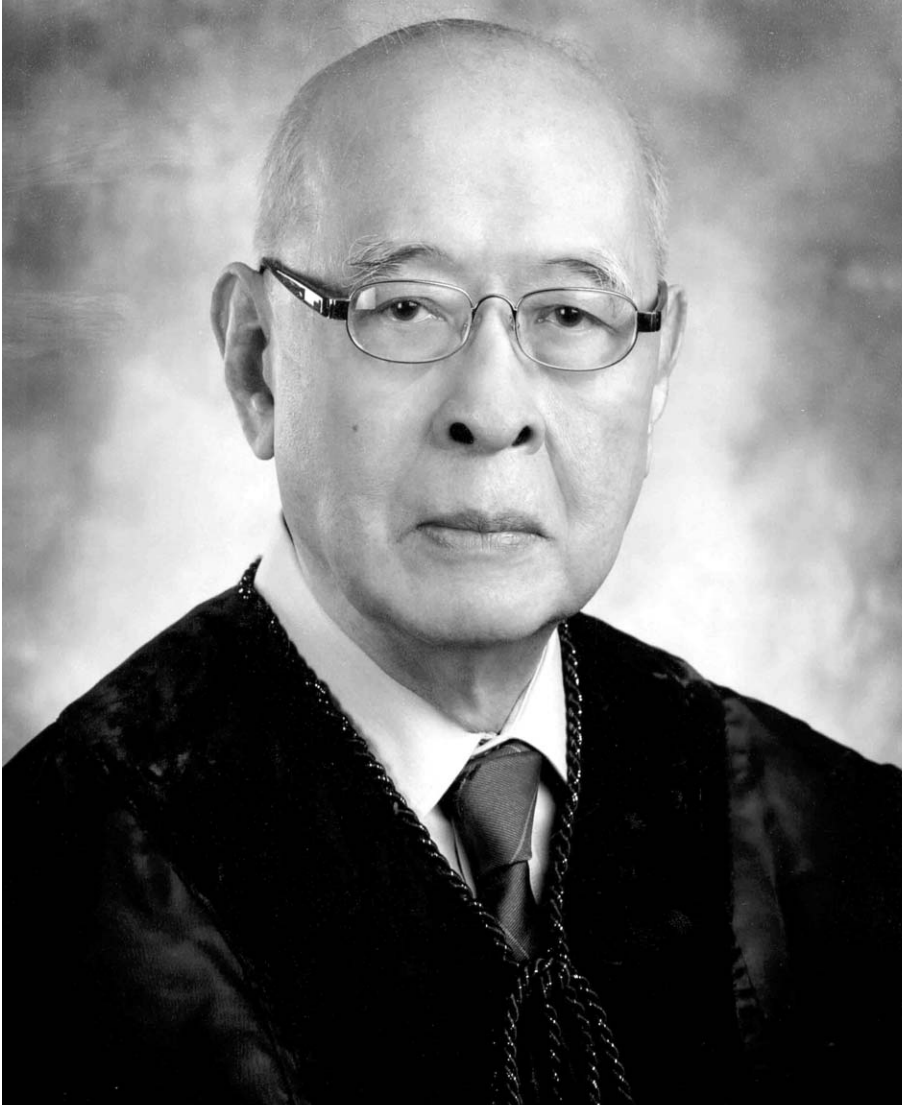


## INTERNATIONAL LAWYER

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# A Dialogue with Judicial Wisdom

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Justice Florentino Feliciano

## INTRODUCTION

The Journal of East Asia and International Law has the honor of inviting one of the most eminent international lawyers of our time, Justice Florentino P. Feliciano of the Philippines. The son of a renowned academic family, Justice Feliciano was born in Manila in 1928, and is a graduate of the University of the Philippines ("UP"). After graduating from UP, he studied international law at Yale Law School where he earned an LL.M. and a Doctor of Juridical Science ("JSD") under the supervision of legendary international law scholar Myres S. McDougall. Dr. Feliciano has had a wide-ranging and highly successful legal career as a judge, corporate lawyer, law professor and international arbitrator. It is not easy to meet a man who has embraced such a wide variety of legal appointments in a single lifetime. Admitted to the Philippine Bar in 1953, Dr. Feliciano became a co-managing partner at SyCip Salazar Feliciano & Hernandez from 1981. He was appointed Associate Justice of the Supreme Court of the Philippines in 1986 and served as Senior Associate Justice, 1994-1995. Justice Feliciano was subsequently appointed to the Appellate Body of the WTO in 1995, and he is well-known for his activities as an international arbitrator. He has served at a number of important international arbitration institutions such as the International Chamber of Commerce ("ICC") and the International Center for the Settlement of Investment Disputes ("ICSID"). He presided over a case before the Stockholm Arbitration Institute and he was a Member of the Arbitration Tribunal under Chapter XV of the UN Convention on the Law of the Sea. Dr. Feliciano is a great legal scholar. After receiving his law degree from Yale, he taught international law at various universities both at home and abroad and has published many invaluable academic papers and books on the subject. He is a member of *L'Institut de Droit International* and a member of the Curatorium of the Hague Academy of International Law. He is married to Virginia T. Feliciano. Justice and Madam Feliciano have two daughters and one son. He may be contacted at: [fpfeliciano@syciplaw.com](mailto:fpfeliciano@syciplaw.com) For details on his academic and judicial life you may be recommended to read, *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO*(Cambridge University Press, 2005), which was co-contributed by his prestigious colleagues and warmest friends from all over the world.

The following is a transcript of the discussion we shared in his office in Makati on February 12, 2009.

## QUESTIONS & ANSWERS

*1. I would like to start my question with your personal background. You were born in Manila and raised there before coming to the United States for study. Would you briefly introduce your family? How about your campus life in The Philippines?*

I was born in Manila. I had prep school, high school, College and my basic law course in Manila. The university system here in the Philippines is very similar to US system. You have Bachelor of Arts and Bachelor of Science and then you take your law degree. It was a long time ago, 1952. I am now 81 years old.

To briefly introduce my family, my father was a professor of Geology and Geography in the University of the Philippines for 40 years. He did his Ph.D. in the University of Chicago in Geology and then went for post doctoral work in Stanford University in west coast because they had some very distinguished people in the field of Geology. My father was the first Geologist in my country. Before he became a Geologist, he was teaching in the field of Applied Science (Pharmacy) and he has his doctoral Science from the University of Santo Thomas in the field of Pharmacy. My mother is also a pharmacist and I have a sister who is a doctor of music from Boston University. She is a professor of music at both Musical Art and Music College.

After High school, I went to LASAL College and from there I went to the University of the Philippines and did my Bachelor of Arts and LLB. Since my father did his graduate work in US, he stayed there for a long time 5-6 years. I went there and Yale University was kind enough to give me fellowship and scholarship. There, I met Professor MacDougall and I took courses under him.

*2. You went to Yale Law School to take graduate program which has a strong tradition of "policy-oriented perspective on international law" under the name of New Haven School. What were social and historical grounds for academic lawyers in Yale to maintain this policy-oriented methodology? What and how did the New Haven School contribute to the development of contemporary international legal studies?*

Let me give you some background first so that you understand. Professor MacDougall was a graduate of Mississippi University and Yale Law school and Oxford University. He was a student of Brierly. From Oxford he came back to US and was teaching at Yale

when he first met Professor Harold Lasswell. Professor Lasswell is not a lawyer but he is a great man in the field of social science. I think he is the one of the greatest man that US has produced in the last fifty years. You cannot study any social science without colliding with him.

Professor MacDougall met Professor Lasswell by accident in Chicago. Because Lasswell was teaching there and MacDougall was holding meetings for the Association of American Law Schools. By accident MacDougall walked into the lecture room, just sat at the back and started listening. He found what he was hearing fascinating. So at the end of the lecture he walked up and introduced himself to Lasswell and they talked to each other. It was very coincidental.

Law can be looked up as one of the social sciences. What MacDougall realized was far more than that. He realized on the other hand, social science is a body of knowledge but how you translate it into operating facts and into events which will help men and community. As we know "Man is a social animal" to use Aristotle's words and we live in organized society, therefore social science is very important. Law is an instrument by which social goals are realized. One of the basic assumptions is that the people, who live in the distinct society, do so because they share certain fundamental goals and norms are the most important method or system, or process by which those goals are considered they are renewed, they are mended, and they are implemented. That is in a very simple way what is enrolled but what two of them did mean. Professor MacDougall and Lasswell, they were fascinated with each other and interested.

MacDougall was in the field of property law and jurisprudence at first, not international law. There was a man named of Borchert. He was much older than MacDougall. He was teaching at Yale and was a Principal Professor of international law. This was before the beginning of the Second World War. Throughout the war, Borchert was teaching and MacDougall had not yet entered the field of international law. Later on, after Borchert retired and MacDougall became fascinated with the field of international law and that is when he gave up property law.

Property law is very philosophical and also heavily immersed in sociological and anthropological concepts. From there, he spread out to the field of international law because he had studied and taken courses in Oxford. So I went there but I had not heard about him or met him. But when I have finished my work in the Philippines and taken the bar examination, I went for graduate work in "New Haven." I wanted to work with Professor MacDougall and Lasswell.

There was a very distinguished professor in corporation law at Yale, Professor Boris Bittker. He is a very famous man in the field of corporation law and cooperate tax. I took

courses of corporation law just for the heck of it, and he invited me to work with him but I had reused it because I had gone there to study international law and jurisprudence.

So later on, I took courses with Professor MacDougall and Herold Lasswell together.

There also was a man named Quincy Wright, who is a political scientist. His orientation is somewhat different but Professor MacDougall on the other hand, believed law does not simply consist of strict written letters, because you have to apply those to problems of human beings. I was very fortunate that I had many hours of personal, one on one discussion with him because we worked together and he had what many people thought, strange vocabularies but really these were those that Lasswell provided from the field of political science, because they did not want to invent other words. So they used some concepts and vocabularies of social science into the field of law.

To go back to what I was doing in Yale, I wrote my dissertation on the field of the Legal Regulation on the Use of Force. Not very much people today spend much time on such area. We subjected these ideas to debate and we were arguing, exploring and testing Lasswell's ideas and their applications to the field of international law. I have written my dissertation under the supervision of Professor MacDougall and worked on applying the basic concept that he was grappling with and so that was why it was very interesting for me. Later on when I have finished, I started applying in other areas of the law. So we ended up writing a large book and it was published in 1961, when I came back to New Haven after staying one year in my country. Then I came back to Manila to practice law instead of becoming a full time professor.

I shifted my career three times in my life. First, I was in academic, then I became a practicing lawyer and then I became a judge. And in the practice of law, I focused on international business and international economic activity

*3. "Rule of law" is believed to be the very center for your legal life. Not only in domestic society but also in international community the rule of law should be kept. Just a few weeks ago, however, many civilians including children were killed in Gaza by the bombardment of Israel. What do you think of Israel's attacks against civilians from a viewpoint of international law? Could the attacks be advocated as self-defense? What would be the best way to recover and maintain rule of law in Middle East?*

I feel very badly about this I have to say. I have not undertaken special studies on Israel and Palestine but from what I read in newspapers, newsmagazine, television, all the

media, I think Israel cannot claim lawful self-defense. To the contrary I think that strong case that they have violated fundamental norms: prohibition or the use of force. They are one of the few countries left in the world who have occupied territory. During the Six-Day war, they conquered the large chunks of the territory without any legal right to do so. They do not seem to understand the difficulties. Palestinians were deprived also of what was originally theirs.

I do not go back biblical times. We cannot do that. There is modern law and it was the end of the First World War, when the United Kingdom had won and the other colonial powers affected the territory of Palestine. They were holding it and at the end of the Second World War, Israel was born and the UN was not particularly effective at the time. Instead of two states, they have one very strong state, because of the support of the super power. Of course Palestinians were engaged in warfare, what Mr. Bush calls "acts of terrorism."

Talking about Gaza, you have some acts of provocation on the part of Palestinians. But the response is disproportionate, I think. We know the requirement of the necessity and proportionality. The response involving the use of force may be lawful. You must maintain those two limiting factors: necessity and proportionality.

I feel very badly about the way Israel has behaved in this area. It is not just the numbers. It is the ruthlessness with which they use modern weapons to inflict massive damage. Of course they also use the pin-point weapons to attack particular persons living in a particular house and they close the entire territory and subject the whole population to starvation. It is very sad and there was no one to help Palestinians. Well, that is all politics, what was bi-polar became uni-polar.

They think they can live like that but the US is changing, too. I am sure the new ministry will be different from Mr. Bush. The famous professor Hans Morgenthau and Professor MacDougall engage in a prolonged debate. To simplify the debate, Professor Hans Morgenthau said: "It is power that moves things in the modern world." However, Professor MacDougall said: "Of course the naked power moves things but it is not the only formal power force and because authority also plays very strong function, you must have both. If you have only naked force, you just conquer. If you on the other hand have international law without organization, without back up system by which disputes can be solved peacefully, it is a totally inadequate system that you have. So you must have the blend of both. You must have a system or process or authority, what we lawyers call the "legal authority" and that need to be supported by effective capability or effective force." But that is the whole problem with modern world.

4. *You are a member of L'Institut de Droit International. What are recent contributions of L'Institut to the development of international law? Only a few members, however, come from Asia in L'Institut. Don't you think it is too conservative?*

It is quite right. *L'Institut* is European origin and they have tried to maintain its European background. Even the US, sometimes Soviet Union or Russia or China, they are all traditional European academics. Judges and lawyers who have always been in the center of *l'Institut* were Europeans. But I think slowly, *l'Institut* has been changing.

The time I was elected, I did not apply for it. Up until now I do not know who put in my name. I was just informed by the secretary of *l'Institut* by telegram.

I found myself force to learn French because at that time *l'Institut* used only French. Everything was written and said in French. Today it is not anymore; English has already overtaken French. But I did not become fluent in French because you have to live in Europe to become fluent, but I think I have good reading knowledge of French.

The last meeting we had in 2007. It was in Chile (Santiago de Chile). It meets every second year. This year it will meet in Naples, in Italy. I do not know the exact percentage, but the time I was elected, there were some Japanese and Chinese. There were a few Russians, myself and Boutros Boutros Gali in the 1970s.

It is easier to become a member if you are French speaking but not really anymore. It has tried to modernize itself and it has been doing quite well. The topics discussed are no longer discussed in a very abstract doctrinal way but they discuss living problem. Because whether or not you are aware of it, if you only speak in terms of abstract doctrine, you don't get very far and if you become a judge, your problem is to apply the doctrine to facts. You will see that the doctrine itself does not solve anything.

I was very sorry to hear Justice Choon-Ho Park, the Korean member in *l'Institut* has passed away in November last year. I very much respected him.

In the year book of *l'Institut*, they always indicate the countries from where the members come from. So you can see the geographic distribution of the membership. There should be replacement for Professor Park. I think South Korea should be represented in *l'Institut*.

5. *You have been respected as "judge's judge." What is the most fundamental requirement for judges of international tribunals?*

To tell the difference between the Domestic Judges and International Judges, I think the basic intellectual operations are the same because the task is the same. You have to

apply norms to facts and reach a conclusion. The norms international judges use are of course the norms of international law. But also in international law, norms are not so detailed like national law. That is the difference and many times there is a reference by international law to national law for detailed rules or norms to apply when there is no norm of international law. That is directly applicable. You may have general principles you can apply.

Modern international law is very European oriented but Europe is not the only universe. There are actually relatively small portion of the universe. So you cannot have international law that exhibit or expresses only European values, European practices and customs. International law must have universal and more extensive, more comprehensive picture of the world. Europe has approximately three hundred million people but the world outside is very large and unfortunately in the world outside Europe, there are more poor communities like my own country. The economic condition of a community in which you are born and which you grow up and which you internalize unconsciously may affect your viewpoints but international lawyers must consciously remind himself that what really he should strive for are, to achieve values which are widely spread, not just the viewpoints about values which are held by one state or a few states. Especially there are very rich countries. Those values are very different to the values held by poorer countries. Of course as the economic development goes up, it may change the viewpoints of poor countries but getting there is the problem.

That is the value of studying and working outside your original community. You get to understand world outside a little better.

In the 1950s right after war, South Korea was devastated. Today South Korea is very wealthy affluent community and the Philippines is trying to copy your example. In our case we have not done well as South Korea. But we hope to be able to achieve what South Korea has.

I know Koreans are very hard working people and I hope our Philippines' young people will have the same viewpoints.

*6. You were editing many international law reviews for a long time. Journal of East Asia & International Law is one of a few academic law reviews covering the East Asian questions as a whole. What should we keep in mind in the course of editing international law journal?*

I hope people here in the Philippines will be able to contribute and we want to restart the Philippine Journal of International Law and invite you to contribute, too.



I will be attending the "Tokyo-Asian society" and they have invited me to deliver key-note talk in the field of international economic law, arbitration and trade law.

*7. How do you expect the 21<sup>st</sup> Century's East Asia would be? Will international law play more actively its role in resolving disputes and harmonizing the national interests in East Asia in the future?*

I think the questions asked here are really asking what the international legal problems are we have in our regions. Fortunately, there are no large territorial disputes at the moment. There are small disputes involving islands but those islands could become very important because we think they are probably hydrocarbon resources and that is always deficient. So those islands disputes must result peacefully, hopefully in a collaborative and cooperative way. That involves, by the way, the some problems relating to the law of the sea.

China has become economically very important in East Asia and Japan is beginning to worry a lot about China. I hope Japan remains very sensible and reasonable but there are difficulties in the economic area that they should be looking at.

Tomorrow I will be discussing in my ministry of trade and industry and especially board of investments, problems relating to bilateral investment treaties. Those are very important for countries like my own and also for the members of ASEAN.

And I think Japan is worried about the relative degree of influence that it will be exercising throughout the region like China and India.

Emergence of China and India, those are major powers.

Indonesia is also very progressive country now. It is focused on its internal economic development and its social and political development. They are doing better than my country is.

Thailand, they are accepting their house in order and Malaysia is trying to make progress.

Singapore is in a very strange situation. Economically, they belong to the developed country, therefore the perspectives and viewpoints are heavily influenced by these. They think like US, UK, France, and Germany. So many problems of developing country they do not understand.

It is relative interplay of China, Japan, India and the US.

I do not know if Russia will become very active again in East Asia. They have a tremendous amount of territory in North East Asia and rich in resources.

There are some disputes with Japan but I don't think anything that can not be resulted by judicial or arbitral procedures. It is really the economic aspects which are

important.

*8. May I have your advice for young international lawyers in this region?*

For people who are operating in somewhat different field(international field), I think and important aspect is your ability to understand that we are part of larger community.

To put in very simple terms, if we make an honest goodness effort to understand what the problems are fell on the other side of the table, with whom we are negotiating, they will also begin to understand our problems. We have to solve problems by negotiations. Some of us are much better than others in negotiation.

**Interview by Eric Yong-Joong Lee**

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