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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

ON FEDERALISM

REVISED VERSION

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RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT

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MEMORANDUM ON FEDERALISM
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This memorandum purports to be an aide memoire regarding different models of Federalism as adopted in other countries which would generally be considered to represent models of open and democratic societies based on freedom and equality. (The words which are employed in the Interim Constitution to indicate the objective of the democratic enterprise in South Africa).

1. In briefly describing different models, cognisance is taken of Schedule 4 of the Constitution and in particular those principles which impact directly upon structures of government.

   1.1 Principle VI provides that there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

   1.2 Principle X provides that there shall be formal legislative procedures which shall be adhered to by legislative organs at all levels of government.

   1.3 Principle XV1 provides that government shall be structured at national, provincial and local level.

   1.4 Principle XVII provides that at each level of government there shall be democratic representation, this principle shall not derogate from the provisions of Principle XIII which provide for the protection of the institution, status and role of traditional leadership according to indigenous law.

   1.5 Principle XVIII (1) provides the powers, boundaries and functions of the national government, provincial government shall be defined in the Constitution. Sub para (2) provides that the powers and functions of provinces defined in the Constitution shall not be substantially less/inferior to those provided in the Constitution. Amendments in the Constitution which alter the powers, boundaries, functions and institutions of provinces which shall in addition to any other procedure specified in the Constitution for Constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively if there is such a chamber, a two thirds majority of the chamber of parliament composed of the provincial legislatures and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed. Sub para (4). Provisions shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions. Sub para (5).

1.6 Principle XIX provides that the powers and functions of the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on agency or delegation basis.

1.7 Principle XX provides that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability in each level of government and to effective public administration which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

1.8 Principle XXI sets out a series of criteria to be applied in the allocation of powers to the national government and the provincial governments.

1.9 Principle XXII provides that the national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional, institutional integrity of the provinces.

1.10 Principle XXIII provides that in the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and the provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

1.11 Principle XXIV provides that a framework for local government powers, functions and structures shall be set out in the Constitution.

1.12 Principle XXV provides that the national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution.

1.13 Principle XXVI provides that each level of government shall have a constitutional right and equitable share of revenue collected nationally so as to ensure that provincial and local governments are able to provide basic services and execute the functions allocated to them.

1.14 Principle XXVII provides for the appointment of the Financial and Fiscal Commission.

2. This memorandum now proceeds to examine how other countries have dealt with the problem of allocating powers to both a national government and

provincial governments and the structures which they have adopted accordingly. In short, this memorandum provides an indication as to how other countries have dealt with the question of where power is situate (whether in the states/provinces or at central level) and how this is specified in the Constitution. In addition the role of the Senate (Upper House) is also canvassed.

3. UNITED STATES OF AMERICA

Arguably the Constitution which provides for the strongest of entrenched powers to be held by states (provinces) is contained in the Constitution of the United States of America.

3.1 After the Declaration of Independence sovereignty resided in each of the states. Each state had its own constitution and each functioned as an autonomous local unit. Even under the Articles of Confederation the states retained their sovereignty as a necessary condition to the establishment of a federal union. However the new states gave a portion of their sovereign powers to the national government that was created by the Constitution. The original understanding of the system of government established by the Americans in 1789 was that the federal government was to be one of enumerated or delegated powers and that all powers not expressly delegated to it reserved to the states. In short the federal government was said to possess only such powers as were expressly granted to it by the states. Powers not delegated or expressly provided in the Constitution were resided in the states.

3.2 Enumerated powers granted to the federal government are found primarily in article I, Section 8 of the American Constitution. These powers include the following:

3.2.1 The power to levy and collect taxes, duties, imposts and excises and the power to provide for the common defence and general welfare;

3.2.2 The authority to borrow money on the credit of the United States;

3.2.3 The power to regulate interstate and foreign commerce;

3.2.4 The right to establish rules of naturalization and laws relating to bankruptcy;

3.2.5 The authority to coin money, to regulate the value thereof and to fix the standards of weights and measures;

3.2.6 The power to provide for the punishment of counterfeiting

securities and current coin of the United States;

3.2.7 The authority to establish post offices and post roads;

3.2.8 The jurisdiction to secure to authors and inventors the exclusive right to their respective writings and discoveries;

3.2.9 Prerogative of establishing judicial tribunals inferior to the Supreme Court;

3.2.10 The right to make and enforce laws relating to piracy and felonies committed on the high seas and offenses against the laws of nations;

3.2.11 The power and responsibility for declaring war or making rules concerning capture on land and water;

3.2.12 The responsibility raised in support of armies;

3.2.13 The power to provide and maintain a navy;

3.2.14 The authority to make rules for the government and regulation of the land and naval forces;

3.2.15 The power to provide for the calling forth of the militia to execute the laws of the Union, suppress insurrection and repel invasions;

3.2.16 Limited authority to organise, arm, discipline and train a militia;

3.2.17 Exercise the exclusive legislative control over the seat of government in Washington and all other federal installations; and

3.2.18 The power to make all laws necessary and proper for carrying into execution all of the above specifically enumerated powers.

3.3 Notwithstanding the structure of the American Constitution, it should be noted that the power of the federal government has been increased through Supreme Court interpretation of the so- called Interstate and Foreign Commerce clause. Exercising this power for example, Congress has prescribed safety standards and transportation industry, developed labour legislation, crop restriction programme, anti-trust laws and even civil rights legislation. A whole body of federal criminal statutes have been

justified on the grounds of interstate and foreign commerce such as the so-called Mann Act which makes it a federal offence to transport women across state lines for immoral purposes, the National Motor Vehicle Theft Act making it an offence to transport stolen vehicles and interstate commerce and the Federal Kidnapping Act imposing penalties for kidnapping individual and carrying him or her across state lines.

3.4 To provide but one example of the way in which the Supreme Court has extended federal powers on the basis of the Interstate Commerce clause, the case of Equal Employment Opportunity Commission v Wyoming 460 US 226. In this case the Supreme Court held that Congress had acted constitutionally when it extended the definition of employer as used in the Equal Employment Opportunity Act to include state and local governments. The court held that the extension of the Age Discrimination in Employment Act to cover state and local governments was a valid exercise of Congress's powers under the Commerce clause. The court determined that the mandatory retirement of a Wyoming game warden at age of 55 based on age alone was in a violation of the federal act. This example simply amplifies the point made above namely that not withstanding the residual powers of the states, the so-called override clause, that is the Interstate Commerce clause which allows federal government to justify overriding state interests, has been widely interpreted by the American Supreme Court so that federal powers have increased steadily over the past 100 years.

THE ROLE AND POWER OF THE SENATE

3.5.1 The other important aspect of the American Constitution is the bicameral nature of congress whereas representatives for the House of Representatives who are elected every two years senators, one third of them at a time, are elected for six year terms. Senators are elected state wide while representatives are elected from districts from within the state, the result is the two houses will reflect different bodies of voters. Small states enjoy a level of representation completely out of proportion to their population. Half the population of the United States lives in the nine largest states represented by 18 Senators out of the total of 100. Seventeen smaller states in which well under a tenth of the population lives are represented by 34 Senators, mathematically enough to control the outcome of any voting in which a two thirds majority is required. This is because each state irrespective of size is entitled to two Senators. The Senate is the only house with authority to block a Presidential appointment. On the ratification of treaties only the Senate and not the House of Representatives is entitled to participate. The Constitution assigns one function exclusively to the House of Representatives namely the authority

to originate Bills for raising revenue. The Senate however has the same power to amend or reject such Bills as it would with any other proposed legislation.

3.5.2 In Garcia v San Antonio Metropolitan Transit Authority (1985) the court used the idea that the Senate protects State interests to limit the restrictions on the federal override over the states.

4. GERMANY

A number of the more modern constitutions tend to specify competency for both federal government and states. In this regard it is useful to examine the German model.

4.1 The Basic Law provides for division of legislative competencies between the central state (Bund) and the states (Länder). The legislative powers of the Bund are numerated and include both exclusive and concurrent authority. The Federation has competencies to legislate only on those matters specified in the Basic Law. The Länder enjoy all legislative authority not specifically granted to the Bund including education, relations between church and state, police and internal administration. They also have the right to conclude international treaties in those fields in which they possess legislative authority. The Länder execute their own laws through their own authorities. In addition they have authority to implement Federation legislation.

The Bund possesses both exclusive and concurrent legislative authority. The list of exclusive powers are short comprising matters that by their very nature need uniform treatment or regulation. While the powers of the Bund to exercise concurrent legislation covers a much larger number of fields it can legislate in these fields only:

i. If the matter cannot be regulated effectively by Länd legislation; or

ii. If regulation by one Länd would prejudice the interest of the other Länder; or

iii. If federal action is required for the preservation of the legal or economic unity of the country. [Article 72].

Where there is concurrent legislation however the Länder can legislate only as long as the Bund does not exercise its own legislative authority. [Article 72 (1)].

4.2 Although the Basic Law stipulates that Germany is an "Eternal Federation" this has generally been interpreted as referring to its

institutional structure rather than the functional processes of the Länd or Bund. Indeed the federal government has narrowed the legislative room that has been available to the Länder by using its own legislative power extensively then relying on the provision that in the case of conflict federal law prevails.

4.3 Like the United States of America Germany also has a bicameral system.

4.3.1 The two chambers of the German parliament are the Bundestag and the Bundesrat. The Bundestag has 496 seats which are proportioned to the Länder on the basis of representation by population. One half of the members are elected from single member constituencies by simple majority whilst the other half are appointed from party lists in the Länder and are elected according to proportional representation. Thus the Bundestag is similar to the American House of Representatives or our own National Assembly notwithstanding the different approach to voting.

4.3.2 The Bundesrat is a very powerful second chamber and it is known as the direct representative of the government of the Länder. The Prime Minister of each Länd is a member of the Bundesrat and the Länd delegates always vote as a block, there is no individual voting. Prior to the unification of Germany there were three classes of Länder with representation determined by size. Each Länd was guaranteed three votes. Those with a population over 2 million received four votes and those with a population over 6 million received five votes. For example Bremen and Hamburg with a combined population of less than 2 1/2 million each sent three delegates to the Bundesrat out of a total of only 41.

4.3.3 The Bundesrat has an absolute veto over all Bills that affect the Länder and suspends a veto over all other Bills. Any attempt to amend the law affecting the division of the Federation, its Länder or the participation of the Länder in legislation shall be unconstitutional. In the event of a Länd failing to fulfil its constitutional or legal obligations towards the Bund, a federal sanction on the part of the federal government may force the relevant Länd to fulfil its duties but only with the approval of the Federal Council. Prior to such a step however the dispute must be submitted to the Federal Constitutional Court. In other words a dispute between a Länd and a Bund subject to the approval of two distinctly federal institutions, namely the Federal

Constitutional Court and the Federal Council.

4.4 There are certain distinct "Anti-federal" characteristics of the German Constitution namely:

4.4.1 Article 28 determines that the constitutional order in the Länder must conform to the principles of the Republican, Democratic and Social State based on the Rule of Law principle . The Bund must guarantee that the constitutional order of the Länder correspond to the basic rights and provisions referred to above.

4.4.2 The Federal Constitution takes over from the normal jurisdiction of the Länder when it comes to determining the basic rights of local self government. Article 28 provides that counties and communities "must have a representative assembly resulting for universal, direct, free, equal and secret elections." Article 28(2) provides that the local bodies must be guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by law. The associations of local communities shall also have the right to self government in accordance with the law and within the limits and functions assigned to them by law.

4.4.3 Article 29 provides that changes in the geographic boundaries of the Länder are subject to the final jurisdiction of central government namely to the approval of the federal legislature and a confirmation by referendum.

4.4.4 Article 30 provides that the exercise of the powers of the State and the performance of state functions shall be the concern of the Länder in so far as the basic law does not otherwise prescribe and permit. In this particular connection Article 31 provides that federal law shall override Länd law on the condition of course that the federal law is constitutional, that is that the federal government has jurisdiction, an important "Supremacy Clause."

5. CANADA

The origins of the federal system in Canada appear to be a political compromise between fans of the Unitary Legislative Union and advocates of diversity, that is those who are unwilling to submerge the separate identities of their province under a legislative union. It does appear however that advocates of legislative union held sway when the provinces of Ontario, Quebec and the three maritime provinces got together. Initial legislation in

1867 appeared to plan for a strong central Government giving the Provinces only enumerated powers to make law and the residue of power being situate in the federal parliament. This was a marked departure from the President of the United States of America where, as we have already seen, residuary power has been left with the states. Thus early on Canadian Federal Parliament was given the power to regulate trade and commerce without any qualification whereas the United States Congress has been given a more limited power to regulate commerce of the foreign nations and amongst the several states and "with the Indian Tribes". Banking, marriage and divorce, criminal law and prisons were all topics which have been allocated to the federal parliaments in Canada which have been reserved to the states in the United States. Perhaps more important was that the Federal Canadian Government was considered to be fiscally dominant. In terms of Section 91(3) of the Constitution the power to levy indirect as well as direct taxes was given to the federal parliament whilst the Provinces were confined to direct taxation. It should be noted that when the Act was passed in the 1860's indirect taxes such as customs and excise counted for 80% of the revenue so as at a very early stage it was envisaged that federal government would have the overwhelming revenue by which the country would be financed.

5.1 As has been seen in paragraph 5 above, the distribution of the legislative power between the federal parliament and the provincial legislatures are set out in the Constitution Act (see Sections 91 and 92). Section 91 lists the kind of laws which are competent to the federal parliament and Section 92 lists the kind of laws which are competent to the provincial legislatures. Much of the jurisprudence of the Canadian Supreme Court is taken up in this area by attempting to determine whether a particular piece of legislation falls within the competence of the provincial legislature or the federal parliament. Once more the tendency is being relied upon for a fairly generous approach to the ambit of the federal legislation.

5.2 As has been noted above in the United States the enumerated federal powers include the so-called ancillary power, that is a power to make all laws that shall be necessary and proper for carrying in execution the enumerated powers. The Canadian Constitution does not include such an ancillary power in either the enumerated powers of the federal parliament or the provincial legislatures. That is because the Canadian courts have adopted the view that where there is a rational functional connection between an expressed power and a power which has been implied by the applicable authority, the authority would have acted constitutionally. To give an example; a federal criminal code authorising the payment of compensation to a victim of crime was attacked as being unconstitutional in that federal parliament had not been given a specific power to authorise compensation when it was granted criminal jurisdiction. The court said that there was

a rational connection between the criminal law power and the "civil" sanction of compensation.

5.3 Unlike the American and Australian Constitutions, concurrency has a limited role in Canada. Indeed there are only three concurrent powers:

5.3.1 Provincial legislatures are granted the power to make laws in relation to the export of natural resources, power explicit in so far as the federal parliament is concerned given their trade and commerce power;

5.3.2 The federal parliament has the power to make laws in relation to old aged pensions and supplementary benefits and the applicable Section (94A) acknowledges the existence of the concurrent provincial power; and

5.3.3 Section 95 confers on both the federal parliament and the provincial legislatures concurrent powers over agriculture and immigration.

5.3.4 Apart from the specific examples of concurrency the Canadian Constitution emphasises exclusivity in that the lists provide for exclusive powers for the provinces and the Central Government. However it is possible under the so-called "Pith and Substance" doctrine developed by the Canadian judges concurrency might be more frequent. In other words the custody of children may be regulated incidently under the federal Divorce Power although the custody of children is otherwise a matter coming with the expressed list of provincial competencies. Thus concurrency can occur beyond the three examples given above. Whenever legislative power is concurrent and there is the possibility of conflict between federal and provincial powers, the Canadian rule is resolved by the rule of Federal Paramountcy.

5.4 An interesting aspect of the Canadian federal debates turns on the question of secession. Secession can be accomplished by an amendment of the Federal Constitution that is in the case of the Canadian province by amendment to the Constitution of Canada. The seceding province cannot pass the amendment itself for in terms of Section 45 of the Constitution secession is not simply an amendment to the Constitution of the province. There involves a division of the national debt and of the federal public property and in the case of Quebec arrangements of the shared uses of St Lawrence Seaway. Secession can only be accomplished under the general amending provisions of Section 38, that is by the assent of both houses of the federal parliament and of the legislative

assemblies and two thirds of the provinces representing 50% of the population.

THE SENATE

5.5 Canada also has a bicameral system. The Senate was intended to serve as a protector of regional interests hence its membership was drawn equally from the the original regions or divisions namely Ontario, Quebec and the three maritime provinces. The purpose of the Senate was originally to offset representation by population in the House of Commons with equality of regions in the Senate. The objective was never fulfilled because the senators are appointed rather than elected and the appointment takes place by the federal government rather than by provincial government. The members of each senate are appointed by the Governor General which means by convention that Cabinet Constitution provides for a fixed number of senators and once appointed a senator holds office until age 75. Each government tends to appoint its own supporters to the senate. The government which has been in office for a long time will have a majority and sometimes an overwhelming majority of its own party members in the senate. After a long standing government loses an election a new government might well be faced with the senate which is still controlled by the opposition party. However the senators rarely refuse passage of measures proposed by government, this despite the fact that the Constitution Act gives to the senate the same powers as the House of Commons except that Money Bills must originate in the House of Commons. The idea of a senate is that it was intended to serve as a protector of regional interests and although it consists of 104 senators, that is 24 senators of each of four divisions namely Ontario, Quebec, the three maritime provinces and the four western provinces. Because the senators are appointed rather than elected the senate has never really been an effective voice for regional or provincial interests. As an appointed body the Senate is considered that it has no political mandate to obstruct the democratically elected House of Commons.

6. AUSTRALIA

By contrast to Canada, Australia enjoys a Constitution which lists only federal legislative powers most of which are concurrent with a general unenumerated state power. Thus Federal parliament makes laws on specific enumerated subjects. Many of these deal with national matters such as interstate trade, customs, defence, immigration and external matters. Some are not such obvious national matters such as trading or financial corporations, marriage and old aged pensions. By contrast state parliaments have been given wider more general powers. In general the states deal with matters not usually regulated by the Commonwealth so that they are

constitutionally responsible for education, local government, health, transport, traffic control, general administration of justice and law enforcement. In a number of areas the State has passed a law on matters already canvassed by federal law. This has happened in areas such as banking, bankruptcy, bills of exchange, cheques, broadcasting and television, copyright, marriage, divorce, broad area of family law, life insurance, patents, postal and telecommunication services, trademarks and respective trade practices. In terms of Section 109 state law does not operate in the event of inconsistency with the federal law and accordingly in these matters Commonwealth Acts have to cover the field alone. It is however in the area of the exclusive powers of the Commonwealth that the expansion of the Commonwealth jurisdiction has taken place. Certain powerful provisions are given to the Commonwealth Parliament including the power to make laws with respect to taxation and an exclusive power to impose amongst other things excise duties. The courts have also interpreted Section 92 which directs that trade commerce and intercourse amongst the states shall be absolutely free as giving the Commonwealth of Parliament the power to prevent discriminatory regulation of a protectionist nature. Section 109 provides that in the event of inconsistencies, the Federal Court prevails over State law.

6.1 In Australia there has been a substantial increase in Commonwealth power due to the Commonwealth Parliament exploitation of its limited exclusive powers. By virtue of the Taxation Power contained in Section 51 the Commonwealth was able to decrease inflation, freeze extra income by provisional tax, use sales taxes and exercise taxes to control the economy and cut back imports to manipulate supply and demand. Furthermore in terms of Sections 96 the Commonwealth can reduce money for state public works, housing or transport or it can stimulate spending in these public sectors by increasing grants to the states. In addition the Commonwealth has a so-called Incidental Power. In certain instances this is expressed such as under the Taxation or Interstate Trade Provision (Section 51) but there is also an implied incidental power attached to each of the Commonwealth parliament's main powers.

THE SENATE

6.2 The Australian Constitution also provides for a bicameral parliament. By contrast to the Canadian Senate the Senate of Australia is elected by virtue of each state electing a certain number of senators. Elections for half the 76 compliment is the Senate by proportional representation each three years. There are 12 Senators per state plus four territorial Senators. This has resulted in a different composition of the Senate to lower house and in one particularly famous instance caused the downfall of the government. Because the two houses namely the House of Representatives and the Senate are both popularly elected each has

the same legislative power with one exception. The Senate may not originate nor amend a Money Bill. Accordingly the Senate has a constitutional power to refuse to pass the Money Bill and did so in the case of Gough Whitlam's Labour Government in 1975 which resulted in the dismissal of the Government when the Senate dominated by the Liberal Party refused to pass the budget. [Section 57]

6.3 The Senate has the same law making power as The House of Representatives save for one important difference relating to Money Bills. A Bill that appropriates revenue or imposes taxation cannot originate in the Senate but must originate in the House of Representatives. However the Senate can at least send a Money Bill back to the lower house at the request for an amendment. Beyond this the Senate can introduce or amend ordinary Bills just as much as the House of Representatives can. In short the Senate shall have equal power as the House of Representatives in respect of all proposed Bills (Section 53). Although the Senate appears to have been modelled on the House of Lords in the United Kingdom, since 1911 the Lords can delay a Money Bill for only a month and then they become law without the Lords assent. Other Bills since 1949 can be laid for twelve months thereafter objections can be disregarded by the House of Commons. The Australian Senate cannot be bypassed in either of these ways.

6.4 In summary the Senate in Australia appears to have two major functions:

6.4.1 It is a House of Revue for the Bills coming from the House of Representatives; and

6.4.2 It acts as an investigating body through its committee system. It maintains a legislative oversight procedure on the bureaucracy on public spending and on general public matters. A series of Senate Committees was introduced from 1970 in Australia. In particular nine legislative and general purpose standing committees have wide ranging briefs to collect specialist knowledge for the Senate and to scrutinize government activity. Furthermore six estimate committees are appointed as each parliament begins to look into the budget allocations of several government departments. A committee collects information for the full Senate specially information from ministers in the Senate and from departmental officers putting the Senators in a position to debate the estimates on the basis of information which has been produced through the estimate committees.

6.5 It is possible that Australia, unlike Canada can have a hostile

Senate. That is a Senate which is different in composition from the House of Representatives. This can occur as a result of a number of factors:

6.5.1 Under the Senate's rotation system only half of the Senators go to the electorate every three years the other half would have been elected every three years prior to the membership of the Lower House; and

6.5.2 Under the Senate's proportional representation system the numbers of the major parties are more similar to each other and there may be small party or independent Senators elected. To give an example; after the general election in March 1993 seven Australian Democrats, two Independent Greens, one Independent Tasmanian formed part of the Senate.

6.5.3 The Senators are elected on a state wide basis, state by state or territory by territory as the case may be.

7. SWITZERLAND

Switzerland is described by many commentators as a Confederal State. In terms of Article 3 of the Swiss Constitution the cantons are sovereign in so far as their sovereignty is not limited by the Federal Constitution and as such exercise all rights which are not entrusted to the federal power. Residuary powers hence are situated with the cantons. Article 5 provides that the Confederation shall guarantee the cantons their sovereignty within the limits set forth in Article 3. It goes on to say that this guarantee shall also be in terms of the Canton Constitutions, the freedom and rights of the people, the constitutional rights of the citizens as well as the rights and prorogertives conferred upon the authorities by the people. Furthermore the cantons are bound to request the Confederation to guarantee their Constitutions subject to the following conditions:

7.1.1 The Constitutions contain nothing inconsistent with the Federal Constitution;

7.1.2 They ensure the exercise of political rights according to republican, representative or democratic forms; and

7.1.3 They have been accepted by the people and to be amended whenever the absolute majority of citizens so demand.

7.2 The Constitution provides a number of powers for the Confederation. Without specifying all of these, reference can be made to the following:

7.2.1 Article 31 BIS provides that the Confederation shall take measures to promote the general welfare and the economic security of its citizens. In doing this the Confederation may enact regulations on the exercise of trade and industry and take measures in favour of specific economic sectors or professions. In doing so it must respect the principle of freedom of trade and industry. However whenever justified by general interest the Confederation is entitled to enact regulations departing if necessary from the principle of freedom of trade and industry in order to preserve important economic sectors or professions whose existence is threatened, to maintain a sound peasant population and to encourage agricultural productivity, to protect regions the economyies of which are threatened, to prevent economically the socially harmful effects of cartels and to take precautionary measures in the view of times of war. In terms of Section 34 BIS the Confederation is entitled to legislate on a range of issues relating to labour law including the protection of the employees, the relationship between employers and employees and generally binding affective, collective labour and other agreements betweem associations of employers and trade unions etc. In terms of Article 41 BIS the Confederation is entitled to levy taxes on stamp duties, anticipate tax on income from moveable capital, taxes on raw and manufactured tobacco and special taxes affecting a person resident abroad to counteract fiscal measures by foreign states. In terms of Article 42 TER the Confederation shall encourage financial equalization amongst the cantons. In terms of Article 64 BIS the Confederation is entitled to legislate in the field of criminal law as well as in a civil capacity, on all legal matters affecting commerce, immigration, emigration, residence and the establishment of aliens.

8. THE PARLIAMENTARY STRUCTURE

Supreme power of the Confederation is exercised by the Federal Assembly which has two councils namely the National Council and the Council of States. The National Council is composed of 200 representatives of the Swiss people that are distributed among the cantons in proportion to their resident population, each canton and half canton being entitled to one seat at least. Elections to the National Council are direct taking place in terms of the system proportional representation with each canton and half canton forming one electoral district.

The Council of States consists of 44 representatives of the cantons. Each canton elects two representatives in the half cantons, each half canton

elects one representative. In terms of Article 84 the National Council and the Council of State shall deal with all matters which are within the competence of the Confederation (as specified above). Voting takes place by ordinary majorities.

8.1 By virtue of the existence of half cantons it is argued that Switzerland has a form of *Asymmetrical Federalism*. Three of the 23 cantons are divided into two half cantons which have almost the same rights and duties except that they have only one deputy in the Council of States as opposed to two and they count as half a vote in constitutional elections. The most relevant area thus of asymmetry is in the context of finance despite powers of taxation the cantons need to have grants from the federal authority. In order to calculate these grants the cantons are divided into three classes which are recalculated every two years namely rich, medium and poor cantons.

9. CONCLUSION

This memorandum attempts to provide some information for members regarding the two critical issues namely how to draft a Constitution to accommodate both central and provincial power as is specified in the Constitutional Principles outlined above and secondly the different roles of senates within the context of a federally structured society.