PART I

Reflections on the contributions of Florentino Feliciano to international law
A Judge’s Judge: Justice Florentino P. Feliciano’s Philosophy of the Judicial Function

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Florentino P. Feliciano is a towering scholar in international law. He has written authoritatively in virtually every area of international law and legal theory, from the law of the sea and, especially, the problems of archipelagos, to human rights law, where his work on refugees and coerced movements of peoples is remarkable for its insights, to environmental law, international economic law, and the law of war, in which his magisterial work with Myres S. McDougal continues to be the essential vade mecum for practitioners and students.1 A student who knew Feliciano only from his extraordinary corpus of written work would have expected a scholar, stockaded behind books in some corner of an ivory tower, jealous of every minute that could be devoted to even more scholarly inquiry. That student would be surprised to encounter quite a different person, for Feliciano has been anything but retiring. He has been an outstanding teacher, practitioner, diplomat, citizen of his country, region and the world, and, above all, judge.

Every role that Feliciano has played has enriched his scholarship and his scholarship has analysed and reflected on each successive role for which he has been a participant-observer. But the role of judge has been central to his intellectual evolution. Indeed, long before he was a Justice of the Philippine Supreme Court and long before he was the Chair of the seven Members of the Appellate Body of the World Trade Organization, the most striking impression that Feliciano made on one was his judiciousness. So it was no surprise that, upon elevation to the bench, as he had done in each previous phase in his career, he would turn his thought to an examination of the role of the judge, informed by the understanding he had acquired in all of his previous experiences, and produce penetrating essays on the judicial function. This is in the great tradition of Holmes, Cardozo, and others. But

1 See Bibliography of Works by Florentino Feliciano.
other judges who have used their own experiences and insights to analyse the judicial role have done so from a purely domestic perspective. No one has done so from the vantage of both a seasoned domestic and a seasoned international judge. For this reason, Feliciano the judge, and his work on judging, are unique and a particularly valuable source for the student of legal decision.

In an address to the judicial orientation programme of the Philippine Supreme Court on 14 January 1994, Justice Feliciano explained to newly appointed judges the qualities that they would have to nurture in themselves and bring to bear on their assignments for the proper discharge of their office. He identified four characteristics or, as he described them, ‘qualities of mind and heart’, that the judge required. The first was humility, both personal and with respect to the role of the judge itself:

A judge must, in the first place, be a man of humility. This is a fundamental requirement which manifests itself in many different ways. Perhaps the most important dimension of humility in a judge is the willingness to listen to both parties, to consider carefully their respective views of the facts and their understanding of the applicable legal principle or norm, before he reaches a conclusion. In a real sense, the observance of the requirements of due process is an exercise in humility for the judge.

There are other dimensions of judicial humility. The judge should have a clear understanding not only of his own personal limitations but also of the limitations of professional competence and of the judicial process itself. A truly humble judge should be able to resist the shimmering vision of an ‘imperial judiciary’ and should come to realize that he has neither the commission nor the competence to solve all the problems of the nation and that there are other ‘workers in the vineyard’, the members of the Executive and Legislative Departments who make and execute the laws which the judge is to apply.2

The second quality of mind and heart was learning:

In the second place, the judge must be a man of learning. The law has always been a learned profession and the judge must render, not justice according to his own private lights, but justice according to law. The judge then must have a natural love of learning. He must be willing to invest a considerable amount of time and effort learning about the craft and profession of judging, and in informing himself about recent developments in the law and new norms and caselaw he must apply to the controversies before him. He must also inform

himself about the community in which he lives, the social concerns, the politics and economics and the notions of moral rectitude obtaining in that community, the stuff out of which human controversies arise and eventually come before the judge. The judge must be learned but he is not a lonely scholar in a library nor a scientist isolated in a laboratory. He must be a man of his times.3

The third quality was sensitivity to the social values in the law:

A judge must be sensitive to the basic social values which are embodied in the legal norms and principles he must apply and which the law seeks to promote and protect through the judicial process. He must, in other words, become aware that his decisions have consequences for human values. In those areas which are open to the exercise of judicial discretion, the judge in making his choices should give effect to the values which have been incorporated in the moral code and social mores of the community. His decisions, in other words, should not reflect merely his own individual caprices nor his private conceptions of a desirable social or economic or political program.4

The fourth quality was personal morality and integrity:

A fourth characteristic which I believe a judge must have, relates to the fact that our community requires very high standards of personal morality and integrity from judges. A judge passes judgment upon his fellow human beings. To be morally entitled to do so, to merit respect for his judgments, our society demands more from a judge than from those who are subject to the authority and jurisdiction of the judge. It is not easy to be a good man; it is even more difficult to be a good judge, for he must constantly strive to be better, morally speaking, than the average person or the man of average goodness. The quality of justice a judge renders is necessarily reflective of the quality of the judge as a moral person, as a principled man.5

In another article, Justice Feliciano related these issues of character and quality to a method, marked by patience and a scientific disposition. He counselled a method which is ‘tentative and discursive . . . analyzing, testing and reviewing provisional characterizations, revising, sometimes rejecting, preliminary conclusions before settling upon definitive ones’.6 As he put it:

3 Ibid. at p. 3. 4 Ibid. at pp. 3–4. 5 Ibid. at p. 4.
The judge proceeding in this cautiously tentative manner is thereby acting out his impartiality and open mind and his willingness to examine and consider the evidence and the arguments submitted by the contending parties. He is, in other words, consciously deferring a conclusion, until such evidence and arguments have been factored in his own judgmental process.7

These instructions to acolyte judges have a universal validity. They are also a portrait of Florentino P. Feliciano. In his distinguished Sherrill Lecture, which he delivered on 4 December 1990 at the Yale Law School, Justice Feliciano elaborated the methodology which the judge, whose personal characteristics he had described, had to deploy in order to properly discharge the obligations of his office. I had the privilege of hearing Judge Feliciano deliver the lecture and, like everyone else in the packed hall, realized that I was witness to a major event in legal scholarship. Subsequently published as an essay, Justice Feliciano’s lecture ranks with Cardozo’s *The Nature of the Judicial Process* in its ambition, but goes far beyond it in depth of analysis. The lecture proposed to do nothing less than ‘to explore the thrust and implications of the intellectual activities summed up as the “application of law” which take place within, and as part and parcel of, the process of judicial review and, more broadly, the judicial process itself’.8

Justice Feliciano turned his attention, specifically, to the intellectual operation involved in the application of legal prescriptions. He explained that this task has a number of temporal dimensions. In the short term, the judge must decide a case within definite time limits. In the longer run, he must clarify and develop a body of law. This is, of course, akin to Judge Friendly’s ‘law-making’ function, but Justice Feliciano has made clear that whatever the nominal philosophy of the judge in question – positivist, naturalist, historicist, or socialist – there is no way of evading this part of the intellectual assignment.

To be sure, as Justice Feliciano teaches us, the law pretends to be retrospective, always purporting to look back for authority. In fact, it is, ineluctably, a process of making choices, which are, of course, informed by expressions of policy from the past but require far more from the judge than their rote application. As Justice Feliciano put it:

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Human choice is inherent in the functioning of the judicial process as we know it, that freedom of choice is exercised by the judge in the course of applying authoritative policy to the facts before him.9

Few judges acknowledge this and many more may be unaware of it. But Justice Feliciano has been there and warns us that ‘the rhetoric of judicial decision is frequently different from the rhetoric of the preceding deliberations in a collegiate or multi-judge court’.10

Justice Feliciano gently disagreed with Justice Cardozo and Judge Clark with respect to the number of cases requiring choice. His learned predecessors had thought that the vast majority of the cases coming before them were ‘predestined’ because, as Judge Clark put it, there are ‘vast and important areas of the law where there is little debate as to the substantive principles, and the cases, if not foredoomed from the start, deal only with the procedure’.11 Justice Feliciano instructs us that even there, the choices that still remain to be made, indeed, are ineluctable. As he says, the more the judge knows about an area, the more options or alternatives in decision he will perceive.12 He draws attention to Karl Llewellyn’s staggering compendium of ways that appellate courts shape old law into new without acknowledging it, perhaps without themselves being fully aware of it.

So, like it or not and admit it or not, the application function inexorably includes a component of choice by the applier. Is this choice to be effected by untrammelled exercise of discretion, in some sort of quintessential ‘creative act’? In his Sherrill Lecture, Justice Feliciano pointed out that the freedom of the judge is not absolute. Nonetheless, there is always an element of choice and the question is how it is to be performed. Whatever the degree of consciousness of the judge about these tasks, he is engaged in three distinct operations when applying legal norms in a case before him: first, he must determine the operative facts; secondly, he must determine the applicable legal or normative prescriptions; and thirdly, he must relate the prescriptions to the operative facts.13 Nor are these tasks performed in a linear sequence.

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9 Ibid. at 35. 10 Ibid.
13 Ibid. at 36.
For Justice Feliciano, the method of choice required is a very disciplined exercise of judgment. As he writes:

The most important task of the judge is to become very clear as to what community values or interests are engaged, and in what degree, in the case before him, given the facts provisionally designated as operative and the legal norms tentatively deemed applicable. He must be able to apprehend such values and translate them into terms sufficiently concrete and operational so as to be able to relate them to both the facts and the probably applicable authoritative policy. The detailed relating of basic community interests to the facts and the norm or norms provisionally applicable may be done through, and in the course of, carrying out the other tasks of application.

He must then draw upon the wisdom of the past and examine the previous applications of the potentially applicable precedent to ascertain what principles, more or less general, have emerged from what beginnings and in what directions precedent and principle may be developing. The past decisions or potential precedents, whether they agree or are apparently in conflict with one another, would have to be scrutinized to lay bare the factors or conditions which may rationally explain the results reached in different decisions and the shape of the general principle which has emerged or may be emerging. These factors might relate, for instance, to the presence or absence of certain critical facts; the relative importance of the values at stake and the anticipatable impacts upon such values; the size and other characteristics of the groupings of people affected by particular decisions; the tranquillity or the condition of crisis (e.g., insurgency or social unrest or economic depression) prevailing in society at the time; the degree of persuasiveness or ineptness of the analogies used in past decisions; and so on. Further, the judge must seek to anticipate and estimate possible future consequences upon the community of each alternative in decision that he sees open to him. Finally, he must seek to design a decision, with an appropriate mode of explication, which promises the greatest net value advantage to the parties and to the community at large.\(^\text{14}\)

In free societies, a key source of community values is the authoritative communications of legislative, executive, and administrative bodies. But, if the answer to the question before a court were readily available in these formal expressions of the law, there would be little requirement for judicial choice. As Justice Feliciano points out:

\(^{14}\text{Ibid. at 42–3.}\)
The task of clarifying and specifying community values is not necessarily exhausted by examination of the value content of the legal norms tentatively designated as applicable by the judge. The policy guidance yielded by that examination might not be adequate or sufficiently specific to bring him to the critical point of decision. In this and other types of situations, the task of clarification and specification needs to continue. So the judge may be obliged to consult more general community values. Faced with this challenge, some scholars have retreated to logical exercises. Professor Wechsler made famous the notion of ‘neutral principles’. My former colleague, Judge Bork, insisted that the judge eschew clarification of values and rely upon strict logic, which, he believes, ‘has a life of its own’ and can be applied rigorously to a text in order to squeeze out answers. My former colleague, Harry Wellington, suggests that in these circumstances the judge need do no more than repair to ‘conventional morality’ as a reliable indication of shared community values, a pluralization of Lord Devlin’s ‘man on the Clapham omnibus’. But as Judge Skelly Wright observed, ‘how are we to evaluate the “neutrality” of line-drawing except by reference to some sort of value choices?’

Justice Feliciano cuts through this. He observes that consensus on conventional morality dissolves quickly when one puts it under the microscope of social inquiry. Indeed, most of the critical issues in complex modern societies are marked by heterogeneity of view rather than homogeneity. Hanging on the straps of that Clapham omnibus are many different men (and women), each distinguished by factors as diverse as personality, culture, class, sexual orientation, and crisis exposure. Their inner worlds, their identifications, their matter-of-fact expectations of past and future, and their value demands, may vary greatly. Hence Justice Feliciano explains that the judge may have to engage in an integration of many different moral views in order to determine what the supplementary material available from his inquiry is. He may also turn to the body of international human rights law, which, happily, the United States Supreme Court has at long last begun to do.

All of these exercises essentially involve the integration of others’ views. It seems to me clear, from a review of all of Justice Feliciano’s

15 Ibid. at 47.
work, that he also believes that the judge may, in some circumstances, be obliged to postulate values for the community and apply them even if they are inconsistent with the other more conventional sources. This supplementing and corrective function may involve an integration of competing interests or the superordination of one of those over the other. Such integrative solutions are often referred to as ‘balancing’, a term borrowed from hydraulics, which seems to import a mechanical operation. In fact, ‘balancing’ conceals a great deal of choice. As Myres McDougal eloquently wrote:

A rational concern for long-term interests in the real world commonly includes, further, a concern for the next steps, or immediate consequences. The effective accommodation of opposing interests must require, beyond verbal abstractions, the balancing and integration of value demands in social process.  

Justice Feliciano concluded his remarkable Sherrill Lecture with the following words:

In the end, of course, much depends upon the judges themselves, their qualities of mind and heart, the substance of their attachment to the best traditions of the judicial and legal professions, their courage and sensitivity and commitment to the values of free human beings in a society that is both productive and caring and, ultimately, their view of the relation of man to the universe.

This tribute to Justice Feliciano and his extraordinary contribution to our understanding of the judicial process began with his identification of the necessary characteristics of the judge. And properly so. For Justice Feliciano has demonstrated to us more than anyone else that adjudication is not an impersonal process of ‘rule-crunching’. In the end, it is the judge, drawing upon a lifetime’s personal resources of knowledge, character and courage, who must decide. In all the judicial functions that Justice Feliciano has performed, as Justice of the Supreme Court of the Philippines, as Member of the Appellate Body of the World Trade Organization, and as international arbitrator in innumerable cases, the international community can be grateful for the character, knowledge, courage, and judiciousness that he has brought to bear.

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19 Supra n. 6 at p. 56.
The Benign First Mate

ROSALYN HIGGINS

Toy Feliciano’s life in the law is a silent rebuttal to those who contend that a policy-oriented approach to law is but a façade for politics, that it is a tool for the powerful, and that it is in essence a front for the views of the State Department. As a member of the ‘invisible college’ of Yale Law School lawyers, he has throughout his life shown how this approach can be put to the service of values that are universal. His life and work also illustrate how those values can be promoted in full conformity with deep scholarship.

I first met Toy when I was a graduate student at Yale from 1959–61. He was already established there as a teacher and known to be collaborating with Myres McDougal in the preparation of *Law and Minimum World Public Order*. I was at that stage in my life where I had left the safe moorings of black-letter law and was being tossed about in the turbulent waters of policy science. Moreover, the captain of the ship on which I now found myself was at once magnificent and terrifying. Toy Feliciano seemed to me a sort of benign first mate, who certainly understood the course on which we were set and how we were to get there, but who might still be talked to in the ‘language of the old country’. My enduring memory of him in those early Yale years was of a person who was gentle, kind, and thoroughly competent. I have never had occasion to revise those early impressions.

Toy had already numbered among the ‘associates’ who in 1987 wrote with McDougal *Studies in World Public Order*. The co-authored *Law and Minimum World Public Order*, which appeared in 1961, was shortly followed by the *International Law of War* in 1964. When, thirty-five years later, Toy spoke at McDougal’s Memorial gathering, he spoke of this collaboration as an ‘honour, which I have treasured throughout my life’.

However, he decided to proceed with his life’s work outside of academia and returned to the Philippines as a member of the law