

§ 2 Procedural and substantial aspects of the impeachment

I. The legal basis

- regulation of the basic features in the constitution
 - examples: art. I sect. 2 cl. 5 and sect. 3 cl. 6, 7 and art. II sect. 4 U.S. Constit.; art. 85, 86 Brazilian Constit.; art. 65 Korean Constit.; art. 68 French Constit.
- in some countries regulation of details in special laws
 - examples: Brazil (Law no. 1079 of 1950), France (Institutional Law no. 2014-1392 of 24.11.2014), Korea (art. 130 et seq. National Assembly Act, 48 et seq. Constitutional Court Act); no statutory regulation in the U.S.A.
- national regulations very heterogeneous, both in terms of terminology and systematics, as well as in terms of proceedings, final decision, quorums and grounds of impeachment

II. The preparation of the impeachment

- the proceedings usually start with the investigation of accusations against the president by the lower house of the parliament and its committees in the exercise of parliamentary control (*impeachment inquiry*)
 - includes in the U.S.A. numerous public and non-public *hearings*
- in France these steps may be taken by both chambers

III. The impeachment proper (indictment)

- the impeachment in the proper (strict) sense is the *formal indictment* of the president by the lower house of the parliament of having committed a misdemeanor which falls under the grounds of impeachment (→ § 3); this officially initiates the impeachment procedure
- in the U.S.A. a simple majority in the House of Representatives is required
 - the impeachment and its reasons are laid down in the *articles of impeachment*
- in Brazil a two-thirds majority of the members of the Chamber of Deputies is required
- in Korea a majority of the members of the National Assembly is required for the proposal and a two-thirds majority for the approval of a motion for impeachment
- in France there is no "impeachment" in the proper sense but each house of the parliament can propose with a two-thirds majority that both houses convene as "High Court", which then will rule about the removal ("destitution") of the President

IV. The impeachment trial and the impeachment decision

- a formal investigation of the accusations in a trial, which includes own taking of evidence and own hearings but often largely builds on the investigation in the impeachment inquiry
- the impeachment trial ends with a vote either to acquit the president or to convict him and remove him from office
 - in some countries, he may also be disqualified from holding public office in the future
- in the U.S.A the impeachment trial against the president takes place in the Senate, presided by the Chief Justice; conviction requires two-thirds majority of the members present
- in Brazil the impeachment trial takes place either before the Supreme Federal Court (for common criminal offences) or in the Federal Senate, presided by the Chief Justice of the Supreme Federal Court (for crimes of malversation under art. 85 Brazil. Constit.); conviction requires two-thirds majority of the votes
- in France the *High Court* (both houses of the parliament sitting together, presided by the President of the National Assembly) decides within one month with a two-thirds majority of its members about the removal of the President from office
- in Korea the National Assembly's motion for impeachment leads to an impeachment trial before the Constitutional Court; removal from office requires a majority of 6 (of 9) judges

- in Brazil and Korea, during the impeachment trial the president is suspended from exercising its powers

V. The grounds of impeachment

1) Overview

- U.S.A. (art. II sect. 4): "Treason, Bribery, or other high Crimes and Misdemeanors"
- Indonesia (art. 7A): "violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through disgraceful acts ["perbuatan tercela", sometimes translated with "moral turpitude"], and/or ... no longer meets the qualifications to serve as President"
- Philippines (art. XI): "culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust"
- Brazil (art. 85): "crimes of malversation: [→defined in Law no. 1079 of 1950]
I – the existence of the Union;
II – the free exercise of the Legislative Power, the Judicial Power, the Public Prosecution and the constitutional Powers of the units of the Federation;
III – the exercise of political, individual and social rights;
IV – the internal security of the country;
V – probity in [= integrity of] the administration;
VI – the budgetary law;
VII – compliance with the laws and with court decisions"
- Korea (art. 65(1)): "violated the Constitution or other Acts in the performance of official duties"
- France (art. 68(1)): "breach of his duties clearly ["manifestment"] incompatible with the exercise of his mandate"

2) Impeachment for criminal offences

- only for offences committed in his function or by misusing his position as president (→ no impeachment for shoplifting or drunken driving)
- in the U.S.A., the term "high crimes and misdemeanours" is used in this sense but according to the prevailing opinion also extends to non-criminal acts
- problem: how serious must the criminal offence of the president be?
- the risk that the president is impeached for minor corruption by people more corrupt than him and finally replaced by someone more corrupt than him (example: Brazil 2016)

3) Impeachment for political and moral offences

- in particular for *intentional violation of the constitution*
- in the U.S.A., the term "high crimes and misdemeanours" also refers to *non-criminal serious political or moral misconduct in the exercise of the public function*; the details are highly controversial
- in other countries, terms such as "perbuatan tercela", "betrayal of public trust" or "breach of his duties clearly incompatible with the exercise of his mandate" point into the same direction
- problem: what can be defined as political or moral misconduct and what is still legitimate?
- problem: how serious must the misconduct be to justify removal from office?

4) The problem of the legitimacy of removing a directly elected president from office for immorality

- the need to strictly separate law and morality in a state based on the rule of law
- problem: overriding the democratic choice of the voters by reasons of morality?
- what if the voters stand behind the still legal but "immoral" acting of the president?
- what if the "moral" is only shared by the elites or, for example, the older generation?

VI. The role of the judiciary

1) The problem: involvement of the constitutional or supreme court in a largely political process?

- the courts are functionally legitimised to monitor compliance with formal and procedural requirements (which, however, are usually not very detailed)
- the constitution may also provide for their involvement in the substantial decision or for substantial judicial review if the grounds of impeachment are designed as legal criteria - examples: Korea, Brazil (in the Law no. 1079 of 1950)
- however, decisions based on political or moral grounds of impeachment (→ § 2 V.3.) are by nature *non-justiciable political decisions*, since these grounds are unsuitable for judicial review (except, depending on their formulation, for very obvious and serious abuse)
 - solutions involving the court in these cases substantially (e.g. art. 7B Indon. Constit. 1945) misuse an organ of the judiciary for a political function

2) The practice

- in the U.S.A. no significant role of the Supreme Court (which has found impeachment-related issues non-justiciable)
 - however, a possible review in case of an unfair, distorted impeachment trial is discussed
- in Brazil, important role of the Supreme Federal Court in clarifying procedural issues
- in Korea, the impeachment decision itself rests with the Constitutional Court, which necessarily also decides about the substantive question