

## **Follow the Rule of Law, But Aspire for the Rule of Justice**

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*Justice Antonio T. Carpio*

Fr. Jose Ramon T. Villarin, SJ, President of the Ateneo de Manila University, Dean Jose Maria Hofilena of the Ateneo Law School, Members of the Faculty and Administrative officials of the Ateneo Law School, the Graduating Class of 2019, parents, families and loved ones of the graduates, distinguished guests, friends, a pleasant afternoon to everyone.

I wish to thank the Ateneo Law School for inviting me here this afternoon to speak before the Class of 2019. I am truly honored by your invitation.

Let me congratulate the Class of 2019 on your graduation. Your hard work and perseverance have paid off, as you receive this afternoon your diplomas for your Juris Doctor or Master of Laws degree. Let me also congratulate your parents, families and loved ones for their steadfast support for you all these years.

I can assure you this graduation ceremony is one moment that will be etched in your memory throughout your life, even as you will surely forget what I will be saying here this afternoon. I myself have no recollection of what our law school graduation speaker said at our graduation.

In law school, we learn that the rule of law is central and vital to the maintenance of a civilized and orderly society. In law

practice, lawyers have made the rule of law their motto, which is enshrined on the logo of the Integrated Bar of the Philippines, on which are inscribed the words *For the Rule of Law*. Lawmakers, judges, and executive officials stress the importance of the rule of law to preserve peace in society and to promote economic development in the country. Therefore, we must all follow the rule of law.

My experience in the Court in the last 18 years has taught me that while we must follow the rule of law, we must actually aspire for the ideal, which is the rule of justice. The ultimate goal of a just society is the rule of justice, not just the rule of law. Is there a difference between the rule of law and the rule of justice? Yes, there is sometimes a wide gap between the rule of law and the rule of justice.

With your indulgence, let me explain this with a graphic example in the case of *Corpus v. People*, decided by the Supreme Court *En Banc* in April of 2014. In *Corpus*, the accused committed *estafa*, having failed to return on demand P98,000 worth of jewelry entrusted to him for sale on commission.

As you know, the penalty for *estafa* increases as the amount of the property taken increases beyond the P22,000 threshold. These amounts have not changed since 1932 when the Revised Penal Code was enacted. In 1932, one US dollar was equivalent to one peso, but by 2014 one US dollar was already worth 40 pesos. In short, P2,450 in 1932 was equivalent to P98,000 in 2014, a depreciation of 4,000 percent.

Had the *estafa* of the same jewelry been committed in 1932, the indeterminate penalty would only have been imprisonment of one month and one day to two years and four months. The same jewelry subject of *estafa* in 2014 would be penalized with the indeterminate penalty of imprisonment of three years, two months and eleven days to fifteen years.

In short, the minimum of the penalty had increased more than thirty-six times, while the maximum of the penalty had increased six and a half times to *reclusion temporal*. Over time, because of inflation, the penalty for *estafa* as provided in the law had become grossly disproportionate to the value of the property taken.

All the Justices, without exception, agreed that it would be a grave injustice to apply the law in the same way as it had been applied since 1932. To apply the existing law in the case before the Court would fall terribly far short of the sense of justice of the Members of the Court. The justices struggled to find a resolution to this conundrum. The Court even called for oral arguments. Three approaches were proposed.

*First*, the Court should adjust the amounts fixed in the Revised Penal Code in 1932 to account for inflation. The Court would do this without legislation.

*Second*, the escalating penalty based on the amount of the *estafa* should be declared unconstitutional as cruel and unusual punishment, leaving as the only constitutional penalty the minimum penalty before the escalating penalty applied. This was the approach I took.

*Third*, the Court should still apply the penalty under the existing law, but recommend to Congress the immediate amendment of the law to adjust for the inflation since 1932. This was the approach taken by the majority.

So, the Court imposed the penalty as provided in existing law as of 2014. The maximum of the indeterminate penalty was imprisonment for fifteen years of *reclusion temporal*, for the *estafa* of jewelry worth P98,000. The Court, however, furnished a copy of the decision to Congress to apprise Congress of the excessive penalty imposed in this case. Almost two years after the decision, Congress enacted RA 10951, adjusting and updating the amounts on which penalties and fines are based under the Revised Penal Code.

With the passage of the amendatory law, the Court gave the amendatory law a retroactive effect, applying it to all those already convicted of *estafa* or theft so they could benefit from the updated penalties which reduced drastically the length of their sentences. Many convicts still completing their final sentences have been released, and still being released, from prison under this retroactive rule. The rule of justice finally prevailed, and the accused in the *Corpus* case, of course, benefited from the amendatory law.

The *Corpus* case instructs us not only to follow the rule of law but also to seek and aspire for the rule of justice whenever there is a gap between the rule of law and the rule of justice. Wide gaps between the rule of law and the rule of justice occasionally arise, and it is the duty not only of the Judiciary, the Legislature and the Executive Branches, but also of the law profession, to work in closing these gaps. It

is in closing these gaps that we refine and improve the law, a never-ending process as we seek and aspire for the rule of justice.

In international law, the wide gap between the rule of law and the rule of justice is even more pronounced and serious because of the absence of a mechanism to enforce the awards of international tribunals.

The classic example is the 2016 Award by The Hague tribunal declaring China's infamous nine-dashed line without legal effect for being contrary to the United Nations Convention on the Law of the Sea or UNCLOS, to which both China and the Philippines are parties. The Award affirmed that the Philippines has a full 200-NM Exclusive Economic Zone in the West Philippine Sea with an area larger than the total land area of the Philippines. All the resources in this huge maritime area - all the fish, oil, gas and other mineral resources – belong exclusively to the Filipino people.

However, China has refused to comply with the arbitral Award and UNCLOS has no mechanism to enforce the Award. State parties that ratified UNCLOS undertook to comply in good faith with any arbitral award under UNCLOS. But if a state party reneges on this treaty obligation, and refuses to comply with an adverse award, there is no world sheriff or policeman to enforce the award. There is a rule of law, embodied in the award, but there is no rule of justice because of the absence of an enforcement mechanism.

Under these circumstances, how do we achieve justice for the Filipino people so they can enjoy our immense resources in the West Philippines Sea? The present government Administration has taken the position that enforcing the arbitral Award means going to war with China, and if we go to war with China, our soldiers and sailors will surely be massacred.

This position, repeatedly reiterated by the present government Administration, makes the Filipino people feel helpless and hopeless, portrays our Armed Forces as timid and useless, and denigrates the rule of law. Every time this position is publicly repeated, we must expose this as a hollow attempt to scare our people into submission to China.

Is war really the only way of enforcing the arbitral Award? The answer is, of course, a resounding no. Waging war to enforce the arbitral Award is against the rule of law, both under domestic law and international law. Under the Constitution, the Philippines has renounced war as an instrument of national policy. Our Constitution prohibits the government from going to war to enforce the arbitral Award. Under the United Nations Charter, war has been outlawed as a means of settling disputes between states.

Any war of aggression can even subject the leaders of the aggressor state to prosecution for a crime against humanity, even if the aggressor state is not a member of the Rome Statute, as when the act of aggression is referred to the International Criminal Court by the Security Council. In short, it is against the rule of law to go to war to enforce the arbitral Award.

Is there a way to enforce the arbitral Award using the rule of law in the absence of an enforcement mechanism under UNCLOS? This, in essence, is the question that President Rodrigo Duterte publicly asked me last June 24, 2019. Let me quote the *Philippine Star* news report on that day: “Xi Jinping (said) there will be trouble. So answer me, Justice,” Duterte said, referring to Carpio, “give me the formula and I’ll do it.”

In short, President Duterte asked me before the entire Filipino people - show me the formula to enforce the arbitral Award without going to war with China and I will do it.

My response is yes, Mr. President, there is a formula – and not only one but many ways of enforcing the arbitral Award without going to war with China, using only the rule of law. Let me mention a few of these, and I hope the President will implement them as he had promised.

*First*, the Philippines and Vietnam can enter into a sea boundary agreement on their overlapping extended continental shelves beyond the Spratlys area. The premise of this sea boundary agreement is the ruling of the arbitral tribunal that no island in the Spratlys generates an Exclusive Economic Zone that would overlap with the Exclusive Economic Zones of Vietnam or the Philippines.

Obviously, China cannot prevent the Philippines and Vietnam from entering into such sea boundary agreement. A sea boundary agreement will apply the arbitral Award by state practice, fortifying and enforcing the arbitral Award, and bridging the gap between the rule of law and the rule of justice. In fact, Vietnam has recently proposed such a sea

boundary agreement with the Philippines. Apparently, the present government Administration has not acted on Vietnam's proposal for fear of offending China.

*Second*, the Philippines can enter into a similar sea boundary agreement with Malaysia on the adjoining Exclusive Economic Zones between Borneo and Palawan. The premise of this sea boundary agreement is that no geologic feature in the Spratlys generates an Exclusive Economic Zone that would overlap with the Exclusive Economic Zones of the Philippines or Malaysia. This will enforce by state practice the arbitral Award, and bridge the gap between the rule of law and the rule of justice.

Such a sea boundary agreement will not prejudice our Sabah claim because the U.P. Law Center has issued a definitive opinion that the territory of the Sultanate of Sulu in Borneo never faced the South China Sea. Malaysia has been proposing to sign with the Philippines such a sea boundary agreement. Again, China cannot stop the Philippines and Malaysia from entering into such sea boundary agreement.

*Third*, the Philippines, Vietnam, Malaysia, Indonesia and Brunei can enter into a Convention declaring that, as ruled by the arbitral tribunal, no geologic feature in the Spratlys generates an Exclusive Economic Zone and there are only territorial seas from the geologic features that are above water at high-tide. This Convention will leave China isolated as the only disputant state claiming Exclusive Economic Zones from the Spratly islands.

This Convention can be open to accession by all coastal states of the world so that their right to freedom of navigation

and overflight in the Spratlys can be governed by this Convention. The U.S., UK, France, Japan, Australia, India and Canada, countries that regularly assert freedom of navigation and overflight in the South China Sea, can be expected to adhere to this Convention. This Convention will enforce the arbitral Award by state practice, bridging the gap between the rule of law and the rule of justice.

*Fourth*, the Philippines can file an extended continental shelf claim in the West Philippine Sea beyond our 200-NM Exclusive Economic Zone off the coast of Luzon, where China is the only opposite coastal state. The Philippines can file this unilaterally with the UN Commission on the Limits of the Continental Shelf. China cannot invoke historic rights under its nine-dashed line which has already been ruled without legal effect by the arbitral tribunal. China's own extended continental shelf does not overlap with the extended continental shelf of the Philippines in this maritime area.

It is most likely that the UN Commission will affirm the extended continental shelf of the Philippines, in the same way it affirmed the extended continental shelf of the Philippines in Benham Rise. This will fortify and enforce, in accordance with the rule of law, the ruling in the arbitral Award that in the West Philippine Sea the Philippines has a full 200-NM EEZ, from the outer limits of which the 150-NM extended continental shelf of the Philippines is measured. This bridges the gap between the rule of law and the rule of justice.

*Fifth*, the Philippines can send on patrol its 10 new 44-meter multi-role response vessels that were donated by Japan for

use by the Philippine Coast Guard. These vessels are ideal to patrol our Exclusive Economic Zone in the West Philippine Sea to drive away poachers from other countries. This will assert our sovereign rights over this resource-rich maritime area in accordance with UNCLOS, and bridge the gap between the rule of law and the rule of justice.

The only way to drive away poachers is for our Coast Guard vessels to be present in the area where foreign poachers take our fish. These 10 new patrol vessels of the Philippine Coast Guard will be useless if they are not used to protect our Exclusive Economic Zone in the West Philippines Sea.

*Sixth*, the Philippines can welcome and encourage the Freedom of Navigation and Overflight Operations of the U.S., U.K., France, Australia, Japan, India and Canada in the South China Sea, including the West Philippine Sea. The naval and aerial operations of these naval powers, which are in conformity with UNCLOS and customary international law, have increased in frequency since the 2016 arbitral Award, and are the most robust enforcement of the arbitral Award, bridging the gap between the rule of law and the rule of justice.

*Seventh*, the Philippines can send its own Navy to join the Freedom of Navigation and Overflight Operations of these foreign naval powers to assert, on behalf of the Philippines, that there is an Exclusive Economic Zone in the West Philippine Sea belonging to the Philippines as ruled by the arbitral tribunal. This fortifies and enforces the arbitral Award with the support of the world's naval powers within and outside Asia, bridging the gap between the rule of law and the rule of justice.

*Eighth*, the Philippines can invite Vietnam, Malaysia, Indonesia and Brunei to conduct joint freedom of navigation operations in their respective Exclusive Economic Zones facing the South China Sea. This will be a common assertion, by five coastal states, that each of them have their own respective Exclusive Economic Zones in the South China Sea, thereby enforcing the arbitral Award that China's nine-dashed line has no legal effect and cannot serve as basis to claim any of the waters of the South China Sea. Again, this bridges the gap between the rule of law and the rule of justice.

All these naval and aerial operations, whether conducted by the naval powers or by the Asean coastal states, uphold that there are high seas in the South China sea, and around these high seas are the Exclusive Economic Zones of the adjacent coastal states. When the navies of coastal states conduct naval or aerial drills in the West Philippine Sea, they affirm that there is an Exclusive Economic Zone in the West Philippines Sea, which could belong only to the adjacent coastal state, which of course is the Philippines.

All these naval and aerial operations refute China's claim that there is no Exclusive Economic Zone in the West Philippine Sea within China's nine-dashed line. Clearly, these naval and aerial operations directly and openly enforce the arbitral Award, bridging the gap between the rule of law and the rule of justice.

We should therefore welcome, encourage and even join these naval and aerial operations, which are conducted in accordance with the rule of law, that is, in accordance with

UNCLOS and customary international law. Sadly, the present government Administration has distanced the Philippines from these naval and aerial operations, saying that the Philippines does not take sides in the on-going dispute between China and these naval powers over these operations.

The present government Administration does not even send our own Navy and Coast Guard vessels to conduct freedom of navigation operations in the West Philippine Sea. The present government Administration decries that UNCLOS has no enforcement mechanism, but does not want to join the naval powers that are effectively enforcing the arbitral Award in accordance with the rule of law.

*Ninth*, the Philippine Government can support private sector initiatives to enforce the arbitral Award. The most creative and dramatic way of enforcing the arbitral award has been undertaken, not by the present government Administration, but by three patriotic private Filipino citizens. These brave Filipinos, former DFA Secretary Albert del Rosario, former Ombudsman Conchita Carpio Morales and their counsel Atty. Anne Marie Corominas, using the rule of law, filed a communication with the International Criminal Court charging the Chinese leaders, headed by President Xi Jinping, of a crime against humanity.

The communication charged the Chinese leaders of depriving tens of thousands of marginal Filipino fishermen and their families of their source of food and livelihood as a result of China's massive destruction of the atoll reefs in the Spratlys. The massive destruction took place in the territory and Exclusive Economic Zone of the Philippines.

China, in creating artificial islands to host its air, naval and other military facilities, dredged the atoll reefs and pulverized the corals. The atoll reefs are where the fish spawn, and their eggs and larvae are carried by currents all over the South China Sea. Without the atoll reefs in the Spratlys, the food chain of fish will be broken, and the fish stock in the South China Sea will collapse, adversely affecting about 200 million people living around the South China Sea who rely on fish from the South China Sea for their protein.

Under the Rome Statute that established the International Criminal Court, leaders of a state who commit a crime against humanity are personally liable if the crime is committed in the territory of an ICC member state. This is true even if the accused are citizens of a state that is not a member of the ICC like China.

The communication of these three brave Filipinos was filed on March 15, 2019, two days before the withdrawal of the Philippines from the Rome Statute took effect. Thus, the crime charged in the communication was committed in the territory of the Philippines, which was an ICC member State when the crime was committed and when the communication was submitted to the ICC. This conferred jurisdiction on the ICC over the crime charged.

If the ICC will proceed to take jurisdiction over the crime charged against the Chinese leaders, this will fortify and enforce the arbitral Award, bridging the gap between the rule of rule and the rule of justice, because it will punish those who have destroyed the exclusive fishing grounds of Filipino fishermen in the Exclusive Economic Zone of the

Philippines in the West Philippine Sea. And this will deter China from further destroying the atoll reefs in the West Philippine Sea.

I have enumerated some of the many ways how the Philippines can enforce the arbitral Award peacefully in accordance with the rule of law without going to war with China. These should be undertaken together to fortify the Award part by part, brick by brick, until the Award is fully enforced. These should be the answer of the Filipino people every time our national leaders tell us that enforcing the arbitral Award means going to war with China.

The Filipino people should not be intimidated by national leaders who peddle a false option that either we go to war with China or submit to China. This false option should be discredited once and for all. This false option does not deserve any further space or airing in the nation's political discourse.

We won a great victory at The Hague by resorting to the rule of law. The arbitral Award is the rule of law, but the absence of an enforcement mechanism prevents that rule of law from becoming the rule of justice. Nevertheless, there are many ways of enforcing the arbitral Award peacefully through the rule of law itself, and thus bridge the gap between the rule of law and the rule of justice.

We cannot just decry the absence of an enforcement mechanism under UNCLOS. We cannot adopt a defeatist attitude and just sit idly by and let China seize what international law has declared to be our own Exclusive Economic Zone. We must use our creativity and resourcefulness to defend and protect, through the rule of law, what belongs to the Filipino people – the present

generation of Filipinos and the generations of Filipinos still to come.

The defense and protection of our Exclusive Economic Zone in the West Philippine through the rule of law is a task tailor-made for lawyers, including future lawyers like you. It is the task of lawyers and our policymakers too, to find peaceful ways to fortify and enforce the arbitral Award, so that the rule of law embodied in the arbitral Award could be transformed into the rule of justice.

So, to the Class of 2019, as you graduate from your venerable law school today, I leave you with this thought which I hope you will always remember: faithfully follow the rule of law even as you always seek and aspire for the rule of justice.

Thank you, and once again congratulations to the Class of 2019. A good day to everyone.