

Lecture

SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2016 – “CUTTING THE CLOTH TO FIT THE DISPUTE: STEPS TOWARDS BETTER PROCEDURES ACROSS THE JURISDICTIONS”*

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I. Introduction

1 It is a great privilege and honour to have been invited to deliver the 2016 Academy of Law Lecture and to follow in the footsteps of so many distinguished judges.

2 There is a view that procedure is not of intrinsic interest; that it is unimportant when compared with substantive law. That was my view when I finished reading law at Cambridge and, a few months later, qualified as a barrister; hence my knowledge of procedure was virtually nil. However, at the University of Chicago, where I went immediately after, it was very different. First year law students there had to study civil procedure, taught in 1969 through a very tough application of the Socratic method by a great procedural scholar, Professor Geoffrey Hazard. It was the view of the law school that it was as necessary to have a grounding in procedure as it was in the more usual subjects of constitutional law, contract and tort. That view was plainly right.

3 Procedure, in my view, is as central to the delivery of justice as is the content of substantive law. It affects access to justice, the cost of obtaining justice, the time proceedings take, their complexity, the enforceability of judgments, jurisdiction and incidental matters, such as the employment of lawyers. Its reform is essential to the challenge faced nationally and internationally by the way our world has changed, and is changing, through the technological revolution. Procedural reform is at the core of the court reform programme on which we have embarked recently in England and Wales.

4 The need to reform procedure is not new, as procedure always has a tendency towards ossification. Several clauses of Magna Carta, for example, were directed at procedural issues. Thereafter, echoing Magna

* I am very grateful to John Sorabji for his assistance in the preparation of this lecture.

Carta, whenever the system ossified beyond the point of public endurance, there were successive attempts at procedural reform focussing on the elimination of three things:

- (a) unnecessary delay;
- (b) excessive cost; and
- (c) excessive procedural complexity.

5 These three have always been pursued as the means to an end: to enable courts better to secure, as was said almost a century ago, “a just and speedy decision upon the merits according to the principles of substantive law, at the lowest practicable cost”.¹

6 However, enthusiasm for procedural reform, particularly radical reform, has never been easy to muster, partly because of the traditional view of its relative lack of importance and its unexciting nature and partly because of an innately conservative approach to procedure. A story told in 1935, three years before the US Federal Rules of Civil Procedure were promulgated, illustrates the latter. The principal draftsman of the Rules, Professor Charles Clark (subsequently a very distinguished US appellate judge), posed a question to demonstrate the challenge he faced when fashioning the draft Rules: Why do birds flying across the Mediterranean Sea take the longest route across Italy and the largest expanse of the sea rather than the shortest one? The answer he gave was simple: because when birds originally started flying from North Africa to Europe the present route was the shortest route. Time and geology had changed that, but the birds carried on each year just as they always had.² For migrating birds so for lawyers “habit has a tendency to become our master”.³ As he went on to say:⁴

So much of our legal thinking, particularly in the field of procedure – properly only the process or machinery for getting court work done efficiently and effectively – is dominated by reasons valid when trial by jury was supplanting compurgation and the ordeal, or the king’s grace was being sought on principles of equity to ameliorate the severity of ancient law ... it is definitely disturbing to find the habits of our ancestors, sensible in the light of their conditions, made into hard and final rules of law.

1 E Morgan, “Judicial Regulation of Court Procedure” (1917) 2 Minn L Rev 81 at 83.

2 C Clark, “The Challenge of a New Federal Civil Procedure” (1935) 20 Cornell L Rev 443 at 443–444.

3 C Clark, “The Handmaid of Justice” (1937–1938) 23 Wash ULQ 297 at 300.

4 C Clark, “The Challenge of a New Federal Civil Procedure” (1935) 20 Cornell L Rev 443 at 443.

7 Many things have changed since 1935. It might reasonably be said that our approach to the radical reform of procedure is not one of them. This is not for want of trying. A study of procedural reform across the world would fill very many weighty volumes. Those reforms have generally had a singular aim – to improve the court’s ability to fulfil its constitutional role in the three ways to which I have referred.

8 However, more recently, particularly in many common law jurisdictions, more radical reform of procedure is being driven forward by five further factors:

(a) The need for a rationed approach to procedure. Rationed because of the acceptance that the State’s resources are limited and that individual litigants, though entitled to access to justice, have no right to an unlimited claim upon them in the pursuit of justice.

(b) The need for a measured approach to procedure because those limited resources must be distributed equitably across all litigants according to the nature of their claims. Rationed and measured because, if not, access to justice becomes arbitrary and inequitable, contrary to the need to secure within a democracy “equal justice to all”.⁵ This change has meant that the achievement of decisions on the merits has had to be balanced against, and limited by, the achievement of a fair and accessible process for all those who need to access the courts,⁶ particularly access without the need for lawyers where their cost cannot be justified by the sums in issue.

(c) The need to use technology in the most effective manner possible. If States are to secure effective justice systems – whether they are civil, family, administrative or criminal justice systems – in an increasingly technological age, they will need to consider: (i) how best to strike the right balance between uniform processes across each of their justice systems and the need to match procedure to the type and needs of the case; (ii) what factors should properly shape their procedures; and (iii) how to effect the necessary cultural change

5 Thucydides, *Pericles’ Funeral Oration from the Peloponnesian War* (Book 2.34–46) <<https://legacy.fordham.edu/halsall/ancient/pericles-funeralspeech.asp>> (accessed 16 September 2016).

6 See, for instance, *AON v Australian National University* (2009) 239 CLR 175; *Marcotte c. Longueuil(ville)* [2009] 3 RCS 65; *Mitchell MP v News Group Newspapers Ltd* [2014] 1 WLR 795; *Re L (a child)* [2013] EWCA Civ 1778 at [12]; J Carroll, “Proportionality in Discovery: A Cautionary Tale” [2010] *Campbell Law Review* (Vol 32) 455 and A Jenshel, *Jenshel’s Civil Court Practice – Vanuatu* (AusAID, 2010) at p 28: “Proportionality principle – This is associated with the philosophical theories of ‘distributive justice’ ...”.

to ensure that reforms meet their purpose rather than undermine it.

(d) The need to fashion technology to hasten the trend of convergence of procedural law on a national level.

(e) The need to promote convergence on an international level. As our national substantive laws are becoming ever closer in a number of specific areas related to international business, there is an increasing need for our national procedural systems to be brought closer together also. Process cannot lag behind substantive law. On the contrary, if we are to “keep the tools of justice bright”,⁷ as we must, process must develop to meet today’s challenges. Such development is as important internationally as it is nationally. It is because, as was noted in 2004 and is all the more pertinent today:⁸

[T]he divergent nature of procedural law in the different judicial systems throughout the world means businesses face extra costs and greater uncertainty when engaging in domestic litigation in a foreign jurisdiction.

9 As Professor Clark’s story illustrates, breaking from the past is not easy. However, it is no longer an option to take any other course than radical reform. Simply because we have a disclosure process inherited from the old equity court does not mean that we should maintain it unthinkingly today. We need to approach matters with an open mind. We will need to cut the cloth of our procedure to fit today’s disputes – whether they be business or consumer, national or international. Success will depend on the way the Judiciary approaches the task and the way in which the changes are made. It will also require a change of litigation cultures, which can be as much creatures of habit as rules and procedures.

II. The potential of technology and the digital revolution

10 My starting point must be technology and digitalisation – it has in part impelled the need for radical reform and provides the potential for a solution. In a lecture given in June 2015, Lord Justice Stephen Richards,⁹ the then *de facto* chairman of the Civil Procedure Rules Committee, explained why in England and Wales civil procedure had, despite attempts at reform, continued to increase in complexity; the White Book had expanded from 2,400 to 3,200 pages in the past

7 C Clark, “The Handmaid of Justice” (1937–1938) 23 Wash ULQ 297 at 304.

8 S McAuley, “Achieving the Harmonization of Transnational Civil Procedure: Will the ALI/UNIDROIT Project Succeed?” (2004) 15 Am Rev Int’l Arb 231 at 231.

9 S Richards, Gresham College Lecture: “Should the Rules be Simpler?”.

15 years. He suggested that the remedy lay in an approach to procedure based on digitalisation. He was plainly right. Procedural reform must be premised on digital technology. In England and Wales, Sir Michael Briggs has just recommended the creation of a standalone Online Court.¹⁰ This is being taken forward, as an aspect of wider plans to fully digitalise procedure.¹¹ We must seize the opportunities.

11 First, and by far the most important, process-mapping of relatively straightforward claims in civil, family and administrative jurisdictions¹² has demonstrated what ought to have been perceived long before – that the basic procedure for all cases has fundamental common characteristics. Although we give the processes and stages different names and embody them in different procedural regimes, they are essentially the same; almost without exception, each type of claim needs a process to start it, a response by the opposing party, case management and an orderly decision-making process. Where expert evidence is needed, the approach is essentially the same whatever the subject matter. The aim must therefore be to design one basic IT system to underpin a common procedural system to cover the different civil, family and administrative law jurisdictions, and possibly the criminal jurisdiction as well. Apart from immense savings on cost, a common basic procedural system based on a single IT system also provides for much easier deployment of judges and court staff between the different jurisdictions.

12 There are many other opportunities. For example, technology will enable the marked simplification of procedure through embedding the rules in the digital processes. Rule compliance, for example, then becomes an aspect of completing the requisite stages in a web-based process, which can be facilitated through the use of automatic prompts to litigants. If Amazon, for instance, can send us a reminder when we have placed something in our “basket” but not yet checked it out, there is no reason a digital court process cannot issue personalised procedural prompts to litigants. The importance of this is that it should facilitate access to justice without the need to incur the disproportionate expense of lawyers in smaller or consumer disputes. Another example is facilitating service. We have already seen service by Facebook and

10 Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (July 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> (accessed 16 September 2016).

11 Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (July 2016) at pp 36 and 54 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> (accessed 16 September 2016).

12 Inspired by Professor Richard Susskind and carried out with the assistance of Herbert Smith Freehills, London.

Twitter.¹³ Electronic service can become the default position in future, not least because the prevalence of a digital presence is becoming ubiquitous in very many countries, both for individuals and businesses. Where businesses are concerned, this can be further promoted by requirements in national procedural rules and in any international process for mandatory registration of electronic addresses for service, just as now there are requirements for companies to have a registered office.

13 Procedure therefore must be based on digital technology. It will provide a procedural system that is simpler and more efficient to operate than our traditional ones, and also the means to match process to claims more effectively in at least three ways:

- (a) Process should be “digital by default”¹⁴
- (b) Process should not merely be simpler and cheaper than previously, but should be matched to the nature and value of disputes.
- (c) Process should provide options for litigants as to both the type of process they desire as well as the amount of process they require.

III. National convergence though a generic procedural regime

14 However, digitalisation is simply the means to achieve this radical change. It must be principle-led. It must be designed to secure both the private interest of individuals and the public interest, in a manner as economical and efficient as is consistent with that aim. What then is the fundamental principle that should govern a common basic procedural system based on a single IT system? The answer is, in my view, a single generic code applicable to all cases, whether civil, family or administrative and, possibly, criminal.

15 The idea that a single code of procedure governs all *civil* claims of a specific type is familiar. In England and Wales, for instance, we have had a complete, consolidated, code of civil procedure since 1883.¹⁵ Before that, civil procedure was scattered across a plethora of

13 See *Blaney v Persons Unknown* (October 2009, unreported, ChD), as noted at <<http://hsfnotes.com/litigation/2009/11/30/service-permissible-twitter/>> (accessed 16 September 2016).

14 Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (December 2015) at p 4 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>> (accessed 16 September 2016).

15 See S Rosenbaum, *The Rule-making Authority in the English Supreme Court* (HardPress Publishing reprint, 1917) at p 86 ff.

judge-made rules, legislation and conventions. More significantly, before the great reforms of the Judicature Acts 1873–1875, we could not talk properly of a code of civil procedure. Substantive law and procedure were merged together at common law, so that for each form of action there was a distinct form of procedure.

16 Under the influence of Blackstone and Bentham from the end of the 18th century, this ancient system came under pressure. The 19th century saw common law, substantive law and procedural law disentangled; civilian systems reached this point earlier in time.¹⁶ Rather than many individual substance-specific forms of procedure, we moved to one procedural code for civil cases.¹⁷ That code, the Rules of the Supreme Court, was the means through which all civil claims in the High Court were prosecuted, irrespective of the nature of the claim.

17 The same process was equally undergone in the US during the 19th and early 20th centuries, culminating in the creation of its Federal Rules of Civil Procedure in 1938.¹⁸ No longer substance-specific, procedural law became what was termed *trans-substantive* by which it was meant that the “same procedural rules are used for different types of case regardless of the substantive law being applied”,¹⁹ *ie*, a single, or generic, code for civil cases.

18 The creation of a generic code, respectively in England and Wales and the US for civil cases, therefore serves as an inspiration today to create a procedural code which can be used for all disputes whether civil, family or administrative based on principles:

(a) It should be value-neutral, or put another way, apolitical. In this it stands in contrast to substantive law.

(b) It should have a singular aim – securing, through a fair process, the proper application and enforcement of substantive law. It is “a means to an end, a machine of sorts”.²⁰

16 R C Caenegem cited in D Marcus, “The Past, Present and Future of Trans-substantivity in Federal Civil Procedure” (2009–2010) 59 DePaul L Rev 371 at 387.

17 D Marcus, “The Past, Present and Future of Trans-substantivity in Federal Civil Procedure” (2009–2010) 59 DePaul L Rev 371.

18 For a discussion of the history in England and the US see, J Sorabji, *English Civil Justice After Woolf and Jackson* (Cambridge University Press, 2014); S Subrin, “The Limitations of Transsubstantive Procedure: An Essay on Adjusting the ‘One Size Fits All’ Assumption” (2010) 87 *Denver University Law Review* 377.

19 S Subrin, “Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits” (1997) 49 *Alabama Law Review* 79 at 80.

20 D Marcus, “The Past, Present and Future of Trans-substantivity in Federal Civil Procedure” (2009–2010) 59 DePaul L Rev 371 at 381 and 385, a point taken directly from Bentham.

(c) It should be written in plain language and easy to use without the need for lawyers in low value disputes.

(d) Although providing a core common procedure, it should allow for guides or practice directions to help the code operate in particular settings. A prime example might be the success of the Commercial Court Guide in England and Wales, though there are two caveats. First, it is important not to have a proliferation of guides; thus, although there is a Financial List Guide, it essentially serves to apply the Commercial Court Guide. Second, vigilance is necessary to prevent localism – everyone believes that they can devise their own best procedure and thus uniformity can easily be lost.²¹

(e) It should not itself affect the substantive rights of parties, although we can all envisage procedures that do have such effects.²² As a general rule,²³ procedure should not be used to effect political choices;²⁴ those are the province of substantive law. Whether a duty of care is imposed or whether obligations in contract arise are matters for legislatures and, in common law jurisdictions, the courts through precedent. They involve substantive policy choices, for instance: when to provide compensation, to whom, and on what basis, fault-based or strict liability. This is not to say that in procedure there are no policy choices. There clearly are. What is the appropriate test for summary judgment, or to obtain permission to appeal? And should there be a requirement to seek permission to appeal? Each of these choices, however, concerns the machinery, and are subject to an overarching aim of securing right judgment and enforcement. They are choices taken to better secure the

21 The criminal justice system in England and Wales provides many examples of localism – see for example: *Baybasin* [2014] 1 Cr App R 264 – a local practice of selecting jurors by balloting by number.

22 On this point see David Dudley Field, as cited in D Marcus, “The Past, Present and Future of Trans-substantivity in Federal Civil Procedure” (2009–2010) 59 DePaul L Rev 371 at 390.

23 It is possible to envisage the imposition of, as in the US, more stringent rules concerning pleading in certain categories of public law proceedings. The aim there is to afford greater protection to public officials as defendants than afforded to defendants in private law proceedings: see D Marcus, “The Past, Present and Future of Trans-substantivity in Federal Civil Procedure” (2009–2010) 59 DePaul L Rev 371 at 404 *ff*.

24 Thus a political choice is made, and affects procedure. It infects it with something that its separation from substantive law should inoculate it against political controversy. See R Bone, “Making Effective Rules: The Need for Procedure Theory” (2008) 61 Okla L Rev 319 and J Resnik, “The Domain of Courts” (1989) 137 U Pa L Rev 2219.

substantive law, whatever that might be. They are not political choices in the sense of whether to impose liability or not.

IV. Proportionality and the generic code

19 There is, however, an obvious objection to an approach which mandates a single code for all disputes. It is one that has been made many times – one size does not fit all. As Professor Subrin, drawing on his experience of the US Federal Rules, made clear “applying the rules to all cases, big and small, has proved disastrous”.²⁵ That was in 1979. In the mid-1990s, Lord Woolf came to the same conclusion in England and Wales. Applying what is often described as a Rolls-Royce procedure to all cases, without consideration of the cost to the parties of doing so or the time that that might engender, was one of the central flaws of our approach to civil procedure prior to his reforms. Differential approaches are needed. Again, the cloth must be cut to fit the case at hand.

20 The answer to this objection is, however, equally well known. It is quite simply that the use of a single code of procedure need not be one size fits all. A code can be uniform, whilst still being value-specific.²⁶ This was the approach in England and Wales historically. The same approach is taken under the post-Woolf and Jackson Civil Procedure Rules. A single civil code applicable in both the High and County Courts contains within it graduated forms of process depending on the value and complexity of claims. We have a one code fits many sizes approach. That is the proportionate approach.

21 But does that mean that disputes are segregated into “business class” and “economy class”? This point was made recently in a report by England and Wales’ Civil Justice Council concerning the development of an Online Court for low value civil claims. It noted that one of the objections to its proposal was that it would result in a two-tier justice system. For those who had to use the Online Court, they would receive an “economy class” justice service. For those who could access the

25 S Subrin, “The Law and the Rules” *The New York Times* (10 November 1979) as cited in S Subrin, “The Limitations of Transsubstantive Procedure: An Essay on Adjusting the ‘One Size Fits All’ Assumption” (2010) 87 *Denver University Law Review* 377 at 377.

26 S Subrin, “The Law and the Rules” *The New York Times* (10 November 1979) as cited in S Subrin, “The Limitations of Transsubstantive Procedure: An Essay on Adjusting the ‘One Size Fits All’ Assumption” (2010) 87 *Denver University Law Review* 377 at 377.

traditional courts, they would receive a superior “business class service”.²⁷

22 As the report makes clear, the objection is entirely misconceived. It rests on the false assumption that securing a decision on the merits requires access to the whole panoply of procedure. It does not. Four examples can be taken.

23 First, the Commercial Court. When a new procedural code was being considered in late-19th-century England and Wales, it was suggested that the courts might do away with the pleading process in its entirety. Pleadings were too long, complex, technical, and, no doubt, expensive. They led to claims failing for formal reasons. It was hoped that they could be replaced by simple notices, some simply stating that the claim was denied.²⁸ The plan was rejected. It was too difficult to implement. In the then newly created Commercial List a different approach was taken. A procedure was adopted that, in the words of Lord Esher MR in *Hill v Scott* in 1895, was:²⁹

... intended and calculated to avoid expense and delay in the trial of commercial causes, by abridging all those useless and idle proceedings of which litigants can under the present rules avail themselves ...

The pleading process was severely limited to no more than permitting the defendant to set out in a letter to the plaintiff why the claim was denied with an indication as to what the defence was. Limits went further. Trials in the early Commercial Court were often dealt with without any pleadings at all. All that was required was an exchange of letters between the parties or exchange of a statement of issues.³⁰ Justice was not just done, it was done to the manifest satisfaction of business parties who increasingly used the court.

24 Second, it is clear that the full panoply of procedure is not required to reach a just decision on the merits in every case. The utility of summary judgment proceedings point quite strongly towards the conclusion that not all claims require a full trial to be determined on their merits.³¹

27 Civil Justice Council, *Online Dispute Resolution for Low Value Claims* (2015) at para 9.4 <<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> (accessed 16 September 2016).

28 See S Rosenbaum, *The Rule-making Authority in the English Supreme Court* (HardPress Publishing reprint, 1917) at p 79 ff.

29 (1895) 1 Com Cas 200 at 203–204.

30 See A Colman, *The Practice and Procedure of the Commercial Court* (Lloyd’s of London Press, 1983) at pp 38–40.

31 Additionally, the growth in the 1970s in the High Court’s Chancery Division of a form of accelerated trial process does so too. At that time, an increasing use was
(cont’d on the next page)

25 Third, a form of ADR was developed in the US called the summary jury trial. In essence, it is a civil trial before a mock jury giving an advisory verdict. The jury do not, however, know that they are not delivering a real verdict. They believe they are a real jury. The trial before them is, however, truncated. It is usually no more than half a day long. It has limited evidence and legal argument. The aim is to promote settlement. The advisory verdict being akin to an early neutral evaluation aimed at promoting settlement. The key point for today's purposes, though, comes from what happens if settlement is not reached and the claim proceeds to a full trial before a real jury. The evidence shows that there is no real divergence between the advisory verdict and the real one.³² Justice on the merits can be just as readily achieved in a truncated trial as in a full trial. Evidence from both sides of the Atlantic dovetails.

26 Fourth, it is clear that full disclosure is not necessary to secure justice. In England and Wales there is little empirical data on civil procedure. This is a continuing weakness, as it undermines the preparation, consideration and implementation of reform. In the US they have a good degree of data. It shows that between a third and half of all civil claims involve no disclosure.³³ They neither need it nor utilise it. Yet justice is still done, on the merits. In England and Wales we have introduced what is known as the menu-approach to disclosure. This offers litigants and the court a choice of disclosure options ranging from no disclosure to full disclosure.³⁴ The aim was to ensure that only the proportionate amount of disclosure is ordered for each case. There are, however, concerns that practice has not changed to meet the new options. The previous approach – erring towards fuller disclosure – is, in the main, still the approach taken – a good example of the innate conservatism that reformers face. Disclosure, therefore, is not yet being matched to the needs and value of the claim. The development of digitalised procedures should overcome this reluctance to move beyond

made of interim injunction applications as a form of mini-trial on the merits. As it was at an interim stage there had been far less disclosure than there would have been at a full trial: costs were saved, time was saved. But importantly, the decision on the merits was made in the light of less than full process. The parties abided by it. They took it as properly indicative of the result at trial. This accelerated process came to an abrupt halt with Lord Diplock's judgment in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, which effectively put a stop to interim injunction applications as a mini-trial.

32 See A Woodley, "Strengthening the Summary Jury Trial: A Proposal to Increase its Effectiveness and Encourage Uniformity in Its Use" (1997) 12 *Ohio State Journal on Dispute Resolution* 541.

33 S Subrin, "The Limitations of Transsubstantive Procedure: An Essay on Adjusting the 'One Size Fits All' Assumption" (2010) 87 *Denver University Law Review* 377 at 392.

34 Civil Procedure Rules 1998 (England & Wales) Pt 31.

the previously established approach. Digital defaults could operate to provide standardised, yet tailored, directions for each dispute depending on the information provided by the litigants. If predictive coding can achieve disclosure to as high a standard as it does,³⁵ and if predictive analytics is capable of predicting your shopping habits as well as it does, there seems to be no reason why the proper use of technology cannot predict as effectively the amount and type of disclosure necessary in any particular case, subject to the litigant applying for variation of the default order.

27 In none of these cases is an absence of full process “economy class” justice. Justice can be achieved through cutting the cloth in the right way. We may wrongly think that business claims need “business class” procedure, if we assume that by the latter we mean a full process. We may wrongly think that medium or low value claims cannot be determined properly without the use of a “business class” procedure, despite the disproportionate expense which that would entail. Neither point is correct. As the Commercial Court historically and now the increasing take-up of the Shorter and Flexible Trial Procedure recently introduced in the Commercial Court show, we can and do achieve justice with less than full process. As the small claims track shows, justice can be done with limited procedure. We can and do cut our cloth to fit the dispute, and justice is still served. Where we need to improve is in the cutting of the cloth: in striking the balance between uniform process and tailored process. We need to get better at matching a generic process to the dispute.

28 Our default setting has historically been that litigation runs along a single pathway: to trial and judgment. We cannot afford to be so monocular in future. Two factors need to inform our approach.

29 First, where trial and judgment is the aim, we should persuade litigants to tailor the nature of the pre-trial and trial process to their needs, subject to ensuring that equality of arms and the public functions of the justice system are not subverted. This is the approach taken by the Shorter and Flexible Trial Procedure. It can, however, be achieved in a number of complementary ways. It can take the form of a simplified procedure for lower value claims, such as that provided by our small claims track.³⁶ It can take the form of a standardised process with an early fixed trial date and a fixed recoverable cost regime and limited case management. And it can take the form of a flexible process, which the

35 *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch); *Monique da Silva Moore v Publicis Groupe* 11 Civ 1279 (ALC) (AJP), (SDNY 24 February 2012) (unreported, US District Court of New York); *Irish Bank Resolution Corp Ltd v Quinn* [2015] IEHC 175; [2015] 3 JIC 0306.

36 Civil Procedure Rules 1998 (England & Wales) Pt 27.

parties can determine, subject to court approval. Technology should assist parties and the court to determine the most appropriate procedure for each claim.

30 Secondly, we should not assume that trial and judgment is the sole aim of the parties. Process should provide parties with the option to choose different forms of dispute resolution; ones that match their needs and the public interest. A more efficient, responsive and cost-effective digitalised generic code can serve both the private and public interest. On the one hand it can promote, where appropriate, consensual settlement. On the other, through increasing access to justice, which a cheaper and more efficient system would, it will ensure that there is a sufficient amount of litigation that yields court judgments to secure sufficient precedent to develop the common law – so essential for many reasons.³⁷

V. Convergence for international civil disputes

31 If this is the correct approach to procedure within a nation state, as I believe it to be, would it be worthwhile to adopt a similar approach to minimise differences internationally in the area of civil litigation? My aim here is narrower and confined to civil disputes, for that is not only realistic but where the primary need lies.

32 The idea of minimising differences between national procedural systems for civil disputes is not new. It was an idea developed by the American Law Institute (“ALI”) and the International Institute for the Unification of Private Law (“UNIDROIT”) from 1997 to 2004.³⁸ It culminated in their Principles of Transnational Civil Procedure.³⁹ The ALI, this time with the International Insolvency Institute, has recently returned to the issue, focusing on the principles that could guide national approaches to transnational insolvency.⁴⁰ More recently, UNIDROIT, this time with the European Law Institute, has embarked upon a project seeking to develop 2004’s Transnational Principles into

37 See The Right Honourable the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, “Developing Commercial Law through the Courts: Rebalancing the Relationship between Courts and Arbitration” (Baillii Lecture 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-baillii-lecture-20160309.pdf>> (accessed 16 September 2016).

38 Professor Geoffrey Hazard was one of the Rapporteurs.

39 *ALI/UNIDROIT Principles of Transnational Civil Procedure* (Cambridge University Press, 2004).

40 American Law Institute and International Insolvency Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (2012) <https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf> (accessed 16 September 2016).

European (in the geographic sense) Rules of Procedure. They are not the first to do so; a Commission led by Marcel Storme first made such an attempt in the late 1980s.⁴¹ Tellingly the Storme Commission “argued that international businesses require an effective and transparent system of procedural law”⁴²

33 As I noted in Dubai earlier this year, we live in a far more integrated world now than we did in the 1980s.⁴³ Technology has fostered the growth and inter-connection of global trade and financial markets to a degree that would not have been imagined then. If an effective and transparent system of civil procedure was needed then, it is needed all the more so now.⁴⁴ A move to such a system of procedure would enable court users and lawyers to be confident that courts in different national jurisdictions have a fair and readily understandable basic common procedure and that, when enforcement of a judgment is sought in another State, the court considering enforcement can be confident that the underlying judgment has been arrived at through procedures with which it is familiar.

34 In my view this is therefore not merely a worthwhile goal, but a necessary one. The best way forward to achieve this goal is convergence between national systems. As I have explained, we should on a national level be moving to a single generic code based on the principles I have set out. There is no reason why the same cannot be done as between

41 See M Storme, *Approximation of Judiciary Law in the European Union* (Dordrecht: Martinus Nijhoff, 1994) and M Storme, *A Single Civil Procedure for Europe: A Cathedral Builders’ Dream* (2005) *Ritsumeikan Law Review* 87.

42 As noted in M Eliantonio, “The Future of National Procedural Law in Europe: Harmonisation vs Judge-made Standards in the Field of Administrative Justice” at p 6 <<http://www.ejcl.org/133/art133-4.pdf>> (accessed 16 September 2016).

43 The Right Honourable the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, “Commercial Justice in the Global Village: The Role of Commercial Courts” <<https://www.judiciary.gov.uk/wp-content/uploads/2016/02/LCJ-commerical-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>> (accessed 16 September 2016).

44 A point which underpins the growth of a particular area of transnational procedural law: that relating to the growth of the European Union’s internal market, through for instance, the Brussels Regulation and its successors, the European Order of Payment and the European Small Claims Procedure. See 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

nation states in the sphere of international civil disputes. It would be transnational rather than national. For the reasons I have set out, it would be a code that says nothing about, nor has a differential impact on, giving effect to substantive rights, which may themselves differ across national jurisdictions.⁴⁵ It would need to accommodate choices for adversarial or inquisitorial procedure and other issues that distinguish the common law and civil systems. If approached through convergence, it is not too ambitious – a first objection to this approach.

35 If we follow this approach of convergence based on the principles I have outlined, we have a basis for developing a transnational civil procedural code, one that we could apply to international disputes that are litigated in our respective jurisdictions, initially at least where the litigants chose to have their dispute litigated under such a code.

36 There is then a second objection – we will be reducing the competitiveness between our national systems in attracting international disputes. There are two answers to this. First, establishing a more consistent legal order internationally is a higher aim, as it will increase international prosperity; second, there are many other ways, including cost, which will ensure competitiveness.

VI. Devising and implementing a new approach

A. *Role of the Judiciary*

37 Such aspirations are all very well, but can they be achieved? First let me turn to national experience which has demonstrated the critical role which judges must play. Procedural reform is something that has been long-pioneered from Lord Mansfield's development of commercial special juries in England, to the creation of the Commercial Cause List in 1895⁴⁶ and then the Commercial Court, and more recently the Financial List and the Market Test Case and Shorter and Flexible Trial Procedures.⁴⁷ Innovation and experimentation are essential.

45 This is a point that we can see from the US Federal Civil Procedure Rules. They are national and apply to federal actions in the US. They had wider influence as a model for convergence amongst the domestic civil procedural codes of each of the US states. One federal code could be, and was to varying degrees, conducive over time to 50 equivalent state procedural codes: see further J Oakley & A Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure* (1986) 61 Wash L Rev 1367.

46 A Colman, *The Practice and Procedure of the Commercial Court* (Lloyd's of London Press, 1983) at p 7.

47 Civil Procedure Rules 1998 (England & Wales) PD51N and 51M.

38 But judges cannot do this on their own. A striking illustration is provided by the procedural innovation in England and Wales that permitted evidence to be provided by means of witness statements well in advance of the trial and to be used as the evidence on which a witness is cross-examined. The innovation began in 1978 in a complex multi-party reinsurance case where the judge ordered the parties to file and serve what were described as “epitomes of evidence of fact”.⁴⁸ They were to be short. They were to give an indication of what the witnesses’ evidence was to be. They were necessary in that case as the nature of the important evidence would not emerge until the last two or three parties called their witnesses. A few years later, in a trial of a low value marine insurance claim, the trial judge⁴⁹ suggested that the witness statements which had been prepared as a basis for examination-in-chief be used in place of examination-in-chief so that the length of the trial would bear some relationship to the sums in issue. That practice was adopted in subsequent cases and, after a meeting in the Commercial Court of judges and practitioners, adapted to follow the practice of epitomes in providing the statements well in advance of the trial. However, other judges introduced refinements; one refinement was the development of a judicial rule that evidence-in-chief could not be given about a matter not included in the statement. The result of such refinements is the present position – statements are all encompassing and anything but epitomes. Many – too many – now, unhelpfully, owe more to James Joyce than the clarity and brevity of George Orwell. Statements in their present form can add unnecessary time and cost to proceedings, when they were originally intended to move proceedings along more quickly and economically while enabling the parties to better understand their respective cases and prosecute them to, and at, trial more efficiently.

39 It would have been much better if court users and their litigation lawyers had been involved at the outset in scoping, costing, and developing the change through a body representative of those interested and setting it in a procedural code, rather than as happened in this instance. Although historically we have not been very good at this way of further improvement, more recently, particularly in relation to criminal procedure, suggestions for improvement in procedure are passed in the judgment to the relevant procedural rule making body for consideration, development and costing;⁵⁰ those are tasks that it is not easy to undertake when the court only has the submissions of the parties in the dispute.

48 *Philadelphia Manufacturers Mutual Insurance Co Ltd* (3 July 1978, unreported), per Donaldson J, subsequently approved by Parker J: see A Colman, *The Practice and Procedure of the Commercial Court* (Lloyd’s of London Press, 1983) at p 62.

49 Bingham J.

50 See, eg, *Puceviciene v Lithuanian Judicial Authority* [2016] EWHC 1862 (Admin).

40 Furthermore, although I would anticipate that a generic code would be clearly drafted, experience has shown that it may well be subject either to elucidation by commentary or to dispute which will then need to be resolved by judicial decision. This has happened to the Civil Procedure Rules, like the Rules of the Supreme Court before; they became encrusted with case law and lengthy explanations rather than being subject to revision to keep the procedural code simple and easy to use. These defects must be avoided for the future – no commentaries!

41 On an international level, innovation and experimentation are not something that we lack. The task is how best to draw together our experiences and practices from different States, to assess them and choose those that are most apt to secure procedure's aim. We are used to doing this in improving our own procedural systems. Lord Woolf and Lord Justice Jackson in their reform reports drew on experience from across the world.⁵¹ US, Australian and Singaporean experiences of case management – (something we pioneered unsuccessfully in the 1880s)⁵² – were equally influential.⁵³ The proposals for an Online Court by Lord Justice Briggs have been similarly influenced.⁵⁴

B. Role of the Standing Forum

42 The question then is really a practical one: how do we draw together our experience to devise practical and principled rules to form the basis for a converging code for transnational civil disputes? One way is for our judiciaries to come together to start the convergence necessary for such a code, and for the work then to be subject to wide consultation with the professions, businesses, *etc.* The Standing International Forum of Commercial Courts is one means by which this can be achieved.⁵⁵

51 New Zealand's approach to disclosure was particularly influential: see Lord Justice Jackson, "Controlling the Costs of Disclosure" (24 November 2011) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>> (accessed 16 September 2016).

52 S Rosenbaum, *The Rule-making Authority in the English Supreme Court* (HardPress Publishing reprint, 1917) at p 93.

53 See Lord Justice Jackson, "Achieving a Culture Change in Case Management" (22 November 2011) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case-management.pdf>> (accessed 16 September 2016).

54 Particularly developments in online dispute resolution in Canada and the Netherlands: Lord Justice Briggs, *Civil Courts Structure Review – Final Report* (July 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> (accessed 16 September 2016).

55 The Right Honourable the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "Commercial Justice in the Global Village: The Role of Commercial Courts" at paras 47–51 <<https://www.judiciary.gov.uk/wp-content/>

(*cont'd on the next page*)

Drawing on the experience of all judges in this area at regular symposia could provide the basis for this task. I hope that this is something that the Forum can take forward in the future. It will require considerable effort, both in terms of design but also in terms of implementation.

43 An obvious starting point are the ALI/UNIDROIT Principles of Transnational Civil Procedure. They can provide an outline of the areas that need to be dealt with by any code. We could then draw on the practical experience of many jurisdictions to flesh out those principles into a code. One of the main developments in recent years, in procedural terms, has been innovation and experimentation. In the US this was mandated by legislation in 1990.⁵⁶ The intention was to enable the States, as “laboratories of federalism”, to develop new procedures so that the “best solutions” to procedure’s problems could then be chosen for future across-the-board reform.⁵⁷ At the international level, as I have mentioned, we are already our own laboratories, whose best solutions are there to be drawn on.

C. *Applicability*

44 I must now turn to a third objection to what I have proposed – how would such a code be applicable with binding force in litigation in a particular State? National procedural codes have the force of law. There are, however, two models that could be used to make a transnational code binding: international agreement (such as adopting the approach taken in arbitration)⁵⁸ or national implementation.

45 The second model would offer a better route for implementation. Each country that is willing to implement a transnational procedural code could make it a discrete aspect of its own national procedural code. Although the result would be that judgments would be the judgment of another State, the code could provide for judgments made in the other State under a similar code to be enforceable as if it was a judgment of the State in which it was to be enforced, subject, of course, to issues such as the establishment of jurisdiction.

uploads/2016/02/LCJ-commerical-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf> (accessed 16 September 2016).

56 M La Belle, “The Local Rules of Patent Procedure” (2015) 47 Ariz St LJ 63 at 80.

57 See former Chief Judge Rader cited in M La Belle, “The Local Rules of Patent Procedure” (2015) 47 Ariz St LJ 63 at 98.

58 Or it could be effected in a manner akin to a Hague Conference Convention, such as those on service (Hague Conference, Convention of 1 March 1954 on civil procedure) or choice of court agreements (Hague Conference, Convention of 30 June 2005 on Choice of Court Agreements).

VII. Honing procedural culture

46 Although the type of procedural system to which we should aspire will be embodied in a code specifically designed for a digitally-based system, I have no doubt that little real change will be effected unless culture is changed. As experience has shown, as admirably summarised by Professor Caponi, litigation culture is the most important factor.⁵⁹ Changing and honing procedural culture is more than simply devising a new generic code.

47 As the legal profession of England and Wales pointed out in 1870 when a serious attempt was made to alter procedural culture, it is “a difficult thing to embody what is very much in the nature of an alteration of the spirit of a procedure in distinct specific rules”.⁶⁰

48 What is therefore needed is first to imbue the new code with a purposive rule; an overriding objective in modern terms, which sets out the spirit in which the new code is to be applied; it should be possible to achieve transnational convergence in this respect. Second, the code must be interpreted without resort to past practice. This was the problem in England and Wales in the 1840s, when an attempt was made to liberalise the application of the pleading rules.⁶¹ The prevailing formalist culture imposed itself and frustrated the attempt; the “habits of our ancestors” had become “hard and final rules” of practice.

49 To effect a new procedural culture within a nation state requires concerted effort over time. It requires a consistent approach to be taken to the new code from those who enforce it, and who can give guidance on its application. In Singapore this, I understand, is a truth well known, as it was a consistent attitude to your new approach to case management that changed the prevailing litigation culture. It is one known in the US, Australia, and in England and Wales, where similar changes have effected a change in the procedural culture.⁶² If Singapore’s judiciary had not taken the consistent approach they did to compliance with case management decisions, a culture of compliance would not have taken hold. The same was true of those US jurisdictions that attempted to introduce a culture of compliance, one that sought to ensure that litigation was conducted swiftly and cost-efficiently.⁶³ In England and

59 R Caponi, “The Performance of the Italian Civil Justice System: An Empirical Assessment” *The Italian Law Journal* Vol 02 – No 01 (2016) 15 at 30–31.

60 19 Sol J 252, 6 February 1875 cited in S Rosenbaum, *The Rule-making Authority in the English Supreme Court* (HardPress Publishing reprint, 1917) at pp 46–47.

61 J Sorabji, *English Civil Justice after Woolf and Jackson* (Cambridge University Press, 2015) at pp 50–59.

62 See R Fox, *Justice in the 21st Century* (Cavendish, 2000) at p 30 ff.

63 Rocket docket.

Wales, a long and determined effort is at last succeeding in getting the profession to change their culture in criminal cases and to embrace our criminal procedure code.

50 The task is more complex when we consider international convergence. Differential understanding of the meaning of substantive and procedural law is well known across jurisdictions. A discussion, for instance, of the meaning of “good faith” in contracts by practitioners from across the world would yield many different understandings.⁶⁴ Equally, if we look at the application of Art 6 of the European Convention on Human Rights,⁶⁵ its terms could, in principle, be interpreted differently amongst different contracting States. That would enable different States to define “civil rights” differently, or the scope of what is meant by “criminal”, thus bringing a variety of matters outside its ambit.⁶⁶ International procedural convergence thus needs to find a way to promote a common understanding and a convergent procedural culture. As culture can rightly be described as a set of “shared meanings”,⁶⁷ how can that be achieved?

51 First, we must ascertain what the actual user (as distinct from the lawyer) wants. It is obvious that litigant behaviour will to a large degree be shaped by the applicable cost and billing regime, both in terms of encouraging or discouraging litigation in the first instance and in shaping the way in which pre-trial management is carried out, and satellite litigation over procedural matters develops. User views here are of crucial importance in shaping decisions on procedural design, which in turn will shape the development of a new procedural culture within it.

52 Secondly, the legal profession has a critical role. As I have pointed out on other occasions, the legal profession has undergone radical change and more is yet to come. One of the effects of the growing dominance of the international law firms is that they have much greater knowledge and experience of different litigation cultures and systems.

53 Finally, the Judiciary has for reasons that are readily apparent the central role in seeing that the appropriate culture develops and

64 E Zaccaria, “The Dilemma of Good Faith in International Commercial Trade” (2004) 1 *Macquarie Journal of Business Law* 101 at 103, fn 10.

65 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (entered into force 3 September 1953).

66 See, for instance, P van Dijk *et al*, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 1998) at p 77 ff.

67 R Caponi, “The Performance of the Italian Civil Justice System: An Empirical Assessment” *The Italian Law Journal* Vol 02 – No 01 (2016) 15 at 31.

properly takes hold. Judicial decisions and behaviour fundamentally shape procedural cultures and common understandings and approaches. It is here that the Standing International Forum of Commercial Courts will have a crucial role, possibly developing in due course an advisory council, akin to that which issues guidance to the proper interpretation of the CISG, the United Nations Convention on Contracts for the International Sale of Goods.⁶⁸

54 We know what it takes to build a common and consistent procedural culture, and the work involved in doing so. There is no reason why we cannot do so across national and international jurisdictions to promote greater consistency in approach. What is clear is that it will take a much greater effort on the international than national stage. That, however, is simply to note the scale of our endeavour. It is not to run up the flag of surrender. If we work together, users, lawyers and judiciaries we can create and operate better procedures and better procedural cultures.

VIII. Conclusion

55 Where does this leave us? I started by referring to the fact that habit has a tendency to become a lawyer's master. We approach procedure through ingrained habits, the original reasons for which have long passed away. We can see those habits all around us. Whether it is the concentrated trial, a product of the civil jury, or our adversarial process, a product of the common law, or disclosure, this time a product of equity; what we do today remains very much as it does because that is how we used to do it.

56 Times change however. We live in a world which is vastly different from that in which these habits first evolved. Over the last 60 years we have seen the development of substantive law on an unprecedented scale – whether it be administrative law or the law of negligence and statutory strict liability for defective products. We have seen the massive growth of mass consumer claims, generally of a low value. And we have seen ever increasing business growth, and cross-border transactions.

57 The world we live in is one where ready and cost-effective access to a just decision, and to the secure framework that that provides both nationally and internationally, is all the more pressing. It is also one which must be fulfilled in many countries against increasing financial constraints on the courts, on the provision of legal aid, and on the

68 <<http://www.cisgac.com>> (accessed 16 September 2016).

financial wherewithal of individuals and businesses to fund the ever increasing cost of litigation.

58 Unless we are able to take a new and radical approach to procedure, we will be rooted in the past that no longer exists, like the birds in Professor Clark's story – flying north by the long route simply because it was once, but is no longer, the shortest route. We need to give life to the principles I have outlined in ways that simplify procedure and practices. Taking Occam's razor to them ought to be our starting point; unnecessary divergence should be eliminated. Uniform process both nationally and internationally through a generic code should be our aim. And, within that code, we should then match procedure to the type and needs of the case. Here, as with everything today, effective and innovative use of technology will be central to devising a common and tailored approach.

59 The key though will be cultural change amongst judiciaries and lawyers. This will take time and effort. It has been said that lawyers, and I include judges here:⁶⁹

... always seem to approve of the procedure with which they are familiar. Instances are not wanting where [they] have openly declared that only the system which they knew could be considered workable at all and that all others must be condemned and despised, even though actually in operation in neighbouring states.

We have a tendency not just to think that the way we do things now is not only the way things have always been done, but that it is the only and best way to do things. We can no longer be so complacent. I am sure we will not be, and that we will mould new and more effective procedural cultures just as we will devise the new and more effective generic procedural code.

69 C Clark, "The Challenge of a New Federal Civil Procedure" (1935) 20 Cornell L Rev 443 at 448.