PUBLISHING *JUS GENTIUM*: Satisfying Procedural Due Process in the Application of International Law in Domestic Disputes

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Laws must come out in the open in the clear light of the sun instead of skulking in the shadows with their dark, deep secrets. Mysterious pronouncements and rumored rules cannot be recognized as binding unless their existence and contents are confirmed by a valid publication intended to make full disclosure and give proper notice to the people. The furtive law is like a scabbarded saber that cannot feint, parry or cut unless the naked blade is drawn.
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I. INTRODUCTION

The idea of due process, in its present conception, is a product of a long and tedious evolutionary process. While it is said that as early as 1354, the majestic phrase "due process of law" already appeared in an English statute,[2] its precise meaning was subject to disagreement among several scholars.[3]

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[1] Justice Isagani Cruz, *Tañada v. Tuvera (Resolution),* 146 SCRA 446 (1986).
[2] J. Scalia's Concurring Opinion in *Pacific Mutual Life ins. Co. v. Haslip*, 499 U.S. 1 (1991).
[3] Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of law*, 19 AM. J. LEGAL HIST. 265 (1975).

The concept of due process of law made its way to the Philippines when the Americans introduced the Anglo-American legal tenets in the Philippine legal regime. This is readily apparent from the Philippine Organic Act of 1902[4], which provides "that no law shall be enacted in [the Philippine Islands] which shall deprive any person of life, liberty, or property without due process of law…"[5] Since then, the subsequent versions of the fundamental law of the land, including the present one, have contained the same provision.[6]

Despite the constant presence of the due process clause in the previous versions of the Philippine Constitution, as well as the present one, its precise meaning has been elusive. In fact, the Court once pronounced that "there is no controlling and precise definition of due process,"[7] at least in this jurisdiction. Perhaps, that is because "[t]he requirements of due process are interpreted in … the Philippines as not denying to the law the capacity for progress and improvement." Toward this effect and to avoid the confines of a legal straitjacket, the courts instead prefer to have the meaning of the due process clause gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.[8] Thus, due process is dynamic and resilient; adaptable to every situation calling for its application that makes it appropriate to accept an enlarged concept of the term as and when there is a possibility that the right of an individual to life, liberty and property might be diffused.[9]

Accordingly, despite the debate on the historical meaning of "due process of law," compliance with both procedural and substantive due process is required in the Philippine jurisdiction.[10] As such, notwithstanding the malleability of its concept, there are fundamental facets of due process, developed by jurisprudence and shaped by the prevailing social forces and the ideals of democracy, that must be observed at all costs. A simple overlook of any of this facet, no matter how obscure, should be deemed as a violation of this sanctified right.

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[4] 32. Stat. 691

[5] *Id., sec. 5*

[6] PHILIPPINE AUTONOMY ACT, 39 Stat. 545, sec 3(a) (1916); CONST. (1935), art. III, sec. 1(1); CONST. (1943), art. VII, sec. 2; CONST. (1973), art. IV, sec. 1; CONST. art. III, sec. 1.

[7] *Ermita-Malate Hotel and Motel Operators Association, Inc. v. The Honorable City Mayor of Manila,* 20 SCRA 249 (1967).

[8] *Secretary of Justice v. Lantion*, 322 SCRA 160 (2000), citing *Twining vs. New Jersey*, 211 U.S. 78 (1908)

[9] ISAGANI A. CRUZ, CONSTITUTIONAL LAW 94-95 (1995 ed.)

[10] *Provincial Bus Operators Association of the Philippines v. DOLE*, G.R. No. 202275, July 17, 2018

II. PUBLICATION AS COMPONENT OF DUE PROCESS

In the Philippines, the requirement that laws must be published before they take effect is set forth in Article 2 of the New Civil Code[11], which provides: "Laws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is otherwise provided. This Code shall take effect one year after such publication." Arguably, Article 2 of the said law is the first ***substantive*** provision of the New Civil Code as it is the first provision which confers actual rights. Although the sequence of the provisions in the New Civil Code does not, in any way, create a hierarchy of the rights that they respectively create, the position of the provision laying down the publication requirement right after the provision that designates the nomenclature of the Code is indicative of the magnitude of significance that it holds.

The New Civil Code was not the first to deal with publication *viz-a-viz* effectivity of laws. A provision of similar import may be found in the Section 11 of Act No. 2657,[12] as amended by Act No. 2711, which provides:

> A statute passed by the [Philippine Legislature] National Assembly shall, in the absence of special provision, take effect at the beginning of the fifteenth day after the completion of the publication of the statute in the Official Gazette, the date of issue being excluded. For the purpose of fixing such date the Gazette is conclusively presumed to be published on the day indicated therein as the date of issue.[13]

A juxtaposition of Article 2 of the New Civil Code and Section 11 of the Administrative Code, as amended, would reveal evident similarities. Both provisions provide the general rule that a law passed by the national legislature shall take effect at some point subsequent to its publication; and both provide a proviso that qualifies the general rule – "*unless it is otherwise provided"* for Article 2 of the New Civil Code, and "*in the absence of special provision"* in the Administrative Code.

In the case of *Askay v. Cosalan*[14], the Supreme Court had the occasion to interpret Section 11 of the Administrative Code. In that case, the Court was

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11 R.A. 386 (1950)

12 An Act Consisting an Administrative Code (1916)

13 An Act Revising an Administrative Code (1917)

14 An Act to Amend and Repeal Certain Provisions of the Administrative Code relative to the Judiciary in order to Reorganize the Latter; Increasing the Number of Judges for Certain Judicial Districts; Increasing the Salaries of Judges of Courts of First Instance; Vesting the Secretary of Justice with Authority to Detail a District Judge Temporarily to a District or Province Other Than His Own; Regulating the Salaries of Justices of the Peace; Abolishing the Municipal Court and Justice of the Peace Court of the City of Manila and Creating in lieu thereof a Municipal Court with Three Branches;

pressed on the issue as to the date of effectivity of Act No. 3107,[15] the final section of which provides *that "[t]his Act shall take effect on its approval."* Petitioner argued that it was not in force until fifteen days after the completion of its publication in the Official Gazette. However, the Court ruled against the said contention, holding that the provision in question was a 'special provision' within the meaning of Section 11 of the Administrative Code. As such, Act No. 3107 took effect on the date of its approval itself, and not after its publication. With this, the interpretation of Section 11 of the Administrative Code laid down by the Court was that the Legislature has the discretion, as may be provided by an express statutory provision, to designate a date on which a law shall take effect, even sans publication. In other words, publication was not indispensable, but rather a mere reckoning point of the date when a law will take effect if Congress did not so provide. The Court also applied the same interpretation, even after the effectivity of the New Civil Code, in the case of *Philippine Blooming Mills v. Social Security System.*[16]

However, in the canonical case of *Tañada v. Tuvera*[17], the Court made a substantial departure from the doctrine laid down in *Askay*. In *Tañada*, petitioners sought for the issuance of a writ of *mandamus* to compel then Executive Secretary Juan Tuvera and other public officials concerned to publish and/or cause the publication of a number of decrees and issuances promulgated by President Ferdinand Marcos. In granting the petition, the Court made a categorical pronouncement that "Article 2 [of the New Civil Code] does not preclude the requirement of publication in the Official Gazette, even if the law itself provides for the date of its effectivity."[18] The Court justified in this wise:

> The clear object of the above-quoted provision is to give the general public adequate notice of the various laws which are to regulate their actions and conduct as citizens. Without such notice and publication, there would be no basis for the application of the maxim "*ignorantia legis non excusat*." It would be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.[19]

Consequently, the Court, in a *Resolution,* clarified the proper interpretation of the phrase "*unless it is otherwise provided"* in Article 2 and the implications

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Regulating the Salaries of Clerks of Court and other Subordinate Employees of Courts of First Instance, and for other purposes (1923).

15 46 Phil. 179 (1924).

16 17 SCRA 1077 (1966).

17 136 SCRA 27 (1985).

18 *Id.*

19 *Id.*

thereof.[20] There, the Court held that it "refers to the date of effectivity and not to the requirement of publication itself, which cannot, in any event, be omitted. This clause does not mean that the legislature may make the law effective immediately upon approval, or on any other date, without its previous publication."

The ruling in the *Tañada* Decision and Resolution was reiterated and bolstered in *Umali v. Estanislao,*[21] where the Court, citing its resolution in *Caltex (Phils.), Inc. v. The Commissioner of Internal Revenue,*[22] held that notwithstanding the express statement of Congress to the contrary, laws take effect after publication, following Article 2 of the Civil Code. As such, R.A. 6965,[23] which contains an effectivity clause that states that "*This Act shall take effect upon its approval*," was deemed to have taken effect not on the date of its approval itself, but fifteen days after the publication thereof.

In *Tañada*, the Court treated publication in a glaringly different manner from *Askay*. While *Askay* concentrated on the *fact* of publication as material only insofar as Congress did not set the date effectivity of a law, *Tañada* gave due stress to publication *itself* as a mandatory requirement. Definitely, the difference in this treatment led to the divergent interpretations of the clauses in Section 11 of the Administrative Code, as amended, and in Article 2 of the New Civil Code. As may be deduced from their respective disquisitions, *Askay* deferred to the plenary power of Congress as controlling inasmuch as the determination of the effectivity date of laws is concerned, while *Tañada,* as reinforced by *Umali,* took other considerations for ruling otherwise.

In *Tañada,* the petitioners went to the Court invoking the people's constitutional right to be informed on matters of public concern. However, in granting their petition, the Court went a step further and considered the broader and more encompassing right to due process as illustrated by the following discussion:

> It is not correct to say that under the disputed clause [in Article 2], publication may be dispensed with altogether. The reason is that such omission would offend due process insofar as it would deny the public knowledge of the laws that are supposed to govern it. Surely, if the legislature could validly provide that a law shall become effective immediately upon its approval notwithstanding the lack of publication (or after an unreasonably short period after publication), it is not unlikely that

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[20] *Supranote 1*

[21] 209 SCRA 446 (1992)

[22] G.R. No. 97282, 26 June 1991

[23] An Act Revising The Form of Taxation on Petroleum Products from Ad Valorem to Specific, Amending For the Purpose Section 145 of the National Internal Revenue Code, As amended by Republic Act Numbered Sixty Seven Hundred Sixty Seven (1990).

> persons not aware of it would be prejudiced as a result; and they would be so not because of a failure to comply with it but simply because they did not know of its existence. x x x[24]

In the Philippines, the right to due process is enshrined in Section 1, Article III of the 1987 Constitution, which provides that: "No person shall be deprived of life, liberty, or property without due process of laws..." The said right has enjoyed a sacrosanct stature in the Philippines in that it has been equated with the "very essence of justice itself"[25], "the embodiment of the sporting idea of fair play,"[26] and "a cornerstone of our legal system."[27]

The Philippine notion of due process has two components – procedural and substantive. Substantive due process refers to the intrinsic validity of a law that interferes with the rights of a person to his property;[28] procedural due process, on the other hand, means compliance with the procedures or steps, even periods, prescribed by the statute in conformity with the standard of fair play and without arbitrariness on the part of those who are called upon to execute it.[29]

As it appears, the Court had in mind procedural due process when it promulgated *Tañada*. As the Court was stressing the significance of public knowledge of the laws that are supposed to govern the people, the Court was underscoring the duty of the government to make laws known to the people. As such, the publication requirement relates to procedural due process, which has been described as concerning "government action adhering to the established process when it makes an intrusion into the private sphere," which ranges from the form of notice given to the level of formality of a hearing.[30]

In the United States, the concept of notice of laws within the context of procedural due process was illustrated in *Lambert v. California.*[31] In that case, the US Supreme Court held that the application of a municipal ordinance to a person who has no actual knowledge thereof, and where there is no showing of the probability of such knowledge, offends the Due Process Clause of the Fourteenth Amendment[32]. The Court acknowledged that due process places

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[24] *Supranote 1*.
[25] *Macias v. Macias*, citing J. Panganiban, Separate Opinion in *Serrano v. NLRC,* 323 SCRA 445 (2003).
[26] *Supranote 7*.
[27] *Fabella v. Court of Appeals*, 282 SCRA 256 (1997).
[28] *Ynot v. Intermediate Appellate Court*, 148 SCRA 659 (1987).
[29] *Tatad v. Sandiganbayan*, 242 Phil. 563 (1988).
[30] *White Light Corporation v. City of Manila*, 596 Phil. 444 (2009).
[31] 355 U.S. 225 (1957).
[32] U.S. CONST., amend. XIV, sec. 1: *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any*

some limits on the operation of the principle that ignorance of the law will not excuse. Similarly, in *Armstrong v. Maple Leaf Apartments, Ltd.,* the US District Court, N.D. Oklahoma held that "due process of law rights of the defendant as guaranteed by the Fifth Amendment of the United States Constitution were violated… for the reason that Congress did not provide any reasonable means by which the defendants or their attorneys could have acquired notice or knowledge of the existence or content of the Act."[33]

Even before the categorical pronouncements in *Tañada*, the Court had gradually recognized publication, as a means to accord notice to the public, as a vital component of due process. In *Pesigan v. Angeles,* where an Executive Order providing for the confiscation and forfeiture by the government of carabaos was deemed as ineffective until after its publication, the Court acknowledged that "[p]ublication is necessary to apprise the public of the contents of the regulations and make the said penalties binding on the persons affected thereby."[34] Similarly, same principle was considered in *People v. Que Po Lay,* where the Court said that a Central Bank Circular "which prescribes a penalty for its violation should be published before becoming effective, this, on the general principle and theory that before the public is bound by its contents, especially its penal provisions, a law, regulation or circular must first be published and the people officially and specifically informed of said contents and its penalties."[35]

Further, publication is likewise an integral aspect in the application of the principle *ignorantia legis non excusat*. The said principle is embedded on Article 3 of the New Civil Code, which provides: "[i]gnorance of the law excuses no one from compliance therewith." The operation of *ignorantia legis* supports the importance of publishing laws as it serves a two-fold purpose: (a) to avoid difficult issues of proof, either as to an individual's knowledge of the law or as to the adequacy of the promulgation and (b) to encourage citizens' knowledge of the law by putting the burden on them to find it.[36] As the Philippine jurisdiction, on the basis of expediency and necessity, holds the presumption of knowledge of the law as conclusive, its application necessarily presupposes publication.[37] While *ignorantia legis* derives from the Roman notion that the law

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person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[33] 436 F. Supp. 1125 (N.D. Okla. 1977).

[34] 129 SCRA 174 (1984).

[35] 94 Phil 640 (1954).

[36] Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 270 (1982).

[37] ELMER T. RABUYA, THE CIVIL CODE OF THE PHILIPPINES 10 (2006).

is definite and knowable,[38] its application presupposes that means have been employed to make law known.

The importance of publishing laws has since been recognized by the policy makers which compelled them to enhance the administrative regulations governing publication. Under the old rules, the prescribed publication platform was the Official Gazette, as mandated by the C.A. No. 638,[39] the New Civil Code[40], and the Revised Administrative Code[41]. However, following the observation pronounced by the Court in its *Tañada Resolution* that "[t]here is much to be said of the view that the publication need not be made in the Official Gazette, considering its erratic release and limited readership,"[42] President Corazon Aquino, by way of executive fiat, issued Executive Order No. 200[43] allowing the publication in either the Official Gazette or a newspaper in general circulation in the Philippines.

In fine, the Philippine concept of publication in relation to due process has evolved from being merely a tool of expediency, to an indispensable requirement as a matter of public policy grounded upon constitutional considerations. The Court has since recognized it as a device to afford the people due process by giving them notice, be it actual or constructive. Even in the United States, from which our Bill of Rights, including the due process clause, is patterned, publication is recognized as an essential element of fair play and justice. Accordingly, there would be no justice if the state were to hold its people responsible for their conduct before it made known to them the unlawfulness of such behavior.[44]

III. APPLICATION OF INTERNATIONAL NORMS AND PRINCIPLES IN THE PHILIPPINES

A. International law as a source of law

Under Section 1, Article IV of the Constitution, the legislative power is vested in the Congress. The Supreme Court, applying Judge Cooley's

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38 Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. LJ. 1, 15-16 (1957)
39 An Act to Provide for the Uniform Publication and Distribution of the Official Gazette, sec. 1 (1941)
40 Sec 2.
41 Executive Order No. 292, sec 24.
42 *Supranote 1.*
43 Providing for the Publication of Laws either in the Official Gazette or in a Newspaper of General Circulation in the Philippines as a Requirement for their Effectivity, sec 2 (1987).
44 *How Our Laws are Made*, H. Con. Res. 190, 110th Cong, 1st Sess. (July 25, 2007).

understanding of the concept of legislative power, defined it as "the authority, under the constitution, to make laws, and to alter and repeal them."[45] Conceptually, legislative power is intrinsically related to, if not the very operationalization of, the State's inherent police power, since it has been defined as the power "vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without…"[46] Thus, the grant of legislative power to Congress has been described as "broad, general and comprehensive."[47]

Markedly, while the Congressional power to make laws is plenary in nature, inasmuch as it can be so pervasive, *it is not exclusive*. It is important to note that the legislative power is not an inherent power of Congress, but one that is merely granted thereto by the Constitution. As such, aside from the fact that the exercise of legislative power is subject to the limitations provided under the Constitution, laws could not be said to have originated solely from the Congress, as the Constitution itself may, as it actually did, lodge certain extent of legislative power elsewhere. An example is the proviso in Section 1, Article IV of the Constitution itself[48], which allows the people to exercise legislative power to the extent reserved to them by the provision on initiative and referendum.

In recognition that the Philippine legal jurisdiction does not exist in isolation, but is rather situated in community of nations, the 1987 Constitution, in certain provisions, makes reference to elements of international law. There are two ways set forth by the Constitution by which the principles of international law may take effect locally: the *Incorporation Clause* and the *Transformation Clause*. Under the Incorporation Clause, the Philippines adopts the generally accepted principles of international law as part of the law of the land.[49] Conversely, the Transformation Clause (also known as the Treaty Clause), effectively recognizes treaties and international agreements as a source of vested rights, as it provides that "no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."[50]

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45 *Government of Philippine Islands v. Springer*, 50 Phil 259 (1927).
46 *People v. Pomar*, 46 Phil 440 (1924).
47 *Ople v. Torres*, 292 SCRA 141 (1998).
48 CONST., art VI, sec 1: *The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.*
49 CONST., art II, sec 2.
50 CONST., art VII, sec 21.

With these Constitutional provisions, it is readily apparent that international law itself is a source of law in the Philippines. Generally accepted principles of international law, by virtue of the incorporation clause of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations.[51] On the other hand, a treaty engagement creates a legally binding obligation on the parties.[52] Thus, it has been said that treaty law and customary international law are placed on the same level as statutes passed by the Congress.[53]

Hence, the Supreme Court, in a number of cases, applied international law which has entered into force in the domestic sphere either by way of incorporation or transformation. Nonetheless, it is necessarily implied that compliance with constitutional methods of internalization is a condition *sine qua non* to the application of norms and principles of objective international in Philippine jurisdiction.[54] It is under this condition that they create rights and duties international law.[55] On this account, they may be said to derive their validity as "part of the law of the land" from the Constitution, based on their **substantive content** determined by objective international law.[56] In other words, these methods of internalization are the processes by which international law becomes domestically operational. If statutes take effect after having gone through the legislative mill and the approval by the Chief Executive, international law, which is said to be in equal footing with statutes, comes into force upon compliance with these methods of internalization.

B. The Incorporation Clause

Notably, by its plain language, the incorporation clause gives the impression as to how generally accepted principles of international law take effect in the Philippines. Accordingly, these generally accepted principles of international law are considered to be *automatically* part of Philippine laws.[57] Under the doctrine of incorporation, rules of international law form part of the law of the land; no further legislative action is needed to make such rules applicable in the domestic sphere.[58]

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[51] *Mijares v. Ranada*, 455 SCRA 397 (2005).
[52] *Tañada v. Angara*, 272 SCRA 18 (1997).
[53] JOAQUIN G. BERNAS, THE PHILIPPINE CONSTITUTION FOR LADIES, GENTLEMEN AND OTHERS 12 (2007).
[54] Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, 85 PHIL L.J. 1, 3 (2010).
[55] *Id.*
[56] *Id.*
[57] *Supranote 49.*
[58] *Secretary of Justice v. Lantion*, 322 SCRA 160 (2000).

In *Agustin v. Edu*[59], the Court was confronted by an issue as regards the validity of a Letter of Instruction issued by President Marcos prescribing certain regulations to prevent fatal or serious accidents in land transportation, prompting petitioner to assail the validity thereof. In dismissing the petition, the Court, among others, considered the Vienna Convention on Road Signs and Signals and the United Nations Organization. According to the Court:

> It cannot be disputed then that this Declaration of Principle found in the Constitution possesses relevance: "The Philippines adopts the generally accepted principles of international law as part of the law of the land." The 1968 Vienna Convention on Road Signs and Signals is impressed with such a character.[60]

Similarly, generally accepted principles of international law were likewise applied in the resolution of *Kuroda v. Jalandoni,*[61] a case that involves a general of the Japanese Imperial Army who was charged for committing war crimes. The Court, in dismissing Kuroda's contention that the Military commission has no jurisdiction to try the war crime charges against him, considered, among others, that The Hague and Geneva Conventions form part of and are wholly based on the generally accepted princips of international law. As such, even if the Philippines was not signatory thereto, the rules and principles laid down therein form part of the laws of our nation.

Generally accepted principles of international law were likewise utilized by the Court, in the same rigor, in cases in the field of *lex mercatoria*. Particularly, these cases have as their subject the governing law of certain areas in letters of credit.

In *Bank of the Philippine Islands v. De Reny Fabric Industries, Inc.*,[62] *Feati Bank & Trust Company v. Court of Appeals,*[63] *Metropolitan Waterworks and Sewerage System v. Daway,*[64] and *HSBC v. National Steel Corporation,*[65] the Court consistently applied provisions of the Uniform Customs and Practice for Documentary Credits (UCP) drafted by the International Chamber of Commerce (ICC). While it is true that in some of these cases, the letters of credit in question expressly state that UCP shall govern the same, the Court, in *Feati*, declared that even in the absence of a statement to that effect in the letter of credit, the UCP shall still be applicable, on the strength of Article 2 of the Code of Commerce, which provides that in the absence of any particular provision in

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[59] 88 SCRA 195 (1979).
[60] *Id.*
[61] 83 Phil. 171 (1949).
[62] 35 SCRA 256 (1970).
[63] 196 SCRA 576 (1991).
[64] 432 SCRA 559 (2004).
[65] G.R. No. 183486, February 24, 2016.

the Code of Commerce, commercial transactions shall be governed by the usages and customs generally observed.

In several other cases, the Court recognized generally accepted of international laws from which legal and demandable rights were sourced. In *Government of Hong Kong Special Administrative Region v. Olalia*, the right to bail in extradition cases was recognized on the basis of the Universal Declaration of Human Rights (UDHR), the principles thereof "are now recognized as customarily binding upon the members of the international community." [66] In the same vein, the Court recognized the right to bail in deportation cases under the UDHR in *Mejoff v. Director of Prisons*[67] and *Chirskoff v. Commission of Immigration.*[68] The right to return to one's country was acknowledged in *Marcos v. Manglapus,*[69] on the basis of UDHR and the International Covenant on Civil and Political Rights; and in *International School Alliance of Educators v. Quisumbing,*[70] the right to equal pay for equal work was upheld on the basis, among others, of the UDHR, International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, and the Convention Concerning Discrimination in Respect of Employment and Occupation.

In contrast to the aforementioned cases, the applicability of international law domestically by way of incorporation was clarified in *Pharmaceutical and Health Care Association of the Philippines v. Duque.*[71] In that case, the validity of the Revised Implementing Rules and Regulations (RIRR) of the Milk Code, which was patterned after the International Code of Marketing of Breastmilk Substitutes (ICMBS) and other Resolutions adopted by the World Health Assembly, was assailed. The Court made a categorical declaration that "for an international rule to be considered as customary law, it must be established that such rule is being followed by states because they consider it obligatory to comply with such rules *(opinio juris).*" As petitioners failed to produce any evidence to prove that the WHA Resolutions were in fact enforced or practiced by at least a majority of the member states or that compliance by member states with said WHA Resolutions was obligatory in nature, the Court refused to recognize international law as the basis to justify the validity of the RIRR .

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66 521 SCRA 470 (2007).
67 90 Phil. 70 (1951).
68 90 Phil. 256 (1951).
69 177 SCRA 668 (1989).
70 333 SCRA 13 (2000).
71 535 SCRA 265 (2007).

From the disquisitions in *Pharmaceutical and Health Care Association*, the method of internalization of generally accepted principles of international law in the domestic plane may be deduced. First, it is necessary that the norm or rule in question be practiced by states on the belief that compliance with such norm is obligatory. This is consistent with the classical formulation in international law which sees customary rules as binding as a result of the combination two elements: the established, widespread, and consistent practice on the part of States; and a psychological element known as the *opinion juris sive necessitates* (opinion as to law or necessity).[72]

Second, the status of such rule or norm as a generally accepted principle of international law is evidentiary in nature—the parties need to present proof that would attest that there is concurrence of the two aforementioned elements. Absent this proof, the Court will refuse to apply such international norm or rule. In making such discussion in *Pharmaceutical and Health Care Association*, the Court appears to have departed from the express provision on the Rules of Evidence relating to judicial notice, which provides that judicial notice of the 'law of nations' is mandatory.[73] In any case, it has been suggested that mandatory judicial notice of the 'law of nations' is unsound as a matter of policy, considering that international law is an essentially changing and malleable domain.[74]

C. The Transformation Clause

As regards the application of international law in the municipal sphere by way of transformation, Executive Order (E.O.) No. 459[75] provides for the guidelines as to how treaties and international agreements become operational locally. Section 6(a) thereof provides: "A treaty or an executive agreement enters into force upon compliance with the domestic requirements stated in this Order." In Section 7(a), it was provided that the effectivity of executive agreements primarily rests upon ratification by the President, while Section 7(b) states treaties come into force after ratification by the President *and* concurrence by the Senate.

Nonetheless, while a treaty or executive agreement comes into force *ipso jure* upon compliance with these Guidelines, it is entirely possible that the

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[72] *Supranote 48*.
[73] REVISED RULES ON EVIDENCE, rule 129, sec. 1; 2019 PROPOSED AMENDEMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 129, sec. 1.
[74] Aloysius P. Tiamzon, *"The Generally Accepted Principles of International Law" as Philippine Law: Towards A Structurally Consistent Use of Customary Law in Philippine Courts*, 47 ATENEO L. J. 243, 356-358 (2002).
[75] Providing Guidelines In The Negotiation Of International Agreements And Its Ratification.

validity thereof be assailed on the ground that it runs contrary to the provisions of the Constitution and, resultantly, conclude its domestic applicability. This is apparent from the text of Section 5(2)(a), Article VIII of the Constitution which grants the Supreme Court the power to declare treaties and executive agreements as unconstitutional. Accordingly, this conflict between the Constitution and customary international law is unlikely, because the Constitution, when formulated, accepted the general principles of international law as part of the law of the land.[76]

Thus, in a number of cases, the constitutionality of several treaties and executive agreements entered into by the Philippines was scrutinized and passed upon by local courts. For example, the accession to Madrid Protocol was upheld in *Intellectual Property Association of the Philippines v. Ochoa*[77]. The Visiting Forces Agreement (VFA) was held as constitutional in *BAYAN v. Zamora*[78]. Notably, in these cases, the challenge to the constitutionality of the treaty or international agreement in question was concentrated on whether Congress needs to concur thereto.

Conversely, there are certain cases where the core issue was not the alleged infirmity in the process of entering into a treaty or executive agreement, but the alleged inconsistency of the treaty or international agreement with the substantive provisions of the Constitution. In *Santos III v. Northwest Airlines*[79], there was a question of whether the Warsaw Convention offends the constitutional guarantees of due process and equal protection. Similarly, the Court, in *Tañada v. Angara*[80], inquired whether the World Trade Organization Agreement contravenes the constitutional provisions on economic nationalism. In both cases, the validity of the treaty in question was sustained. Curiously, while the VFA was also questioned on the ground that it violates the due process clause, among other constitutional provisions, the Court's resolution in *BAYAN* was centered on the procedural aspect of treaty-making.

Thus, from the foregoing cases, treaties and executive agreements are internalized upon compliance with the process of entering thereto as laid down in the Constitution and reiterated in E.O. No. 459. Further, should the substantive validity of the treaty or international agreement entered into be assailed on the ground that it clashes with the Constitution, it is likewise necessary that the treaty or international agreement hurdle such challenge.

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[76] JOAQUIN G. BERNAS, INTRODUCTION TO PUBLIC INTERNATIONAL LAW 64(2009).
[77] G.R. No. 204605, July 19, 2016.
[78] 342 SCRA 449 (2000).
[79] 210 SCRA 256 (1992).
[80] *Supranote 49*

D. Internalization of International Law

As may be gleaned from the foregoing discussion, it is clear that the *methods of internalization* of international law in the Philippine jurisdiction depends on the manner by which it is made to apply domestically. If it is internalized by way of incorporation, it must be established, by way of evidence, that the international norm or rule being made to apply domestically is one that is followed by states because they consider it obligatory to comply with such norm or rule. Conversely, if it is made applicable in the domestic sphere through the transformation clause, it must comply with the process of transformation laid down in the Constitution and in E.O. NO. 459, and must withstand constitutional challenges, if there is any.

IV. INTERNATIONAL LAW: THE UNKNOWN LAW?

To recall, under Article III, Section 1 of the Constitution, no person shall be deprived of life, liberty, or property without due process of law. Jurisprudence consistently holds that due process has two aspects: procedural and substantive.

While the Court has rigorously examined the compliance of local statutes with both aspects of due process, it appears that the Court has limited its examination of applicable international laws to the *substantive* aspect of due process. This is because substantive due process – which requires that laws be grounded on reason and be free from arbitrariness[81] – is the only element zeroed in by the Court, as revealed in the cases discussed above, whenever confronted with the issue involving the application of international law in domestic adjudication. If it involves one that is internalized through the incorporation clause, the Court only asks: *is the international law to be applied practiced by the international community coupled with opinion juris sive necessitates*? As regards treaties and executive agreements, the Court inquires*: is its substance consistent with the Constitution?* If these questions are answered in the affirmative, the Court, as illustrated in the aforementioned cases, will apply the international rule or norm to the case at bar.

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[81] *Supranote 10*

This being the case, there seems to be a discrepancy in the determination of compliance to the due process clause. If the Court, in *Tañada* and its subsequent cases, emphasized in no uncertain terms the importance of publication of statutes and presidential issuances as an indispensable component of due process, why is it that in the internalization of international laws, there is no requirement of publication, considering that international law made domestically applicable by way of incorporation or transformation is placed on equal footing with statutes.

The sweeping effect of non-publication is readily apparent from the *fallo* in *Tañada* itself – all presidential issuances in question, "*unless so published, they shall have no binding force and effect*."[82] Yet, in the application of international law, there is no judicial apprehensiveness to that effect.

V. ELIMINATING INCONSISTENCIES

The suggestion that the absence of publication in the internalization of international law, when viewed within the spirit of *Tañada*, has the effect of non-effectivity thereof will have deleterious consequences. Indeed, international law has played an instrumental role in the jurisprudential evolution of the reading of the Bill of Rights and economic, social, cultural and other human rights available and judicially enforceable.[83] In so suggesting, it would mean that the rights recognized in *Government of Hong Kong Special Administrative Region, Mejoff, Chirskoff, Marcos, International School Alliance of Educators* and other similar cases should not have been so recognized, should the international conventions and agreements from which such recognition was anchored be proved to not have been published.

The development of the law of the land as shaped by international law would be defeated should the treaties and international agreements entered into by the country be deemed without legal effect on the ground that they were not published. Certainly, the benefits derived from the WTO Agreement enabled through *Tañada v. Angara,* the protection afforded to passengers by the Warsaw Convention upheld in *Santos III,* the heightened sense of national security brought about by the VFA upheld as valid in *BAYAN*, and the more sophisticated regime of intellectual property introduced by the Madrid

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[82] *Supra* note 49.

[83] Francis Tom Temprosa, *Reflections of a Confluence: International Law in the Philippine Court, 1940-2000*, ASIAN YRB. OF INTL. LAW, 18, 116-120 (2013).

Protocol sustained in *Intellectual Property Association of the Philippines* will all be rendered irrelevant because of the simple fact of the non-publication of treaty or international agreement concerned.

These deleterious effects only hold true when the application of international law is beneficial to the citizens. When the situation is otherwise, the application of international law to domestic disputes must be seriously reconsidered. For example, in *Kuroda*, where the application of international law was indubitably unfavorable to the petitioner, should not the Court's disdain in non-publication be applied with equal vigor as in *Tañada*? Assuming *arguendo* that the regulations questioned in *Agustin* was upheld solely on the basis of the Vienna Convention, should not the Court inquire first if the petitioner therein had notice, even constructive, of the provisions of the said Convention?

These questions become more pressing when the principle *ignorantia legis non excusat* comes into picture. To recall, *Tañada* upheld every citizen's right to due process when the Court ruled that all unpublished laws and presidential issuances have no binding force and effect. Following *Tañada*, should a person be put in a situation where the deprivation of his life, liberty or property is impending on the basis of an ***unpublished*** treaty, executive agreement, convention or any other document embodying applicable international law, his plea of ignorance of the international law should be upheld, considering that there was no basis for the application of *ignorantia legis*. Otherwise, he would be in a situation that could not be better described than a *blatant, unjustified offense to the constitutional right to due process*.

In order to address this anomaly, there must be a reconfiguration of the current practice of internalization in order to comply with the requirements of due process enunciated in *Tañada* while, at the same time, serving the purpose of constitutional provisions on the domestic application of international law.

The immediate solution to this problem is simple: publish the unpublished international covenants and protocols embodying the generally accepted principles of international law, as well as the treaties and international agreements entered into by the country.

The simplicity and practicability of this proposal certainly holds true in relation to treaties and executive agreements. By their very nature, they are similar to statutes in the sense that they require governmental actions, thus presupposing the actual motivation of state actors to enter thereto. Thus, as in the case of statutes, it is unlikely that there will be any problem in requiring publication of treaties and executive agreements as a *sine qua non* condition before they come into force.

However, such proposal will be indubitably problematic in case of international covenants and protocols embodying the generally accepted principles of international law. If publication, within the meaning of Article 2 of the Civil Code, shall be required before such international rules and norms come into force, their applicability in the Philippine jurisdiction would be entirely left to the discretion of the authority who shall cause such publication. Such authority may simply refuse to cause the publication thereof in order to prevent its domestic application. In effect, the very purpose of the incorporation clause will be defeated. The incorporation clause, which conceives that, continuously evolving norms and rules in the community of nations that are impressed with *opinion juris* be *automatically* part of the law of the land, will be rendered nugatory.

In order to comply with due process requirements, it is submitted that there should instead be legislation that will require the publication of conventions and protocols promulgated by international organizations, especially the UN General Assembly. This is because there is a growing recognition that the UN General Assembly Resolutions are authoritative sources of international law.[84] Should such international conventions and protocols be pleaded as a source of legally demandable rights, all the plaintiff should do is to offer proof that the international rule or norm put forward has the character of generally accepted principles of international law, consistent with *Pharmaceutical and Health Care Association*. As such, no party, in any case, can raise the defense that he is ignorant of such law, because there, a basis for the application of *ignorantia legis* is obtaining and that the requirements of procedural process have been observed and satisfied.

VI. CONCLUSION

The publication of laws is arguably the most oft-overlooked element in the compliance with due process requirements. After the Court's categorical pronouncement in *Tañada*, clarified by its subsequent cases, publication has become almost a non-issue as it became a standard practice in legislation, signifying the final stage in the legislative mill. Thus, after *Tañada*, no other canonical jurisprudence was promulgated dealing with publication of laws. Rather, much of the Court's energy was devoted in passing upon cases

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[84] Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L. J. 876, 886 (1983).

concerning the other facets of procedural due process, *i.e.* the twin requirements of notice and hearing, and the substantive validity of statutes.

Nonetheless, it seems that the general non-concern on publication with regard to statutes was able to contaminate international law that are domestically applicable. A survey of jurisprudence suggests that the primary concern of litigants was the substantive aspect of international law or compliance with the constitutional methods of their internalization, but not the observance of procedural due process. Indeed, non-publication of international law may appear as a trivial matter, considering the annals of existing literature on *jus gentium* devotes much of its attention to its deepest complexities, intricacies, and consequences.

In fact, even the Roman law did not allow ignorance as a defense to actions under the *jus gentium*, which, at that time, was the law derived from the common customs of the Italian tribes and thought to embody the basic rules of conduct any civilized person would deduce from proper reasoning.[85] This is understandable since *jus gentium,* back then, is a mere product of the rationality of man and does not involve particular rules and norms. Stated differently, it is definitely not unreasonable to hold someone liable for a violation of any of the ***basic*** norms that are shaped by civilization and are expected to be known by any rational man.

Nonetheless, trends in legal scholarship have emerged over the past decades that rendered the said Roman law notion inapplicable, or at the very least, dubious in the Philippine jurisdiction under the current setting. First, international law has evolved to become an area of law mainly comprised of technical and particular norms that are no longer akin to its previous form. This is largely brought about by the emergence of legislation-type functions of international organizations, particularly the United Nations, and the sophistication of treaty-making, from which specific and detailed norms with the status of domestically applicable international law are developed. Second, Philippine courts have exhibited adherence, nay, fervent adherence to the idea of due process. Existing jurisprudence indicates that countless government actuations were examined under the lens set by the requirements of the due process clause.

Considering the magnitude of the spirit of *Tañada,* non-publication can cast a legitimate doubt on the applicability of international law insofar as the ideas of justice and fair play are concerned. If the Court once held that it is unfair to bind the people with an unpublished piece of legislation crafted by their representatives, would it not be more unfair to bind them with a rule

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[85] Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 685 (1976)

developed by the community of nations itself? Sometimes, all that is needed is to take a step back to determine whether the application of the law is right, fair, and just, taking into account *all* the facets of due process, and not just the palpable ones.