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TO :
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Adv A Cheskelson SC. - LRC.

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As discussed for your information &
comment.

Regards from Trick

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TO : Hassan.
FAX NO : 330 7119.
FROM : Fink Hayson.
DATE : 30/3/93

NUMBER OF PAGES (Including this one):

Hassan

After a discussion with J.S. at the consultative conference, I prepared this short memorandum for J.S. and MVM (who I thought might be interested)

It still needs a properly drafted formulae. Please pass on to Vall,

Regards

Fink

M E M O R A N D U M

^^

TO: JOE SLOVO AND VALLY MOOSA
FROM: FINK HAYSOM
DATE: 26 MARCH 1993
RE: ANC'S PROPOSALS ON REGIONS

Concurrent and Overriding Powers - A Possible Reformulation

1. *This memorandum assumes the ANC's framework on regional and central powers, but suggests an alternative formulation regarding the exercise and the powers of the centre to "override" legislation and the exercise of powers by regional governments.*

2. *The ANC proposal envisages that regional legislatures and executives, democratically elected, and acting within the framework of the constitution and the Bill of Rights will have the power to legislate and exercise powers in respect of discrete areas of social life - generally those areas of government more effectively carried out an a regional level. The exercise of these powers are however, subject to a provision which requires that they should not be repugnant to any legislation passed by parliament and further that the central parliament has full powers to override any legislation or action taken by the regional government. The purpose of this override is to establish a hierarchy of authority in respect of all those areas in which both central and regional government have concurrent jurisdiction. The only matters which would not be subject to this concurrent interest would be those that are demarcated as exclusively governed by the central parliament or executive, (e.g. defence, foreign affairs, certain financial matters etc.)*

3. *The question which will no doubt be posed to the negotiators is whether the ANC formulae allows for any aspect of regional government, in which*

to be subject to the exclusive jurisdiction (guaranteed autonomy) of the regions. This question was raised by Arthur Chaskalson at the Consultative Conference but no-one responded to it. Another way of posing the question would be to ask whether the ANC's constitution envisages any security for the function performed by regional governments. In other words, in the context of a plural democratic politics at a regional level (where parties campaign for election on the basis of policies regarding regional matters), is there any guarantee that a party different to that which is in power in parliament will not be frustrated by central government overrides when it attempts to execute policies in accordance with its mandate. It will be argued that the existing ANC formulation invests the centre with powers which it neither needs, nor intends to perform, or which it should not perform because it involves matters which are subject to regional political dynamics. (e.g. Waste disposal in Amanzimtoti or the siting of creches in greater Port Elizabeth or toll roads in Ellisras or other matters relating to the delivery of regional services).

4. Our response up till now has been to distinguish our model from the old provincial council system by claiming that our proposal envisages that the regions would have original (i.e. constitutionalised) powers and thus the centre would not be able to remove the functions or structures allocated to the regions. Parliament can merely qualify, limit or prescribe how these powers would be exercised. It could not entirely remove the power to build houses, it could merely prescribe how those houses should be built or build them itself. While this is jurisprudentially correct, an argument will be advanced that the ANC proposal, in reality, allows the centre to intervene so as to empty the regional functions of any meaningful discretion even as an implementing agent. The centre could so limit the powers of the region that there would be little meaning in regional politics. In short it will be argued our formulation envisages that regional functions will be exercised at the whim and the behest of the centre.
5. This critique can be met without deviating from our essential framework

by allowing for the override to be used insofar as it meets the purposes or objectives of the override. These purposes would then be incorporated into the constitution and would hence be justiciable. This is by no means a novel proposition. Such a formula exists for example in the German constitution. This does not make the formula a German formula as the German formula exists in the context of state governments (Laender) which have a long list of exclusive powers (including the power to sign treaties with foreign states).

6.1 What might such conditions be for the exercise of an override?
Our rationale for an override lies in the need:

6.1.1 for national reconstruction;

6.1.2 nation-building;

6.1.3 the removal of disparities as between regions or even within regions (as between citizens);

6.1.4 need for the establishment of frameworks within in which aspects of social life and entitlements common to all South Africans must be exercised;

6.1.5 to prevent an irrational multiplicity of policies managed by autonomous competing bureaucracies especially as regards fiscal, trade and related matters;

6.1.6 to prevent a racial or ethnic balkanisation of South Africa;

6.2 The CBM has in addition listed that the following leading norms in regard to the issues in which the state should have an override.

6.2.1 where it is a necessity for a state to speak with one voice or to act as a single unity;

6.2.2 where uniformity across the nation is regarded as important with regard to a particular function;

6.2.3 where minimum standards across the nation are regarded as important in the delivery of public services;

6.2.4 where it is desirable to guarantee a quality of opportunity or access to a government's service;

6.2.5 in regard to the power to protect the common market in respect of the mobility of goods services, capital and labour;

6.2.6 the power to arbitrate between the regions.

6.3 The German constitution allows for the exercise of overriding powers wherever the matter is applicable or of concern to all or several states. I would add that matters dealing with economic growth, fiscal and trade regulatory powers should be specifically mentioned but would be covered by some of the above propositions.

7. It should be mentioned that the right of the United States federal legislature to intervene in any matter which effects "interstate commerce" has, according to constitutional lawyers allowed the federal state to intervene in all aspects of governance to the extent that it is now regarded as having an override in almost all aspects of political and economic life. In short a formula appropriately worded would preserve the power of the centre to exercise its powers nationally and to safeguard its interest in ensuring that all regions exercise their powers in accordance with our overriding concerns.
8. Such a formula would mean, however that there would be matters that would fall outside central jurisdiction and, would, accordingly confer on the regions some degree of exclusive jurisdiction. This would obviously apply in respect of minor matters relating to local and regional government which a court might consider inappropriate for central intervention, i.e. aspects of a specific regional development

program. The CBM has suggested that matters that are peculiar to one region or a part thereof might be insulated from the override. George Bizos has also suggested such a principle. Also, where services are delivered at a regional level, the regional authorities should be held accountable at that level. This means the Regions might be granted autonomy in some aspects of service delivery. This is, in principle, compatible with our view that the function of regional politics is to deepen democracy, accountability and transparency at all levels of government. Albie envisages that it is in the area of execution of policy that a region should have autonomy. (I would personally hedge both the above propositions with some qualifications). It should however be envisaged that there will always be areas of dispute.

9. In short in my view such a formula would both preserve the interests of central government and confine its jurisdiction appropriately by not conferring upon it powers which it would not wish to exercise. Such a formula would not be inconsistent to our overall framework and the principles adopted at the ANC's Consultative Conference on Regions. For your information I attach hereto a copy of the formula used in the German constitution for the exercise of the override.
10. Should there be concern that regions will be able to exclusively regulate some aspects of social life and the central government might be unable to intervene it should be borne in mind that even these regional powers would be subject to the overriding values of the constitution and the fundamental rights enshrined therein.
11. In regard to the breadth of the override formulae proposed (some or all of the propositions in 6.1 and 6.2), I believe they can be justified by common sense, the apparent support of the business community, and, most importantly, the fact that the override will be exercised with the participation of regional representatives in parliament (whether in a uni-cameral or bi-cameral legislature through regional lists etc).

Note: This proposal is based on the assumption that the concurrent powers are

those set out in our policy document and do not include such matters raised by the NP and IFP such as policing, administration of justice etc. In regard to these issues concrete and specific arguments need to be advanced as to why they remained central, or at worst, centrally delegated powers.