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DRAFT DISCUSSION DOCUMENT ON REGIONAL POLICY
CONSTITUTIONAL COMMITTEE / DEPARTMENT OF LOCAL AND REGIONAL
GOVERNMENT & HOUSING
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This document provides the basis for a process of consultation that will culminate in a National Consultative Conference on Regional Policy in November, 1992. The formulations in the document arise out of a number of meetings jointly convened by the Constitutional Committee, and the Department of Local and Regional Government and Housing of the ANC.

While this consultation process is primarily intended for ANC structures, and the democratic movement in general, it is important to remember that the policy must work for as many South Africans as possible. The ANC policy approach to regions is that of building and re-uniting - not redividing - a nation.

SECTION ONE

INTRODUCTION

A Heated Debate

The debate on different levels of government in South Africa, and in particular on the degree to which regions should have autonomy, has become heated. The issues are not only what the powers and boundaries of regional and local government should be, but who decides, how and when.

Usually the debate is presented in terms that are both grossly over-simplified and quite wrong. It is said that the choice before South Africa is between a highly centralised state directing a centrally planned economy, allegedly the ANC position, on the one hand, and a highly de-centralised state with a free economy on the other, said to be the Pretoria position on the other. Both positions are misrepresented.

We in the ANC want democracy and development at all levels, and look forward to the private sector making an essential contribution to the nation's well-being. Pretoria, on the

other hand, is really interested in creating disguised NP-dominated homelands, even if this means wrecking the economy and even if it results in promoting population movements so as to concentrate potential voting support in regions of potential NP hegemony. If this were to happen, the bitterness of the past will re-surface in new forms, and just as Balkanisation is bringing disaster to the Balkans, so would its equivalent in South Africa tear our country apart.

We have no problem with the democratic principle that different parties can hold office at national and regional levels. Any healthy democracy recognises that people in a certain area might prefer the opposition party to the governing party at the national level. What South Africa would not be able to bear would be the creation of mini-states ruled by ethnically based parties and pulling in different directions.

Similarly, we are not too concerned with the labels 'unitary state' or 'federation'. Every unitary state has federal features and every federal state has unitary ones; the Federal Republic of Germany thus has a more centralised state system than the United States of America, despite their different names. Furthermore, in reality, in both those countries in all but a few relatively minor matters, legislation adopted by the national legislature will override laws adopted by the local states. What matters is the relationship between the different levels of government and how they all connect up in the total constitutional picture.

Our Objectives

The way that government is structured in each country will inevitably depend very much on its history and on what the purposes of government are seen to be. In the case of South Africa, we are involved in the process of knitting together the state again after the nightmarish dismemberments created by apartheid. We are trying to transform an oppressive state built on division and inequality into a democratic one that serves the interests of the whole South African nation.

Our goal is to enable everyone to live freely and with dignity anywhere in the country, and to create stable and efficient institutions so as to give the best possible chances for the development of democracy, peace and prosperity for all.

The ANC wants to

- * de-racialise our country, so that people can start to think of themselves politically as South Africans holding diverse views, and not as members of this or that racial, ethnic or linguistic group locked into corresponding political compartments;

- * progressively integrate, normalise and legitimise the structures of government so that these are no longer seen as instruments of oppression, division and corruption but rather as the means for enabling people to live in tranquillity and get on with and improve their lives;

- * discourage political mobilisation on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for purposes of ethnic domination, intolerance and forced removals of populations;
- * democratise our land, so that people are as directly involved as possible in shaping their destinies at every level of government;
- * minimise the possibilities of abuse of power which could result from the overconcentration of authority in too few hands;
- * reduce and eliminate the massive inequalities established by apartheid, by making resources available for the advancement of those oppressed and kept back in the past by racial discrimination and gender oppression;
- * progressively do away with the massive imbalances between regions and between urban and rural areas within regions;
- * facilitate the development of an integrated, efficient and internationally competitive national economy; and
- * enable people to take pride in their culture and language in a spirit of non- racialism, democracy and respect for the language, culture and beliefs of others.

Healing our country, creating the conditions for economic advance, establishing a climate of peace and tolerance and embarking upon orderly and sustainable programmes to improve the lives of the majority, can only be achieved by means of a national effort undertaken with a sense of national responsibility. We can never succeed if we have a multiplicity of conflicting policies carried out by a multiplicity of feuding bureaucracies.

Soft Boundaries

Underlying the whole presentation that follows is a concern for three fundamental and inter- related rights: the right to freedom, the right to democracy and the right to development.

The basic issue is not what powers should be reserved for the regions and what powers set aside for the central government. Rather, it is what the relationship between central, regional and local government should be in respect of the national, regional and local dimensions of the tasks that face the whole country. Thus, education, health, housing, employment, transport and economic development, all have to be conducted both at national and sub-national levels. The issue is not how to separate out exclusive competence for one level as against the other, but how to ensure appropriate responsibility and accountability at each level, and the harmonious interaction of all levels.

Following from this is the necessity to have soft boundaries rather than hard boundaries in relation to different levels of government. While we have to be rigid rather than soft on

basic constitutional principles such as multi-party democracy, equality and fundamental rights and freedoms, our institutional arrangements should be as flexible as possible so as to enable them to grow and adapt themselves in the light of experience. Thus, the provision of services should not stop at this or that hard boundary. Nor should responsibility for development be confined to one hard level of government or the other. Civil service, police and development structures should be designed with a view to harmonising and integrating rather than sealing off and separating their functions.

Interrelationship of Checks and Balances

Finally, the question of timing is important. We are totally against the prescribing of structures and powers of regional and local government in advance of the process of adopting a new constitution. We accept the general principles that there should be national, regional and local levels of government, that each should be democratically elected rather than appointed, and that the constitution should lay down the principles on which they are to be structured. It should go without saying that the general principles of the Bill of Rights enshrining universally recognised fundamental rights and freedoms should apply throughout the country at all levels of government.

Beyond this, we feel that the determination of regional structures and the spelling out of functions for the regions and local authorities, is something that should be done as part and parcel of the elaboration of the constitution as a whole. Apart from the fact that institutions created by structures that lack democratic legitimacy will themselves lack legitimacy, and hence be vulnerable to future attack, constitutions simply cannot be made in a piecemeal fashion.

The whole concept of checks and balances requires that all the checks and all the balances be known and be in place and interacting with each other at the same time. Certain checks and balances by their very nature cannot be created in isolation from other checks and balances. The new constitution will be an integrated package of interrelated rights, duties, mechanisms and procedures, not an assembly of constitutional spare parts.

Thus, the shape and nature of the regions relates to far more than the simple devolution of power from the centre. It affects the electoral system for the country as a whole (whether to have regional as well as national lists), the composition of the central legislature (there are strong arguments for an upper house based essentially on regional representation), amendments to the constitution (whether or not a certain percentage of regions have to agree to certain amendments), the role and functioning of state fiscal and monetary institutions (especially in relation to revenue collecting and transfer payments), the structure of the army, police force, and prison service, lines of responsibility and accountability in the public administration, and the structure and functioning of the judiciary.

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SECTION TWO

THE RELATIONSHIP BETWEEN THE DIFFERENT TIERS OF GOVERNMENT

In the South Africa Constitutional debate there is general consensus among the different political actors that a new democratic constitution for South Africa should provide for three tiers of Government - central, regional and local. There seems to be an agreement that each level of Government should be democratically elected, with certain specified powers and functions protected by the constitution.

In order to ensure that historical inequalities are redressed, citizens are equally treated and protected by the constitution, it is necessary that regional and local government operate within a national framework guided by the same set of democratic principles.

It is often taken as given that decentralisation will bring government closer to the citizenry and as such act as a buffer against an over centralised bureaucracy. However in practice decentralisation does not always yield the expected democratic and accountable results. This is one important consideration in stating, therefore, that the autonomy of regional and local government cannot be seen as absolute. For example, in South Africa governing powers were devolved to homelands which are regionally, and often locally based. This, however, has often brought repression - and not government - closer to the people.

Similarly, for purposes of co-ordination and reasonable uniformity in service provision, caution should be expressed against allocating powers and functions exclusively to a single tier of government. Hence the suggestion for concurrent powers among the three tiers of government. For example, central, regional and local government could play a role in the provision of educational and health services in their respective areas of operations.

In order for regional and local governments to carry out their functions effectively and efficiently they need to have an appropriate combination of political and fiscal powers. In addition, while central government has a role to ensure equitable redistribution of resources from poor to rich regions, it is equally important for sub-national governmental to co-ordinate development and strive to redress inequalities in their own areas of jurisdiction.

The Constituent Assembly Decides

We might add that there is growing support for the idea of relatively strong metropolitan government being established in the areas of greater Johannesburg, Cape Town, Durban, Port Elizabeth and possibly elsewhere. It would be unwise indeed to adopt rigid schemes of regional and local government that pre-empted balanced discussion of the desirability or otherwise of establishing such metros and ensuring that they take their proper place in the total constitutional scheme.

It is expected that, within the framework of clearly enunciated general principles of constitutionalism, democracy and non-racism agreed to in advance, there will be a considerable degree of give and take on all these questions at the Constituent Assembly (whatever the body might be called). This was the experience in Namibia, where the Constitution that emerged after extensive discussion was signed by every single participant at the constitution-making body.

The objective in South Africa will be to draft a constitution that has the assent and support of the overwhelming majority of South Africans with a view to creating a country in which the overwhelming majority feel comfortable and at home.

The question of regional and local government is a difficult one for any country, and particularly for one where apartheid has created so many false boundaries and divisions. The proper time and place for determining the precise structures and powers of government at all levels is after elections have been held to create a legitimate and widely representative constitution-making body, not before.

Transitional arrangements

In the meantime, all we are called upon to do is to make suitable transitional arrangements, bearing in mind that there are many honest civil servants whose interests have to be dealt with in a fair and practical way. In this respect, we propose that the four provinces are sufficiently familiar and are sufficiently capacious to provide the basis for progressive re-integration of Bantustans and homelands into the mainstream of South African political and administrative life, pending the adoption of a new Constitution.

Looking to the future, it is imperative that the ANC spearhead within the broad democratic movement the formulation of clear and concrete proposals on regional and local government for submission at the Constituent Assembly. The purpose of this document is to launch discussion within our organisation and amongst all anti-apartheid forces in a calm and scientific fashion.

Let the other groups allow themselves to present the whole question in terms of how best they can cling to power. Our task is to help determine how the new South Africa can be shaped so that our age-old dream of a united, open, prosperous, non-racial, just and democratic society can be realised. After the trauma of apartheid that, and no less, is what our people and the world

In dealing with the different tiers of government, a number of issues could be resolved in different ways. These are options that are currently under consideration in the ANC. One such debate revolves around the issue of metropolitan government. While South Africa currently has a number of metropolitan areas, it has no metropolitan governments. The ANC views the creation of metropolitan governments in certain parts of the country as essential to the cause of unifying, deracialising and democratising cities in addition to the more efficient and effective provision of affordable services.

Metropolitan governments, in places like Greater Johannesburg, Cape Town or Durban will necessarily be large, populous and relatively powerful. Because of their size, budgets and influence, there is a view that metropolitan areas should be treated as regional governments in their own right. As such, they would be seen to be part of the second (or regional) tier of government, with the same powers and functions allocated to them as other regional governments.

The contrary view sees metropolitan government as a form of local government, and accordingly located in the third tier - below regional government. To further complicate the picture, there are generally two levels (or tiers) of decision-making and responsibility within a metropolitan government: the metropolitan government itself, and the primary local authorities (or boroughs) within the area of its jurisdiction.

In dealing with the issue of regional government, the specifics of metropolitan government and its location will have to be the subject of further examination and debate. (See section 6.2 on page 29)

Insofar as the more rural areas are concerned, the ANC envisages the creation of larger geographical forms of local government: district councils. The similarity with metropolitan government lies in the fact that there would be two levels of decision-making, powers and functions within such district councils: that of the council itself, and that of the (lower-level) village or small town. However, the district council is seen as constituting part of the third tier of government within the overall constitutional framework. Further attention needs to be paid to the possible form and relationship between the third and first tiers of government - between local government, on the one hand, and the central state. While some are of the view that this relationship should be mediated by means of the regional tier of government, others hold

the opinion that circumstances will arise wherein a formal relationship outside of regional interference will serve a useful purpose.

Finally, it is worth recording the ANC's view that we envisage a significant role for civil society in ensuring that all tiers of government - and the relationship between such tiers - become and remain transparent, sensitive, accountable and democratic. In our conception, civil society embraces diverse bodies such as religious organisations, trade unions, civic associations, professional bodies, student organisations cultural groups, organisations of the disabled, sporting bodies and the women's movement. They would be independent of the state and their right to exist would not be dependent on the authorisation of the state.

At the same time they could collaborate with the state in securing the objectives of the constitution, particularly in relation to guaranteeing basic freedoms, securing social advancement, healing the divisions of the past and promoting religious, cultural and linguistic rights. Co-operation with the state, however, will not mean co-option by the state or subordination to it. These bodies must retain their right to criticise state actions, to demand improved performance, and to make proposals for reforms at all levels of government. Law-making bodies should be required to keep the public adequately informed on all matters affecting the public interest, and to make reasonable provisions for organisations of civil society to be heard in relation to matters affecting the rights and expectations of their constituencies.

SECTION THREE FINANCE AND RESOURCES

A critical component of the balance that needs to be drawn between the powers of central, regional and local government within the framework of a national, democratic Constitution lies within the vital role of finance and resources. In this section, the discussion document deals with this critical issue, seeking to examine the relationship between political decentralisation and the allocation of fiscal powers and functions between the tiers of government.

3.1 Fiscal Decentralisation

Given the importance of economic considerations and the fact that finance is in many cases the real key to political influence, it

is vital that the manner in which the new constitution deals with decentralisation of the fiscal system is coherent, and consistent with the desired structure of political decentralisation. It must be appropriate to modern economic conditions, seeking to enhance democratic accountability while ensuring that the public resources of the country are shared fairly amongst the whole population.

3.1.1 An emphasis on local control

The starting point should be a strong emphasis upon the need to strengthen local control over the use of public resources. This helps to ensure that usage is efficiently and appropriately tailored to local conditions. The link between paying taxes and receiving public services must be recognised as an important element in the strengthening of democratic accountability, and is most direct at the local level.

3.1.2 The constraints on decentralisation

However, there are substantial constraints on the extent to which the fiscal system can be decentralised. While these have always existed, they have grown more compelling in recent decades because of the rapid increase in the mobility of goods, people, services and information, and the consequent intensification of the national integration of the South African economy. Policies introduced in one part of the country quickly have impact on other areas.

Fiscal decentralisation must not compromise the capacity for the authorities to exercise sound management over the economy as a whole. A prerequisite, for example, of implementing effective policies to control inflation and unemployment levels is that the autonomy of decentralised government over taxation, spending and borrowing must not clash with effective overall management. Fiscal decentralisation should guard against allowing too many distortions to be introduced into the economy which prevent resources from flowing to best use. The more taxes differ across different areas, the more the flow of resources across the country will be inefficiently distorted. Allowing regions and local authorities too much power to distort economic conditions in their favour could lead to chaotic results as each authority continually tries to outdo its neighbours. If businesses are to compete effectively the extent to which regional and local authorities should be allowed to compete must be limited. Linked to this is the need to even the responsibility for redistribution across the country as a whole. Micro and macroeconomic distortions could arise if business and the wealthy

in some parts of the country are forced to bear a greater responsibility for dealing with the country's poverty and inequality than in other parts; or if the poor in some areas are treated worse than in others. It would also lead to inefficient and undesirable migration of both the rich and the poor. The need to place at national level key responsibility for effecting and co-ordinating redistribution is particularly important in South Africa given the severe spatial imbalance between the location of needs and resources. The level of inequality in the country compromises the extent to which accountability can be based on a direct relationship between payment of taxes and receipt of public services.

Thus, more important even than the call for 'one city one tax base' is the need for 'one country one tax base'. Balancing the extent of redistribution across the country limits not only the regional variations which can be permitted in the progressivity of taxation, but also constrains the autonomy which can be given to different regions over how resources are spent. To a large extent it is the nature of the overall package of public goods provided by the authorities which determines the extent of redistribution: for example, spending resources on ensuring good primary education for all has greater redistributive content than subsidising universities. By the same token, fiscal decentralisation should not compromise the capacity for coherent national policies on urbanisation to be implemented. Allowing regions to compete in making themselves as unattractive as possible to poor incoming migrants in the hope that they will go elsewhere will make coherent urbanisation policies impossible.

3.2 Technical constraints on devolving taxes

The nature of most of the significant taxes makes it impossible to give much power to lower tiers of government over how they are levied. For example, given the national integration of the South African economy, allowing VAT to be levied at different rates in different regions would lead to enormous administrative difficulties. Even where it is levied at the same rate, identifying in which region the many firms which operate nationally actually 'add value' would be almost impossible. For similar reasons company tax can also not be assigned to any particular region or locality; while assigning customs duties to particular regions would be very arbitrary.

Similar difficulties are to be found with income tax; it is often difficult to identify clearly where income is actually earned.

Furthermore, where income tax rates are different in different areas, ensuring that people don't register for tax purposes in low tax areas even when they live elsewhere would be a difficult policing task.

The problems of assigning fixed property taxes, such as rates, to a particular area are much less severe, making them much better candidates for devolution to decentralised levels of government. Some excise duties, such as fuel levies may also hold greater potential for decentralisation.

A distinction needs to be drawn between:-

- assigning particular taxes, such as mining taxes, to the region or local area in which they are supposedly generated, allowing each region to see its own rate; and

- assigning particular taxes, levied at a uniform rate nationally, to a whole level of government. In this case some formula would be required to ensure that the revenue is shared fairly between the different governments at that level.

In either case, consideration must be given to the way in which changes in economic conditions could interfere unduly in the relationship between different levels of government. For example, over recent years the contribution of mining taxes to the total tax pool in South Africa has declined very significantly, while the contribution of income tax and GST/VAT has risen. Had a particular level of government been dependent mainly on mining taxes, for example, its capacity to perform would have been severely compromised.

3.3 The need for fiscal transfers to effect decentralisation

The above arguments make it clear that, as at present, considerable national control needs to be exercised over the overall fiscal system, and that a large proportion of taxes will inevitably have to be collected at national level.

However, to accommodate a more substantial and effective decentralisation of political power that exists at present, better mechanisms will need to be found for transferring resources from the national fiscus to lower levels of government than have existed up till now.

These transfers will fall into two main categories. Firstly, where regional and local government is given responsibility for implementation of national policies, transfers will have conditions attached to ensure that national policies are indeed adhered to in implementation. Thus, within clearly defined nationally determined parameters, decentralised governments would be able to fine-tune the actual pattern of expenditure to suit local needs. The majority of transfers are likely to fall into this category.

Other transfers, however, would have far less stringent conditions attached, and would be

aimed at enabling lower tiers of government to implement policies in areas where the constitution gives them powers to act autonomously. These grants would have to take into account the capacity of various lower level governments to raise their own resources so that inequalities amongst regions and localities could be counteracted.

3.4 Institutions for managing fiscal transfers and the decentralisation of taxes.

Given that the way in which responsibility and control over the transfers is exercised affects the relationship between different levels of government, it would be unwise to leave such control entirely to central government. On the other hand, trying to fix in the constitution the detail of how transfers are made would tend to be either too vague or too rigid, or both.

It may therefore be advisable that there be created, by means of a Statutory Act of Parliament, a permanent Advisory Fiscal Commission structured on a non party-political basis in which certain powers for advising on the structure and mechanism of fiscal decentralisation would be vested. This Commission would be answerable to national parliament as a whole including the chamber in which the regions are represented at national level. Its powers should extend to aspects of transfers between all levels of government.

Its task would be to advise government how best to ensure that the allocation of taxes and transfers to the various levels of government takes place within guidelines laid down in the constitution. These guidelines must be consistent with the extent of political autonomy decentralised government is to have, and with the Bill of Rights. Such guidelines should ensure that transfers are made in such a way that lower levels of government are able to plan properly; that they are structured so as to enhance efficiency and local accountability and that they are open to clear and effective monitoring. The guidelines must seek to redress inequalities between regions.

The Fiscal Commission should have a say in granting powers of taxation to lower levels of government within this overall framework. This should be done in a way which enhances accountability and which allows lower levels of government some leeway to raise additional revenue to deal with their own specific problems. Finally, the Fiscal Commission could also play an advisory role in certain areas.

3.5 Resources, economic and the structure of decentralisation

An implication of the above structure of fiscal decentralisation is that because resources are to be collected largely on a national basis, and distributed by means of transfers, drawing boundaries to ensure that each region has similar economic strength becomes relatively unimportant. This opens the way for regional boundaries to be drawn on the basis of a wider range of criteria, including how regional representation can represent the regional diversity of the country at national level for the purpose of national policy making.

SECTION FOUR POWERS AND FUNCTIONS OF REGIONS

The critical issue in any framework for regional government is the relationship between, on the one hand, regional and central government and, on the other hand, regional and local government.

This issue is most sharply raised in the delineation of the powers of the region in regard to the powers of the centre. The proposed legal formulation is set out in the first annexure to this document. The formulation advanced in this proposal establishes that regional government will be empowered to exercise a law-making and executive power in relation to the areas listed in the schedule, provided that regional legislation will have no force where it is repugnant to national laws. Thus, in regard to its legislative and executive powers, the central state shall have concurrent and overriding jurisdiction.

Regional governments shall also have the powers to implement and administer national policy and legislation, when empowered by national legislation to do so. The areas designated as areas of regional government are the following:

- (i) The imposition of taxes in accordance with a national policy framework operating within guidelines overseen by a National Fiscal Commission. (See section 3: Finances and Resources);
- (ii) Education, other than tertiary education
- (iii) Health services including hospitals
- (iv) Welfare
- (v) Housing
- (vi) Transport, including harbours, airports and roads
- (vii) Markets and pounds
- (viii) Works and undertakings within the region, provided that if works and undertakings extend beyond the regional boundary, such works and undertakings may only be carried out with the consent of the neighbouring region or regions affected thereby.
- (ix) Traffic control
- (x) The environment
- (xi) Industrial and other development within the region
- (xii) Horse racing and gambling
- (xiii) Town and regional planning

(xiv) The imposition of punishment by fine, imprisonment or other sanctions for the contravention of any laws made in accordance with the provisions of this section.

(xv) All other matters delegated to it by Act of Parliament.

This simple formulation requires some further discussion to establish a clearer grasp of exactly what powers the ANC is suggesting that regions will have. It should be mentioned at the outset that, although this formulation favours the central authorities at the expense of the regional authority, it is not out of line with the constitutional devolution of powers in Germany and some other federal states. We may set out the powers of the regions as follows:

4.1 Regional Powers

4.1.1 Concurrent and Overriding Jurisdictions

The regions would be entitled to enact laws dealing with any aspect of the areas listed in the schedule, provided that the provisions of such legislation are not repugnant to national legislation. The central state would thus have concurrent jurisdiction in all these areas. It may be that there are a few areas where it is possible to argue exclusive regional jurisdiction but these would be so minor or qualified that there is little purpose in including such a category.

4.1.2 Original Powers

The powers of the regions would be original in the sense that they would be conferred on the regions by the constitution, not by statute or government. They may of course be removed, amended or augmented by means of a procedurally proper amendment to the constitution. The central state would not, however, be empowered to enact ordinary legislation which would effectively remove those powers. In other words, the central government may regulate those areas in which regional governments are competent but may not remove the region's right to deal with those issues. It may not, for example, prohibit the regions from building any houses or providing any health facilities.

4.1.3 Exclusive Jurisdiction

In respect of all matters not expressly listed in the schedule the central state will have exclusive jurisdiction to make laws, and to confer the authority and/or establish the agency by means of which such areas of government are administered. Examples of such areas are Foreign Affairs, Defence, Internal Security, Constitutional Affairs, Administration of Justice. The regions will not be able to make policy in these areas at all.

4.1.4 Delegated Powers

The region will be able to administer and implement national policy where empowered to do so by national legislation which may delegate both legislative and executive functions even in respect of non-scheduled matters.

4.1.5 Residual Powers at the Centre

The regions would not have any residual powers, that is powers to make and implement policy in respect of matters not expressly mentioned in the schedule. The central government would have such powers.

4.1.6 Power to Compel Performance

The central state can implement national policy within a region - even or especially when a region refuses to implement national policy when legislation authorises the regions to do so. In this proposal central government can, by legislation, compel regions to perform certain functions but would, of course, be limited by practical political considerations in attempting to do so.

Provision should be made to allow for central government to assume regional government functions where the region cannot, or refuses to, perform. This power should be limited to drastic cases of breakdown of regional government. It is envisaged that neither the regions nor the central state would have the power to dissolve regional governments, but regional governments will be responsible to the constitution as well as to the regional electorate.

4.1.7 Multi-level Jurisdiction over Scheduled Matters

It is clear that in relation to scheduled matters, all three levels of government may have as legitimate an interest and could perform some functions more appropriately than any of the other two levels. Thus, in both Health as well as Education, there may be national policy regarding qualifications, access, as well as funding. Regional government may be concerned with the location of facilities and the management of resources. Local authorities are the appropriate bodies to regulate and supervise the provision of services by hospitals and schools. Indeed there may be even a 4th level of function, for example, those performed by parents at the level of the educational institution. It is possible that problems could arise out of this situation. Central and regional government may have the power to build houses.

The central government could regulate not prevent the region from doing so. However, as in the past, these are not insurmountable problems and in the 'old' South Africa there were many examples of such overlapping jurisdiction notably in housing, transport and health.

4.1.8 Local Government

In regard to local government, the ANC has identified two options. On the one hand, it could be proposed that the law dealing with local government be in the form of a national statute. On the other hand, it may be possible to entrench local government in the constitution. This would protect some of their powers from the central state and the regions.

One of the issues that needs to be debated is whether the Constitution should spell out,

either in general terms or by means of a detailed list, the powers and functions of local government. An alternative would be to empower the National Parliament to adopt a Local Authorities Act which would elaborate such powers and functions, making suitable amendments when and where necessary.

Further, and whether the powers and functions of local government are constitutionally entrenched or merely legislated, local authorities could operate either under the ultra vires principle, which specifies the exact parameters of local authority jurisdiction (the current system), or be delegated a general competence to perform its functions.

In respect of the relationship between local and regional government, it should be noted that the national statutory framework would necessarily limit the powers of regional government in regard to establishing local government policies which are repugnant to the national framework. Regional government would still be able to pass ordinances in unregulated areas of local government. The regional executive counsellor in charge of local government would inter alia be responsible for ensuring that there was no corruption in local governments or for ensuring that elections were properly held. Such issues may be better dealt with by regional governments than by a central government. Local government powers, on the other hand, could be amended or increased through national legislation.

4.2. Functions deemed inappropriate for regional government:

It is necessary to mention some areas which the National Party proposals regard as within the competence of regional government.

4.2.1 Administration of Justice, Bill of Rights In our view, overall responsibility for the administration of justice, including the establishment and maintenance of regional and supreme courts, should be exclusive with the central government. While regional government will have the power to establish penalties for the breach of regional ordinances, it will be necessary to limit the power of regional government to, for example, institute the death penalty in respect of its region. We need a nationally integrated system of justice with full re-incorporation of the judicial structures in the TBVC areas. We cannot afford a multiplicity of legal systems with a multitude of Chief Justices giving different decisions in different parts of the country. Instead, we should maintain the present nationally integrated system, but in a deracialised and representative form while making provision for regional and magisterial sub-divisions.

Of course, the Bill of Rights will have national application and will override any regional laws and govern all acts of regional government. No regional government will be able to override these rights.

4.2.2 Law and Order

While the ANC endorses the principle that policing should take place in close collaboration with local communities who should assist in establishing the policing priorities for their areas, we do not believe in the establishment of regional police forces, save for the

possibility of establishing local traffic police.

Autonomous regional police forces create the possibility of private armies, linked to regional or ethnic leaders through patronage and capable of victimising regional outsiders. It is possible to conceptualise a system in which a single national police force is regulated by a statute which requires regional and local government supervision. This, however, is very different to disestablishing the SAP and reconstituting seven, ten or sixteen police forces. There are other reasons for the maintenance of a central police force - these include the fact that contemporary police forces require a degree of centralised resources and management - particularly in regard to training, the maintenance of centralised information, the combatting of organised crime, maintenance of internal security and the setting of uniform standards and disciplinary codes.

4.2.3 Other functions listed by the National Party as regional which appear to be exclusively or primarily national include:

Mining, Commerce Agriculture and Land

4.2.4 We must firmly oppose policies which perpetuate or reinforce the present situation, where we have five armies, 11 police forces, over 15 health and education departments and innumerable ad hoc committees. We are over-governed. Therefore, we should not confuse governance with accountability and democracy. We wish to avoid situations that arise in places such as Nigeria or the United States, where there is a vast, unnecessary and expensive bureaucracy at regional levels. The cost of such structures, alone, is sufficient to render them undesirable.

4.3 Fiscal Powers of Regions

It is clear that both regional and local government must have some powers to raise revenue. The National Party's recent proposals appear to give all power over taxation to the regional level. This is viewed by the ANC as unworkable, particularly in a modern economy such as South Africa.

In our view this matter should be dealt with in the constitution in order to prevent (i) all income accruing to the regions from whom the central state would have to request its apportionment, (the scenario envisaged in the National Party proposal) and (ii) disproportionate revenue raising capacity by richer regions, thereby perpetuating regional disparities. Provision is made for this by the proposed statutory creation of an Advisory National Fiscal Commission (see section 4: Finance and Resources).

Rather than define the diverse sources from which regional government would be entitled to raise its revenue, (eg, gambling tax and property tax), it may be more appropriate to set out those potential areas of income in respect of which the central state will have the prior or exclusive right to raise revenue. Usually the central state has the sole prerogative on personal income tax, company tax, customs and excise. On the other hand, rates and property taxes are more effectively and appropriately raised by local and regional

authorities.

As indicated in this proposal, the central state will have a prior claim on revenue and thus would be able to secure the preponderant proportion of taxes raised and thereby be in a position to equalise the distribution of resources as between regions. The regions would be able to raise additional revenue only after all distributions to the central revenue fund. This would empower the central authority, which will bear the burden of the cost of reconstruction, to set taxes at the levels it deems appropriate and, accordingly, limit the ability of the regions to further increase tax burdens.

However, it should not be the intention to entirely discourage regions from attempting to raise additional revenue to deal with their particular problems. Although it is envisaged that certain types of taxes - such as the current turnover tax and salary levies (the Regional Services Councils levy) - would be income which could accrue to the regional governments, it should not be necessary to specify this in the constitution.

A question which has not been addressed is whether the constitution should specify equalisation formulae, in terms of which income would be redistributed to poorer regions from richer ones ('financial transfers'), or whether this would take place through simple central government allocations in respect of its own programmes and practices. The issue is critical only where the regions are fiscally autonomous - as in Canada. As this proposal allows for central government to have concurrent and overriding fiscal and legislative powers it is not as critical.

4.4. Language

The regional council could specify the languages of record for the region, as suggested in the draft Bill of Rights and subject to language rights in the Bill.

4.5. Amendment of Constitution

An issue not separately canvassed here relates to the amendment of the constitution or, more specifically, those provisions dealing with regional structures and functions. Our proposal has been that regional powers be entrenched and would accordingly require a 2/3 majority of parliament to amend them. Such a majority implies considerable support for any amendment. It is likely that some parties will propose an additional requirement that all or 2/3 of affected regional councils also approve of the amendment. This would in our view confer double veto powers on minorities and would lead to frustration and friction. No decision to alter the original proposal should be made until the parliamentary structure has been finalised. This structure may in any event involve adequate forms of regional representation to cater for regional input e.g. regional lists etc.

4.6. Assent

This proposal sets out the procedure for the assent to regional laws or ordinances. It may be argued that the signature of the State President (rather than the Administrator) is

required for the valid promulgation of a regional ordinance. However, in view of the possible number of regions and the likely existence of a constitutional court capable of adjudicating upon the procedural and substantive validity of an ordinance, it is proposed that the administrator be empowered to assent to any regional law.

4.7. Politics, Accountability and Stability

It is believed that the formulation of the functions and powers of regional government should be designed to enrich political life through facilitating public participation, transparency and accountability in government at the levels at which it is most appropriate. It should not, however, disempower South Africans by fragmenting their resources and compartmentalising the citizenry's decision-making powers. The ANC is of the view that there is no necessary contradiction between the existence of regions and the project of nation building. It may even be suggested that regional government can enhance national stability and identity, provided that regional boundaries do not necessarily coincide with ethnic, racial, linguistic or other boundaries, and that the regional framework is not designed to perpetuate or create disparities between citizens.

4.8. STRUCTURE OF REGIONS

4.8.1 Number of Regions

Although no fixed boundaries or numbers of regions are specified in the framework, two options have arisen in the course of debate within the ANC. The first, contained in the original Constitutional Committee's discussion document, favours 10 regions. The second favours more regions, approximately 16. (See Maps in Appendices)

The ten regions are similar to the nine existing development regions, except that a tenth region has been proposed to give effect to a single Border/Kei region. The sixteen regions differ in one fundamental respect, in that all of the Metropolitan areas, not only the PWV, form separate regions.

The question of fixing precise boundaries is not the function of this discussion paper, nor of any single political party. The ANC envisages that this process will be undertaken by a Delimitation Commission after agreement on the basic number and siting of regions has been agreed. Detailed questions, such as the regional location of East Griqualand, would be left to this Commission.

It is the view of the ANC that this entails a process that could and should be utilised to foster understanding, unity, peace and reconstruction rather than conflict. Only a full and thorough process of consultation can adequately inform the debate and the decisions, thus avoiding expedient decisions in the short term.

It will be assumed then, for the purposes of visualising what the regions will look like in terms of physical size, administrative cost and political coherence, that the regional framework envisages between 10 (ten) and 16 (sixteen) regions. In contrast the N.P. is proposing 7 (seven) regions with greater, and more equivalent, human and economic resources. This, in turn, will manifest in a relatively greater degree of

decision-making and fiscal autonomy as compared with the ANC's envisaged framework.

4.8.2 Size of Elected Council

In view of the cost of maintaining between 10 and 16 regional governments, this proposal suggests a maximum of 20 regional councilors. This would mean a total of between 200 and 320 such councilors.

4.8.3 Elections by Proportional Representation

The proposal assumes that the electoral system will be the proportional representation 'list' system. All the reasons for opting for this system at the national level (viz inclusivity, exact proportionality between representation and support, the avoidance of conflict over constituency boundaries) would apply at this level. On the other hand, arguments for more direct representation through single member constituencies has been raised only in local government proposals where there are more compelling reasons for personal or direct accountability.

However, a sound case could be made for a mix of representation (direct and indirect) at both the regional and local government levels. Insofar as regional government is concerned, this could have the effect of ensuring that regional policies were responsive to local needs. In the case of local and especially metropolitan government, a mixed system could have the effect of unifying apartheid structures.

4.8.4 Regional Elections and Regional Constitutions should be set out in the Constitution

In a previous proposal these matters were to be left to a national statute to set out. Some parties at Codesa have argued that they could be left to the regions themselves to formulate or amend as in the U.S.A.

After reconsideration, this proposal asserts that the full framework should be set out in the National Constitution. The regions will thus have uniform provisions and powers. The situation in South Africa is not analogous to federal states created out of pre-existing autonomous states. At the same time, the democratic functioning of the regions requires to be protected by its constitutionalisation and thus would not easily be subject to amendments. The regional councils would retain powers to finalise the details of how they function and their rules of procedure.

4.8.5 Tenure of Councilors/Period between Elections

It is proposed that regional elections should not take place at the same time as national elections. By proposing a 4-year term (in contradistinction to the 5 year parliamentary term) such elections will generally take place before or after a general election. This will mean that regional issues will not be lost or submerged by national issues. However, the cost of separate elections must be weighed up against this possible benefit.

4.8.6 Dissolution

It is proposed that the constitution should provide that the regional councils should not be able to dissolve themselves (so as to frustrate central government) or be dissolved by Parliament (to undermined regional governments). In this proposal the only means by which a regional government will be dissolved is through the expiry of the period of office. It will be necessary, however, to incorporate within the constitution a provision which will enable the functions of regional government to be assumed by the central government where a regional government will not or cannot discharge its constitutional or statutory obligations.

4.8.8 Size of Regional Executive Council

It is proposed that the regional executive council be limited to five members in addition to the administrator. Under the old provincial government system the number of executive members was limited to four. In view of the large number of regions and the general expenses and benefits which will flow to REC members, it may be better to limit the number to five.

4.9 Administrator

It is proposed that the administrator be elected by an absolute majority of the regional council. In an earlier proposal of the constitutional committee, and in line with the previous practice, it had been proposed that the Administrator be appointed by Pretoria without regard to his/her acceptability to the council. This practice could well lead to disharmony between different levels of government. While such a system has been proposed in the interim government/constituent assembly stage, we propose that in a final constitution the electoral principle should apply to regional government.

4.10 Method of Composition of Regional Executive Council

It should be noted that the principle of collegiality (i.e. that parties be represented on the executive council in proportion to their representativeness in the council itself) will be argued by the National Party. This system once operated in regard to provincial councils and was abandoned precisely because it entrenched conflict and disharmony. Subject to a reasonable right of access to information for all members of the council, we believe there is no good reason for a proportionally representative regional executive.

It is possible to argue that the executive council should be

elected by the council and hold office at the discretion of the council or, alternatively, appointed by the administrator to hold either office at his/her discretion. In our view, this latter system could provide for a more effective executive. The administrator him/her self should be capable of being removed by the majority of the members of the council on a simple vote of no confidence. In this way the council would have supervisory control over the administrator and his/her executive council.

SECTION FIVE MANAGING REGIONAL POLICY IN THE TRANSITION

This document contains a variety of issues relating to regional policy for discussion within the ANC, and with the democratic movement in general. Whatever the final form and results of this consultative process, the ANC viewpoint will only be one amongst many that will be submitted for discussion and negotiation to the Constituent Assembly.

The difference between the views of the National Party and its allies, on the one hand, and the ANC and its allies, on the other, cannot be reduced to a simple "federalism or not" equation, but rather relate to how and which specific powers and functions should be allocated to the three tiers of government.

As we stated in the introduction, it is the relationship between the decentralisation of political power and the constitution that is of most importance.

It is the ANC's view, as articulated at the Policy Conference, that the details of the powers, functions, roles and boundaries of the regions carry such Constitutional importance that only a national and democratically elected Constituent Assembly should arrive at any final decision on the matter. The National Party Government, however, is of the view that the powers, functions and even the boundaries of future regional governments should be settled before a constituent assembly is elected.

This raises the important question as to how the matter should be dealt with between now and the election of the Constituent Assembly - the transitional period.

In order not to pre-empt the deliberations of the Constituent Assembly, the ANC proposes that the four existing and established Provinces with the 1910 boundaries be retained in the interim.

The ANC and the democratic movement in general is firmly committed to a procedure in terms of which a majority of the elected representatives of the people make binding decisions. We are committed to this procedure because we regard the principle of equal liberty - the principle that all adult citizens should have an equal right to participate and determine the outcome of political decision-making processes - as fundamental.

Institutionally, this fundamental principle requires the election of a representative body with