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The Work of the Supreme Court and How It Is Performed*

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It was a happy thought which prompted my former students to tender me this sumptuous banquet on what is my last youthful birthday. Next year it will be a fifty-fifty proposition with me, and from then on I will be going down the long, long trail to dust and oblivion. On such an occasion one is tempted to indulge in tedious reminiscences and to give way to tearful sentimentality. But why do so? You probably know your old Dean better than he knows himself. So permit me to content myself with stating that your gracious act is only what is to be expected from graduates who experienced the rigorous training in law which was given them in the University of the Philippines, and who on account of that training and their native ability are counted among the acknowledged leaders of their country.

One of the major accomplishments of my administration as Dean of the College of Law in the University of the Philippines was the founding of the Philippine Law Journal. It still continues under the efficient direction of Dean Bocobo and your fellow alumnus, Professor Sinco. The January, 1929 issue of the Journal, on the editorial page, contained an article entitled "How Does Our Supreme Court Work". It referred to the speech of Mr. Justice Stone of the United States Supreme Court at the Semi-Centennial meeting of the American Bar Association in which he described the manner by which the United States Supreme Court performs its work. The writer could have added, if he had deemed it necessary, that Mr. Justice Campbell, in his eulogy of Mr. Justice Curtis in 1874, and more recently, Mr. Justice Hughes, now the Chief Justice, in his Columbia University Lectures, gave intimate pen pictures of the United States Supreme Court and its procedure. At any rate, the

* Remarks made by Mr. Justice Malcolm on November 5, 1930, on the occasion of the banquet offered by his former students to celebrate his birthday.

editorial in the Law Journal continued: "The revelation of how that high tribunal of justice (referring to the United States Supreme Court) disposes of matters presented before it arouses in many of us a desire, more than a passing curiosity, to know just how our own Supreme Court carry on its task of administering justice". To allay that curiosity, to dispel some of the mystery which seems to surround appellate practice in the Philippines, and to give reassurance, if such be needed, to lawyers and litigants that their cases are considered carefully by the Supreme Court and decided on their merits, it would appear that I can best devote my time this evening to the performance of a public service by taking the public into my confidence, and briefly describing the work of the Supreme Court and how it is performed.

As you are all aware, the Supreme Court of the Philippine Islands consists of nine Judges, the Chief Justice and eight Associate Justices. They are appointed by the President by and with the advice and consent of the Senate of the United States. The Court sits both *in banc* and in divisions. Six to nine judges compose the Court *in banc*, and four judges make up each of the divisions.

It might be supposed, because the members of the Supreme Court are nominated by the Executive Department and confirmed by a branch of the Legislative Department, that politics have dictated appointments. That such has not been the case is shown by the facts. Republican Presidents have named Democrats to the Court, and a Democratic President has named Republicans. It might be supposed also, because of the maintenance of the ratio of five American members to four Filipino members that racial alignments have occurred. I doubt if a single case can be found which was decided by five Americans on one side as against four Filipinos on the other side. Indeed, there have been occasions when the ratio has been nearly reversed, wiith four Filipinos participating as against two or three Americans, and the work has gone on as before. It is most gratifying to realize that political affiliation has not been of paramount consideration in the appointment of members to the Court, and that race has not been permitted to influence decisions.

The Supreme Court is, for all practical purposes, the sole court of last resort for the twelve millions of inhabitants of the Philippines. An extraordinarily heavy burden is thrown on the Court on account of practically unlimited appeal being

permitted, and on account of the Court having to decide questions of fact as well as questions of law. Not to tire you with figures, you may be interested in knowing that in 1909 the Supreme Court decided practically 700 cases. In 1919, after the passage of a decennial period, this number had risen to nearly 1,500 cases. In 1929, the number of cases decided had again increased to over 1,800. Approximately 2,000 cases are now submitted for decision annually. This number will incline to increase rather than decrease. Formerly the criminal cases were in the majority, but for some years, because of the large number of land cases, the civil cases have predominated. Of the average number of 1,800 cases decided annually, about 1,400 are disposed of by decision, and about 400 by resolution or order. In addition, the Supreme Court considers innumerable motions and petitions, hears and decides disbarment and impeachment proceedings of lawyers and judges, and conducts the bar examinations. Notwithstanding this heavy burden, it is a pleasure to be able to state that, during the last seven years, the Court has adjourned for the new year with its docket practically free from undecided cases, although I anticipate that this desirable state of affairs will not be attained this year.

Not to make invidious distinctions, but merely to emphasize the individual output of the members of the Court, a few additional facts may prove of interest to you. Mr. Justice Johnson, the senior Justice on the Court, has written the remarkable number of 3,500 opinions. Mr. Justice Torres, the member with the next longest service, over a period of twenty years and during a time when most of the work was done entirely *in banc,* handed down an average of 100 opinions a year. Mr. Justice Villa-Real, during the last four years, at a time when the Court sat both *in banc* and in divisions, was responsible for over 200 opinions a year. Mr. Justice Ostrand, in 1922, his first year on the Supreme Court, delivered exactly 362 opinions. The examples could be extended indefinitely if time permitted. With these figures in mind you might take into account the fact that judges of appellate courts in the United States are satisfied if each of them prepares 60 opinions a year, and that in the United States Supreme Court the annual average is 30 opinions.

The enormous quantity of cases being known, the next question of moment concerns the quality of the output of decisions. I can best answer by attempting a description of the Supreme Court at work.

Ordinarily, the Supreme Court calls four calendars annually. A calendar contains the cases which are ready for submission to the Court. On the calling of the calendar, or a few days previous, the Chief Justice distributes the records of the cases among the members of the Court. He does this by segregating the English records for any member not familiar with Spanish, and then by making an automatic division of the rest of the cases among the remaining members. Care is taken that each member has practically the same number of *banc* and division cases as has each of the other members. The member of the Court having in his possession the records of the cases which have been assigned him, including the transcript of the stenographic notes, the exhibits, the bill of exceptions or the record on appeal, if the case is civil, and the briefs, has now the duty of studying these cases and presenting them to the Court.

The Court convenes every morning except Sundays and holidays, during the judicial year, at 8:45. The Clerk first reads the minutes of the preceding day, which are approved or amended. The Clerk then presents for consideration the various motions which have come into Court. These are decided by the Court *in banc*. When this work is finished, the Court is ready either to hear oral arguments, to decide cases *in banc*, or to divide into its two divisions. The Court continues in session until noon. Early mornings, afternoons, and evenings are when the members find time to make their individual studies of cases and to write up decisions.

In banc, the method in conference is to begin with the junior justice and proceed around the table to the Chief Justice, each Justice as his turn comes being permitted to present a case. He does this by first distributing the bills of exceptions, or the records on appeal, if any, and the briefs, or if the case is an important or complicated one by asking for a special assignment for a day certain and distributing the briefs, and bills of exceptions, or records on appeal, if any, sometime prior thereto. Each member of the Court participating, reads the bill of exceptions or the record on appeal, if any, and the briefs. When all have concluded their study of the case, the Justice having the case in charge makes a statement, after which the case is thrown open for general discussion. Should any member entertain a doubt on a question of fact, and this happens frequently, he takes the record for reading and the discussion is postponed to another day. When the discussion is concluded, the

Justice presenting the case makes his proposition, as for example, that the judgment be affirmed. The Chief Justice polls the Court and the members vote against or in favor of the motion. Should the proposition of the Justice presenting the case prevail, he writes up the decision in accordance with the vote. Should the proposition of the Justice presenting the case not prevail, the Chief Justice assigns the case anew to a member of the Court whose views accord with the majority of the Court, in order that the decision may be prepared. After the decision is prepared, if there be one or more members dissenting, the decision is turned over to the dissenting Justice or Justices in order that the dissenting opinion may be attached to the decision. Thereafter, the majority opinion, with the dissenting opinion, is circulated among the members for their signatures. When all of the members participating have signed, or have indicated their non-conformity, the decision is handed to the Chief Justice and the following morning he gives the decision to the Clerk who announces the title and number, the Justice writing the decision, and the Justices concurring and dissenting. The case is then considered promulgated, and a record of the same is made in the judgment book and in the minutes of the Court.

The procedure in divison is slightly different. There each member of the division has a day for the submission of his cases. In the matter of presentation and voting, the same method is followed, however, in division as *in banc*. If in division the vote on the case should be two to two, or if any member should dissent on a legal question, the case is transferred to the court *in banc* for decision. As to special proceedings and important motions, as they are filed they are placed before the Chief Justice who assigns them among the members of the Court.

Now, do not gain the impression for a moment that the conferences of the members are formal, pink tea affairs. If any of you have been in the room in which the members meet daily for consultation, you will have noted a rectangular table around which they sit, and you will have noted also a smaller table at the head of the long table for the Chief Justice. The small table was placed there at the instance of a former Chief Justice who objected to the force with which some of the members pounded the table to enforce their points. I recall in the judicial lottery case, that when the case was originally submitted, only one of the members stood with me in adhering to the view that the law was invalid, and that this member who later

was named Chief Justice became so heated in argument one morning that he had to retire to his office to avoid a serious physical collapse. Do not think either that a member of the Court, to use Mr. Justice Holmes' phrase, must not be ready to "recite" on the case he is presenting. The other day, after concluding a study of the Lopez *habeas corpus* case, which included every available authority, I obtained the approval of a special time for the discussion of the case, and distributed the three briefs of the parties. When the day named arrived, I made my statement, after which I was subjected to cross-examination and to counter arguments which were thrown at me from all angles. Even then four members were not ready to announce their votes, and the case had to be postponed for further consideration. When a case comes forth from such an ordeal, it is dissected to its last detail, and if the result does not accord with exact justice, it is on account of the frailty of human wisdom and not on account of a desire not to see that exact justice is done.

The pertinent question now arises as to what defects, if any, there are in the procedure which I have attempted to outline. I can only offer my personal opinion for whatever it may be worth. My blunt answer is that there are quite a number of defects. The procedure is exactly wrong end too. The cases are assigned by lot to the members, without any special attention being given to the particular qualifications of the individual members. The cases are set down for hearing without the members being acquainted with the questions at issue, except that the one member having the record, may have some acquaintance with the facts. This means that oral arguments by counsel are often a waste of time, because counsel assumes that the members have knowledge of the case that they do not have, and so makes a presentation unprofitable alike for counsel and the Court.

If the foregoing is true, why is it that the procedure has not been changed? The answer is twofold. In the first place, courts are never inclined to depart from accepted practice without repeated urging. In the second place, to change the procedure would mean that the Court would soon find itself behind with its work, which would be an intolerable situation. It has long been my intention, once the Court of Appeals bill, or some substitute measure, is approved to offer a motion proposing the revision of our rules and practice.

What should be the procedure in the Court? It is a matter which merits careful reflection. I can only answer by

profferring my individual opinion. When the records are complete and ready for submission, the bill of exceptions and record on appeal, if any, and the briefs should be distributed among the members. These should be read by the members. The Chief Justice should then call up a particular case indicating its subject-matter and invite discussion. When the members have finished with the proffering of their views, although not yet final, the case should be assigned to the member who has displayed the best knowledge of it, or to the member in whose particular field it happens to fall. The case should be set down for hearing, with the members prepared to understand the arguments and to quiz counsel if desired. After the hearing, the case should again be called up by the member having it in charge, discussed, and voted. Under this practice, there could be little likelihood of a case slipping through the Court without it having been given that study and that consideration which are to be expected from an appellate Court.

What criticism has there been regarding the practice of the Supreme Court in handling its business? You are probably able to proffer more accurate information on this score than I am. There are present former Private Secretaries to the Justices who, because of their experience, are in a position to know whether or not the criticism was justified. No court, not even the Supreme Court of the United States, has been free from attacks. Thomas Jefferson once exclaimed that "the judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our Confederated fabric." Chancellor Kent, in writing to Mr. Justice Story, once said: "What a succession of great and estimable men have you witnessed as Associates since you ascended the Bench, and now what a 'melancholy mass' it presents!" Here in the Philippines, there will come to mind the good natured but pungent remarks on our Supreme Court by Judge Crossfield, your former Professor of Contracts, at a banquet of the American Bar Association, attended by Justices of the Supreme Court. The philippics of President Quezon in the Senate after I handed down the decision sustaining Judge Borromeo, the fighting Judge, will be recalled, but fortunately did not prejudice the Senate President against the Court; he was too big a man to let his opinion that one decision was wrong sway his judgment on what was for the best interests of the Court. Now, you, as lawyers, having knowledge of the criticism of our own Supreme Court and having before you

the mental picture which I have attempted to portray of Supreme Court practice, can fit complaints into the picture as well as I can. However, if any of you are still uncertain on any point, I will, at the conclusion of my remarks, permit you to get even with me for the quizzes to which I used to subject you, by letting you interrogate me on any question, relevant or irrelevant, on which you desire enlightenment.

By what constructive measures can you, who are Legislators, assist the Court? It is not for me to answer with absolute finality, but possibly I can lay before you the problems of the Court as I see them, and can indicate the basic principles which might properly act as guides. The major needs of the Court are four: First, relief from an ever-increasing volume of work; second, a remedy for the breaking of deadlocks so that the Court can function under any and all circumstances; third, adequate retirement privileges which will properly recompense members with long service on the Court; and fourth, reformed procedure. The last three subjects do not invite further discussion. As to the first need of the Court, there have been advocated as remedies the following: First, the prohibition of appeals in second instance; second, the naming of commissioners, or as they were known in Spanish times, "relators", to assist the Justices; third, the creation of an intermediate court of appeals, and fourth, the increase of the membership of the Court. The first three remedies which have been mentioned can be placed to one side with brief observations. The allowance of appeals for cases which originate in the Justice of the Peace Courts has little to commend it, but public opinion seems to insist on the right of such appeal, and even with the elimination of these minor cases, the bulk of the cases would still remain. Regarding "relators" I anticipate that even with them to make findings of fact, the Justices would need to read the records. Twice the Philippine Legislature approved bills providing for an intermediate court of appeals, which would have taken from the jurisdiction of the Supreme Court about 1,300 small cases annually, leaving with the Supreme Court the 700 cases of importance which should rightfully obtain the attention of an appellate court, but unfortunately the Congress of the United States has never been afforded any real opportunity either to ratify or to reject the court of appeals bill.

The move to increase the membership of the Court has disclosed varying opinions regarding the proper number, as eleven, thirteen, and fifteen, and the proper number of divisions,

as two or three. The latest bill which I have seen provides for fifteen Justices for the Court *in banc*, and for three divisions each with five Justices. In connection with these proposals, it can safely be asserted, without fear of successful contradiction, that a membership of nine *in banc* represents the largest number which can function efficiently. In 1837, after there had been an increase of membership in the United States Supreme Court, Mr. Justice Story wrote: "You may ask how the Judges got along together? We made very slow progress, and did less in the same time than I ever knew. The addition to our numbers has most sensibly affected our facility as well as rapidity of doing business. 'Many men of many minds' require a great deal of discussion to compel them to come to definite results; and we found ourselves often involved in long and very tedious debates. I verily believe, if there were twelve Judges, we should do no business at all, or at least, very little". After giving this quotation, Mr. Justice Hughes, now the Chief Justice of the United States Supreme Court, observes: "Doubtless, a rhetorical exaggeration to emphasize a strong point! Everyone who has worked in a group knows the necessity of limiting size to obtain efficiency. And this is peculiarly true of a judicial body. It is too much to say that the Supreme Court could not do its work if two more members were added, but I think that the consensus of competent opinion is that it is now large enough. Happily, suggestions for an increased number and for two divisions of the Court have not been favored because of their impracticality in view of the character of the Court's most important function." Professor Dodd of Yale University, in a recent address on the Problems of Appellate Courts, stated: "In view of the increasing mass of cases, the appellate courts are faced with a very practical problem. How are they to determine all cases submitted, and to maintain a leadership in the development of the law? * * * Mere mechanical devices, such as increasing the number of judges, do not solve the problem, and in a single court successful conference becomes difficult with a membership of more than nine." The second consideration is that to increase the number of divisions would simply amount to multiplying the number of chances for differences of views. The third point to remember is that increased membership means an increased budget, say of ₱150,000 annually, and increased accomodations, for the building of the Supreme Court is utilized to the last inch. If the propositions which I have announced are sound, the problem consists

in relieving the Court of its work, without increasing the membership *in banc* to more than nine, and without increasing the divisions, but preferably by abolishing them. This result was attained in the court of appeals bill and possibly could be reached by some other means.

As you will at once realize, any measures, to be helpful, require adequate study. How can that study, with profitable results, be had? Three parties are to be considered: The Judiciary, whose problems are to be solved; the Legislature, which must provide the legislation solving the problems; and the Chief Executive, who must concur in the legislation. I have always found the Executive and Legislative Departments inclined to lend sympathetic aid to the Judiciary. It occurs to me to suggest that the most logical way to bring the three powers into unison on the subject, to ascertain the needs of the Supreme Court, and to find remedies for its needs, consists in the approval of a Concurrent Resolution creating a joint committee of the Philippine Legislature to make a study of the needs of the Supreme Court and submit recommendations thereon, together with the necessary legislation, to the next session of the Legislature. I entertain no doubt that by this means, and in due time, helpful, constructive legislation will be approved.

In the address of Mr. Justice Stone to which I previously alluded, he concluded as follows: "From the history of the court we know that firm adherence to its established traditions of judicial independence and of performance or judicial duty with painstaking thoroughness and fidelity are the strongest assurance that it will meet and sustain the responsibility of the future. Often unjustly and unreasonably attacked, those attacks have left no scar. The faithful performance of the great work of the court day by day and year by year has won to it deserved confidence in its disinterestedness and stability as an institution, and brought it to an indisputable triumph over hasty criticism and the dissatisfaction of the moment. Those who bear its responsibilities now and in the future will do well to ponder this significant fact and to recall as well that in the course of its long history the only wounds from which it has suffered have been those which, in the words of former Justice Hughes, were 'self-inflicted'." I would like to think that in a lesser degree these apt words could be applied to our Supreme Court.

I esteem the birthday present of sincere friendship which you have given me, and from it will gain renewed faith for the performance of the daily task. One year hence, I would like to see another reunion of this kind, and so invite you to be my guests on that occasion.