Looking Forward: The Golden Age of Procedure*

By JOSE P. LAUREL
Associate Justice, Philippine Supreme Court

NO legal system has ever remained stationary. The two procedural systems, the continental and the common law, have passed through various interesting stages of development. The Philippines is an heir to both systems. The advent of American sovereignty and the early enactment of Act No. 190 by the Philippine Commission on August 7, 1901, resulted in the complete overthrow of the continental system in its crude state of development in the Philippines. Act No. 190 of the Philippine Commission implanted a system of procedure sponsored by then Commissioner Ide and patterned after the Dudley Field Code of 1848, as modified and adapted to local conditions in the states of California, Georgia, Mississippi, Massachusetts, Ohio and Vermont. The system represented the Anglo-American procedural development of that epoch which was the result of a long historical process, covering the transition from oral pleading to that of written pleading at common law, and from the system of compurgation to that of procedural formalism in the determination of issues of fact in the country of its origin. Under the sway of Anglo-Saxon influence, procedural reform in the Philippines has closely followed reform movements in the United States. It took more than a quarter of a century in the United States to partially emancipate from the artificial system of issue pleading at common law which is said to be "once the pride of Stephen and Parke and the despair of Bentham."

In the Philippines we cannot speak of the indigenous growth of any procedural system. In fact the much-vaunted benefits, said to have been derived from the blending of the two great legal systems in this part of the world —which is not true in the law of procedure—are the outcome of pure accident and are not attributable to the genius or the fertility of the soil on which the Anglo-American system of procedure found itself planted and to have taken roots. Three hundred years of political servitude has enervated and dwarfed Filipino initiative and mentality. The timely announcement of the projected creation of a codification committee so that our laws may be framed in accordance with social and economic forces at work and in consonance with our customs and idiosyncrasies as a people and in the direction of our ideals in jurisprudence is a presage of a forthcoming wholesome relief.

Historically, our system of procedure has come from a country known for its traditional conservatism. It is said to be the Briton's boast that he cares nothing for political and legal abstractions, that he advances from point to point always resting on the past, ready to retire in case of error. The American bench and bar have inherited this English tradition,

* Delivered at the Judges' Convention in Baguio.

and, curiously enough, the need for procedural reform had to be sounded through postulations of academicians and law professors. (Dean Roscoe Pound of Harvard Law School, Some Principles of Procedural Reform [1910], 4 Ill. Law Review, 401 et seq.)

To be sure, much has been done to do away with procedural stratagems and to make the trial of cases less a battle of lawyers' wits and more an inquiry into the truth of the matter in controversy, but the reforms in the United States can hardly be said to approximate the desired goal and I dare say that our imitation and adoption of the novel features and now incorporated in our new Rules of Court will not carry us to the golden age of procedure. Albeit, we have taken rapid strides in bringing about simplification and promptitude in the determination of judicial controversies: We have abolished general denials and demurrers: have developed a device permitting free joinder of claims and parties; have provided for liberality in the introduction of amendments to pleadings; have made summary judgment available in all cases; have adopted extensive fact-discovery before trial even in doubtful cases; have incorporated the feature of pre-trial conferences to reach amicable settlement or to settle facts and formulate issues; have simplified and made less costly appeals; and have otherwise simplified pleadings and procedure to effectuate the avowed purpose announced in the first rule so that controversies may be determined on their merits and the parties may obtain "just, speedy and inexpensive determination of every action and proceeding." Let us hope that we are nearer the goal. But, to further approximate the *golden age of procedure* much remains to be done and undertaken:

(1) Not only must the judiciary be reinvested with the rule-making power which properly and essentially belongs to it, but the policy of judicial totalitarianism should be accepted and followed to its logical conclusion by making the rules promulgated by the Supreme Court beyond recall or amendment by a coordinate department of the Government. The rule-making power insofar as it concerns the determination of what is needed and what is best for the transaction of judicial business either belongs to the judiciary or not at all. If it belongs to the judiciary—and it belongs to the judiciary rationally and historically—the wisdom and necessity of a particular rule should be determined by that branch, and finally. The limitation upon this power was deemed to constitute a wholesome restraint upon the Judiciary—as it was so considered in the Constitutional Convention—but if the wisdom of legislation is exclusively determined by the Legislative department and absolute confidence is lodged in the Executive in the faithful execution of the laws, no potent reason is perceived why supervisory authority in the nature of a *veto* power should be needed in the exercise of the rule-making power by the Supreme Court. The pronouncements of the Supreme Court on the validity or constitutionality of a legislative or executive act is final, and our only limitation is the Constitution and our own self-restraint. And it seems illogical that upon a matter which is primarily its concern, the action of the Supreme Court should be lacking of the desired finality. Only by vesting

the Judiciary with totalitarian-like control over pleading, practice and procedure could *judicial leadership* be established in its own field, and complete and total responsibility assumed in the practical operation and proper functioning of what should be an integrated judicial system of the nation.

(2) No method of administering justice will work well without a competent judiciary to operate it. The success of any procedural system depends upon the indispensable and ultimate factor: the man. With indolent and incompetent judges no system of procedure will succeed however well devised. No system of procedure can be judge-proof. In the language of President Quezon, "the administration of justice cannot be expected to rise higher than the moral and intellectual standards of the men who dispense it." (Inaugural Address, November 15, 1935.) To bring about the desired simplification in the operation of the judicial machinery, the operative basis should be "breadth and flexibility." This means that the rules or any void found in the rules must be supplemented by sound judicial discretion, looking backward for precedents when necessary for enlightenment by our own experience and looking forward most of the time to keep pace with the development of time and circumstances. In fact, generally speaking and except as otherwise provided, the application of the rules of procedure is lodged in the sound discretion of the trial judge. He is supposed to possess a mastery of the general legal principles, gifted with ordinary common sense, and *endowed with a high sense of justice and honor*. If adhered to intelligently and fairly, it is to be expected that trials will be conducted competently, the rights of all concerned adequately safeguarded and, in the language of section 2 of Rule I, the parties will obtain "just, speedy, and inexpensive determination of every action and proceeding" on the merits. "All the rules in the world," so we are admonished by Dean Wigmore, "will not get us substantial justice if the judges have not the correct living moral attitude towards substantial justice What the law of Evidence, and of Procedure, nowadays most needs is that the men who are our judges shall firmly dispose themselves to get at the truth and the merits of the case before them. Until they become of this disposition and spirit, the mere body of rules, however scientific, however sensible, however apt for justice, will minister to them in vain." (Introduction, Code of Evidence [1935], p. xiv.) Therefore, only men capable of understanding and applying the rules with breadth and fairness should be appointed to the Bench. To this end, a judicial council, presided over by the Chief Justice, may be administratively created, whose functions could simply be of advisory character. Close scrutiny in the selection of judges is always beneficial. Nominal leadership in any field or undertaking is undesirable because it is of no practical utility devoid, as it must be, of that moral invigorating influence that attracts and solidifies.

3. Orderly and efficient administration of justice implies devoted cooperation on the part of the members of the bar. An intelligent and upright Bar is essential. Even in Russia where, following

the Marxian theory, judges and lawyers are considered a temporary evil and the practice of law —after the revolution of 1917— was thrown open to any uneducated workman and peasant, communistic economics and socialistic ideology have yielded to the fundamental truth, that "justice", in the language of Daniel Webster, "is the greatest concern of mankind," and that whatever the form of government, those who minister it and those who are called upon to aid in that vital public function must have had some adequate training and preparation and possessed furthermore of the primary condition of moral character. In countries, where an enlightened judicial system is in vogue, admission to the bar, no less than the selection of judges, is regulated with utmost concern. In our case, we have established certain standard requirements for admission to the practice of law, but there is a feeling that the output speaks more of quantity than of quality. Notwithstanding the academic requirement that the applicant must have had the two-year preparatory course in addition to the four year high school course previous to the required four-year law course in a recognized law school (Rule 127, sections 5 and 6), it has been suggested that further emphasis be made in the acquirement of a general and broader culture as a prerequisite to the study of law. It is advocated, for instance, that the preparatory course should be lengthened with a view to imparting a more liberal education and that the law course should be shortened to three years or even less. This suggestion is not without pattern in the United States where leading universities require four-year collegiate course and only three years for law. In the study of law thereafter, the American system claims the advantage of rigorous attendance and individual supervision and training over the students unlike the system in vogue in some countries of Continental Europe where the lecture system is adopted and the requirement as to attendance is said to be lax. The argument advanced in favor of the continental system is that thereunder the students are led freely to develop criticism and the love of mental adventure instead of relying on antiquated precedents and outworn legal principles. A system that would combine the advantages of the two methods is perhaps the solution. It does not seem, however, to be much a matter of system of instruction as it is of developing a tradition for the law profession. Not mere law or rule will set this tradition. Not mere legal education will offer the desired relief for improvement. In the Latin countries of Continental Europe, led by France, the lawyer is said to be a thoroughly trained man in an academic sense. "La Noblesse de la Robe" embodies an ideal which makes of the *avocat*, in the fiery language of a French pre-revolutionary leader, as "the tutelary genius of the repose of the people, the friend of man, his guide and protector." In said countries, law is emphatically a learned profession for which the universities of Paris, Sorbonne and Madrid are famous. In England, however, university education is not essential, although English barristers are generally colleged-bred. But they do not receive their technical training in schools or universities but in the inns of court which are

"the nurseries of the common law." The Council of Legal Education of these inns promulgate uniform "consolidated regulations" which prescribe the requirements for admission, the mode of keeping terms, the examination of students, and the calling of students to the Bar. More than mere instruction in the study and practice of law, the noble tradition of the profession is breathed, in the air of mutual respect and comradeship by the obligatory attendance, for instance, at the required number of dinners during each term. Above scholastic requirements and above all things else, the Inns of Court inspire and uphold the highest standards of professional honor and rectitude to the Bench, the Bar and the people. We are informed by Dean Burdick in his interesting account of *The Bench and Bar of Other Countries* (1939), p. 222, that "the Benchers of each Inn have disciplinary power over all their members, and no person expelled from one Inn is admitted a member of any of the others. Moreover, a barrister, if expelled, is no longer given audience in the courts. On the other hand, when called to the Bar, a barrister remains a member of the Inn for life, or during good behavior. There are no annual dues. The Bar dues paid, in connection with the other fees, at the time of his call constitute a life payment." Here is an inspiring English tradition that has given to the world its greatest contribution to the science of government not only with respect to the development of an indepedent, self-respecting and respected judiciary but also in the forging of the noblest professional tradition among barristers, founded on dignity and integrity in personal character, loyalty to established legal principles, and strict adherence to the fundamental ideas of truth and justice. A self-governing, integrated bar along the line of the English tradition is something that should be longed for. A disorganized bar is no better than an atrophied living organism. It neither draws nor commands respect.

(4) The broad policies affecting the administration of justice should be integrated on the basis of anxious cooperation between the powers of government. The rule-making power of the judiciary is, indeed, a notable accomplishment and, as stated, shifts to the judiciary the burden of responsibility in the matter of formulation of methods for determining, promptly and economically, judicial controversies. But the concession of this authority is not the *summum bonum* of judicial reform and cannot mean liberation from cooperative action of the other departments of the Government. Nowhere is interdependence of the powers best illustrated than in the common enterprise of improving upon the administration of justice. What pleading, for instance, should be allowed in the interest of speedy and economical administration of justice? This is a matter that should be passed upon and determined by the judiciary under its rule-making authority. Who should be appointed to the Bench, capable of administering justice with wisdom, breadth and flexibility? This is primarily confided to the Executive. What legislation of substantive character should be enacted to render effective a given judicial policy expressed in a rule of court? This is a matter on

which the legislative department should act. Why, for instance, it has been asked among lawyers in the court corridors, should it be permitted for stenographers in certain cases to collect in a month's time more than the salary of a judge of first instance for copies of stenographic notes? Why, it is asked, are the stenographic records transcribed and elevated sooner to the appellate courts, in some cases but in other cases stenographers have to be threatened with contempt proceedings before the records are transcribed and elevated? Would it not be better it is asked, to increase the salaries of court stenographers and prohibit the collection of honorarium for transcripts made? The collection being authorized by law, and the conferment of this privilege being substantive in character, here is an instance where the cooperation of the legislative department may be displayed to assist the parties in obtaining as speedy and inexpensive dispensation of justice, in the language of our Rules. And there are other instances to show that the judiciary in its own field is not self-sufficient.

(5) The process of litigation is divided into two principal stages: the pleading and the trial. We must look forward to the day when pleadings, although prepared and formulated by the parties and their counsel, the issues are no longer to be framed by the parties without the intervention of the court; we must make further advances by divesting procedure of the remaining unnecessary technique and according more and more recognition to the substance and merits of the controversy. Pre-trial conferences, to precipitate settlement and to simplify and determine issues, should be made compulsory instead of discretionary. In other words, the incoming innovations should go far to make that part of the law of procedure, which is concerned with the steps to be taken before trial, an effective aid in the accurate ascertainment of matters of fact and the satisfactory application of the substantive law to the fact. Great stress should be given to the initial pleading so that the same could be simplified under the direction of the court and the settlement of exact issues made under the direct control of the court.

(6) Basically, the system of pleading should be characterized by its suppleness. Historically, the rigid principle has been the Anglo-American tradition and the Code system has offered but a palliative to atone the rigidity. The rigid system is best illustrated by the time-honored principle of *juxta alegata et probata*. Pleadings become structural and the judgment must find its support in the pleadings as well as in the proof. The next advance towards the flexible system will consider allegations and averments as preliminary notices. This is the system of notice-pleading advocated by Dean Roscoe Pound of Harvard Law School, in his advocacy for procedural reform. Provided adequate notice of the facts sought to be proved is had, pleadings should be deemed to have discharged their office and the case should be adjudged on the merits without being embarrassed by the rules. This is more than a recognition of alternative and hypothetical averments in pleadings.

(7) The system of voluntary arbitration in the settlement of differences between parties to a contract should eventually be ac-

corded recognition as part of an enlightened procedural system. Arbitration takes no rights from the courts. (Cf. U. S. Asphalt Refining Co. vs. Trinidad Lake Petroleum Co. [1915], 222 Fed. 1006, and Manila Electric Co. v. Pasay Transportation Co. [1932], 57 Phil. 600.) No one is compelled to arbitrate unless he previously had agreed so to do. As we must expand beyond economic orthodoxy, so must the rules similarly expand in providing for a method of effectuating a moral obligation which people, specially businessmen, consider fundamental. In the language of Justice Cardozo in Berkovitz, et al v. Arbib and Hovlberg, Inc., 230 N. Y. 261, 130 N. E. 288, "the court does not lose the power of hearing in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation, for the right to nullify is substituted the duty to enforce. Arbitration is not a definition of a substantive right, rather it is a form of procedure whereby differences may be settled.

(8) In the field of criminal procedure the tendency should be not to oversafeguard the rights of a person accused of a crime but to facilitate law enforcement, the prosecution of criminals and the rapid administration of criminal justice. In the United States, the tendency in the beginning was to surround the accused with prolific constitutional and legal safeguards. Recently, in order to stay the ever-advancing tide of crime, recent decisions have relaxed these safeguards with the fundamental objective in view of facilitating the capture and search of criminals and promptly deal with them in the interest of peace and public tranquility.

(9) A scientific restatement of the law of evidence should be undertaken and the rules properly coordinated and integrated. This means code-formulation along the line suggested and followed by Professor John M. Wigmore of Northwestern University in his Code of Evidence. The rules are in many instances a series of general statements of vague principles which undoubtedly may be rendered more specific and topically arranged. Fewer rules are perhaps desirable, although Professor Wigmore is of the opinion that "What the system of Evidence needs is, not so much another set of rules, or fewer rules, as a judicial flexibility of rules." But even in this case, he has formulated certain "powerful principles dominating, in spirit as well as in letter, the course of technicality, so far as it burdens our system of Evidence." In Rule 19, for instance, of his Code of Evidence, he speaks of the regulated discretion of the trial court upon the admissibility of evidence, and thereafter lays down the procedure in questions of admissibility of evidence. To attain the desired objective of dispensing prompt and inexpensive justice to the litigants, simplification in the presentation, admission and rejection of evidence at the trial is as important as the simplification of the rules governing matters of pleading and practice. The idea of codification suggests a lifetime work, if it is to be done earnestly. But certainly it is worth the efforts and sacrifice of any man of the noble profession.

(10) And, last, it is desirable that there be a standing advisory committee on rules, integrated by members of the Bench and Bar and professors of law, whose function shall be primarily to take up, in the first instance, amendments to the Rules, and to make proper recommendations to the Supreme Court. This is the case in the United States where the advisory committee that drafted the Federal Rules still continues to function, notwithstanding the approval of the present Rules of Federal Procedure. The first amendment of the Federal Rules (Rule 81 [a] [6]) was adopted by the Supreme Court on December 28, 1939, upon the recommendation of the advisory committee. The facility with which the Rules of Court may be amended is not always an advantage. Frequent changes mean disturbance of established procedure, no less than disorientation of inferior courts and members of the Bar, and the Supreme Court, in the spirit of self-restraint and by a self-imposed limitation, should resist *unnecessary* and *improvident* changes in the rules of procedure. Ambiguities and defects in the Rules will be noted but a great portion of these may be adequately dealt with by judicial construction. For no other purpose than to soft-pedal the application of the judicial brake or impart the necessary momentum, a continuing organization acting in an advisory capacity is without doubt of great practical value in the appraisal of the need of changes that should be effected from time to time.

Courts are generally conservative and are averse to radical departures from the trodden path. This conservatism, while it insures stability not infrequently is an obstacle to progress. Constructive conservatism with enough courage and audacity kept in the blood to advance when demanded by time and circumstances is just about the correct attitude and frame of mind. This, I take it, has been the attitude of the Supreme Court. The innovations adopted are expected to improve upon the existing procedural system. More perhaps could have been done and more radical changes undertaken. But Britonlike, *litus ama altum alii teneant* (Virgil, in the Aeneid). By keeping close to the shore, it does not mean that we shall never venture on the deep. Withal in the figurative language of Mr. Justice Cardozo, "the Inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow." (The Growth of the Law [1939 ed.] p. 20.)