ROUNDTABLE DISCUSSION HOSTED BY THE STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS (SIFoCC) AND THE NATIONAL JUSTICE ACADEMY (NJA) OF INDIA

"E-Dispute Resolution – A Judicial Conversation"

Saturday, 27 November 2021

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I. Introduction

1. A very good afternoon to everyone. I am grateful to Lord Thomas, Sir Robin Knowles, and Justice Chandrachud, as well as the National Justice Academy of India and the SIFoCC Secretariat, for organising today's roundtable discussion. We have gathered to discuss a topic of growing importance – e-dispute resolution. I think this is an area that bears tremendous transformative potential, principally because technologically enabled forms of dispute resolution hold out a hope for some partial solutions to the challenge that I have been asked to outline today, which is the problem of *hyper-complexity* in dispute resolution.[1]

2. I recently delivered the Goff Lecture in which I addressed this issue in some detail, and a copy of my paper has been circulated. We also have time set

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[1] Jörg Risse, "An inconvenient truth: the complexity problem and limits to justice" (2019) Arbitration International 291.

aside later for an open-ended discussion. So, for my introduction, I wish only to briefly set out the contours of the problem and outline its impact on us as judges and our judicial systems.

II. The nature of the complexity problem

3. Let me begin with the nature of the problem. In essence, the "complexity problem" refers to the concern that there is a growing class of disputes that have become so factually and evidentially complex that they are virtually impossible to adjudicate fairly and properly by our existing systems and process.[2] There are several factors that drive this trend, including the growing sophistication of commerce in modern society and the inexorable march of science and technology. At the core of all these factors is human advancement – as our understanding of the world has evolved and become more complex, so too have our innovations and the way we structure our relationships, and inevitably, also the way we resolve our disputes.

4. A simple example of how this problem has manifested is in the process of discovery. As many among us would likely have observed, discovery today is vastly different from how it was just two decades ago. Instead of being restricted to just a few hardcopy bundles of documents, there are now frequently terabytes

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[2] Sundaresh Menon CJ, "The Complexification of Disputes in the Digital Age", speech at the Goff Lecture 2021 (9 November 2021) ("Goff Lecture 2021") at para 2.

of digital information that parties overwhelm each other with, and often also the court. If we accept that no person can readily digest or review this amount of information without some form of technological assistance, much less within the sort of timeframe expected in a typical litigation, would it be fair or realistic to expect our Judges to do so in a manner that is efficient and just?

5. If we break the complexity problem down further, we might see that there are at least three dimensions.

(a) The first dimension is *legal* complexity, because in today's "law-thick world", legislation and regulations touch almost every aspect of our social and economic relationships.[3] And the speed and extent by which these evolve to catch up with societal innovation make it unrealistic for any judge or lawyer to claim complete mastery over any area of law or practice.

(b) Second, there is *technical* complexity, which is led primarily by advancements in science and technology, and has resulted in our courts becoming increasingly reliant on experts to explain concepts outside of our

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[3] Gillian K Hadfield and Jamie Heine, "Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans" in S Estreicher and J Radice (eds) Beyond Elite Law: Access to Civil Justice in America (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>.

ordinary experience and expertise.[4] Indeed, in today's digital age, it might sometimes feel like it is us, the judges, who are truly the "laypersons".[5]

(c) The third dimension is *evidential* complexity which I have alluded to with the earlier example of discovery. One illustration of how significant this problem has become is the *Bell Group* litigation in Western Australia, which was commenced after the collapse of a massive government-linked conglomerate. The proceedings culminated in a trial that lasted 404 days, in the course of which over 86,000 documents were tendered in evidence and over 37,000 pages of written submissions were filed. The resulting judgment took two years to draft and consisted of almost ten thousand paragraphs![6]

III. The impact of the complexity problem

6. The complexity problem can have serious consequences not just in terms of the time and cost needed to resolve these disputes, but also in terms of its

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4 Goff Lecture 2021 at para 14, citing Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press, 1997) at pp 143–144, 151.

5 Even in matters of proof, we increasingly rely on tools and experts that augment human sensory perception. We see this, for instance, in motor accident cases where expert testimony on perception-reaction timings and frame-by-frame analyses of traffic camera footage are used to supplement or even contradict the motorist's account of what transpired See, for example, *PP v Tubbs Julia Elizabeth* [2001] 2 SLR(R) 716.

6 *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; [2008] WASC 239 at [956], [960]; see Anna Olijnyk, "Justice and Efficiency in Mega-Litigation" (October 2014): https://digital.library.adelaide.edu.au/dspace/bitstream/2440/91442/3/02whole.pdf at p 40, fn 1.

impact on our *ability* as judges to resolve cases properly, as well as the pressure that it exerts on the justice system as a whole.

(a) For the individual Judge, complexity can affect the basic ability to adjudicate. It may result in a greater tendency toward error, as studies in the field of medicine have shown in the context where decisions need to be made in the face of an avalanche of information.[7] It may also cause judges to rely more heavily on cognitive heuristics and shortcuts.[8] These are very human responses to complexity that Judges are not immune to.

(b) The problem also has a wider effect on the judicial system. In a world of limited judicial resources, particularly in the wake of the pandemic where national budgets will inevitably be somewhat constrained, complexity will place an increasingly unsustainable strain on the Courts and our justice system. How many 400-day trials and 10 thousand paragraph judgments

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7 Goff Lecture 2021 at paras 28–30, citing Jonathan B Spira, *How Too Much Information is Hazardous to Your Organization* (Wiley, 2011) at p 103. In the field of medical health, for instance, studies have shown that electronic health records that present doctors with quick and easy access to a wealth of detailed patient information such as past test results and detailed medical histories, rather than improve the quality of clinical decision-making, contributed to greater error and inefficiency because they overwhelmed the doctors with the sheer amount of information at hand: see Lauren F Laker, *et al*, "Quality and Efficiency of the Clinical Decision-Making Process: Information Overload and Emphasis Framing" (2017) 27 Production and Operations Management 2213 at p 2214.

8 A study has found, for instance, that in more complex jury trials, jurors tended to take mental shortcuts to reduce their cognitive load by assessing the merits of a position based on the attractiveness of the communicator, or the communicator's credentials, or the *number* of arguments rather than their *quality*: see Joseph Sanders, "Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes" (1998) 48 DePaul Law Review 355 at pp 363-364.

can we afford? And, if we somehow managed to develop technological and procedural tools to reduce the number of trial days by half, say to 200 days, which is still more than half a year, will we then be susceptible to an allegation that we have deprived parties of due process? The short point I wish to make is that complexity requires process management, but it *also* needs a more fundamental rethink about what justice means in a modern age. Do we continue to hold as inviolable the assumptions, for instance, that the more we know the better we can decide, or that justice requires that we always pursue truth at all cost?

IV. Conclusion

7. The most valuable resource that a judge needs in the modern world, I suggest, is no longer *information*, but rather, *time, focus, and attention*. And because of this, I think complexity will be one of the most critical challenges that we in the Judiciary will face in the coming decades. At the start of my remarks, I mentioned that the root cause of complexity is human advancement. One implication of this is that there is no way to *avoid* the problem; it is *inevitable* and the best we can do is to *manage* it. In the Goff lecture, I set out some possible solutions which include reviewing our evidential rules to consider permitting, for instance, proof by sampling, and to utilise technology to develop predictive or assistive tools that will help us preserve our limited judicial resources for the types and aspects of cases that *most* require our attention. But as I mentioned, this is not only a process issue but also a philosophical one that will require consensus

and our concerted study, thought, and effort.

8. Thank you very much.