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JUSTICE IN ITS FULLEST ORB: THE EVOLVING RELATIONSHIP BETWEEN PROCEDURE AND SUBSTANTIVE LAW (I/II)

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I. INTRODUCTION

Common-law procedure has come a long way since England's royal courts of justice were established in the 12th century. For centuries, procedure was the law; the common law was called "a law of procedure" with "whatever substantive law … hidden … in its 'interstices'".[1]

Following the 19th-century *Judicature Acts*,[2] procedure was made subservient to substantive law. Sir Richard Collins MR (as his Lordship then was) memorably described procedure as a "handmaid" (a servant of a household) rather than a "mistress" (a controller of a household)[3]:

> Although … a Court cannot conduct its business without a code of procedure … the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.[4]

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[1] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: OUP, 2014) at 242.

[2] *Supreme Court of Judicature Act, 1873* (UK), 36 & 37 Vict, c 66; *Supreme Court of Judicature Act, 1875* (UK), 38 & 39 Vict, c 77.

[3] See Jeffrey Pinsler & Cavinder Bull, "Procedure's multi-faceted relationship with substantive law: Not a 'mistress'; nor a 'handmaid'" in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, gen eds, *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Singapore: SAL Publishing, 2011) [Pinsler & Bull (2011)] at [2].

[4] *Re Arbitration between Coles and Ravenshear* [1907] 1 KB 1 at 4.

Since this century's turn, procedure has been made coequal with substantive law. VK Rajah JA (as his Honour then was) described procedure as the servant, not of substantive law, but of the "overriding objective" of "even handed justice":

> The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. In the ultimate analysis, each case involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even handed justice.[5]

More dramatically, Andrew Phang JC (as his Honour then was) described procedure and substantive law as two facets of one "orb" of justice:

> The quest for justice … entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind …
>
> It is true, however, that in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt … to *resolve* this tension. There is a *further* task: it is to actually attempt, simultaneously, to *integrate* these two conceptions of justice in order that justice in its fullest orb may shine forth.[6]

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[5] *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537, [2007] SGCA 22 at [82].

[6] *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425, [2005] SGHC 50 [*UOB*] at [8]–[9] [emphasis in original].

Building on Professor Jeffrey Pinsler, SC and Cavinder Bull, SC's seminal work,[7] which covered cases from 2005 to 2010,[8] this two-part article examines various High Court and Court of Appeal cases from 2001 to 2020, most of which are expressed in terms of the orb of justice or even-handed justice. It considers how these cases show that procedure has been made coequal with substantive law, and how this shift to coequality has occurred in two stages:

(a) From resolving the tension between procedure and substantive law as separate conceptions of justice ("to resolve this tension", in Andrew Phang JC's words[9]) – discussed in Part I (this Part);

(b) To balancing procedure and substantive law as integrated aspects of the orb of justice ("to integrate … justice", in Andrew Phang JC's words[10]) – discussed in Part II.

II. "TO RESOLVE THIS TENSION"

Classically (at least following the *Judicature Acts*[11]), the common law has been bifurcated between procedure and substantive law, perhaps in line with 19th-century English lawyers' tendency to classify the world into binary sets. This sets up a tension which the cases have resolved in several ways:

(a) For a long time, procedure was subservient to substantive law – discussed in section II(A).

(b) Recently, procedure has become more dominant, whether:

  (i) In protection of substantive law – discussed in section II(B); or

  (ii) In collaboration with substantive law – discussed in section II(C)

(c) Fundamentally, procedure is the very means by which substantive law is effectuated – discussed in section II(D).

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[7] Pinsler & Bull (2011), *supra* note 3. See also Jeffrey Pinsler, "The Ideals in the Proposed Rules of Court" (2019) 31 SAcLJ 987 at section II.

[8] *Ibid* at [2].

[9] *UOB*, *supra* note 6, at [9] [emphasis removed].

[10] *Ibid.*

[11] *Supra* note 2.

A. Procedure Yields to Substantive Law

First, procedure yields to substantive law in the interest of justice, though as an equal "spouse" rather than a subordinate "handmaid" shoved aside by substantive law.

Perhaps the pioneering case in this shift to coequality is *Lea Tool and Moulding Industries Pte Ltd v CGU International Insurance plc*,[12] where the High Court set aside a judgment in default of compliance with an unless order. Substantive justice favoured setting aside the default judgment: the claim was "substantial" (slightly under $1.5m) and there were triable issues (summary judgment had been refused).[13] The balance of procedural justice was less clear: on the one hand, the application to set aside the default judgment was nearly three years late; on the other hand, the applicant's non-compliance with the unless order was "minor", and the respondent's failure to highlight the potential irregularity to the registrar (when the respondent should have) contributed to the irregularity of the registrar's default judgment.[14] Ultimately, the court held that the applicant "should not be deprived of the benefit of an insurance cover merely because of a minor [procedural] irregularity",[15] as "procedural laws are ultimately handmaidens to help us achieve the ultimate and only objective of achieving justice".[16]

The decision, while expressed in the language of subservient "handmaidens", foreshadows procedure's new role as a coequal "spouse" on closer inspection. Initially, the court was not inclined to set aside the default judgment.[17] After further arguments,[18] the court was persuaded that the balance of procedural justice tipped in favour of setting aside the default judgment.[19] Thus, procedure was not violently shoved aside by, but gently yielded to, substantive law in the interest of justice.

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[12] [2000] 3 SLR(R) 745, [2000] SGHC 241.
[13] *Ibid* at [3], [21].
[14] *Ibid* at [17], [21].
[15] *Ibid* at [21].
[16] *Ibid* at [16].
[17] *Ibid* at [17].
[18] *Ibid* at [18].
[19] *Ibid* at [22].

B. Procedure Protects Substantive Law

Second, procedure protects substantive law's integrity.

In *K Solutions Pte Ltd v National University of Singapore*,[20] the High Court struck out the claim of a party who deliberately destroyed documents. The court held that the possibility of a fair trial depended, not only on the availability of documents, but also the reasons for any unavailability of documents:[21]

(a) If the destruction was deliberate, and:
    (i) If important documents were unavailable, striking out would be appropriate.[22]
    (ii) If important documents remained available, striking out would not necessarily be appropriate, depending on the availability of other documents.[23]
(b) If the destruction was reckless or negligent, striking out would depend on a variety of considerations.[24]
(c) If the destruction was innocent, even if important documents were unavailable, striking out "must be rare".[25]

This intricate classification reveals a nuanced approach towards protecting substantive law's integrity. A fair trial is impossible if important documents are deliberately destroyed. But a fair trial remains possible even if important documents are innocently destroyed, or unimportant documents are deliberately destroyed. Indeed, striking out may even occasion substantive injustice, as "… perfect justice … would actually defeat justice".[26]

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[20] [2009] 4 SLR(R) 254, [2009] SGHC 143.
[21] *Ibid* at [129].
[22] *Ibid* at [127].
[23] *Ibid* at [126].
[24] *Ibid* at [130]; as noted by the SGHC, such circumstances are "infinitely varied".
[25] *Ibid.*
[26] *Breezeway Overseas Ltd v UBS AG* [2012] 4 SLR 1035, [2012] SGHC 170 at [20], citing *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 at [51].

C. Procedure Collaborates with Substantive Law

Third, procedure collaborates with substantive law to achieve the policy of the law. While policy has long been derided as a "very unruly horse",[27] the twin whips of procedure and substantive law can be helpful in taming this workhorse.[28]

In *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [*Greenline*],[29] the Court of Appeal admitted into evidence a letter which was both a without-prejudice communication and an acknowledgement of debt. It held that the letter fell within all three solutions in *Bradford & Bingley plc v Rashid* [*Bradford*][30] to the question of the admissibility of without-prejudice acknowledgements, without endorsing either the majority's, Lord Hoffmann's, or Lord Hope's solution.[31]

Greenline remains to be explained in terms of which *Bradford* solution(s) apply in Singapore (even if, strictly speaking, the discussion on the admissibility of without-prejudice acknowledgements were *obiter*, as the *ratio* turned on the waiver of privilege[32]), for three reasons. First, *Greenline* was applied without explanation by the Court of Appeal in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd*,[33] in admitting a without-prejudice acknowledgement.[34] Second, *Greenline* was applied at some length by the High Court in *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [*Cytec*],[35] which preferred the majority's solution, and noted that Lord Hoffmann's solution was subsequently disapproved by the UK House of Lords (while ultimately leaving the question to the Court of Appeal).[36] Third, *Bradford*'s solutions should be reconsidered in Singapore, where both the without-prejudice rule and the acknowledgement rule are statutory rules embodying Parliament's intent.[37]

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[27] *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674, [2008] SGCA 23 at [40], citing *Richardson v Mellish* (1824) 2 Bing 229 at 252, 130 ER 294 at 252, 303.

[28] See *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674, [2008] SGCA 23 at [40], citing *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591 at 606.

[29] [2007] 3 SLR(R) 40, [2007] SGCA 25 [*Greenline*].

[30] [2006] 1 WLR 2066 [*Bradford*].

[31] *Greenline*, *supra* note 29 at [17]–[19].

[32] *Ibid* at [22].

[33] [2014] 2 SLR 318, [2014] SGCA 5 at [93].

[34] See *ibid* at [93].

[35] [2009] 4 SLR(R) 769, [2009] SGHC 177 [*Cytec*].

[36] *Ibid* at [36].

[37] See *Evidence Act* (Cap 97, 1997 Rev Ed Sing), s 23(1); *Limitation Act* (Cap 163, 1996 Rev Ed Sing), s 26(2).

Procedure's collaboration with substantive law can partly explain which *Bradford* solution(s) should apply in Singapore. The basis for this collaboration is the policy of encouraging settlements shared by the *Limitation Act*[38] and the *Evidence Act*;[39] the High Court in *Cytec*[40] observed that both the without-prejudice rule and the acknowledgement rule have the policy of encouraging settlements.[41] A recent exercise in identifying a policy shared by two statutes is *UKM v Attorney-General* [*UKM*],[42] where Sundaresh Menon CJ held that the *Adoption of Children Act*'s[43] specific provisions on child adoption were "supplemented by" the *Guardianship of Infants Act*'s general provision for the paramountcy of the child's welfare,[44] so that the policy of the paramountcy of the child's welfare was shared by both statutes.[45]

Collaboration favours the majority's solution – that the without-prejudice rule does not apply to apparently open communications designed only to discuss the repayment of an admitted liability, rather than to negotiate the existence and extent of a disputed liability[46] (which was preferred by the High Court in *Cytec*[47]). The majority's solution is not unlike Lord Hope's solution – that the without-prejudice rule does not apply to "clear admissions or statements of fact", which do "not form part of the offer to compromise".[48] Both solutions achieve the policy shared by the without-prejudice rule and the acknowledgement rule – to keep claims out of court.[49] Otherwise, to exclude without-prejudice acknowledgements, even if they clearly admit the existence or extent of liability, not only does nothing to achieve the (other) policy of the without-prejudice rule – to encourage parties to reach agreement[50] (presumably, because agreement has already been reached); but also undermines the policy of the acknowledgement rule – to keep claims out of court (because creditors will be forced to litigate, if the limitation clock cannot be reset by acknowledgement).[51]

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[38] Cap 163, 1996 Rev Ed Sing.
[39] Cap 97, 1997 Rev Ed Sing.
[40] *Cytec*, *supra* note 35.
[41] *Ibid* at [15], [27]–[28].
[42] [2019] 3 SLR 874, [2018] SGHCF 18.
[43] Cap 4, 2012 Rev Ed Sing.
[44] Cap 122, 1985 Rev Ed Sing, s 3.
[45] *UKM*, *supra* note 42 at [148].
[46] *Bradford*, *supra* note 30 at [73].
[47] *Cytec*, *supra* note 35 at [36].
[48] *Bradford*, *supra* note 30 at [25].
[49] *Ibid* at [34], [74].
[50] *Ibid* at [74].
[51] *Ibid* at [3], [38], [74].

Indeed, both solutions not only represent collaboration between procedure and substantive law, but would also give full effect to the Singapore Parliament's intent.

Collaboration is inconsistent with Lord Hoffmann's solution – that the without-prejudice rule does not apply to acknowledgements,[52] unless parties agree that anything said in negotiations cannot be used as acknowledgements[53] (which was subsequently disapproved by the UK House of Lords, as noted by the High Court in *Cytec*[54]). Lord Hoffmann's solution effectively emasculates the without-prejudice rule in the context of acknowledgements (since, as his Lordship acknowledges, parties in this context are unlikely to agree that anything said in negotiations cannot be used as acknowledgements, as creditors will realise that debtors are trying to run down the limitation clock[55]). Indeed, Lord Hoffmann's solution not only represents the triumph of procedure over substantive law (albeit a largely hollow triumph since, as his Lordship acknowledges, "[q]uestions of evidence to prove the debt will arise later"[56]); it is also questionable in Singapore, where the without-prejudice rule is a statutory rule embodying Parliament's intent, rather than a "general public policy" as in England and Wales.[57]

Furthermore, collaboration is inconsistent with Lord Hoffmann's justification for his solution – that a statement of acknowledgement would be used, not as evidence of an acknowledgement (ie an admission), but as the acknowledgement itself.[58] Lord Hoffmann's justification was subsequently disapproved by the UK House of Lords[59] because his Lordship's distinction between admissions and acknowledgements was difficult to draw.[60] Perhaps, this is because Lord Hoffmann's distinction undermines the collaboration between procedure and substantive law;

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[52] *Ibid* at [16].

[53] *Ibid* at [16], [18].

[54] *Cytec*, *supra* note 35 at [36].

[55] *Bradford*, *supra* note 30 at [18].

[56] *Ibid* at [16]. See *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd (1135/2016)* [2017] ZASCA 98, [2017] 3 All SA 739 at [39], where the Supreme Court of Appeal of South Africa, applying *Bradford*, held, "Where acknowledgements of liability … would interrupt the running of prescription, such acknowledgements should be admissible, even if made without prejudice during settlement negotiations, but solely for the purpose of interrupting prescription. … The admission remains protected in so far as proving the existence and the quantum of the debt is concerned."

[57] See *Bradford*, *supra* note 30 at [16].

[58] *Ibid* at [16].

[59] See *Ofulue v Bossert* [2009] 2 WLR 749.

[60] *Ibid* at [43], [51], [95].

Lord Hope (taking another bite at the without-prejudice cherry) opined that "this is not a situation in which arguments that resort to procedural … technicalities are appropriate".[61]

D. Procedure Effectuates Substantive Law

Finally, procedure effectuates substantive law. As Lord Penzance in *Kendall v Hamilton*[62] said, procedure is "the machinery of the law".[63]

This perhaps obvious point is vividly illustrated in *Family Food Court v Seah Boon Lock*,[64] where the Court of Appeal considered an agent's claim for substantial damages in contract for loss suffered by its (identifiable) undisclosed principal. The substantive law was controversial, with "conflicting arguments" whether to award the agent substantial damages for its loss.[65] Fortunately, procedure had a "simple … solution" for achieving substantive justice: awarding the principal substantial damages for its loss by joining it as a party, whether on parties' application, of the court's own motion or by the court's inherent power.[66] If the principal decides not to join, it cannot re-open the case,[67] presumably for abuse of process.

It seems ironic that, in trying to achieve substantive justice, substantive law tied itself up in knots. Instead, procedure cut the Gordian knot and "obviate[d] all the difficulties [*vis-à-vis* recovery of damages]", awarding the principal its "full measure of damages"[68] and achieving the full extent of substantive justice. But it is unsurprising, for procedure has secreted substantive law since the 12th century. Substantive law's recent growth spurt (at least since the *Judicature Acts*[69]) may obscure this. But when substantive law inadvertently throws in a spanner, procedure still restarts the law's machinery.

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[61] *Ibid* at [7].
[62] (1879) 4 App Cas 504.
[63] *Ibid* at 525.
[64] [2008] 4 SLR(R) 272, [2008] SGCA 31.
[65] *Ibid* at [60], [62].
[66] *Ibid* at [63]. In *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258, [2013] SGCA 28, VK Rajah JA (as his Honour then was) observed that "inherent power" was not synonymous with "inherent jurisdiction" (at [33]), given the distinction between jurisdiction (the authority to hear and determine a dispute) and power (the capacity to give effect to the determination of a dispute) (at [31]).
[67] *Ibid* at [65]–[67].
[68] *Ibid* at [63].
[69] *Supra* note 2.

III. CONCLUSION

Part II discusses how more recent cases have adopted a conceptually different approach, where procedure and substantive law are not conflicting concepts in a tension to be resolved, but harmonious aspects of the orb of justice to be integrated.