

INFORMATION NOTE

The Criminal Immunity of Head of State/Government and Whether Impeachment Proceedings Precede Criminal Prosecution

1. Background

1.1 At its meeting on 18 December 2006, the Panel on Constitutional Affairs requested the Research and Library Services Division to conduct a study on the criminal immunity of Head of State/Government and whether impeachment proceedings precede criminal prosecution.

1.2 This note recapitulates relevant information contained in a previously published research report entitled *Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea*¹, with additional information regarding impeachment practices at the state level of the United States (US).

1.3 In addition, we have studied the arrangements in Germany and France. In Germany, the President enjoys immunity from prosecution and can only be removed by impeachment for wilfully violating the German law. The impeachment systems in Germany and Korea are similar. In any event, no Germany President has ever been impeached. France has just recently instituted the system of impeachment and the relevant information will be presented in the final part of this note.

2. The United States

2.1 In the US, the President is both the Head of State and the Head of Government. There are no legal provisions providing express immunity for the President. The courts have developed a doctrine of official immunity for the President. The President is entitled to absolute immunity in civil suits regarding all of his official acts. However, the President is not entitled to immunity from civil liability for unofficial acts: acts committed in a personal capacity rather than as President.

2.2 There are various legal opinions regarding criminal indictment of an incumbent President. It is an unsettled question whether a sitting President may be the subject of a criminal trial.² However, no sitting President has ever been prosecuted for criminal charges.

¹ Legislative Council Secretariat (2005).

² See Bazan (2003) and Freedman (1992).

2.3 Under Article II, Section 4 of the *US Constitution*, "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors".

2.4 There are no legal provisions specifying whether or not impeachment proceedings precede criminal prosecution in the US. Before 1999, under Title 28, Section 595(c) of the *United States Code*, an independent counsel was required to "advise the House of Representatives of any substantial and credible information...that may constitute grounds for an impeachment".

2.5 For example, President Clinton's impeachment was triggered by evidences presented to the House by an independent counsel appointed pursuant to the independent counsel provisions of the federal law. The independent counsel provisions of the federal law have expired after 30 June 1999.

2.6 At the state level, the Heads of Government (governors) are not immune from criminal prosecution. State legislatures can impeach state officials, including governors. The court for the trial of impeachments varies among the states and may differ from the federal model. For instance, in the state of New York, similar to the federal practice, the Assembly is responsible for impeachment, and the state Senate tries the case.³ However, the members of the New York State Court of Appeals (the state's highest constitutional court) also sit with the Senators as jurors during the trial.⁴

2.7 There is no evidence to indicate that impeachment proceedings precede criminal prosecution at the state level. In the most recent (1988) case, the Governor of Arizona, Evan Mecham, faced impeachment and criminal proceedings simultaneously. At the same time, he was also scheduled to face a recall election. Mecham was impeached and removed from office for concealing a large campaign contribution, misusing state funds, and obstructing justice. He was subsequently found not guilty of similar charges in a criminal trial.⁵

3. The United Kingdom

3.1 In the UK, the ruling monarch, being the Head of State, is exempt from the jurisdiction of the criminal courts. The Prime Minister, being the Head of Government, is not immune from any criminal liabilities. The Prime Minister is subject to the law in the same manner as any member of the public.

³ The *New York State Constitution*, Article 24.

⁴ In the federal system, the House of Representatives impeaches and the Senate tries the case. The Chief Justice presides when the President is tried.

⁵ Kevin E. McCarthy (2004).

3.2 By the law of Parliament, all persons (including the Prime Minister) may be impeached for any crimes although impeachments have generally been reserved for extraordinary crimes and extraordinary offenders.⁶ Impeachment has not taken place in the UK after 1806. With the development of the doctrine of collective responsibility and the practice of confidence motions, the impeachment process has gradually fallen into disuse in modern times.⁷

4. Korea

4.1 In Korea, the President is the Head of State, the chief executive of the government, and the commander in chief of the armed forces. Under the *Korean Constitution*, the President is entitled to criminal immunity during his tenure of office except for insurrection or treason.⁸ The Prime Minister, who is appointed by the President with the approval of the National Assembly⁹, is not immune from any criminal liabilities.

4.2 The *Korean Constitution* stipulates that the National Assembly may pass a motion for the impeachment of the President and the Prime Minister if they have violated the Constitution or other Acts in the performance of official duties.¹⁰

4.3 Except for insurrection or treason, criminal proceedings could only be instituted against the President when his tenure of office expires. Under the *Korean Constitution*, the President has a fixed five-year term and cannot be re-elected, and can be removed from his office by impeachment.

4.4 The Constitutional Court of Korea has jurisdiction over impeachment proceedings. When the National Assembly passes the impeachment motion, the President shall be suspended from exercising his power until the impeachment has been adjudicated by the Constitutional Court. A decision on impeachment shall not extend further than removal from public office. A judgment upholding impeachment does not exempt the person impeached from civil or criminal liabilities.¹¹

⁶ *Erskine May Parliamentary Practice* (1976) p. 66.

⁷ *Erskine May Parliamentary Practice* (2004) p. 73.

⁸ The *Korean Constitution*, Article 84.

⁹ The National Assembly is a unicameral legislature.

¹⁰ Article 65(1) of the *Korean Constitution* provides that "[i]n case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment".

¹¹ The *Korean Constitution*, Article 65(4).

5. France

5.1 A constitutional amendment passed by the French Parliament on 19 February 2007 has introduced an impeachment procedure to check on the President's power. A two-thirds majority of both houses of Parliament is required to launch an impeachment proceeding against the President in case of a "*neglect of his duties manifestly incompatible with the exercise of his mandate*".

5.2 Under the French Constitution, the President is not liable for acts performed in the exercise of his duties except in the case of high treason.¹² Two earlier court cases, by the Constitutional Court in 1999 and the French highest appeals court in 2001 respectively, ruled that a serving President could not be prosecuted, charged or forced to testify in an ordinary law case.¹³

5.3 According to the French Constitution, other members of the government (including the Prime Minister) are criminally liable for acts performed in the exercise of their duties.¹⁴

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¹² *The French Constitution*, Article 68.

¹³ See Karin Oellers-Frahm (2005).

¹⁴ *The French Constitution*, Article 68-1.

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