TO: CONSTITUTIONAL COMMITTEE, SUBCOMMITTEE

FROM: TECHNICAL ADVISORS THEME COMMITTEE TWO

REPORT ON IMPEACHMENT AND MOTIONS OF NO CONFIDENCE

A. IMPEACHMENT

1. COMPARATIVE OVERVIEW

The power of impeachment is of British origin and was aimed at removing ministers of the Crown from office. The House of Commons initiated impeachment by adopting a resolution for the prosecution of treason and high crimes and misdemeanours before the House of Lords. The Lords exercised the function of a high court of justice by adjudicating upon the charge preferred. It was a procedure reserved for extraordinary crimes and extraordinary offenders.¹ The rise of the principle of collective cabinet responsibility and the resignation of the cabinet following a successful vote of no confidence in a minister, has resulted in the disuse of impeachments in modern times, although the British Parliament still retains this power.²

The impeachment procedure in the United States Constitution is similar to that of the British. The President, Vice President and all civil officers of the United States can be removed by means of impeachment.³ This includes judges and other civil servants. The House of Representatives initiates the process by passing by majority vote "articles of impeachment" which serve as an indictment. The grounds for impeachment are "treason, bribery and other high crimes and misdemeanours". The latter offences are impeachable only if they involve serious

¹ See Erskine May Parliamentary Practice 1976 65-6.
² Erskine May op cit 66; Wade & Phillips Constitutional Law 1977, 98.
³ Art II s 4.
abuse of official power.⁴ After the commencement of impeachment proceedings
against President Nixon in 1974 it has been observed that "a showing of
criminality is neither necessary nor sufficient for the specification of an
impeachable offence".⁵ A violation of the Constitution, a gross breach of trust or
serious abuse of power would suffice.

In the US the Senate is given the sole power to adjudicate all impeachments, and
a conviction is returned by a two-thirds vote. The consequence of a conviction is
removal from office but "the effect of impeachment shall not extend beyond
disqualification to hold and enjoy any office of honor, trust or profit under the
United States." In the US it is accepted that the decisions to impeach and to
convict are not subject to judicial review.⁶

A civil officer cannot escape impeachment by resigning. Impeachment may take
place after resignation because the penalty flowing from impeachment is more
than removal from office. Congress may thus pursue impeachment proceedings
in order to deprive the resigned officer of any retirement benefits which would
flow from impeachment and prevent that person from holding public office
again.⁷ An impeached person may also be charged in the criminal courts for the
same conduct.

Brazil, Ireland, Namibia, Nigeria⁸ and Mexico have procedures similar to that of

⁷ Tribe op cit 290.
⁸ 1979 Constitution, see Nwabueze Nigeria's Presidential
the United States. In India both Houses can impeach the President and investigate the charge itself. Impeachment is not necessarily limited to directly elected presidents. Heads of State elected by the legislature are usually subject to impeachment procedures. Some constitutions contain specific procedures to deal with the problem of incapacity of Heads of State due to ill-health. For example, in Guyana a panel of medical doctors is appointed which reports to the legislature which may then remove the head of state from office.

From this overview the following conclusion can be drawn:

(a) Impeachment is aimed at the removal of state officials who are guilty of abuse of power. It is thus not limited to the Head of the State, but includes, for example, the judiciary.

(b) The conduct need not necessarily be criminal; a violation of the Constitution, or breach of trust would suffice.

(c) The removal of persons who are unable to perform their duties due to some physical or mental incapacity is not necessarily linked to impeachment.

(d) The legislature, or a part thereof, acts as a court to convict a person.

(e) In some constitutions there are consequences beyond removal from office.

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Lundy Parliaments of the World (1989) 44.
(f) Impeachment clauses in constitutions are usually the only provision for the removal of certain high officials from office; unlike the current South African situation where the President can also be forced out of office by a vote of no-confidence in him or her.

2. SOUTH AFRICA

Under the 1961 Constitution the State President, performing a ceremonial function as head of state, could be removed by a vote by the House of Assembly and the Senate for reasons of "misconduct and inability to perform efficiently the duties of his office" (s 10). The change in the nature of the presidency in the 1983 Constitution, entailing a political role, did not alter the wording of the "impeachment" provision. It has been suggested that misconduct should be assessed in terms of the presidential oath; it would thus include anything which would harm the country. Removal was by simple majority of all the houses of Parliament.

The impeachment process prior to the interim Constitution can be summarised as follows: (a) "Impeachment" was the only method of removal; (b) it could be done on two grounds - misconduct and inability to perform functions efficiently; (c) it was done by a majority vote of Parliament; and (d) consequences other than removal were not contemplated.

Under the interim Constitution of 1993 the position changed with regard to both the grounds and the procedure. The President and the Deputy Presidents can be removed on "the ground of serious violation of the Constitution or the other laws of the Republic, or of misconduct or inability rendering him or her unfit to exercise and perform his or her functions" (s 87). A two-thirds majority in a joint sitting of both the National Assembly and Senate is required. The two-thirds
majority was presumably inserted to distinguish the removal by impeachment which may involve an element of censure, from a removal by a motion of no confidence which requires a simple majority and which reflects a political decision which involves no disgrace.

It should also be noted in this regard that judges of the Supreme Court can be removed from office only by a vote of Parliament. In 1993 the office of the attorney-general was granted independence and office holders can be removed by a similar procedure.

3. CONCLUSION

The fact that provision is made in the interim Constitution for both impeachment of the President and a vote of no-confidence in him or her need not lead to duplication, contradiction or overlap. In principle the two can be reconciled, provided that the requirements and procedures for, and the consequences of the two methods are clearly distinguished in the Constitution. The following reasons can be advanced for including an impeachment provision:

(a) Impeachment is aimed at the punishment of a person who has abused the office of the President. It also serves "to solidify the lesson of the officer's misconduct in the form of clear precedent." An impeached President might thus be denied the benefits of the office and could be barred from holding public office again. It should also be possible to impeach a person after he or she has resigned from office. Because impeachable conduct need not coincide with criminal conduct, reliance on criminal law may be inadequate. However, impeachment would not be a bar to criminal prosecutions.

\[10\] Tribe op cit 290.
(b) As impeachment serves as punishment it is inappropriate in cases other than for a serious abuse of power. Inability to perform duties efficiently due to ill-health or incapacity, should be excluded. These grounds could give rise to a motion of no confidence, or a separate procedure could be created.

(c) If impeachment is primarily a method of censure, then it may be asked why other members of the Cabinet should not be subjected to the same procedure.

Should the punishment function of impeachment be acceptable, then the present formulation could be amended as follows:

(1) The National Assembly may remove from office the State President or .... by resolution adopted by a majority of at least two-thirds of its members, but only on the grounds of serious violation of the Constitution or the laws of the Republic or of serious misconduct.

(2) A person who has been removed from the office of the State President in terms of subsection (1) shall be disqualified from being elected to public office again, and the National Assembly may, if it deems it appropriate under the circumstances, rule that such a person shall not be entitled to any benefits or pension from that office.

B. MOTIONS OF NO CONFIDENCE

1. BACKGROUND
The motion of no confidence is closely tied to the notion of collective cabinet responsibility; government collectively and ministers individually are answerable to Parliament. An attack on one minister on a matter of policy is an attack on the government as a whole. In the Westminster conventions and precedents there is some flexibility over what is regarded as a major test of confidence. Where the Government loses a vote of no confidence, the Prime Minister may resign and request the monarch to dissolve Parliament and call an election. There is a residual discretion in the monarch to refuse the request. This stems from the typical Westminster notion of the "Queen-in-Parliament". If the monarch is convinced that there is a clear majority in Parliament in favour of a new government, he or she may ask the leader of the party or parties that emerged strongest after a motion of no-confidence to form a government.

Another feature of the Westminster system is that the head of government (prime minister) may at any time request the monarch to dissolve Parliament, following which an election has to be held. This also stems from the idea of the "Queen-in-Parliament": the monarch is entitled to convene and adjourn his or her Parliament. By convention, if the request comes mid-term, and not as a result of a vote of no-confidence, the monarch would accede.

It may be asked why a government should be able to dissolve a legislature which has lost confidence in it. There appears to be no easy answer. A political mandate theory may prove to be inconclusive. If the government, drawn from the majority party, was elected on the basis of a particular policy, and the majority in the legislature has shifted in policy resulting in the motion of no confidence, then the government may argue that it wants to renew its mandate from the people. The converse is, however, equally feasible. The majority in the legislature has remained true to the original mandate of the people and the government has moved away from that policy. In such a case, there is no argument for the
dissolution of the legislature. Furthermore, the mandate theory is not applicable where the motion of no confidence is not based on policy differences but on mismanagement, corruption or abuse of power.

The dissolution of a legislature need not be a necessary consequences of a successful motion of no-confidence. A motion of no-confidence could lead only to the creation of a new government which has the confidence of the legislature. In such a case, the legislature may serve a fixed term.

A fixed term poses two problems. First, a legislature may agree about ousting the executive but cannot agree on its replacement. Deadlock then ensues. Second, new and important circumstances may well arise which lead the legislature to believe that it requires a new mandate from the electorate.

2. INTERIM CONSTITUTION

In the interim Constitution there are three possible votes of no confidence (s 93):
(a) If the vote of no confidence is in the Cabinet (President and Ministers), the President shall resign or dissolve the National Assembly and call a new election.
(b) If the vote of no confidence is in the President alone, the President shall resign.
(c) If the vote of no confidence is in the Cabinet excluding the President, the President may resign, reconstitute the Cabinet, or dissolve Parliament and call a new election.

The interim Constitution moved away from the Westminster notion of the "President-in-Parliament". Parliament now has a fixed term and may only be dissolved by time and by a motion of no-confidence in the cabinet or the cabinet excluding the President.
3. CURRENT PROPOSAL

The current draft adopts the interim Constitution's three motions, with one modification to the last one.

(a) If the National Assembly passes a vote of no confidence in the Cabinet (President and Ministers), the President shall resign or dissolve the National Assembly and call a new election.

It is unlikely that a party in the National Assembly with a clear majority would choose this options for dissolving Parliament. Apart from being an outrageously cynical move, it might be open to a constitutional challenge.

The DP opposes giving the State President the choice of dissolving the National Assembly.

(b) If the National Assembly passes a vote of no confidence in the State President, the State President shall resign.

By adopting this route the National Assembly may achieve the same result as in (a), but without the fear of being dissolved by the State President. The primary power of the State President is the appointment of ministers. The removal of the State President alone, could result also in the removal of the entire cabinet; a new State President is appointed who may then dismiss the entire Cabinet and appoint a new one.

In both (a) and (b) a motion of no-confidence in the State President is
possible where he or she has lost the confidence of the majority party who has elected him or her. It may also happen when there has been a realignment in Parliament. This presupposes that there can be movement across the floor. Furthermore, it can also happen if a minor party to a coalition government withdraws its ministers and the government therefore loses its majority in Parliament.

(c) If the National Assembly passes a vote of no confidence in the Cabinet excluding the State President, the State President may resign or reconstitute the Cabinet.

This motion is a form of parliamentary ratification or veto procedure of the appointment of Ministers. If the National Assembly is not satisfied with particular cabinet appointments, it could pass motions of no confidence in the Ministers until it is satisfied with all the ministers (or until the State President resigns). This procedure affords the majority party's caucus / congress extraordinary power to influence the composition of the cabinet. A State President may thus not be free to select his or her own cabinet. Obviously, however, the political implications of a vote of no confidence for a majority party would inhibit its use as a mechanism for forcing cabinet reshuffling.

The DP proposes a similar provision but it is linked to its proposal on a Prime Minister (appointed by the State President): Should the National Assembly pass a vote of no confidence in the Government, i.e. in the Prime Minister and the Cabinet Ministers, the State President shall terminate their office and appoint a Prime Minister and Cabinet Ministers who enjoy the confidence of the National Assembly. The Ministers are appointed by the State President after consultation with the Prime Minister.
4. CONCLUSION

From the present formulation of the motions of no-confidence the following conclusions can be drawn:

(a) Where the National Assembly does not desire its own dissolution, that it can replace an incumbent executive by simply removing the State President by a vote of no confidence. It is likely that the rest of the Cabinet will resign with him or her, but even if that does not happen, the new State President can dismiss the incumbent ministers and appoint a new cabinet.

(b) Where the National Assembly desires its own dissolution, then a motion of no-confidence may be adopted in the Cabinet including the State President.

(c) Where the National Assembly may question the appointment of ministers through a motion of no-confidence in the ministers, it may undermine the power and status of the State President to determine his or her own cabinet, and consequently the policy of the executive.

If basic principles are to be distilled from the provisions and debates thus far, the following may be ventured:

(i) The executive is accountable to the National Assembly and it should thus be able to remove the executive by a vote of no-confidence.

(ii) It is questioned whether the executive should be able to dissolve the National Assembly after a motion of no-confidence.
(iii) There may well be a need to dissolve the National Assembly before term when deadlock is reached after a successful motion of no-confidence. This will occur where two parties from the opposite sides of the political spectrum join forces to oust an incumbent State President but cannot agree upon electing a new one. Such a deadlock would paralyse the government. Where the National Assembly has no confidence in the incumbent State President but cannot agree on who should form the new government, then the National Assembly should be dissolved and new elections called.

(iv) There may be situations where the National Assembly wish to dissolve itself. This may occur when the National Assembly is of the opinion that it requires a new mandate because a particular situation has arisen since the last election. The decision to dissolve should be taken by the National Assembly as a whole requiring at least a two-third majority.

These principles can be reflected in two provisions:

A. Constructive vote of no-confidence.

If the National Assembly passes a vote of no confidence in the State President, the State President shall resign. Where, after the adoption of such a motion of no-confidence, the National Assembly is not able to elect a new State President within 21 days, the National Assembly shall be dissolved and a new election held.

B. Self-dissolution.
The National Assembly may by resolution adopted by two-thirds of all its members as determined by the Constitution, dissolve itself.