

JUDICIAL REVIEW OF IMPEACHMENT: THE JUDICIALIZATION OF PHILIPPINE POLITICS

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“There is hardly a political question xxx which does not sooner or later turn into a judicial one.”

– Alexis de Tocqueville,
French historian & political scientist,
1805-1859

INTRODUCTION

The importance of impeachment in democratic institutions, as well as its efficacy in checking the excesses of certain high officials, has long drawn mixed reactions. For Clinton Rossiter, an authority on the American presidency, impeachment is a “rusted blunderbuss,” while Thomas Jefferson is quoted to have said that “experience has already shown that the impeachment the Constitution has provided is not even a scarecrow.”¹ Edward S. Corwin, on the other hand, lauds impeachment as “the most formidable weapon in the arsenal of democracy,” while Alexander Hamilton describes it as “a method of national inquest into the conduct of public men.”²

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¹ Accessed at http://quotes.liberty-tree.ca/quote/thomas_jefferson_quote_817a, on 07 January 2006, 1:00 pm.

² THE FEDERALIST PAPERS, No.: 65, accessed at <http://www.yale.edu/lawweb/avalon/federal/fed65.htm>, on 01 October 2005, 3:00 pm [hereinafter, FEDERALIST].

Regardless of the actual importance of impeachment in the protection of democracy, it is undeniable that in the Philippines, the drama that accompanies any attempt at impeachment – whether successful or not – grips the entire nation; and, to paraphrase Alexander Hamilton, agitates the passions of the whole community, dividing it into parties more or less friendly or inimical to the accused.³ Indeed, the impeachment of former President Joseph Ejercito Estrada divided the country into camps of pro-Erap and anti-Erap, so much so that both factions avidly watched the televised impeachment proceedings with the same fervor that one usually sees reserved for primetime soap operas. More recently, the attempt to impeach former Chief Justice Hilario Davide⁴ did not only inspire the ire of many sectors in Philippine society, it even, in the words of the Supreme Court, created a political crisis.⁵

It is in this background of relative tumult that the Supreme Court rendered its landmark ruling in the case of *Francisco, Jr. v. Nagmamalasant na mga Manananggol ng mga Manggagawang Pilipino, Inc.*,⁶ invalidating not only the second impeachment complaint against former Chief Justice Hilario Davide, but declaring certain sections of the Rules of Procedure in Impeachment Proceedings of the House of Representatives null and void. This decision goes against the widely accepted norm in American and Filipino constitutional thought that impeachment proceedings lie solely in the province of the legislative and that the Courts have minimal, if any, role in it.

While this decision might seem novel from the perspective of American constitutional philosophy and jurisprudence, judicial review in impeachment proceedings is not entirely uncommon when viewed in light of comparative constitutional law. As will be later seen, for many countries, the Judiciary plays an important role in the impeachment

³ *Id.*

⁴ He retired from office last 20 December 2005.

⁵ *Francisco, Jr. v. Nagmamalasant na mga Manananggol ng mga Manggagawang Pilipino, Inc.* 415 SCRA 44, at 105 (2003).

⁶ 415 SCRA 44, G.R. No. 160261, 10 November 2003.

process. In fact, in at least one country,⁷ a judicial body has gone much further than the Philippine Supreme Court – it actually invalidated the impeachment of a sitting President and reinstated him in office.

Insofar as the Supreme Court is concerned, the *Francisco* decision finds solid and unassailable foundations in its constitutionally-granted power of judicial review – what the ponencia termed as the Court’s “expanded certiorari jurisdiction.”⁸ Indeed, this is not the first time that the Supreme Court has exercised judicial review over Congressional action.⁹

Be that as it may, the ruling in *Francisco* remains truly remarkable, if not downright epochal, in light of the many questions it raises as regards the institution of impeachment, and its character as big leap – albeit not the first one – in the judicialization of Philippine politics.

It is into these areas that this article focuses on. The first part recounts the factual milieu of the *Francisco* case, while the second part provides a brief historical background on origins and roots of the impeachment institution. The third part focuses on the issue of judicial review in impeachment cases, with an extended analysis of the ramification of the *Francisco* ruling. The fourth and last part examines the *Francisco* case in light of the global trend of “judicialization of politics.”

I. BACKDROP OF THE *FRANCISCO* DECISION

Article XI, entitled “Accountability of Public Officers”, enshrines the Impeachment process in our constitutional structure. Pertinent provisions state:

Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the

⁷ South Korea.

⁸ *Francisco*, 415 SCRA at 124.

⁹ *Id.*, at 132.

Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. xxx

Section 3. (1) The House of Representative shall have the exclusive power to initiate all cases of impeachment.

(2) A verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution of endorsement by any Member thereof, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.

(3) A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded.

(4) In case the verified complaint or resolution of Impeachment is filed by at least one-third of all the Members of the House, the same shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed.

(5) No impeachment proceedings shall be initiated against the same official more than once within a period of one year.

(6) The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.

(7) Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial and punishment according to law.

(8) The Congress shall promulgate its rules on impeachment to effectively carry out the purpose of this section.

In accordance with its power to promulgate rules on impeachment¹⁰, the 12th Congress of the House of Representatives, on 28 November 2001, adopted and approved the Rules of Procedure in Impeachment Proceedings. Pertinent provisions state:

RULE V

BAR AGAINST INITIATION OF IMPEACHMENT PROCEEDINGS AGAINST THE SAME OFFICIAL

Section 16. – *Impeachment Proceedings Deemed Initiated.* – In cases where a Member of the House files a verified complaint of impeachment or a citizen files a verified complaint that is endorsed by a Member of the House through a resolution of endorsement against an impeachable officer, impeachment proceedings against such official are deemed initiated on the day the Committee on Justice finds that the verified complaint and/or resolution against such official, as the case may be, is sufficient in substance, or on the date the House votes to overturn or affirm the finding of the said Committee that the verified complaint and/or resolution, as the case may be, is not sufficient in substance.

In cases where a verified complaint or a resolution of impeachment is filed or endorsed, as the case may be, by at least one-third (1/3) of the Members of the House, impeachment proceedings are deemed initiated at the time of the filing of such verified complaint or resolution of impeachment with the Secretary General.

Section 17. *Bar Against Initiation Of Impeachment Proceedings.* – Within a period of one (1) year from the date impeachment proceedings are deemed initiated as provided in Section 16 hereof, no impeachment proceedings, as such, can be initiated against the same official. (*Italics in the Original*)

¹⁰ CONST. art. XI, § 3, ¶ 8.

On 02 June 2003, availing of the right of a private citizen to file a verified impeachment complaint,¹¹ former President Joseph E. Estrada filed an impeachment complaint against then – Chief Justice Hilario G. Davide Jr. and seven (7) Associate Justices of the Supreme Court for “culpable violation of the Constitution, betrayal of the public trust and other high crimes.” The complaint was endorsed by Representatives Rolex T. Suplico, Ronaldo B. Zamora and Didagen Piang Dilangalen,

Unfortunately, while the House Committee on Justice found said complaint to be “sufficient in form,” it voted on 22 October 2003 to dismiss the same for being “insufficient in substance”.

Then, on 23 October 2003 – 4 months and 3 weeks after the filing of the first impeachment complaint – Representatives Gilberto C. Teodoro, Jr. and Felix William B. Fuentebella filed a second impeachment complaint against then-Chief Justice Hilario G. Davide, Jr. This second complaint was accompanied by a “Resolution of Endorsement/Impeachment” signed by at least one-third (1/3) of all the Members of the House of Representatives.

The filing of said second impeachment complaint spurred numerous groups and individuals¹² to file their respective petitions before the Supreme Court, assailing the legality of the second impeachment complaint for being violative of Article XI, Sec. 3 (5) of the Constitution, which prohibits the initiation of impeachment proceedings against the same official for more than once within one year. In a unanimous decision¹³ penned by Justice Conchita Carpio-Morales, which upheld the

¹¹ CONST, art. XI, § 3, ¶ 2.

¹² Though the case came to be known as “*Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagwang Pilipino, Inc.*,” it actually involved 18 consolidated cases – GRs. 160261 to 160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160365, 160370, 160376, 160392, 160397, 160403 and 160405.

¹³ Carpio, *J.*, concurred in the ponencia of Justice Carpio-Morales, while Vitug, Panganiban, Sandoval-Gutierrez, Callejo, Sr., Quisumbing, Corona and Azcuna, *JJ.*, filed separate concurring opinions. Puno and Ynares-Santiago, *JJ.*, filed separate concurring and dissenting opinions, while Austria-Martinez, *J.*, concurred both in the majority opinion and in the separate opinion of Justice Vitug.

exercise of judicial review over impeachment proceedings if and when the question posed involves “constitutionally imposed limits on the powers and functions conferred upon [Congress]¹⁴” in the matter of impeachment, the High Court declared Sections 16 and 17 of 2001 Impeachment Rules unconstitutional, and consequently, held the second impeachment complaint to be barred by Article XI, Section 3(5) of the Constitution.

In its decision, the Supreme Court not only rejected the rather common acceptance of impeachment as being predominantly, if not purely, of a political character – the High Court likewise abandoned its historical origins. It is submitted that this places Philippine impeachment in a unique situation. Moreover, while the decision is seemingly clear-cut, a closer analysis reveals that the new doctrine opens what can be said to be a Pandora’s Box insofar as what impeachment matters are within, and what are beyond, the pale of judicial review.

A clearer understanding of the issues involved in the matter of judicial review in impeachment proceedings require a brief examination of its historical background as well as its contemporaneous milieu.

II. HISTORICAL BACKGROUND OF IMPEACHMENT

Impeachment is not of Filipino origin; rather, it is an institution that we adopted from the American Constitution, which, in turn, the American Framers unabashedly derived from the United Kingdom. Thus, Alexander Hamilton identifies British parliamentary practice as the “model from which this institution [impeachment] has been borrowed.”¹⁵

Impeachment in the United Kingdom, in the form closest to that of today, is generally accepted to have started in 1376,¹⁶ when the “Good

¹⁴ *Francisco*, at 151.

¹⁵ FEDERALIST, *supra* note 2.

¹⁶ Specifically, the 1376 impeachments of Richard Lyons, a London merchant; and of Lord William Lattimer, are identified as the “first modern impeachments”. See M.R. Romney, *The Origins and Scope of Presidential Impeachment*, HINCKLEY JOURNAL OF POLITICS, Spring 2000, p. 67 (2000), accessed at <http://www.lib.utah.edu/epubs/hinckley/v2/romney.pdf>, on 09 September 2005, 2:30 am. [hereinafter Romney, *Origins*]

Parliament of 1976 saw the use of impeachment, whereby the House of Commons as a body could accuse officials who had abused their authority and put them on trial before the Lords.”¹⁷ It was used as a means whereby the Parliament could assert its authority over an official who cannot be removed in any other way, and it was a power that the Parliament jealously guarded against attempts at interference by the Crown. Thus, in 1388, when King Richard II challenged the Parliament’s right to impeach an official without his consent, all judges, who opined that an impeachment without the King’s consent is illegal, *were themselves impeached and removed by the House of Lords*.¹⁸

In modern times however, impeachment fell into disuse in the United Kingdom.¹⁹ With the Prime Minister and other executive officers answerable to the Parliament – no longer to the Sovereign – under the “Principles of Responsible Government,”²⁰ the House of Commons can remove them without a long and tedious impeachment process.²¹

The institution of impeachment was brought to American soil by the colonists, and the first case of impeachment in the Colonies was the 1635 impeachment of John Harvey, Royal Governor of Virginia, by the

¹⁷ Website of the United Kingdom Parliament, accessed at <http://www.parliament.uk/works/parliament.cfm>, on 01 October 2005, 3:10 pm

¹⁸ See Romney, *Origins*, *supra* note 10, at 67.

¹⁹ The last attempted impeachment occurred in 1848, against Viscount Palmerston, who was accused of having signed a secret treaty with the Russian Empire, and of having received monies from the Tsar. See <http://encyclopedia.laborlawtalk.com/Impeachment>, accessed on 01 October 2005, 3:30 pm.

²⁰ A principle of the Westminster Parliament that the “Government is responsible to [the] Parliament, more specifically, to the lower, popularly-representative, house, rather than to the monarch”. See http://www.absoluteastronomy.com/encyclopedia/r/re/responsible_government.htm, accessed on 01 October 2005, 4:10 pm.

²¹ Thus, Peter Hain, Leader of the House Commons from June 2003 to May 2005, responding to Plaid Cymru MP Adam Price’s announcement of his intention to move for Tony Blair’s impeachment on account of his involvement of the United Kingdom in the controversial US-led invasion of Iraq in 2003, said that impeachment was obsolete, given the modern government’s responsibility to parliament.

Virginia General Assembly.²² Soon enough, Colonial assemblies adopted the impeachment process as a method of removing royal officials.²³ Though actual removal often did not occur since the target royal officials had recourse to the King, impeachment nevertheless continued to be used as a “tool of colonial protest” – as Colonial assemblies realized that impeachment, even without actually removing an official, has a detrimental effect of the impeached official’s ability to govern.²⁴

After the Revolution, it would have been logical to conclude that without the Crown – and hence the disappearance of “impeachable officers” – the impeachment institution would have lost its *raison d’être* and thus would have fallen to disuse. The contrary, however, occurred – by that time, impeachment was already “ingrained in the American experience, and [thus underwent] a process of republicanization.”²⁵ Thus, it is not surprising that impeachment eventually found its way into the American Constitution.²⁶

III. IMPEACHMENT AND JUDICIAL REVIEW

A. The American Paradigm

The result of the deliberations of the American Constitutional Convention was the exclusion of the Supreme Court from the impeachment

²² See Romney, *Origins*, *supra* note 10, at 69.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ U.S. CONST. art. I, § 2 – “That the House of Representatives xxx shall have the sole power of impeachment: U.S. CONST. art. Art. I, § 3 – “The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the concurrence of two thirds of the Members present.

Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

process, and the grant of the power to impeach to the Legislature, though it was not done without debate.²⁷ In fact, the Virginia and the New Jersey Plans lodged the power to impeach in the judiciary.²⁸ Eventually, however, the Convention divorced the impeachment process from the judiciary and gave the Senate the sole power to impeach. Alexander Hamilton explained this decision thus:

It is much to be doubted, whether the members of that tribunal [the Supreme Court] would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

²⁷ Mr. Madison felt this would make the President “improperly dependent”, and preferred the “Supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part.”; while Mr. Pinkney opined that making the Senate the Impeachment Court might produce a situation where the President, when opposing a favorite law, would cause “the two houses [to] combine against him, and under the influence of heat and faction throw him out of office.” See 2 FARRAND 551, accessed at <http://memory.loc.gov/cgi-bin/ampage>, on 07 January 2005, 100:00 am.

²⁸ *Nixon v. United States*, 506 U.S. 224 (1993), citing 1 Farrand 21-22.

xxx xxx xxx

There remains a further consideration, which will not a little strengthen this conclusion. It is this: *The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence?* That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present, and disqualification for a future, office.”²⁹

Three (3) considerations, therefore, were uppermost in Hamilton’s mind when he rejected the Supreme Court as the appropriate body to try impeachment cases, to wit: (1) the Supreme Court might not have the fortitude, credit and authority to decide so “difficult a task”; (2) the nature of the proceeding requires a court composed of a great number of judges; and (3) since conviction in an impeachment proceeding might result in a judicial conviction for a criminal offense, it would not be proper for the judges in these two distinct proceedings to be the same.

The judiciary’s exclusion from the impeachment process thus became a widely-held assumption in American Constitutional thought,

²⁹ FEDERALIST, *supra* note 2.

and impeachment came to be regarded as presenting a “true political question case.”³⁰ Charles Black wrote that in matters of presidential impeachment, the courts “have... no part at all to play.”³¹ Politicians have regarded impeachment as solely within the province of the legislature, so much so that for Gerald Ford, “an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history.”³²

These assumptions were challenged rather recently in the case of *Nixon v. United States*,³³ involving the impeachment of Walter L. Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, who was convicted of two counts of making false statements before a federal grand jury, and was then sentenced to prison.³⁴ Nixon refused, however, to resign from his office, and thus continued to collect his judicial salary even while in prison.³⁵ To remedy the absurd situation, the House of Representatives impeached him for high crimes and misdemeanors. When the House forwarded the Articles of Impeachment to the Senate, the latter, invoking its Impeachment Rule XI, appointed a committee of Senators to “receive evidence and take testimony.”³⁶

Said committee held meetings for four (4) days, after which, it presented its report on the uncontested facts and summary of evidence to the full Senate. Both Nixon and the House impeachment managers

³⁰ See <http://conlaw.usatoday.findlaw.com/constitution/article02/18.html>, accessed at <http://conlaw.usatoday.findlaw.com/constitution/article02/18.html>, accessed on 02 January 2003, 2:25 pm.

³¹ CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 63 (1974) [hereinafter BLACK, *IMPEACHMENT*].

³² House Floor Speech: Impeach Justice Douglas, Box D29, Gerald R. Ford Congressional Papers, Gerald R. Ford Library, accessed at <http://www.ford.utexas.edu/library/speeches/700415f.htm>, on 07 January 2006, 1:00 pm.

³³ 506 U.S. 224 (1993).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

submitted extensive final briefs to the full Senate and delivered arguments before them. Afterwards, the Senate convicted Nixon by more than the constitutionally required two-thirds majority, and removed him from his office as United States District Judge.³⁷

This spurred Nixon to commence suit before the Supreme Court, arguing that “Senate Rule XI violates the constitutional grant of authority to the Senate to ‘try’ all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings.”³⁸ He thus asked that his impeachment conviction be declared void.³⁹

The U.S. Supreme Court rejected Nixon’s contentions, and, speaking for the majority, Chief Justice Rehnquist, relying primarily on the deliberations of the Framers of the American Constitution, held that to exercise judicial review over the question of whether the Senate has followed the proper meaning of the word “try” in the impeachment clause, is inappropriate because: (1) it would disturb the system of checks and balances wherein impeachment is sole check of the Legislature on the Judiciary; (2) it would result to lack of finality and difficulty of fashioning relief; and (3) there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.⁴⁰

While the question presented in the *Nixon* case refers particularly to the question of judicial review on the Senate’s construction of the word “try” as used in the impeachment clause, the decision in *Nixon* has become the authority for the argument that impeachment proceedings are beyond judicial review. Thus, it has been observed that “the analysis of the Court applies to all impeachment clause questions, thus seemingly putting offlimits to judicial review the whole process.”⁴¹

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ <http://conlaw.usatoday.findlaw.com/constitution/article02/18.html>, accessed on 02 January 2003, 2:25 pm.

B. The South Korean Model⁴² and Other Counter-Models

While the American paradigm characterizes impeachment as an almost purely political process, and thus excludes the judiciary from participation therein, a markedly different exemplar is found in other countries. In certain nations all over the globe, far from being beyond the pale of the judiciary, the impeachment process directly involves the judicial branch of government.

In Germany for instance, Article 61 of the *Grundgesetz* (Basic Law for the Federal Republic of Germany)⁴³ provides that, after the Federal President has been impeached by the *Bundestag* or the *Bundesrat*, the case shall be tried before the Federal Constitutional Court, which shall then decide whether he is guilty of a willful violation of the basic law. If the Constitutional Court answers said question in the affirmative, it may declare him to have forfeited his office.

The procedure followed in other countries in Continental Europe is the same. In Italy, after the President is impeached by the Parliament in joint session, the case is subsequently brought before the Constitutional Court for trial.⁴⁴

The Bulgarian Constitution⁴⁵ contains a similar provision. Its Article 103 provides that after the President or the Vice-President has been impeached by at least two-thirds (2/3) of the National Assembly, trial shall be conducted by the Constitutional Court.

⁴² While many countries follow an impeachment procedure similar to that of South Korea, this model is termed the “South Korean model” by reason of the landmark developments that have occurred in South Korean impeachment.

⁴³ Promulgated by the Parliamentary Council on 23 May 1949, accessed at <http://www.psr.keele.ac.uk/docs/german.htm>

⁴⁴ ITALIAN CONST. Title VI, § 1, Art. 135, accessed at http://www.oefre.unibe.ch/law/icl/it00000_.html, on 01 October 2005, 7:40 pm.

⁴⁵ Adopted on 12 July 1991, accessed at http://www.oefre.unibe.ch/law/icl/bu00000_.html#1000_, accessed on 11 September 2005, 6:50 pm.

Article 104 of the Croatian Constitution⁴⁶ is practically the same. While proceedings for the impeachment of the President are initiated by a two-thirds (2/3) vote of all the members of the Croatian Parliament, the impeachment shall afterwards be decided by the Constitutional Court.

The Hungarian impeachment process is also the same mold. Articles 31-A and 32 of its Constitution⁴⁷ provides that a President may be impeached by a two-thirds 2/3 vote of the Parliament, after which, trial shall be conducted by the Constitutional Court.

Here in our own backyard, particularly in South Korea, Article 111, Chapter VI of the *Honbop*,⁴⁸ gives the Constitutional Court competence to adjudicate issues on impeachment. This power was exercised in recent history, in the matter of the impeachment of President Roh Moo-Hyun. On 12 March 2004, the National Assembly of South Korea passed a motion to impeach President Moo-Hyun. Barely 2 months after – or on 14 May 2004, the South Korean Constitutional Court dismissed the impeachment motion and reinstated Moo-Hyun. It has been written that this is “the first time in modern constitutional history in which a common constitutional mechanism for removal of a president has produced a situation in which a president impeached by a legislature has been reinstated by a judicial body.”⁴⁹

⁴⁶ Adopted on December 1990, last amended on 02 April 2001, accessed at http://www.oefre.unibe.ch/law/icl/hr00000_.html#C001_, on 02 October 2005, 7:45 pm.

⁴⁷ Adopted 20 August 1949, accessed at http://www.oefre.unibe.ch/law/icl/hu00000_.html, on 11 September 2005, 6:45 pm.

⁴⁸ Adopted on 17 July 1948, accessed at http://www.oefre.unibe.ch/law/icl/ks00000_.html, 11 September 2005, 6:47 pm.

⁴⁹ Y. Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 AMERICAN JOURNAL OF COMPARATIVE LAW 6 (2005), accessed at <http://ssrn.com/abstract=604049>, on 02 January 2003, 2:55 pm. Interestingly, Mr. Lee cites the *Francisco* decision as the “closest analogue” to the Roo Moh-Hyun case. See *Footnote #33*.

C. The Philippine Model – Analysis and Critique of the Francisco Decision

Here in the Philippines, it has been long opined that the judiciary has a very limited role in the impeachment process. It is regarded as a rare instance when the Legislature – a non-judicial branch, was given judicial functions. Thus, Fr. Joaquin Bernas wrote that the power of Congress to impeach is the second exception to the rule of judicial monopoly in the exercise of judicial functions.⁵⁰

Former Supreme Court Associate Justice Isagani A. Cruz, on the other hand, wrote that “a judgment of the Congress in an impeachment proceeding is normally not subject to judicial review.”⁵¹ He made an important qualification, however (seemingly in anticipation of the *Francisco* case) – “But the courts may annul the proceedings if there is a showing of a grave abuse of discretion committed by the Congress or of non-compliance with the procedural requirements of the Constitution...”⁵² This is precisely what occurred in the *Francisco* case.

The crux of the controversy in the *Francisco* case lies on the meaning of the word “initiate” as used in Article XI, Sec. 3(5) of the Constitution, which states:

No impeachment proceedings shall be initiated against the same official more than once within a period of one year.

Under the House Rules of Impeachment, when the verified impeachment complaint is filed by a private citizen, the impeachment proceedings are deemed initiated only on the day that the Committee on Justice finds said complaint to be sufficient in substance, or on the day that the House overturns a finding of said committee that such complaint is insufficient in substance. Thus, the first impeachment complaint, while filed, was not initiated, since the finding of the Committee on Justice that

⁵⁰ J. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 989 (1996 Ed.).

⁵¹ I.A. CRUZ, *PHILIPPINE POLITICAL LAW* 360 (1988).

⁵² *Id.*

it was insufficient in substance had not yet been overturned by the House. Accordingly, the 1-year bar had not yet begun the run, and thus the filing of the second impeachment complaint did not violate the Constitutional proscription. In other words, “the one year bar prohibiting the initiation of impeachment proceedings against the same officials could not have been violated as the impeachment complaint against Chief Justice Davide and seven Associate Justices had not been initiated as the House of Representatives, acting as the *collective body*, has yet to act on it.”⁵³

In assailing the Supreme Court’s power to rule on the issue, both Speaker De Venecia and intervenor Senator Pimentel “raise the novel argument that the Constitution has excluded impeachment proceedings from the coverage of judicial review.”⁵⁴ Particularly, for the House Speaker, “impeachment is a political action which cannot assume a judicial character xxx any question, issue or incident arising at any stage of the impeachment proceeding is beyond the reach of judicial review.”⁵⁵ For the good Senator, “the Senate’s “sole power to try” impeachment cases (1) entirely excludes the application of judicial review over it; and (2) necessarily includes the Senate’s power to determine constitutional questions relative to impeachment proceedings.”⁵⁶

The Supreme Court, however, rejected these contentions.

1. Rejection of American Precedents

In *Francisco*, the High Tribunal rejected reliance on American jurisprudence and Constitutional history as support for the argument that impeachment exists beyond the pale of judicial review. While recognizing that the roots of the Philippine Constitution can be found in its American counterpart, the Court noted, in the words of Father Bernas, that “we have cut the umbilical cord,” and declared that:

⁵³ *Francisco*, at 164, Italics in the original.

⁵⁴ *Id.*, at 129.

⁵⁵ *Id.*

⁵⁶ *Id.*

“while the power of judicial review is only *impliedly* granted to the U.S. Supreme Court and is discretionary in nature, that granted to the Philippine Supreme Court and lower courts, as *expressly provided for in the Constitution*, is not just a power but also a **duty**, and it was **given an expanded definition** to include the power to correct any grave abuse of discretion on the part of any government branch or instrumentality.”⁵⁷

Addressing particularly the differences between the American and Philippine constitutions in their respective provisions on impeachment, the Court held:

“There are also glaring distinctions between the U.S. Constitution and the Philippine Constitution with respect to the power of the House of Representatives over impeachment proceedings. *While the U.S. Constitution bestows sole power of impeachment to the House of Representatives without limitation, our Constitution, though vesting in the House of Representatives the exclusive power to initiate impeachment cases, provides for several limitations to the exercise of such power as embodied in Section 3(2), (3), (4) and (5), Article XI thereof.* These limitations include the manner of filing, required vote to impeach, and the one year bar on the impeachment of one and the same official.”⁵⁸

Immediately, one is struck by what seems to be wholesale abandonment of American precedents on the matter. Admittedly, Philippine constitutional thought is not as firmly welded to its American roots as it was in the past, owing to the many unique developments in Philippine constitutional law.

2. Constitutionally-Imposed Limitation on the Power to Impeach

Elucidating on the issue of whether a particular issue is a political question or not, the Court held:

⁵⁷ *Id.*, at 130-131; Emphases in the original.

⁵⁸ *Id.*, at 131; Citations omitted, emphases supplied.

“...the determination of a truly political question from a non-justiciable political question lies in the answer to the question of *whether there are constitutionally imposed limits on powers or functions conferred upon political bodies*. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits.”⁵⁹

The obvious question then follows – what questions regarding impeachment are beyond the pale of judicial review and what are subject to the same? The guide laid down in the *Francisco* ruling seems simple enough – when the question involves a limitation imposed by the Constitution on the legislative power to impeach.⁶⁰

A closer examination of the question, however, reveals that the aforesaid guideline is not as clear-cut as it appears to be.

Even a cursory reading of the provisions on impeachment would show that it imposes numerous “limitations” on the legislative power to impeach. The decision itself enumerates three: (1) manner of filing; (2) required vote to impeach; and (3) the one-year bar. Others, however, could be mentioned, such as: (1) the impeachable officers; (2) the impeachable offenses; and (3) the process to be followed.

Following the reasoning of the Court in *Francisco*, any violation of these limits would open the doors for judicial review. Yet, on the issue of whether or not “the offenses alleged in the second impeachment complaint constitute valid impeachable offenses under the Constitution,”⁶¹ the Court declared the question to be non-justiciable – that its determination is “a purely political question which the Constitution has left to the sound discretion of the legislation.”⁶² The Court then proceeded to say:

⁵⁹ *Francisco*, at 151; Emphases supplied.

⁶⁰ *Id.*

⁶¹ *Id.*, at 152.

⁶² *Id.*

“In fact, an examination of the records of the 1986 Constitutional Commission shows that the framers could find no better way to approximate the boundaries of betrayal of public trust and other high crimes than by alluding to both positive and negative examples of both, without arriving at their clear cut definition or even a standard therefor.”⁶³

Clearly, we seem to have reached a confusing point. The enumeration of impeachable offenses obviously constitutes a limitation on the Legislature’s power to impeach. Beyond such offenses, impeachment does not lie. Yet the High Court states that the determination of impeachable offenses is non-justiciable. If the Constitutional Commission alluded examples of what does and does not constitute “betrayal of public trust and other high crimes,” may not such example serve as a guide as to the Commission’s idea of what these terms mean? And may not, from that guide, the court determine whether an offense charged in an impeachment complaint is an impeachable offense within the purview of the Constitution?

Further, a closer reading of the Records of the Constitutional Commission reveals that the term “betrayal of public trust and other high crimes” is not as vague as the decision makes it appear to be.

First, the term “high crimes” was borrowed, though with modification, from the American Constitution, which uses the term “high crimes and misdemeanors” – a term which, the American Framers in turn, “lifted bodily from English law.”⁶⁴

Thus, even among American Constitutional scholars, some are of the opinion that “high crimes and misdemeanors” have “ascertainable limits.”⁶⁵ Raoul Berger, for instance, relying on English precedents, argues that “high crimes and misdemeanors” were a “category of political crimes against the State.”⁶⁶ Berger then proceeds with the

⁶³ *Id.*; Citations omitted.

⁶⁴ R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 54 (1973) [hereinafter BERGER, *CONSTITUTIONAL PROBLEMS*].

⁶⁵ *Id.*

substantiated assertion that the Framers were aware of this technical meaning attached by English law and jurisprudence to the term.⁶⁷ He then continues with the argument that if “high crimes and misdemeanors had an ascertainable context at the time the Constitution was adopted, that context furnishes the boundaries of the power [and] it is no more open to Congress to stray beyond those boundaries than it is to include in the companion word ‘bribery’ an offense such as ‘robbery’ xxx.”⁶⁸

Here in the Philippines, the 1986 Constitutional Commission changed “high crimes and misdemeanors” into “betrayals of public trust and other high crimes.” Yet even the definition of high crimes accepted by noted Filipino constitutionalists is remarkably similar to that cited by Berger as its English meaning – i.e., that high crimes are “offenses which, like treason and bribery, are indictable offense and are of such enormous gravity that they *strike at the very like and orderly working of the government*.”⁶⁹

Likewise, the term of “betrayals of public trust” has a guiding, if not perfectly complete definition. It connotes acts which, even if not punishable, render “the officer unfit to continue in office.”⁷⁰ Cited examples are inexcusable negligence of duty, tyrannical abuse of power, breach of official duty by malfeasance or misfeasance, cronyism, favoritism xxx to the prejudice of public interest and which tends to bring the office into disrepute.”⁷¹

There is nothing vague in these characterizations. They may not be faultless definitions, and they may not be sufficient for

⁶⁶ *Id.*, at 61.

⁶⁷ *Id.*, at 74-75. See, however, Romney, *Origins*.

⁶⁸ *Id.*, at 87.

⁶⁹ J. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1112 (2003), citing the Report of the Special Commission on the Impeachment of President Quirino, IV Congressional Record, House of Representatives 155 (1949).

⁷⁰ *Id.*, at 1113.

⁷¹ *Id.*

purposes of criminal law, but it cannot be said that they do not provide “judicially discoverable standards.”

Furthermore, one is struck by the seeming irony of the situation – the process of impeachment – particularly, the determination of when an impeachment complaint is considered filed – is justiciable – yet, the *determination of impeachable offenses is not*.

Another interesting scenario comes to mind on the matter of impeachable offenses. Assuming arguendo that the term “high crimes or betrayal of public trust” eludes precise definition, the same cannot be said as regards the other impeachable offenses, namely: (1) treason, (2) bribery, and (3) graft and corruption. These terms have concrete meanings, both legal⁷² and commonplace. If it comes to pass then, that an impeachable officer is accused of these offenses, yet the impeachment complaint is nevertheless dismissed by the House of Representatives, can the aggrieved party then go to the Supreme Court and invoke judicial review? Can it not be said that the failure to impeach an impeachable officer who has committed an impeachable offense constitutes a violation of a Constitutionally-imposed limitation on the power to impeach?

One may immediately comment, as a reaction to these scenarios, that the same are far-fetched, and can only happen under an environment where the legislative and the executive, or the legislative and the judicial branches are antagonistic to each other. Admittedly, such situations are uncommon – but it cannot be said that they are unheard of.

The 1868 impeachment and trial of U.S. President Andrew Johnson, for example, is cited by many writers as a politically-motivated attack by disgruntled partisans in the Legislature against President Johnson.⁷³ Raoul

⁷² Treason is defined under the REVISED PENAL CODE, art. 114; Bribery and its various forms are likewise defined under the REVISED PENAL CODE, arts. 210-211-A.

⁷³ See http://en.wikipedia.org/wiki/Andrew_Johnson, accessed on 07 January 2006, 1:00 pm – “The impeachment of Johnson is widely regarded as one of the most shameful episodes in the history of the Federal Government”. See also http://www.yale.edu/lawweb/avalon/treatise/andrew_johnson/chap_12.htm, accessed on 07 January 2006, 1:00 pm – “xxx the Republican majority of the Senate placed themselves and their party in the attitude of prosecutors in the case—instead of judges

Berger remarked that the Johnson impeachment was the realization of Charles Pinckney's fear of a situation when the "2 houses would combine against the President under the influence of heat and faction."⁷⁴ Similarly, the impeachment of U.S. Supreme Court Associate Justice Samuel Chase is looked upon by many writers as an attack against an independent judiciary, which, thankfully, was foiled.⁷⁵ In fact, some sectors are of the view that the attempted impeachment of Chief Justice Davide was motivated by less than noble objectives.⁷⁶

sworn to give the President an impartial trial and judgment that their course had the appearance, at least, of a conspiracy to evict the President for purely partisan purposes, regardless of testimony or the facts of the case xxx THAT ESSENTIAL INGREDIENT OF JUDICIAL FAIRNESS WAS NOT SHOWN TO MR. JOHNSON IN THIS CASE BY THE REPUBLICAN MAJORITY OF THE SENATE. xxx It was an ill-disguised and malevolent partisan prosecution.

⁷⁴ BERGER, *CONSTITUTIONAL PROBLEMS* 112-113, at Footnote 47 (1973).

⁷⁵ See <http://www.pbs.org/wgbh/amex/duel/peoplevents/pande02.html>, accessed on 07 January 2007, 1:00 pm – "When Republicans under Thomas Jefferson led an impeachment attack against Samuel Chase xxx the agenda was clearly political. The outcome of Chase's trial would largely determine whether the judiciary could remain independent. Xxx If he [Jefferson] could impeach Chase easily, other Federalist judges, notably Chief Justice of the Supreme Court John Marshall, would probably follow."

⁷⁶ See <http://www.philsol.nl/A03b/Davide-Akbayan-oct03.htm>, accessed on 07 January 2006, 10:00 am – "The impeachment attempt on Chief Justice Hilario Davide is purely and simply an act of political blackmail. xxx The motives are obvious: to get back at the Supreme Court for its decision on the public character of coco levy funds and to influence its prospective decisions on other Danding Cojuangco cases." See also <http://www.clajadep.lahaine.org/articulo.php?p=1939&more=1&c=1>, accessed on 07 January 2006, 10:00 am – "The militant labor center Kilusang Mayo Uno (KMU) today called for the junking of the impeachment case initiated by Danding Cojuangco's Nationalist People's Coalition faction against Supreme Court Chief Justice Hilario Davide Jr. 'The impeachment case against Davide is without doubt politically-motivated. Cojuangco is doing everything in his power and capacity to mangle justice and escape his accountability on the coco levy case and keep his control over the P130 billion shares of San Miguel Corporation.' See also <http://www.ateneo.edu/files/3/Davide%20Impeachment.pdf>, accessed on 07 January 2006, 10:00 am – "xxx we are well aware of the failure of the first impeachment complaint against Chief Justice Davide xxx for insufficiency in form and substance xxx. During that proceeding the absence of the support of the NPC block was very palpable. Glaring indeed is the

3. The Post-Review Scenario

While the controversy in the *Francisco* case revolved around the House of Representatives' interpretation of the word "initiate", the ruling and reasoning behind the decision – in fact, the language of the ponencia itself – includes the entire impeachment process – from the House to the Senate – such that it can be said that the entire proceeding can be subjected to judicial review.

This makes relevant certain concerns expressed by the United States Supreme Court in *Nixon v. U.S.* Let us take this hypothetical scenario – the President was impeached by the House and convicted by the Senate. In the process however, Constitutionally-imposed limitations were violated. Accordingly, a case is filed before the Supreme Court.

From the purely legal perspective, the question of appropriate relief immediately confronts us. Admittedly, the Supreme Court can set aside both the impeachment and the judgment of conviction. But what happens after? As asked in the *Nixon* case, can the Supreme Court order the reinstatement of one who has impeached and convicted?⁷⁷

This scenario, at first glance, might seem purely speculative, if not totally outlandish. In fact, when Charles Black contemplated that self-same scenario of impeachment and conviction and then reinstatement through judicial action, he flatly called the result "preposterous,"⁷⁸ and articulated that he "[does not] possess the resources of rhetoric adequate to characterizing [its] absurdity."⁷⁹

contrast that this time around, we see almost the 75% of the NPC Congressmen throwing their support to the impeachment resolution [against Davide]. xxx Why the sudden turnabout of the NPC representatives against the Chief Justice? How far can we possibly separate this particular NPC initiative from the case of Eduardo Cojuanco's legitimate ownership of San Miguel shares now being appealed by the Solicitor General before the Supreme Court? Is pressure and power play at work here?"

⁷⁷ 506 U.S. 224 (1993).

⁷⁸ BLACK, IMPEACHMENT, at 55.

⁷⁹ *Id.*, at 54.

Yet, as the South Korean experience teaches us, this is the precise consequence of opening the doors of impeachment to judicial review.

Let us extend the analysis further. Pending final resolution by the Court, the finality of an impeached officer's removal – in our hypothetical scenario that of the President – is by no means certain. During this interim period, what happens to the Office of the President? The Constitution provides that in cases of the removal from office of the President – a situation that presupposes impeachment and conviction, since that is the only Constitutional and legal way of removing a President mid-term – the Vice-President *becomes* the President.⁸⁰ This succession, however obviously contemplates a *final removal*. Yet, as we have seen, when the validity of the President's impeachment and conviction is under consideration by the Court, the same cannot be said to be final – corollarily, it cannot be said that the Vice-President has become the President in such a case. At most, he is only an acting-President. This is not a situation provided for in our Constitution.

Furthermore, the lack of finality of an impeachment and conviction can have dire consequences to the stability of the Republic. The period between conviction and judicial resolution would surely be marked by uncertainty, questions of legitimacy and insecurity that would surely beleaguer and confound the unfortunate successor. In the words of *Nixon* case, “opening the door of judicial review to the procedures used by the Senate in trying impeachments would ‘expose the political life of the country to months, or perhaps years, of chaos.’”⁸¹

These considerations pictured little in the *Francisco* decision. Glaringly, while the issues of “lack of finality” and “difficulty in fashioning relief” were included in the ponencia's summation of the *Nixon v. U.S.*-based arguments of Speaker De Venecia and Senator Pimentel,⁸² the

⁸⁰ CONST. art. VII, § 8 – “In case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term.”

⁸¹ 506 U.S. 224 (1993).

⁸² “In furthering their arguments on the proposition that impeachment proceedings are outside the scope of judicial review, respondents Speaker De Venecia,

discussion that followed confined itself to the issues of Constitutional provisions on impeachment and judicial review and the specter of upsetting the system of checks and balances.⁸³

This omission may be ascribed to two (2) reasons. First, the question presented in the *Francisco* case was the impeachment *and not* the conviction of Chief Justice Davide. Thus, even if the impeachment complaint was declared unconstitutional – as indeed it was – the relief to be accorded is plain and simple – the declaration that it is unconstitutional. There is no need for reinstatement, as the Chief Justice has not yet been removed.

As already noted, however, the reasoning of the Court does not confine itself to the process in the House of Representatives. The presence of Constitutionally-imposed limits is true for both the House of Representatives and the Senate in the matter of impeachment. Following the Court's logic in *Francisco*, therefore, judicial review can be exercised at both the House and Senate stage of the proceedings – whenever a “constitutionally-imposed limitation” is violated.

Second, the official involved in *Francisco* was the Chief Justice. Without downgrading the importance of the position, a temporary vacancy therein would not hamper the effective operation of the Supreme Court, which requires only a quorum – i.e., a simple majority – to function en banc,⁸⁴ and which in fact can sit in divisions of three (3).⁸⁵

et. al. and intervenor Senator Pimentel rely xxx principally [on] the majority opinion in the case of *Nixon v. United States*. Thus, they contend that the exercise of judicial review over impeachment proceedings is inappropriate since it runs counter to the framers' decision to allocate to different fora the powers to try impeachments and to try crimes; it disturbs the system of checks and balances, under which impeachment is the only legislative check on the judiciary; and it would create a lack of finality and difficulty in fashioning relief.” 415 SCRA, at 129; Emphases in the Original, Citations Omitted.

⁸³ *Francisco*, at 129 to 133.

⁸⁴ CONST. art. VIII, § 4, ¶ 2.

⁸⁵ CONST, art. VIII, § 4, ¶ 1.

The same cannot be said when the office in limbo is that of the President. An Acting President suffers from several restrictions on presidential powers. For instance, appointments made by an Acting President, while effective, may be revoked by the elected President “within ninety days from his assumption of office.”⁸⁶

Clearly, an uncertain impeachment and removal of a President would have tremendous legal and political consequences – consequences that may have dire effects to national welfare.

D. A Comparison of Models

It can be said that the Philippine model of impeachment straddles the American and South Korean paradigms – in fact, a comparative analysis reveals that impeachment Philippine-style has taken a unique and peculiar form. While it retains its essential character as a political proceeding, it is not as beyond judicial review as its American counterpart. In this sense, it has become rather similar to the impeachment models found in South Korea and Germany, to name a few.

1. Composition of Courts and the Insulation of the Judiciary

A striking difference between Philippine impeachment, as compared to the South Korean model, lies in the composition of the reviewing courts. The Constitutional Courts granted participation in the impeachment process are markedly different in character, nature and composition when compared with that of the Philippine Supreme Court.

Particularly, either all, or a certain percentage of, the members of Constitutional Courts in other countries are elected, either by their respective legislative bodies or by some other entity.

For instance, half of the members of Germany’s Federal Constitutional Court are elected by the *Bundestag*, while the other half

⁸⁶ CONST, art. VII, § 14.

are elected by the *Bundesrat*.⁸⁷ Of the twelve (12) Justices of the Bulgarian Constitutional Court, one-third (1/3) are elected by the National Assembly, one-third (1/3) are appointed by the President, and the remaining one-third (1/3) elected by a joint meeting of the Justices of the Supreme Court of Cassation and the Supreme Administrative Court.⁸⁸ In Croatia, all of the thirteen (13) Judges of the Constitutional Court are elected for eight-year terms by the Croatian Parliament from notable judges, especially judges, public prosecutors, lawyers and university law professors.⁸⁹ In Hungary, the eleven (11) members of the Constitutional Court are elected by the Parliament from a list submitted by the Nominating Committee, which is composed of members from all political parties represented in the Parliament.⁹⁰ In South Korea, while the nine (9) adjudicators of the Constitutional Court are all appointed by the President, three (3) of his appointees must be from persons selected by the National Assembly, and another three (3) from persons nominated by the Chief Justice.⁹¹ Furthermore, the head of the Constitutional Court is appointed by the President from among the sitting adjudicators with the consent of the National Assembly.⁹²

In Italy, the composition of the Constitutional Court is actually *changed* when it is sitting to decide impeachment cases. Its normal membership of fifteen (15) Justices (one-third [1/3] appointed by the President, another third appointed by the Parliament, and another third

⁸⁷ GERMAN CONST. Art. 94, ¶ (1).

⁸⁸ BULGARIAN CONST. chapter eight, art 147, accessed at http://www.oefre.unibe.ch/law/icl/bu00000_.html#l000_, accessed on 11 September 2005, 6:50 pm.

⁸⁹ CROATIAN CONST. chapter V, art. 125, accessed at http://www.oefre.unibe.ch/law/icl/hr00000_.html#C001_, on 02 October 2005, 7:45 pm.

⁹⁰ HUNGARIAN CONST. chapter V, art. 32-A, accessed at http://www.oefre.unibe.ch/law/icl/hu00000_.html, on 11 September 2005, 6:45 pm.

⁹¹ SOUTH KOREAN CONST., chapter VI, art. 111, accessed at http://www.oefre.unibe.ch/law/icl/ks00000_.html, 11 September 2005, 6:47 pm.

⁹² SOUTH KOREAN CONST., chapter VI, art. 111, accessed at http://www.oefre.unibe.ch/law/icl/ks00000_.html, 11 September 2005, 6:47 pm.

by the ordinary and administrative Supreme Court), is increased by sixteen (16) additional members, who are drawn by lot from a list of citizens elected by the Parliament, following the same appointment procedure as that for the appointment of ordinary justices.⁹³

What is the significance of this method of appointing members of the Constitutional Court? By being elected or nominated by their respective countries' legislative bodies – i.e., the people's representatives – then, at least substantially, the inquisitors for the nation remain to be the representatives of the nation – an arrangement that Alexander Hamilton characterized as “proper,” given the nature of impeachment proceedings as a “method of national inquest into the conduct of public men.”⁹⁴

In marked contrast, Justices of the Philippine Supreme Court are appointed by the President from a list of nominees submitted by the Judicial and Bar Council.⁹⁵ Moreover, unlike officials appointed by the President to high positions,⁹⁶ Members of the Supreme Court, by express Constitutional mandate, are not required to undergo confirmation from the Commission on Appointments.⁹⁷

The laudable aim of this rather unique appointment process is to strengthen the independence of the judiciary, and to insulate it from the highly political process in the Commission on Appointments. It has, however, one significant drawback – *it has likewise insulated the selection and appointment process from public scrutiny*. Thus, in relation to the selection of the Chief Justice to succeed former Chief Justice Davide upon

⁹³ ITALIAN CONST., Title VI, § 1, Art. 135, ¶ 1 and 7, accessed at http://www.oefre.unibe.ch/law/icl/it00000_.html, on 01 October 2005, 7:40 pm.

⁹⁴ FEDERALIST, *supra* note 2.

⁹⁵ CONST. art. VIII, § 9.

⁹⁶ See CONST. art. VII, § 16 – “The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution.”

⁹⁷ CONST. art. VIII, § 9.

his retirement, some sectors have remarked that the public ought to be given more information, if not participation in the process.⁹⁸

This insulation is certainly laudable in light of regular judicial functions. Indeed, in the administration of justice, politics should not have any place at all. Justices, and even judges, are required to be impartial and independent;⁹⁹ they cannot afford even the suspicion of partisanship, or the slightest appearance of impropriety.¹⁰⁰

But is this desirable in impeachment proceedings? It is an inescapable fact that impeachment is political in character. It is a “duel where politics plays as important a role as morality, where polls matter more than the purity of process”¹⁰¹ it will, as we have witnessed, “agitate the passions of the whole community.”¹⁰² Thus, populist politics are only to be expected to be a factor – and in fact, an important one, in impeachment questions. The people will surely have strong opinions on the matter, and the thwarting of their desires may lead to disastrous consequences.¹⁰³

⁹⁸ See “*Every hurdle begins with a first step*”, by Atty. Rita Linda V. Jimeno, accessed at http://www.manilastandardtoday.com/?page=ritaLindaJimeno_oct10_2005, on 14 January 2006, 6:21 pm – “In the past there has been no involvement or participation from the general public in the selection and appointment process of justices to the Supreme Court, the Court of Appeals and all other levels of court. Now, people are encouraged to monitor who the candidates are, and what their qualifications, background and leanings on various issues are”; see also http://www.tan.org.ph/files/proj_scaw_faq.asp, accessed at 14 January 2006, 6:24pm – “Citizen participation in the Supreme Court appointment process, albeit possible, is limited.”

⁹⁹ CONST. art. VIII, § 7, ¶ 3 – “A Member of the Judiciary must be a person of proven competence, integrity, probity, and independence.

¹⁰⁰ New Code of Judicial Conduct, Canon 4, § 1 – “Judges shall avoid impropriety and the appearance of impropriety in all of their activities.”

¹⁰¹ N.K. Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW AND CONTEMPORARY PROBLEMS, Nos. 1 & 2, 169-191, at 175; accessed at <https://www.law.duke.edu/journals/lcp/downloads/LCP63DWinterSpring2000P169.pdf>. [hereinafter Katyal, *Congressional Constitutional Interpretation*].

¹⁰² FEDERALIST, *supra* note 2.

¹⁰³ Perhaps the best example of this is what came to be known as the EDSA People Power II, which was sparked by the refusal of pro-Erap Senators to open the

It is precisely for these reasons that Congress was given the power to impeach – in deciding impeachment questions, the political agendas, aspirations and ideologies of Members of Congress will, and are expected to, come into play. In fact, for Neal Katyal, the role of politics should be “open, unabashed and honest,” otherwise, political accountability would be interfered with.¹⁰⁴ Being accountable to the people in future elections, they are expected to hearken to the people’s voice in matters relating to impeachment. Indeed, it is Congress’ nature as a “popularly accountable actor,” and the remedy of voting Members of the Legislature out of office, that is the answer to the fear that the Senate would be “aristocratic and unfair in impeachments” and also to the concerns with agency costs, i.e., that the Members of Congress will “serve their own interests and not their constituents.”¹⁰⁵

Here in the Philippines we have already witnessed the value of Congress as a “popularly accountable actor” in impeachment proceedings. Looking back at the impeachment trial of former President Joseph Estrada, most of the pro-Erap Senators who refused to open the second envelope and who run for re-election in the 2004 Senatorial Elections lost, such as Senators Miriam Defensor-Santiago and Juan Ponce-Enrile,¹⁰⁶ and former Senator Tessie Aquino-Oreta. In a parallel occurrence, when Orlando Mercado, who served as Defense Secretary in Estrada’s Cabinet but later on jumped fences and joined the anti-Erap forces massed at the EDSA Shrine, ran for senator in the 2001 elections under the Erap’s political party – the Partido ng Masang Pilipino (PMP) – he was reputedly booed by Erap supporters during their political sorties, contributing to his eventual loss in said elections.¹⁰⁷

“2nd envelope” believed to contain incriminating evidence against former President Joseph Estrada.

¹⁰⁴ Katyal, *Congressional Constitutional Interpretation*, at 176.

¹⁰⁵ *Id.*, at 177-178.

¹⁰⁶ Notably, however, when these two (2) senators run again in the 2004 elections, they seemed to have earned the forgiveness of the electorate and have won back the love of people, so much so that they are back in the Senate.

¹⁰⁷ URL: http://www.inq7.net/nat/2004/jan/04/text/nat_1-1-p.htm

This accountability factor cannot be said to exist for the Supreme Court. Supreme Court justices do not run for elections. They have security of tenure. They can only be removed by impeachment. Even their manner of selection is insulated, though unwittingly perhaps, from the public eye. There is, therefore, no convenient remedy should their decision in an impeachment question not be acceptable to the public.

This is not to say that the Supreme Court is woefully ignorant of public opinion. But the fact is, in the performance of their functions, the Supreme Courts is expected to be apolitical – it should be prepared to make unpopular decisions, decisions based purely on law and legal principles. Again, while this is to be desired in the resolution of legal questions, its suitability in a so political a process as impeachment is highly uncertain.

As a counter-argument, it might be observed that the *Francisco* decision did not spark any massive outcry, and neither did the South Korean Constitutional Court's reinstatement of President Roh. In fact, in both instances, the Court's decision seemed to have been much welcomed by a broader majority of the respective countries' populace.

In both cases, however, the impeachment was unpopular to begin with. Thus, by confluence of events, the decisions of both courts were aligned with popular opinion. The situation where the Court's ruling in a popular-opinion-sensitive impeachment issue has not yet confronted either country. It is in such a scenario that the question of accountability becomes more focused and vital.

2. Source of Authority

Another difference lies in the source of the reviewing court's authority to review impeachment proceedings. Unlike the German and South Korean Constitutions, the Philippine Charter did not expressly vest the Supreme Court with jurisdiction over impeachment issues. Such jurisdiction was derived from the grant of judicial review and the imposition of certain limitations on the power to impeach by the fundamental law.

In the South Korean model, the source of the Constitutional Court's authority to review impeachment cases is explicit and clear from the provisions the South Korean Constitution. The same cannot be said for the Philippine model, where the exercise of judicial review over impeachment proceedings stands, not from any express grant by the Constitution, but rather, on a "context of xxx constitutional refinement and jurisprudential application of the power of judicial review."¹⁰⁸

IV. "JUDICIALIZATION OF POLITICS"

While the inclusion of impeachment questions within the coverage of judicial review might seem novel when considered from the backdrop of traditional American constitutional thought, a closer look at global trends indicates that this incursion of the judiciary in a realm customarily regarded as political is not so idiosyncratic or unusual.

Several writers have noted trends around the world of Courts intervening in issues that have long been considered as political¹⁰⁹ – a phenomenon that Russel Miller termed as "judicialization," and which he concretely defines as a "shift in the balance of power between law and politics xxx [in] favor [of] judicial institutions over representative and

¹⁰⁸ *Francisco*, at 129.

¹⁰⁹ See R. Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE No. 2, 191-218 (July 2002), accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=337245, on 14 Jan. 2005, 6:02 pm; R. A. Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany*, Washington and Lee Law Review, (cles/mi_qa3655/is_200404" Spring 2004), accessed at http://www.findarticles.com/p/articles/mi_qa3655/is_200404/ai_n9391888#, on 14 January 2005, 6:05 pm.; R. HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004), accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503284, on January 2005, 6:03 pm; S. Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 Texas Law Review 1861 (2004), accessed at <http://ssrn.com/abstract=547425>, on 14 January 2006, 6:10 pm; R.H. Pildes, *The Constitutionalization of Democratic Politics - The Supreme Court, 2003 Term*, 118 Harvard Law Review No. 29 (2004), accessed at <http://ssrn.com/abstract=669068>, on 14 January 2006, 6:08 pm.

accountable [ones].”¹¹⁰ The result is what Ran Hirschl calls “juristocracy,”¹¹¹ which is characterized by “judicial empowerment through the constitutionalization of rights and the establishment of judicial review xxx.”¹¹² Richard Pildes, on the other hand, adopts the phrase “constitutionalization of democratic politics” – wherein “issues concerning the design of democratic institutions and the central processes of democracy have increasingly become questions of constitutional law xxx.”¹¹³

Regardless of the term used or the jargon employed however, the reference is clear – these writers argue that there is a global trend of massive judicial empowerment – such that the arms of the judiciary now stretch to issues that have been traditionally left to the political and popularly-chosen branches of the government.

The manifestations of this phenomenon are myriad and variegated. Broadly classified, they fall into either: (1) “basic constitutionalization” – i.e., the adoption of a constitution; or (2) the adoption and/or expansion of judicial review into areas previously beyond its rule.

Hirschl focuses his analysis of juristocracy more on the first category. Thus, in his book “*Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*,” his four (4) case studies of Constitutional revolutions involve: (1) the adoption by Canada of a Charter of Rights and Freedoms in 1982; (2) the enactment in New Zealand of a Bill of Rights Act in 1990; (3) the adoption in Israel of two new Basic Laws

¹¹⁰ R. A. Miller, *Lords of Democracy: The Judicialization of “Pure Politics” in the United States and Germany*, WASHINGTON AND LEE LAW REVIEW 1 (Spring 2004), accessed at http://www.findarticles.com/p/articles/mi_qa3655/is_200404/ai_n9391888#, on 14 January 2005, 6:05 pm [hereinafter Miller, *Judicialization*].

¹¹¹ R. HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1, (2004), accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503284, on 14 January 2005, 6:03 pm [hereinafter HIRSCHL, JURISTOCRACY].

¹¹² *Id.*, at 2.

¹¹³ R.H. Pildes, *The Constitutionalization of Democratic Politics - The Supreme Court, 2003 Term*, 118 HARVARD LAW REVIEW No. 29, 31 (2004), accessed at <http://ssrn.com/abstract=669068>, on 14 January 2006, 6:08 pm [hereinafter Pildes, *Constitutionalization*].

protecting a number of core civil liberties in 1992³, a final Bill of Rights in 1996, and a new Constitutional Court in 1995; and (4) the adoption in South Africa of an interim Bill of Rights in 1993, a final Bill of Rights in 1996, and a new Constitutional Court in 1995.¹¹⁴

On the other hand, Pildes concentrates more on the second category. Outside of the United States, he cites the following as manifestations of the inclinations of constitutional courts towards constitutionalization: (1) the Irish Supreme Court's construction of political equality as precluding the government from attempting to influence voters on proposed constitutional amendments during referendum campaigns; (2) the Australian High Court's decision holding unconstitutional federal legislation that bans paid broadcast advertising during election campaigns; (3) the resolution by the European Court of Human Rights and by the high courts of Spain, Turkey, India and Israel of the issue of a state ban on certain political parties; and (4) the groundbreaking decision of the Canadian Supreme Court providing for the legal terms on which a democratic polity could dissolve itself.¹¹⁵

Judicialization in the Philippines clearly falls under the second category – the expansion of judicial review. While the concept is not new to the Philippine legal system, its operation has been sharply enlarged under the 1987 Constitution with its expanded definition of judicial power:

Judicial power includes the duty of the courts of justice xxx to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.¹¹⁶

Indeed, this expanded definition has allowed the court to exercise jurisdiction not only over issues argued as political – such as, but not limited to, the validity of the removal by the House of Representatives of a Congressman from the House Electoral Tribunal on grounds of party

¹¹⁴ HIRSCHL, *JURISTOCRACY*, at 4.

¹¹⁵ Pildes, *Constitutionalization*, 31.

¹¹⁶ CONST. art VIII, § 1, ¶ 2.

disloyalty;¹¹⁷ the validity of the removal by the House of a Congressman from the Commission on Appointments,¹¹⁸ – but also over issues regarded as economic – such as that involving the bidding processes and procedures.¹¹⁹

This puts Philippine judicialization under at least two (2) of the four (4) areas identified by Hirschl as new areas of high Court interventions, namely: (1) “core executive prerogatives”¹²⁰ and (2) “political transformations, regime change, and electoral disputes.”¹²¹

The impetus for this expansion of judicial power is of common knowledge. The 1986 Constitutional Commission, reeling from the abuses of the Marcos Regime, and determined to prevent, as much as possible, a repetition of the same, decided not only to enshrine judicial review in the Constitution, but to make it a “duty” of the Courts.¹²²

This places Philippine judicialization under the third scenario of constitutionalization identified by Hirschl as the “*single transition*” – in which “xxx the constitutionalization of rights and the establishment of judicial review are the by-products of a transition from a quasi-democratic or authoritarian regime to democracy.”¹²³

This answers the origins, causes and character of judicialization, Philippine-style. Yet one important question remains – what effect, if any, does such judicialization have in Philippine society?

¹¹⁷ *Bondoc v. Pineda*, 201 SCRA 792 (1991).

¹¹⁸ *Daza v. Singson*, 180 SCRA 496 (1989).

¹¹⁹ *Manila Prince Hotel v. Government Service Insurance System*, 267 SCRA 408 (1997), *Hutchison Ports Philippines Ltd. vs. Subic Bay Metropolitan Authority*, 339 SCRA 434, (2000).

¹²⁰ R. Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE No. 2, 191-218 (July 2002), Abstract, accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=337245, on 14 Jan. 2005, 6:02 pm.

¹²¹ *Id.*

¹²² *Francisco*, at 144 to 149, citing the Record of the Constitutional commission, Vol. 1.

¹²³ HIRSCHL, JURISTOCRACY, at 7-8.

I suggest that beyond its primarily legal consequences, this judicialization has the effect of *providing a stabilizing factor* in Philippine politics.

It requires no extended discussion to say that Philippine politics is not at its most glorious state. Former President Joseph Estrada – the third President to be elected after the twenty-year long authoritarian rule of Former President Ferdinand Marcos – was forced out of office over a jueteng scandal. The legitimacy of our current President, on the other hand, is constantly questioned, and continues to be severely shaken by what came to be known as the Garci tapes. This has translated into growing public satisfaction with the institutions of Government and the people running the same. Amidst this however, the Judiciary has emerged to be a bulwark of democracy, the one remaining institution consistently trusted by the people.

For instance, in the Fourth Quarter 2005 Survey of the Social Weather Station, House Speaker Jose de Venecia's net approval rating is 0% (37% dissatisfied and 37% satisfied). In marked contrast, then – Chief Justice Hilario Davide had a +10 approval rating (42% satisfied and 31% dissatisfied).¹²⁴ Institutional-approval ratings reflect the same trend. For the national administration, net approval rating was at –15, while for the Cabinet, it was –6. The approval rating for the House of Representatives was at a positive, though low +7. Again, in stark difference, the approval rating for the Supreme Court is at +12.¹²⁵

It is not surprising then, that the people have come to look upon the Supreme Court as a check on the excesses of the political officers – even if the issues involved are traditionally regarded as political. It is in this backdrop that numerous sectors welcomed, approved and even cheered the *Francisco* decision for protecting a well-loved Chief Justice from the politically-motivated attacks of unpopular politicians.

¹²⁴ Accessed at <http://www.sws.org.ph>, on 26 January 1:00 pm.

¹²⁵ *Id.*

CONCLUSION

While this article identifies the imperfections of the ruling in *Francisco*, and the many resulting legal quandaries it pose, it is also recognizes that judicial intervention in impeachment cases is not only not totally unheard of, it is not necessarily wholly undesirable. As Berger noted, “although impeachment was chiefly designed to check Executive abuses and oppressions, there was no thought of delivering either the President or the Judiciary to the unbounded discretion of Congress.”¹²⁶

The problems that *Francisco* spawned seem not to stem so much from an inherent antagonism between the institutions of judicial review and impeachment, as from the as of yet highly-undefined-and-unchartered interplay between judicial review and impeachment, such that Philippine laws provide no solution for most of the possible consequences that judicial review over impeachment can bring.

The blame for this indefiniteness and vagueness seems to lie squarely on the broad and sweeping grant of judicial review in the Constitution. This grant is perfectly understandable, and indisputably laudable; however, its innumerable consequences, the myriad areas that it affects, and its countless ramifications on our democratic institutions have been largely unanticipated. Thus, our laws and institutions are not prepared to deal with the numerous scenarios that the exercise of judicial review over issues previously beyond its pale brings about.

Until such time that our legal framework has been adjusted to deal with this judicialization, both our judicial and political institutions must deal with each case as it comes. This is precisely what happened in *Francisco*. Admittedly, the Court’s resolution of the case was acceptable to most Filipinos, and our democratic institutions continued to move on, without any damage resulting from *Francisco*. Yet many of the issues that spring from the exercise of judicial review over impeachment proceedings, while potentially explosive, remain unanswered.

¹²⁶ BERGER, CONSTITUTIONAL PROBLEMS, 117-118.

And for as long we live in this seeming uncertainty, our trust must ultimately be reposed on the people who occupy high positions in our democratic polity. We must hope that those in the political branches would continue to exercise their powers in the manner contemplated by the people when these powers were granted to them, and we must rely on the wisdom of the Supreme Court to exercise its awesome power of judicial review in a judicious and circumspect manner.

And in each and every politico-legal question that confronts our democratic institutions, we should always keep in mind the words of Ronald Dworkin in his work, *“A Bill of Rights for Britain:”*

Constitutional political events – whether these are formal like the Magna Carta and the Revolution or informal like the New Deal in America – define a nation’s character in symbolism that cannot be fully appreciated at the time.