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

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.
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 abuse of official power. 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". 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.

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. An impeached person may also be charged in the criminal courts for the same conduct.

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7 Tribe op cit 290.
Brazil, Ireland, Namibia, Nigeria\textsuperscript{8} and Mexico have procedures similar to that of the United States. In India both Houses can by a two-thirds majority impeach the President and investigate the charge itself.\textsuperscript{9} 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.

\textsuperscript{8} 1979 Constitution, see Nwabueze Nigeria's Presidential Constitution 1979-83 (1985).

\textsuperscript{9} Lundy Parliaments of the World (1989) 44.
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

In view of the provision that the President can be removed from office by a vote of no confidence requiring a simple majority only and without giving him or her the option of dissolving the NA, impeachment could still be justified if the United States model of impeachment is adopted. 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.

(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.

10 Tribe op cit 290.
(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 not be entitled to any benefits or pension from that office, or be elected to any public 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 British conventions and precedents there is some flexibility over what is regarded as a major test of confidence. The budget vote is the major test of confidence. Where the Government loses a vote of no confidence, the Prime Minister may resign or dissolve Parliament and call an election.

The dissolution of a legislature is not a necessary consequence of a successful motion of no confidence. In a
number of constitutions, a motion of no confidence leads only to the creation of a new government which has the confidence of the legislature. In such a case, the legislature serves a fixed term.

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 most compelling argument for the dissolution of the legislature is that the legislature itself deadlocks; a new government cannot be formed. In most parliamentary constitutions the legislature has the power to dissolve itself.

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.

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.

Unless the NA is seeking an election, it would not choose this route. It is questionable, however, whether a majority party can engineer a motion of no confidence purely on the ground that an election would be to its advantage. A German precedent suggests that if a majority party would do so, it could be subject to a constitutional challenge.

The DP opposes giving the NA this choice.

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

By adopting this route the NA may achieve the same result as in (a), but without the fear of being dissolved by the President. The primary power of the President is the appointment of ministers. The removal of the President alone, could result also in the removal of the entire cabinet. A new President is appointed who may then dismiss the entire Cabinet and appoint a new one.
In both (a) and (b) a NA may pass a motion of no confidence in the President if 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.

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

This motion is a form of parliamentary ratification / 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 President resigns). This procedure affords the majority party's caucus / congress extraordinary power to influence the composition of the cabinet. A 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 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 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 President after consultation with the Prime Minister.