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FAX COVER SHEET

DATE:

20 OCTOBER 1992

TO:

ANC H.Q.

LEGAL AND CONSTITUTIONAL AFFAIRS DEPT

FAX NO: 011-3307119

ATTENTION:

ZOLA SKWEYIYA

URGENT

SUBJECT:

REGIONS DOCUMENTS

FROM:

ALBIE SACHS

TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE): |1



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Faculty of Law Fakulteit Regsgeleerdheid

20 October 1992

Dr Zola Skweyiya Constitutional and Legal Affairs JOHANNESBURG

Dear Zola

I write in great haste.

I received the draft paper on regional policy this morning. Because of ill-health, I could not turn to it yesterday and am therefore responding to it as you would like my views before it is circulated.

1. General:

This draft is based largely on the original of a couple of weeks ago, with a new introduction and changes following the regional policy conference from which I was absent. It should, in its introduction be more aggressive and refer to the fact that the ANC position on regions was in general terms made clear in our Discussion Document on Constitutional Principles for a Democratic South Africa of April 1991 and the February 1992 document on 10 Regions for a Democratic South Africa. We are therefore not simply responding to the N.P in a defensive way but in fact were aware of such a need long ago. We have to be aggressive about our objection to a bureaucratic, highly-centralised and impersonal central government.

2. Theory:

Secondly, since the draft begins with the "federal-regional" issues, we <u>must</u> spell out more clearly what federalism means, how many variations there are and what the implications of the DP, NP and Inkatha proposals are for locking wealth and power in different regions. As it is, our constituency will be confused if we talk about concurrent and original powers and do not refer to the federal arguments at all.

Thirdly, we should make it quite clear at the beginning, where the second half of the paper does, that the details about powers, competence taxation, areas are matter for the Constituent Assembly and will not be negotiated at Codesa-type negotiations but that our people are entitled to have a view in advance of elections. I like the section Two arguments very much but would have thought that some of the points made in our February 1992 document could have been incorporated here.

Details

- (i) The bottom of page 4 contradicts the text in paragraph 3.1.1. In fact, the regions will not have any exclusive powers. Why mention them, therefore, on p.4.
- (ii) It is absolutely vital that we should state clearly and unambiguously something we do mention on the text and this that no parliament or government will be able to abolish regional government as happened with the provincial governments in 1986. Such an entrenchment of regions is a safeguard but without prejudice to the central government carrying out functions if there is recalcitrance or corruption or inability.
- (iii) As far as repugnance of regional legislation to national legislation or policy is concerned, I am not happy that the Constitutional Court will resolve the matter. This introduces region-centre tensions, regions may pass such legislation to introduce constitutional crises and involve themselves in "barnstorming" experiences. The President should be able to rule on repugnancy, with an appeal to the Constitutional Court, at the behest of the region. There should at least be an option in the paper, rather than a categorical statement.
- (iv) On 3.1.8, it is not quite clear that a lay reader, who has not been privy to the debate, will understand the alternative to a national statute regulating local government. How do you entrench local government powers and if this can be spelt out, what powers? Re-think this section, please.
- (v) On 3.2, we should make it clear that apartheid has given rise to at least 5 armies, 11 police-forces over 15 health and education departments and <u>innumerable ad hoc</u> bodies. We are over-governed. Therefore, we should not confuse governance with accountability and democracy. We do not want situations as in Nigeria and the United States where there is a vast, unnecessary and expensive bureaucracy at regional levels. The cost if no other reason itself should be a major factor.

- (vi) Ombud We should draw special attention to the fact that our version of the Ombud will have greater powers than what has been proposed or is in effect elsewhere. This will enable corruption, maladministration and abuse of discretion at regional and local levels to be dealt with promptly and efficaciously.
- (vi) On 3.2.3, we should spell out why these powers are exclusively or primarily national. The real motive is to emasculate the central authority and to ensure that a national mandate to deal with reconstruction will not be able to be carried out.
- (vii) Affirmative Action there is no reference in the draft to the fact that the most orderly, systematic and peaceful way of overcoming the legacy of apartheid is by the adoption of affirmative action programmes concerning the transfer of resources, in education, employment and training. The experience of other countries has shown that although the actual programmes could be supervised or implemented at regional or local level, there must be national policies adopted by the national parliament. There ought to be, in my view, a specific reference to AA and its applications.
- (viii) 3.8.3 I like but it is not reflected in the schedule which deals with the election of the council. If a sound case for a "mix of representation" can be made out, then it is not made out. I like very much the idea of indirect representation but what this means should be spelt out. Pierre Cronje feels that regional bodies should be wholly indirectly elected. I am beginning to agree with this!

In any event, do we have to be so categoric about suggestions or proposals. Can we not provide alternatives?

- (ix) We must clearly and firmly reject proportionally elected regional executives. This is the N.P. version of powersharing which (on p.16) is alluded to.
- Finally, on the Fiscal Commission (para. 4.4)

 I think we will have to give much more thought to this and the implications of entrenching such a body. In Germany, much of the litigation before the Constitutional Court concerns the disputes arising out of the equalisation fund. Do we want this? Do we also want the Senate to be involved in its work. Is finance not the prerogative of the National Assembly? We cannot concede the right of the directly-elected body to surrender financial powers. There are many models for the

equitable transfer of resources/taxation or rate support or grant allocation and we should look at the formulae in countries other than Germany before we entrench such a hydra-headed monster.

It is a good paper which provides the basis for discussion. In general, I would tend to go in the direction of providing alternatives to our readers, be not too categoric (e.g. on metropolitan government) and draw attention to genuine problems which experts may agree on but which have not been put to our people. Finally, clarity takes precedence over the language of the expert.

Best wishes

Yours sincerely

Kader Asmal

He, Leveloper, localist and zonstitutionalists -

In general terms I like the Locument J. much, but feel the intro. is too swappy, that the doc. useds a fuller scene - setting and that the reader should be prepared for the rather technical language that follows In particular, we need to engage at the (Political / constitutional level) I've prepared a new Jutos that you night find useful allre

Proposed new dutio, to prepare the reader for the text

regions

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 poulation 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 ministates 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 Fedral Republic of Germany thus has a more centralised state 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.

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 eveyone 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.

We want 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;

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.

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 competences 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 to sealing off and separating their functions.

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 in its totality. 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 a 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 vulnrable 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 representatation], 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.

We might add that there is growing support for the idea of relatively strong metroploitan government being established in the areas of greater Johannesburg, Cape Town, Durban, Port Elizabeth and possibly elsewhere. It would be foolish 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 consitutionalism, 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 consitution-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.

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 groad 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 is what our people and the world expect.

PAGE 9.

3.1.6 - add at the end -

Regional governments will be responsible to the Constitution and to the regional electorate.

Page 29

4.8. "to administer the affairs of the region properly"
This is too wide.

securing the objectives of the consitution, 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.

Saw-naking bodies should be under a daw-naking bodies should be under a duty to keep the public informed in relation to all matters affecting the public interest, and to make reasonable provisions for organisations of zivil sorty and ugo's to be heard in relation to questions affecting the rights and expectations of their member

p. 25 st botton - reeds fuller formulation re 3 majorety and general principles P. 10 - We veek a rationally integrated system of justice, as at present, but de-rocialised and representative with regional and magisterial sub-divisions."

GET INVOLVED IN THE REGIONAL DEBATE!

The debate about future division of South Africa into regions has recently become urgent. Conferences are being held and the press is reporting on various regional proposals. In fact, Codesa 2 broke down over the regional question, and there is still strong disagreement over how and where a tier of government between national and local should be formed.

Where regional boundaries should be drawn and what powers and functions should be given to regional government are not simply technical questions to be worked out by experts. They are political questions, the answers to which will have a very real impact on the lives of all South Africans. We all need to get involved in the debate and give our opinions, especially about the needs and wishes of our particular region - after all, people who live in the region are in the best position to say what's best for them.

The aim of this pamphlet is to provide some background information and to ask questions which should stimulate debate about what type of regions we, as ordinary South Africans, think make sense for us.

THE PROPOSALS

Three main proposals have been put forward about future regions.

THE GOVERNMENT'S PROPOSAL:

The government recently held a conference, attended by the Nationalist Party, the Inkatha Freedom Party, and representatives of some of the bantustans, at which the following proposal for regions was put forward: (Comments are given in italics in brackets.)

- There should be seven regions (see Map 1).
- Regions should be autonomous, with constitutionally entrenched powers which cannot be changed by national government without consent from the regions themselves.
- Provinces, and each should have its own constitution, a Provincial Assembly, and a Provincial Cabinet chaired by a "premier". (In other words there would be seven full-scale provincial governments as well as the national government: altogether eight parliaments, eight sets of government departments and eight large bureaucracies. This does not even halve the present fourteen central government bureaucracies which exist: ten "homelands", one "general affairs" and three "own affairs" houses of parliament.)
- National government should be responsible for a very limited number of functions, i.e. defence, national security, foreign

affairs, and constitutional planning. Regional government should be resposible for agriculture, cultural affairs, education, finance, taxation and commerce, health, mining, nature conservation, police, roads, water and welfare. (This means that the government is actually proposing a federation. Each region would have a great deal of control over what happens within its boundaries, and the national government would have almost no influence over the policies taken in different regions. So if a region wanted to practise apartheid or spend all of its money on defence or casinos, the national government would have no way of stopping it.)

- Each region should be divided into "development areas" (i.e. sub-regions) in which "non-political councils" would "promote and administer" development. (In other words aovernment recognises that real development and improvement of people's quality of life cannot be implemented by regions which are as big as the seven they are proposing, and will have to be handled by structures that are "close" enough to the ground to understand the particular problems faced by different areas. This is a positive recognition. On the negative side, the government's proposal tries to depoliticise the development task, to separate development structures from major structures of government, and does not allow for all sections of the community to be involved in development and to be accounted to.)
- Because not all regions are wealthy enough to be financially autonomous, there should be intergovernmental transfers to make sure that all regions are able to carry out

their many functions. (However, the proposal does not make clear how these transfers will occur: the proposal gives taxation powers to regional government and not to national government, and regions may decide on their own taxation levels. This could entrench white privelege in some regions. Redistribution between regions is necessary to redress apartheid, and is only possible if national government has strong powers to tax and to redistribute national funds. No such powers are given to national government in the proposal.)

Note that the Witwatersrand is the only metropolitan area to be demarcated as a separate region (Cape Town, Durban and Port Elizabeth all form part of much larger regions), and that Pretoria has been separated from the Witwatersrand and included as part of the Transvaal region.

THE TEN REGIONS PROPOSAL:

In February of this year the ANC Constitutional Committee published a proposal for ten regions (see Map 2). The proposal advocated "strong national government, strong regional government, and strong local government" without being specific about what functions would be carried out at which level. It is clear though that the ANC's proposal envisaged national government having many more powers and functions than those given to it in the government's proposal.

However, when the ten regions proposal was discussed at the ANC's National Policy Conference in May, it was not accepted. Some people felt that the proposal did not fully address the need for regional authorities to play a key role in development, and there was also concern that incorporating whole bantustans within regions was a recipe for future ethnic conflict. Of particular concern was the question of regional boundaries. The ten regions proposal uses regional boundaries which correspond more or less with the "development regions" which were introduced by the government for "development" purposes in 1982 (see Map 3). These nine regions (called Regions A, B, C, D, E, F, G, H, and J) are often thought of as Development Bank of Southern Africa regions, as the Development Bank was established at the same time as they were introduced, but they are in fact Nationalist Government regions which were set up in an attempt to integrate South Africa into one economy without weakening the bantustans

politically.

Given the importance of the decision about regions, it is essential that the issue is more widely debated before a decision is made. As part of the ongoing debate, we are discussing the pros and cons of various regional options. The following proposal makes the question of development central to the political debate:

DEVELOPMENTAL REGIONS:

This proposal aims to unite South Africa while recognising regional differences. It recognises ethnic diversity but fragments the formal structures of the bantustans and diffuses the potential for ethnic mobilisation. It offers a way to redress apartheid through national policy and redistribution of national funds, while giving a direct voice to regions in identifying their priorities, implementing programs and increasing accountability. It focuses on the needs of the majority - raising quality of life - and concentrates on reconstruction rather than reform.

- There should be a minimum of fifteen.
 (For an example of what fifteen regions might look like see Map 4.) The final number and positions of boundaries will depend on the consultative process with the regions themselves.
- The main function of regional authorities should be <u>development</u>, and therefore regional authorities do not need lots of legislative (law-making) and taxation powers, and there is no need for grand regional parliaments with cabinets and regional "prime ministers".
- National government must be strong, so that there is a clear national framework in which policy implementation takes place, and local government must be strong, so that people have control over their day-to-day lives.
- Regional authorities should get some of their funds from taxes which they impose themselves, but most of their funding will have to come from national government. If regions are responsible for setting taxes, some regions might compete to give the lowest taxes in order to attract businesses and wealthy people. If rich regions have low taxes, there will be migration to those regions unless there is some form of influx control. If rich regions have

high taxes, businesses and wealthy people will simply leave and go to other regions, thus removing the regional authority's source of funds. Either way, if regional government and not national government is given the power to tax, it is the poor and the undeveloped regions which lose out: most taxation must happen at a national level.

- Regions need to be quite small in order for regional authorities to play an effective role in development. Small regions are in a much better position than large regions to identify the most important development problems that face them, to concentrate resources on solving these problems, and to involve all sections of the community in development in an accountable way.
- Metropolitan areas should form their own separate regions. If a region includes a metropolitan area (a large city), one often finds that most of the resources and energy go into solving problems in the

metropolitan area, rather than the small towns and the rural areas. This is because the majority of the people live in the metro area; they usually have a stronger "political voice", and can make their demands felt more strongly. Wealth does not "naturally" move from rich to poor, or from urban to rural - spreading wealth always involves a struggle. Rural areas should be separated from metropolitan areas when regional boundaries are drawn, so that rural areas can demand national resources straight from the national government and don't have to compete with a domineering metropolitan interest group within their region.

Thus, the four metropolitan areas in South Africa (Cape Town, Port Elizabeth, Durban and the PWV) should each form a region on their own, and rural areas should be divided into regions according to different types of environment, agriculture, economy, traditions, history, and most urgent development needs, as well as according to people's sense of regional identity.

QUESTIONS TO THINK ABOUT

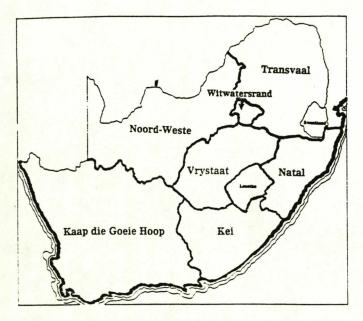
Now that you have some of the background information, please start thinking about the regional debate and about how different regional boundaries, powers and functions may affect your life in the future. All political parties agree (at least in theory) that regional boundaries must be drawn in consultation with people on the ground, so its important that different regions come to positions about where they wish their boundaries to be. For the ANC as a whole it is important to have a clear position on what the powers and functions of regional governments or regional authorities should be. We hope to send out a questionnaire shortly to canvas opinion of people in different regions, but meanwhile here are some facts about "Region A" and then some questions to mull over.

The region that is currently known as "Development Region A" is similar to the government's proposed "Cape of Good Hope" region and to the ANC's initial proposal of a "Western Cape" region.

- A Region A is a very diverse region and consists of different areas with very different characteristics. Some of these areas are: Namaqualand, the West Coast, the Northern Cape, greater Cape Town, the Overberg, the Boland, the Karoo, and the South Cape.
- ▲ There are over four million people in Region A, and most of them (about 80%) live in the Cape Town metropolitan area (greater Cape Town).
- Just over half of the people in Region A are so-called coloured, and about a quarter each are African and white.
- A Region A is quite rich: it produces about 13% of the total product produced by South Africa every year while only about 10% of South Africa's population live in Region A.
- ▲ Of people employed in formal jobs in Region A, 30 % are in civil and domestic service, 21% work in factories (i.e. manufacturing), 15% in trade, 14% in agriculture, 12% in transport, finance, electricity and water, 8% in building, and only 1% in mining.
- ▲ In greater Cape Town most people work in manufacturing, trade or services. In the more rural areas, agriculture is the main employer. The kind of agricultural products vary greatly from area to area, for example, sheep farming is most important in the Karoo, while fruit growing dominates in the Boland. Mining is important in Namaqualand.

Some of the questions that need to be answered by people in each region before we can decide where regional boundaries should be drawn, and what regional powers should be, are: What are the most important development needs in the area where you live? How similar are they to the needs of people in other areas? Is equal attention and money given by the government to all areas of the country? If not, what might the reasons for this be? What level of government should take decisions about development issues like housing, education, health, roads, job creation, and so on? Should the metropolitan area and the more rural area be put together in one region or made into several different regions? What do you think is a sensible regional boundary for your region?

MAP 1: THE GOVERNMENT'S LATEST PROPOSAL



MAP 2: THE TEN REGIONS PROPOSAL

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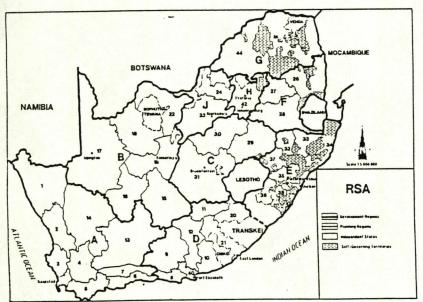
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MAP 3: THE GOVERNMENT'S NINE "DEVELOPMENT REGIONS"



MAP 4: DEVELOPMENTAL REGIONS

