LJ also opined at [57] that "[j]urisdiction clauses are rarely the subject of detailed negotiations … in most transactions in the financial markets this is the case as little attention seems to be paid to this element of risk management".

broad implications for the profession. First, the provision of dispute resolution services is increasingly supported by platoons of lawyers whose *business* is to engage in these costly and somewhat unnavigable processes.[13] This financial incentive may unwittingly lead to institutional inertia for reform or diminished support for measures that may upend the status quo. Second, certain legal procedures particularly in civil litigation and arbitration are, like manufactured products, increasingly standardised and replicated across a wide range of disputes, perhaps to meet the explosive growth in legal demand. Unfortunately, this is often done without regard for compatibility between the procedure and the nature of the matter at hand.[14] The desire for such homogeneity in dispute resolution processes is, I suggest, somewhat misplaced.

16. Together, these factors have weakened the procedural architecture of our justice system. This is cause for real concern because instead of serving as the *gateway* to justice, procedure has in some respects become the *bolted gate* that sometimes thwarts the very purpose for which the legal system was conceived and designed. I suggest this has stemmed from our collective failure to recognise

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13 See for example, Sundaresh Menon CJ, "The Complexification of Disputes in the Digital Age" Goff Lecture 2021, 9 November 2021 ("The Goff Lecture 2021"). See also, Sundaresh Menon CJ, "Technology and the Changing Face of Justice" (2020) 2 Journal of International Arbitration 37 ("Technology and the Changing Face of Justice").

14 See David Marcus, "The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure" (2010) 59(2) DePaul Law Review 371 at 372, observing that trans-substantivity and the simplicity attendant with it may have a certain aesthetic appeal but that they may not suit the complexity of the twenty-first century legal world.

that the *means* of delivering justice are just as important as the *ends*.[15] Indeed, in the pursuit of justice, the ends and the means are *symbiotic, necessary, and inextricable* partners. We must not lose sight of either.

III. Rethinking procedure in dispute resolution

A. Establishing the overarching principles

17. How then should we think about procedure? In this area, universal principles are somewhat elusive, but I would suggest a hierarchy of procedural norms that might help guide our thinking in the context of dispute resolution:

(a) first, underlying all our consideration about procedure must be the paramount and overarching lodestar of fairness. This might be a nuanced concept in some situations, but it is inviolable if we seek a sustainable legal system grounded in a strong sense of legitimacy and popular support;

(b) next, I suggest, are three broad second-order principles that we should have consistent reference to in the course of procedural design and

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[15] See Waldron on Procedure at p7: "It is inevitable that the legal profession will play a larger role in solving these problems. The great danger is that we will unthinkingly carry over to new conditions traditional institutions and procedures that have already demonstrated their faults of design. As lawyers we have a natural inclination to 'judicialize' every function of government. Adjudication is a process with which we are familiar and which enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources".

iteration, and these are contextuality, proportionality, and accessibility;

(c) finally, in particular situations such as in domestic violence cases or cross-border insolvencies, we may also have recourse to certain specific procedural norms, such as certainty, transparency or finality, which I consider to be the third-order considerations. Let me explain.

i. Fairness

18. First, fairness is surely the foundational norm[16] because there can be no meaningful conception of procedural justice without it. To legal professionals, the rules of natural justice are perhaps the preeminent expression of the requirement of fairness. Even laypersons who may not fully appreciate the nuances of fairness and natural justice, often have strong instincts about what is *unfair*, and would not easily submit or defer to the authority of a system *seen* to be unfair. In this sense, procedural fairness – including *perceived* fairness – is a first-order inquiry that is essential to the moral legitimacy and integrity of any legal system.[17] It is unsurprising that the centrality of fairness extends across *all* forms of adjudicative

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16 The principle of fairness may even be said to be the *grundnorm* of any system of legal adjudication. See Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press, 1967).

17 In *Attorney-General v Shadrake Alan* [2011] 2 SLR 445, Quentin Loh J (as he then was) observed that the "relationship between the courts and the public is symbiotic. Individuals depend on the courts to administer justice impartially and effectively; do so, the courts require the confidence of the public. Without the confidence of the public, the laws administered by the courts cease to embody the collective will of the community; the force of law gives way to the law of force". See also, Sundaresh Menon CJ, "Arbitration's Blade: International Arbitration and the Rule of Law", SIAC Virtual Congress 2020, 2 September 2020, at paras 11 to 14.

mechanisms, whether disciplinary proceedings, civil and criminal litigation,[18] or arbitration,[19] and that the failure to observe fair processes may warrant setting aside even the most significant and substantive decisions.[20]

ii. Contextuality

19. Next are three second-order considerations. First, the appropriateness of procedure must be assessed against the *context* of the dispute. In other words, the process should fit the size, nature, and complexity of the dispute. This necessitates a multi-faceted inquiry, which would include considerations such as: (a) the nature of the dispute and the type of interests engaged; (b) the parties, their relationships and background, and the interests of any non-party; and (c) the desired procedural objectives.

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18 For example, in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, Chan Sek Keong CJ observed at [99]–[105] that the administrative law rules of natural justice and the fundamental rules of natural justice were not different rules but were the same in nature and function, except that they operated at different levels of the legal order.

19 See for example, Austin Ignatius Pulle, "Securing natural justice in arbitration proceedings" (2012) 20(1) Asia Pacific Law Review 63 and Khushboo Hashu Shahdadpuri, "The Natural Justice Fallibility in Singapore Arbitration Proceedings" (2014) 26 SAcLJ 562.

20 See for instance, the decision of the UK House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 setting aside its earlier decision holding that the former head of state of Chile, General Augusto Pinochet, did not enjoy immunity for arrest and extradition in relation to crimes against humanity allegedly committed while in office, owing to the discovery of Lord Hoffmann's relationship with Amnesty International Charity that was controlled by Amnesty International, which had obtained leave to intervene in the matter. It was observed that "where the impartiality of a judge is in question the appearance of the matter is just as important as the reality" (at 288 *per* Lord Nolan).

iii. Proportionality

20. The second principle is *proportionality*. Even among cases within the same context, we may need to look in a more granular way at the quantum and nature of the claims, and assess the procedural treatment that different classes of cases ought to be accorded. The *proportionality* inquiry envisages that the complexity of the *process* must bear a reasonable relation to the complexity of the *dispute*. This is important, especially because in a world of growing legal needs and limited adjudicative resources, we cannot allow our desire for perfect justice to overtake reality, and for perfection to become the enemy of the good.[21]

iv. Accessibility

21. The third principle is the need to ensure that the procedural architecture of our legal systems facilitates *effective access* by members of the public. Many court systems around the world are facing a noticeable rise in the number of litigants-in-person ("LIPs");[22] while in the context of arbitration, there is growing concern that the needs of individuals and smaller enterprises are not being

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21 Technology and the Changing Face of Justice, at para 46. See also, Sundaresh Menon CJ, "Judging and the Judiciary: Challenges and Lessons in the Age of Technology" Korea-Singapore Legal Technology Seminar, 19 October 2020, at para 43.

22 See for example, "What Singaporeans Think of the Legal System" Ministry of Law, accessible at <https://www.mlaw.gov.sg/files/news/parliamentary-speeches/2016/04/Annex%20-%20Survey%20of%20legal%20system%20infographics.pdf>, which found that only 62% of Singaporeans agreed that the legal system is affordable.

adequately met.[23] I have spoken about access to justice on several occasions but let me reiterate the most salient points:[24]

(a) First, inequality has intensified across the world over the past half-century. This is not simply a socio-economic problem, but also a justice problem because of the close relationship between inequality and unequal access to justice. Indeed, the correlation between the wealth gap and the justice gap is so striking that it has been said that the opposite of poverty is not wealth, but justice.[25]

(b) Second, there are at least three dimensions to the problem of inaccessibility that we need to bear in mind: first, there is the *physical gap* which refers to the distance between the users and the institutions of justice; second, there is the *resource gap*, which refers to the costs of invoking legal processes that may sometimes deter the pursuit of legal solutions particularly for the less well-off; and third, the *literacy gap*, which

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23 See Mark E Bunditz, "The High Cost of Mandatory Consumer Arbitration" (2004) 67 Law and Contemporary Problems 133, noting that arbitration is in practice unavailable to many consumers because its cost is too great. See also, Jill I Gross, "AT&T Mobility and the Future of Small Claims Arbitration", (2013) 42 Sw. L. Rev. 47.

24 Sundaresh Menon CJ, "Justice in a Globalised Age" Keynote Lecture at the 3rd Judicial Roundtable on Commercial Law, 29 September 2021, at para 26.

25 Patton Dodd, "The opposite of poverty is not wealth. It's justice", Folo Media, 1 June 2017, accessible at <https://www.folomedia.org/the-opposite-of-poverty-is-not-wealth-its-justice/>. For example, a 2017 report found that 86% of the civil legal problems experienced by low-income Americans received no or inadequate legal help: see Legal Services Corporation, "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans" accessible at <https://www.lsc.gov/press-release/lsc-releases-updated-report-justice-gap-america>.

manifests not only in an inadequate understanding of the law, but more fundamentally in an absence of awareness of the legal issues arising in any given situation.[26] In all these dimensions, the procedural design of our legal system can play a pivotal role either in bridging the justice gap or in exacerbating it.

(c) Third, there has been a dramatic transformation in the landscape of dispute resolution in recent decades. With globalisation and the growing sophistication of technology and commerce, so too has the law become increasingly complex. It can hardly be doubted that we now live in a world thick with legislation and rules that touch almost all aspects of our social and economic relationships.[27] With such burgeoning legal complexity, there is a real danger that the law will become enshrined within the preserve of a select "priesthood" of lawyers. But as much as we will need experts and specialists to navigate the law, justice that seems remote and obscure can lose its critical legitimising effect on society, and thoughtful procedural design can help mitigate this.

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26 See Technology and the Changing Face of Justice, at paras 11 to 27.

27 Gillian K Hadfield and Jamie Heine, "Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans" in *Beyond Elite Law: Access to Civil Justice in America* (Samuel Estreicher and Joy Radice eds) (Cambridge University Press 2016), USC CLASSS Research Papers Series No. CLASS15-2, USC Law Legal Studies Paper No. 15-2 (available on SSRN); see also, Lord Neuberger of Abbotsbury PSC, "Justice – Tom Sargent Memorial Lecture 2013: Justice in an Age of Austerity", 15 October 2013, at para 13, accessible at <https://supremecourt.uk/docs/speech-131015.pdf>.

B. The principles applied

22. These overarching principles are not conceptually difficult to grasp, but their application in practice can be nuanced and I can illustrate this by reference to two areas of practice.[28]

v. Family justice

23. The first area is our experience in Singapore in the field of family law. Until about 30 years ago, family justice was generally viewed as just another aspect of *civil* justice. While it had its own governing legislation, it was dispensed in the same courts as those dealing with other civil claims like traffic accidents or contractual disputes, under largely the same set of procedural rules in place for civil litigation. In the mid-1990s, a specialised family division was established as the idea started to take root that an adversarial process might not be optimal for family disputes.[29] Over the next few decades, we introduced a series of structural and procedural reforms, including the incorporation of counselling and mediation

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[28] See for example, ConflictofLaws.net, "The International Business Courts saga continued: NCC First Judgment – BIBC Proposal unplugged", 27 March 2019, accessible at <https://conflictoflaws.net/2019/the-international-business-courts-saga-continued-ncc-first-judgment-bibc-proposal-unplugged/>. Progress towards the establishment of the Brussels International Business Court, has sputtered amidst public resistance to the commitment of resources to establishing what has been labelled a "VIP court" or "caviar court".

[29] Kevin Ng, Yarni Loi, Sophia Ang, and Sylvia Tan, "Family Justice Courts – Innovations, Initiatives and Programmes" (2018) 30 SAcLJ 617 ("Innovations, Initiatives and Programmes"), at paras 7 to 13. One example is the establishment of the Child Focused Resolution Centre (CFRC) on 26 September 2011, which aims to help divorcing parents make a paradigm shift: from being self-focused to child-focused, from marital discord to parent accord, and from being adversaries to being collaborators, through mandatory counselling and mediation sessions.

services in 1996,[30] the establishment of the dedicated Family Justice Courts in 2014,[31] and the formal adoption of therapeutic family justice as our overarching philosophy last year.[32]

24. The central driver behind this series of reforms was the recognition that family disputes, while sometimes couched in the language of rights and liabilities, are generally much more concerned with the preservation of relationships, the management of emotions, and the accommodation of the child's best interests.[33] A wholesale transplantation of the procedural framework for civil justice – with its focus on adversarial truth-seeking, a neutral and detached adjudicator, cross-examination, and so on – was in truth inappropriate for and incompatible with our reimagined vision for family justice. To realise this vision, we needed to create a *new* procedural architecture for family disputes.

25. And this is precisely what we built. Today, the procedural architecture of our family justice system has been contextualised to reflect our outlook on family

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30 See Eunice Chua, "Mediation in the Singapore Family Justice Courts: Examining the mandatory mediation model under the judge-led approach" (2019) 38 Civil Justice Quarterly 97.

31 Sundaresh Menon CJ, "Opening of the Family Justice Courts" 1 October 2014, accessible at <https://www.familyjusticecourts.gov.sg/docs/default-source/resources/speeches/2014_cj_speech_opening_of_fjc.pdf?sfvrsn=c7e113f0_2> .

32 Sundaresh Menon CJ, "From Family Law to Family Justice" The Law Society Family Conference 2020, 14 September 2020, at paras 33 to 39. See also, Justice Debbie Ong, "Practising TJ" Family Conference 2021: Big Questions in a Small World: International Issues in Singapore Family Practice, 29 September 2021 and Tricia Ho & Aaron Yoong, "Therapeutic Justice: For Practitioners, By Practitioners?" [2021] SAL Prac 29.

33 Sundaresh Menon CJ, "Through the Eyes of a Child" 8th Family Law & Children's Rights Conference: World Congress 2021, 12 July 2021 ("Through the Eyes of a Child"), at paras 10 and 11.

justice itself.[34] The overarching philosophy is therapeutic justice, and consequently, the processes are more attuned to and engaged with the deeper human elements that underlie family disputes. Thus, for instance, pre- and even post-divorce counselling and mediation by professionals are available and sometimes mandatory; the judge may interview the child in appropriate cases personally or through an expert;[35] and for case management, instead of assigning hearings to judges based on availability, we docket each case to a single judge who will, with time, become more familiar with the intricacies of that dispute and so be better able to actively engage the parties and manage the matter towards a more holistic, forward-looking resolution.[36]

26. Supplementing this general framework is a simplified track for cases in which parties seeking a divorce may agree on ancillary matters without needing additional court intervention. And such cases are not uncommon – in 2020, 60% of divorces in Singapore were resolved on this simplified track.[37] The streamlined processes spare the parties the financial costs, emotional turmoil, and trauma of navigating the complexities of a system designed for contested disputes. On the

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34 See Justice Debbie Ong, "Family Justice in Singapore: A Defining Moment" 8th Family Law & Children's Rights Conference: World Congress 2021, 12 July 2021, at paras 19 to 28.

35 See *AZB v ACZ* [2016] SGHCF 1 at [11] to [25], observing that the judicial interview of children should remain an important option within the family justice system which employs the judge-led approach to proactively manage case and protect the welfare of the children. See also, Through the Eyes of a Child, at para 14.

36 Through the Eyes of a Child at paras 5 to 7.

37 See Justice Debbie Ong, "A New Tomorrow" Family Justice Courts Workplan 2021, 4 February 2021, at paras 9 to 10.

other hand, complex and high-needs cases that we identify through triage have more intensive upstream intervention, usually by a multi-disciplinary team led by a judge and including mediators, counsellors, and even other professionals.[38] Specialised departments and processes are also available for cases that engage unique considerations, such as those involving domestic violence or transnational families.[39] A unifying trend underlying these and other related reforms is the blending of contextuality, proportionality, and accessibility[40] considerations that helped guide our design of the procedural architecture for family justice.

vi. Arbitration

27. The second area I wish to discuss is arbitration, a body of procedural law the growth of which was fuelled to a degree by dissatisfaction with the traditional litigation process.[41] But despite its roots as a procedural innovation, arbitration is

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38 See Justice Debbie Ong, "Today is a New Day" Family Justice Courts Workplan 2021, 21 May 2020, at paras 85 to 87, intimating the implementation of the Multi-Disciplinary Team Pilot, that explores how judges, mediators, counsellors, psychologists and psychiatrists can work together to resolve the family's issues holistically through a coordinated multi-disciplinary team effort.

39 See Innovations, Initiatives and Programmes, at paras 57 to 67, highlighting that dedicated judges within the Family Justice Courts are assigned to handle applications related to international relocation and abduction cases given the complexity of possible issues involving international elements. In July 2017, the Family Justice Courts also launched the Family Protection Centre, a one-stop purpose-built area designed to offer victims of family violence a safe, private and conducive environment to file applications for personal protection orders.

40 See the Family Justice Courts' Technical Guide to Video Conferencing on Zoom, as well as the FJC Zoom Training Video for Court user, accessible at <https://www.familyjusticecourts.gov.sg/resources/video-conferencing-and-telephone-conferencing>.

41 See Frank D Emerson, "History of Arbitration Practice and Law" (1970) 19 Clev. St. L. Rev 155, accessible at <https://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss1/19>.

today, somewhat ironically, facing some of the very issues with litigation that had once contributed to arbitration's popularity – by which I mean the less than thoughtful application of the *same* arbitral procedures to a gamut of matters to which they may not be suited and the failure to apply the sort of considerations that I have outlined.

28. Let me give two examples of this. The first is the one I mentioned earlier – small value employment and consumer claims.[42] There is a gnawing sense that the mandatory application of arbitral processes to such claims entails their misuse in order to *deny*, rather than *further*, justice. First, the relatively small sums involved means that negotiation of the dispute resolution clause in question will often be impractical.[43] Second, the inevitable inequality in bargaining power adds to this impracticality. Third, the exclusion of procedural tools such as class actions deprives the weaker party of fundamental policies of the law designed to afford accessibility. Even if such claims are found to be arbitrable,[44] *and* even if

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42 See Frederick L Miller, "Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection" (1999) 78 Mich. B.J. 302 at 302, observing that arbitration clauses are fast becoming a standard part of consumer contracts.

43 As Michael S Barr puts in it "Mandatory Arbitration in Consumer Finance and Investor Contracts" (2015) 11(4) N.Y.U J.L & Bus 11 793, consumers are typically presented with contracts on a "take it or leave it" basis, with no ability to negotiate over terms and that arbitration provisions are often not clearly disclosed and in any event are not salient for consumers, who do not focus on the importance of the provision in the event that a dispute over the contract later arises, and who may wrongly forecast the likelihood of being in such a dispute. The lack of salience means that there is no meaningful competition over arbitration provisions or likely any price effect.

44 See for example, Victor D Lopez, "Mandatory Arbitration Clauses in Consumer Contracts: A Legally Permissible Means of Denying Consumers the Constitutional Right to Litigate Contract Disputes in Court and the Right to Trial by Jury" (2020) 40(1) North East Journal of Legal Studies. See also Shelley Smith, "Mandatory Arbitration Clauses

(*cont'd on next page*)

safeguards were put in place to mitigate the risks of injustice, the fact remains that the arbitral process was simply not designed with such small value claims in mind.[45]

29. There are recent reports of some corporations retreating from their long-held policy in favour of mandatory arbitration for small value claims,[46] but this is not uniformly the case.[47] If arbitration aspires to offer a viable solution catering to such disputes, then it surely needs to develop a distinct set of procedures with a

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in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System" (2001) 50 DePaul L. Rev 1191. For a different approach, see the the Indian Supreme Court decision in *M/s Emaar MGF Land Limited v Aftab Singh* (2019) 21 SCC 751 holding that if a dispute brought before the consumer forum arises from an agreement which has an arbitration clause, the consumer forum will be the appropriate forum for hearing the dispute, as consumer disputes are public in nature and consequently reliefs under the Arbitration and Conciliation Act 1996 for the same are barred by implication.

45 Thus, for instance, the 2019 International Arbitration Survey on international construction disputes reported that more than 40% of in-house counsel took the view that claims were worth pursuing in arbitration only if they were valued in excess of $10m: see Queen Mary University of London, "International Arbitration Survey – Driving Efficiency in International Construction Disputes" (2019), at p 5.

46 See Michael Corkery, "Amazon Ends Use of Arbitration for Customer Disputes", The New York Times, 28 September 2021, accessible at < https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html>, reporting that Amazon has informed customers that it would no longer require them to resolve legal complaints through arbitration. See also, Daisuke Wakabayashi, "Google Ends Forced Arbitration for All Employee Disputes" The New York Times, 21 February 2019, accessible at <https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html>.

47 See Abha Bhattarai, "As closed-door arbitration soared last year, workers won cases against employers just 1.6% of the time" The Washington Post, 27 October 2021, accessible at <https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/>. See also, Erin Mulvaney, "Mandatory Arbitration at Work Surges Despite Efforts to Curb It", Bloomberg Law, 29 October 2021, accessible at <https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it>.

focus on simplicity, accessibility, and proportionality.[48] Significantly, there are already some alternative solutions in the market. Take for example the private online dispute resolution ("ODR") platform established by eBay to manage and resolve more than 60 million consumer disputes between traders and users on its marketplace each year. The process may not be failproof or especially sophisticated, but it is mostly *adequate* given the extraordinary number of disputes, their relative low value, and the need for a quick and efficient resolution so that users can obtain closure. And after years of refinement, the eBay platform has become the subject of study for designers of other online, small value, dispute resolution systems.[49]

30. The second example perhaps at the other end of the scale relates to investor-State dispute settlement ("ISDS") in which arbitral processes developed for *private* disputes have been adopted and applied to matters with a strong *public* element. I have argued elsewhere that the growing crisis of legitimacy faced by ISDS may be traced at least in part to a failure to appreciate the real interests in play in such disputes, and to adopt a procedural framework that gives sufficient

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48 Caroline E Mayer, "Hidden in Fine Print: You Can't Sue Us: Arbitration Clauses Block Consumers from Taking Companies to Court" The Washington Post, 22 May 1999, reporting that even the most ardent critics of mandatory arbitration acknowledge that it can be effective when properly employed and structured.

49 Louis F. Del Duca, Colin Rule & Kathryn Rimpfel, "eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers", (2014) 6 Yearbook on Arbitration and Mediation 204, describing the eBay Resolution Center as standing alone among privately created ODR systems, accessible at <https://elibrary.law.psu.edu/arbitrationlawreview/vol6/iss1/10/>.

weight to these interests.[50]

31. Take for example the value of transparency, which I consider to be a third-order consideration within the hierarchy of procedural norms. In ordinary commercial litigation, the principle of open justice is considered one of the cherished values of the justice system and a fundamental procedural safeguard. Commercial arbitration, however, distinguishes itself by its guarantee of confidentiality, which is understandably attractive to some for commercial reasons. But the tolerance of secrecy and confidentiality, though accepted and perhaps acceptable in *private* commercial arbitration, may not necessarily be compatible with the *public* character of ISDS.[51] This is especially so since investor-State disputes often touch on significant issues of public interest, such as public health, environmental policy, and infrastructure,[52] and the adjudication of these claims often carry constitutional dimensions, with all the implications that

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50 See Sundaresh Menon CJ, "A Tale of Two Systems: The Public and Private Faces of Investor-State Dispute Settlement" Lalive Lecture 2021, 27 May 2011.

51 See "Consistency, efficiency and transparency in investment arbitration" A Report by the International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration (2018), at pp53 to 54 and N Jansen Calamita & Ewa Zelazna, "The Changing Landscape of Transparency in Investor-State Arbitration" (2016) Austrian Yearbook on International Arbitration. See also, *Republic of India v Vedanta Resources plc* [2020] SGHC 208, in which the Singapore High Court observed that it is at least arguably novel, the question of whether the general obligation of confidentiality which Singapore law imposes on the parties to a private arbitration extends to investment-treaty arbitration (at [113]–[115]).

52 In *Phillip Morris Asia Limited v The Commonwealth of Australia* PCA Case No. 2012-12, the Australian government had announced it was planning to introduce new rules to require plain packaging on cigarettes and other tobacco products as part of a public health campaign. Philip Morris, the tobacco giant, commenced an ISDS case against Australia, complaining that preventing it from displaying its trademarks would cause a substantial loss of market share.

these may have on the economic, political, and social well-being of constituencies beyond the disputing parties.

32. What this illustrates is that we cannot transpose procedural mechanisms and the balance of trade-offs suitable for one type of arbitration to another, without due regard for the nature of the dispute and of the interests that are implicated. Even a single procedural norm, like transparency, can take on dramatically different significance and complexion depending on the *context*, and this point applies beyond arbitration to a range of matters such as defamation suits, family disputes, and crimes involving sexual assault.

IV. The future of procedure: trends, concerns, and hope

A. The growing urgency of procedural reform

33. That we are presently situated at a moment where transformation is possible means we also find ourselves at a crossroads: should we dedicate our resources to the review and reform of procedure, or will it suffice for us to live with what we have? The answer, I suggest, *must* be the former, and I suggest further that we must do so with *urgency* for four main reasons.

34. The first, as I have alluded to, is the sharpening trend of global inequality and the problems that this poses for equal access to justice. As the lustre of globalisation and multilateralism has waned, it has exposed the fissures of inequality. And there is growing discontent with our existing models of justice, in

part because the law is seen as complicit in the failings of globalisation and a contributor to the problem of inequality. One can understand why this is so. Despite the economic gains of recent decades, there remains a disquieting justice gap, with one United Nations study estimating that 85% of the populations of 179 developing nations live in areas beyond the reach of the law. This translates to over four billion people in the world lacking effective recourse to justice through the law.[53] The urgency to resolve such unmet legal needs cannot be overstated.

35. Second, there has been a significant change in the identity of the players involved in the justice landscape, and this trend will surely accelerate with time. One aspect of this is the sharp rise in the number of LIPs, a trend exacerbated by rising legal costs and reductions in government funding of legal aid especially in the wake of the pandemic.[54] We must not lose sight of the fact that the justice system is, at its core, a provider of a *public* service. LIPs must therefore be seen as legitimate users and beneficiaries of the system, and their presence and active

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53 See Technology and the Changing Face of Justice, at paras 9 and 10. See also, UN Report of the Commission on Legal Empowerment of the Poor, "Making the Law Work for Everyone" vol 1 (2008) at pp 19 and 90, accessible at <un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf>.

54 See for example, Jonathan Ames, "Legal aid cuts leaving defendants to face justice on their own", The Times, 25 November 2019, accessible at <https://www.thetimes.co.uk/article/legal-aid-cuts-leaving-defendants-to-face-justice-on-their-own-r8fg36rr3?utm_source=newsletter&utm_campaign=newsletter_121&utm_medium=email&utm_content=121_7908739&CMP=TNLEmail_118918_7908739_121>. See also, "The Future of the Courts: A White Paper", Thomson Reuters at p 10, accessible at <https://static.legalsolutions.thomsonreuters.com/static/pdf/the-future-of-the-courts-whitepaper.pdf>.

participation within it signify the vitality of the Rule of Law.[55] Another aspect is the rise of "alternative legal service providers" ("ALSPs"). These take a variety of forms, from small start-ups focused on the provision and usually the automation of discrete legal tasks, to the big accounting and management consulting firms that now offer legal services as part of a broader suite of integrated solutions.[56] The rise of ALSPs will result in a legal marketplace that is more crowded, competitive, and diverse,[57] and it will require us to re-examine our fundamental assumptions as to what legal services are, how they may be delivered, and the rules and processes that are needed to provide an assurance of fairness in this unfamiliar new world of legal services and stakeholders.

36. Third, the inexorable advancements in technology have also led to commercial disputes becoming increasingly complex, both technically and evidentially.[58] The "information explosion" occasioned by the digital revolution

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55 See Jaclyn Neo & Helena Whalen-Bridge, *Litigants in Person: Principles and Practice in Civil and Family Matters in Singapore* (Academy of Law Publishing, 2020).

56 Sundaresh Menon CJ, "The Singapore Convention on Mediation & the Coming of a New Age", Supreme People's Court of Vietnam Workshop on Mediation, 17 September 2019, accessible at <supremecourt.gov.sg/docs/default-document-library/vietnam-spc-mediation-workshop---for-publication.pdf>.

57 For instance, in 2009, the international mining group Rio Tinto outsourced all its document review, drafting and legal research to CPA Global, an international provider of outsourced legal services, and saved an estimated $14m in legal spending within months: see Ben Kerschberg, Forbes, "Legal Services Outsourcing (LSO) – Maximising Comparative Advantage", 16 May 2011, accessible at <https://www.forbes.com/sites/benkerschberg/2011/05/16/legal-services-outsourcing-lso-maximizing-comparative-advantage/#596d949f6fe2>.

58 See The Goff Lecture 2021, at paras 8 to 22 and Sundaresh Menon CJ, "The Role of Commercial Courts in the Management of Complex Disputes" 7th Annual Conference of the International Academy of Construction Lawyers, 9 April 2021. See also, Jörg Risse, "An inconvenient truth: the complexity problem and limits to justice" (2019) Arbitration International 291, at pp 291–307.

means that the available scope of electronic evidence that may be adduced has increased tremendously, as has the sheer quantity of evidence that may be produced. This poses considerable challenges for adjudicatory bodies and institutions of justice. If Moore's law[59] is anything to go by, such complexity will only increase at an accelerating rate. And, as I have discussed elsewhere recently,[60] this complexity problem must be carefully managed lest it becomes a debilitating burden weighing down on our justice system and exacerbating the problems with access to justice.

37. The fourth reason is the conviction that our justice frameworks must be designed in a *contextually* sensitive manner.[61] Ultimately, what underpins the importance of contextuality is the broader idea that justice is not amenable to Procrustean definition. What justice entails and demands in any given situation *necessarily* depends on its context.[62] It would be unwise for the contours of justice to be defined solely by the exhaustive and uncompromising search for truth. Indeed, it would be impractical to do so in an age of technology, where the explosion of complexity in dispute resolution has already upended the traditional

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59 Moore's law is the observation that the number of transistors on silicon chips and therefore their processing power was doubling approximately every 24 months.

60 See The Goff Lecture 2021.

61 See Sundaresh Menon CJ, State Courts Workplan 2015, 26 April 2015, describing tailored justice as "the development of different pathways for the resolution of matters with different processes and emphases, depending on the nature of cases that come before us". The court has also taken into consideration social science research: see *TAU v TAT* [2018] 5 SLR 1089 at [18].

62 See The Goff Lecture 2021, at paras 51 and 52.

"truth-seeking" paradigm of justice.[63] The idea that the law should remain the same in form and manner of application across differing substantive contexts – which some refer to as the doctrine of trans-substantivity – rather than promote equality will result in inefficiency, inaccessibility, and injustice.[64]

B. The shape of future procedural reform

38. These trends suggest that procedural reform *must* be high on our agenda. The question that follows is *how* we might go about pursuing this. I earlier suggested a hierarchy of procedural norms that might guide our thinking in this area, and I also offered examples where significant procedural innovation has already taken place such as the family justice framework in Singapore and the eBay ODR platform. If we were to think carefully about how the hierarchy may be applied, we might derive several other solutions that could help us better serve our users.

39. First, I suggest we should develop differentiated models of justice that

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63 See The Goff Lecture 2021, at paras 43 and 48, giving the example that in a claim for damages in respect of thousands of defects in road works performed by a builder, a "truth-seeking" paradigm of justice would require that each defect be individually verified and documented in evidence. Yet, the costs of investigating, documenting and particularising a claim in respect of each defect may end up exceeding the cost of rectifying them.

64 See Robert M Cover, "For James Vm. Moore: Some Reflections on a Reading of the Rules" (1975) 84 Yale LJ 718, where he refers to the United States Federal Rules of Civil Procedure of 1938 as a "trans-substantive achievement", to apply equally to all areas of substantive legal doctrine as one of the keys to the simplicity intended by the drafters. See also, Paul Stancil, "The Problem with One-Size-Fits-All Procedure" Fla St U L Rev (forthcoming 2015), accessible at <https://law.seattleu.edu/Documents/CivProWorkshop/Stancil_Transsubstantivity.pdf> .

better serve the needs of users *in different contexts*. What this contemplates is that we first identify the specific goals of the area of law in question, and then develop the procedural framework with these goals in mind. This might lead us to conclude, for instance, that adversarial processes are not suited for *family* disputes or perhaps even for some *commercial* disputes with a strong relational element, such as cross-border restructuring which might instead benefit from a new procedural architecture that draws together a combination of dispute resolution processes and incorporates forward-looking, interest-based approaches such as mediation.

40. Second, we should prioritise proportionate solutions that bear a sensible relation to the complexity of a case and the quantum at stake. Simplified forms, online filing, asynchronous hearings, and ODR platforms should be made readily available for claims that are of low value, low complexity, or are subject to relatively standardised legal frameworks. And technology will go a considerable way in facilitating this. In Singapore, we launched the Community Justice and Tribunals System in July 2017 as an online case filing and management system for our Small Claims Tribunals. The feedback on the system was so good that we extended this a year later to the Community Disputes Resolution Tribunals which deal with neighbourly disputes, and subsequently to the Employment Claims Tribunal. To the same end, in 2019 we developed an online artificial intelligence ("AI") simulator to help motorists involved in traffic accidents assess the likely range of awards for personal injuries that the court may order should they

proceed with litigation. This affords them greater confidence in deciding whether to resolve the matter amicably and quickly.[65] The arbitral community and institutions might similarly consider developing dedicated and much cheaper modes of resolution for smaller cases so that arbitration is not viewed as a domain designed exclusively for the very rich, which in the long run can only have a delegitimising and destabilising effect on arbitration as a whole.

41. Third, we should strive to *simplify* our rules and frameworks to the greatest extent possible, so that they do not themselves become insurmountable barriers of entry to the justice system.[66] Simplicity in this context takes several dimensions. One, for instance, pertains to the use of plain English and the avoidance of legal jargon to afford lay users an understanding of how the system works.[67] A second

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65 See the Outcome Simulator on Motor Accident Claims Online, accessible at <https://motoraccidents.lawnet.sg>.

66 Helena Whalen-Bridge, "Automated Document Assembly: Access to Justice and Consumer Risk" (2021) 33 SAcLJ 315 ("Automated Document Assembly") at para 19, observing that a Singapore study in 2019 of 206 LIPs indicated that 47.06% identified "understanding the court's processes" as the most challenging aspect of self-representation. Consider also, the observation that it is "strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend": Francis Bennion, *Statute Law* (Oyez Longman, 2nd Ed, 1983), at p8.

67 See the Civil Justice Commission Report of the Civil Justice Commission, 29 December 2017, accessible at <https://app.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf>. The proposed new Rules of Court seek to "simply and expedite applications and appeals on procedural matters" so as to ensure that "disputes do not become procedural skirmishes which waste time and costs and often do not bring the parties any closer to the main battlefield". Some of these recommendations have culminated in the Courts (Civil and Criminal Justice) Reform Act passed in Parliament in September 2021. Among other things, terms such as "in camera", "plaintiff" and "subpoena" will be replaced with more straightforward terms such as "in private", "claimant" and "order to attend court" respectively. In 2013, the Legislation Division of the Attorney-General's Chambers commenced a project to modernise the language of Singapore's statutes, and a public

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dimension relates to the idea that we should provide more procedural information and guidance to litigants in a manner that is considered and organised. Opacity in this context not only creates navigational difficulties but also gives rise to a sense of secrecy, which breeds distrust. In line with this, when the Singapore courts moved towards virtual hearings at the start of the pandemic, we prepared a number of technical guides and videos specifically designed to help laypersons understand how they could participate in hearings over video-conference.[68] For courts with a particularly sizeable proportion of LIPs, like our Family Justice Courts, a number of physical rooms outfitted with virtual hearing facilities and staffed by on-site technical assistants were also made available on the court premises for those who might either lack technological familiarity or access to the appropriate facilities. In a sense, such initiatives are a necessary complement to the suite of procedural innovations that arose out of the pandemic because they help our users both *see* and *sense* that justice is within reach.[69]

42. The possibilities of procedural reform are endless and exciting. If we return to the analogy of virtual maps that I started with, we will see that deep procedural

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survey resulted in the Plain Laws Understandable by Singaporeans (PLUS) project, an initiative seeking to update the law and to make it more understandable to laypersons.

68 See the Family Justice Courts' Technical Guide to Video Conferencing on Zoom, as well as the FJC Zoom Training Video for Court user, accessible at <https://www.familyjusticecourts.gov.sg/resources/video-conferencing-and-telephone-conferencing>.

69 Another example is the Family Orders Guide launched by the Family Justice Courts on 29 September 2021, which contains a catalogue of court orders that an applicant may refer to and will serve as a common reference point for judges, lawyers and unrepresented litigants, aiming to save time by avoiding disputes over the language employed.

thinking requires more than the mere digitisation of isolated components of the procedural architecture. Of course, the virtual approximation of a physical process is often a necessary first step, but we must not stop there. Imagine a system in which for most types of claims that are not particularly complex, there was a technologically enabled platform on which a user could fill a form, be assisted by an AI-enabled chatbot prompting and guiding her along the way, have access to precedents that had been distilled and standardised. She might then be able to get a predictive outcome of her claim if she were to pursue litigation. If she opted to do that, the system could automatically generate and file the required court documents with prompts for the next step, and perhaps even offer to put her in touch with a lawyer practising in this area, together with an estimate of the time and costs that would be involved. If she wished instead to seek settlement, the system might offer a range of options such as online mediation, either with or without a legal expert, and help her weigh these options and gauge the counterparty's response. This and so much more is but a slice of the true transformative potential of procedural reform harnessing the power of innovation and technology.

43. If we were willing to reimagine our procedural architectures in this way, each field of dispute resolution – arbitration, commercial courts, and other fora focusing on specific areas – could devise new procedural paradigms that are fair, proportionate, accessible, and compatible with the unique values and interests that are relevant to that field. So commercial courts might consider special rules

and protocols for large construction disputes that may be different from those for cross-border restructuring matters.[70] In the same way, the arbitration community may benefit from rethinking its approach to a range of issues – for a start from the need to contextualise the procedures for investor-State disputes, to the possibility of developing dedicated AI-enabled processes for small claims, to considering new evidential methods for the resolution of hypercomplex disputes, such as representative sampling under which proof of a smaller sample could be extrapolated to a wider set where it would otherwise be practically impossible to prove each and every item in that set. These are difficult issues that will entail ethical and policy considerations, but the effort is surely worthwhile once we realise the significance of procedure and seize the present momentum to re-imagine and re-engineer the procedural architecture for our justice systems.

V. Conclusion

44. In his landmark treatise on jurisprudence, Sir John Salmond suggested that "procedural law is concerned with affairs inside the courts" whereas "substantive law deals with matters in the world outside".[71] More than eighty years

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70 See, for instance, the Technology, Infrastructure and Construction list ("TIC List") of the Singapore International Commercial Court (SICC) which specialises in dealing with complex disputes in these areas. A case placed in the TIC List will benefit from additional case management features suited to the resolution of these technically complex disputes. For more details, please see: <https://www.sicc.gov.sg/guide-to-the-sicc/the-technology-infrastructure-and-construction-list>.

71 See *Salmond on Jurisprudence* (C.A.W Manning ed) (Sweet & Maxwell London, 8th Ed, 1930), at p495.

on, things have surely changed. I suggest that procedure and substance are today *inextricably* linked. Like a map and a compass, they work together to guide users in navigating a path towards justice. We should rid ourselves of the notion that procedure is merely a handmaiden to substantive law. On the contrary, a thoughtful, effective, and accessible procedural framework is a *necessary* precondition to almost all of our ideals in the pursuit of justice and the Rule of Law. Only if we, as privileged legal professionals, apply ourselves to think more deeply about how we can transform our procedural frameworks to sustain a justice system capable of serving us amidst the great challenges of our times, might procedure come to serve as a real gateway to justice.

45. Thank you very much.