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CONSTITUTIONAL ASSEMBLY

MEMORANDUM ON FEDERALISM

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RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT

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1. 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).

2. 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.

   2.1 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.

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

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

   2.4 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.

   2.5 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 it's powers, boundaries and functions. Sub para (5).

2.6 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.

2.7 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.

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

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

2.10 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.

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

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

2.13 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.

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

2.2 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.

3. 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 it's 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.

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. 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 1 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 it's own legislative authority. [Article 72 (1)].

4.2 Although the Basic Law stipulates that Germany is an "Eternal Federation" this is generally been interpreted as referring to it's 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 it's 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's known as the direct representatives 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, it's Länder or the participation of the Länder in legislation shall be inagnisiable.

5. A significant variant of the German model can be found in the Canadian Constitution. In Canada 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 for a fairly generous approach to the ambit of the federal legislation.

5.1 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.

5.2 Canada also has a bicameral system. 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 it's 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 it's 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.

6. 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. However 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 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]