

MEMS2COD

This memoir is being dictated on 21 October 1994. It is produced without consulting documents so there might be errors in sequence and detail. It is not to be used in any way in any litigation.

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I was part of a team of ANC legal advisors involved in preparations for CODESA. At that stage it was not called CODESA 1, it was simply called CODESA. I was appointed to a committee that had the task of drafting a Declaration of Intent. This would establish the basic principles guiding CODESA and be the foundation of future negotiations on a constitutional settlement. The text of the broad principles underlying CODESA was important and we battled over the detailed formulations. Yet the most important issues related to whether or not a Declaration would be binding on all the participants arrived at.

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Decl. of Intent  
Mandela  
Ramaphosa  
DVD (2/2)

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The documents will indicate who the members of this small drafting committee were. I can recall a relatively large meeting at which each of the potential CODESA participants was represented. I think Zola Skweyiya represented the ANC and I was his technical back-up. At some stage Rowan Cronje was being quite aggressive, interjecting as though he were in a rowdy Parliament. I think M J Mahlangu was in the chair. Zola interrupted on a point of order and demanded that the Chair restrain Rowan Cronje and that we have orderly debate without interjections. The Chair rebuked Cronje who calmed down thereafter and generally, although representing conservative and obstructive positions, conducted himself with due decorum. I regard this slight incident as one of the important moments in the whole process. Zola was firmly insisting that things have changed in South Africa. Now of course we take the new relationships for granted. At that time the self-confidence and assumed superiority of those who had been in charge of the structures of government was still very pronounced. I should mention that in planning for CODESA 1 we found it necessary to deal with balanced representation not only in the forum itself, but in relation to security (this came as quite a shock to the other side), controlling finances, administration, and even protocol. This was not going to be a meeting with government on government ground in an atmosphere of government control and where all behind the scenes were made by the government. We had to fight hard

and insistently to get these points accepted. It was not simply a question of symbolism. It was part of preparing the country and ourselves for psychological and practical transformation.

In any event the larger task force that had responsibility for drafting a Declaration of Intent appointed a drafting committee of about 7 members. I think that the members were Mahlangu from the United Peoples Front (Lebowa), Colin Eglin, Tertius Delport, a white doctor from the Ciskei, myself and someone from either Venda or the Transkei.

The hottest debate in terms of the text was whether to say that South Africa should be a non-sexist as well as a non-racial state. I was insistent on the term non-sexist. It had great significance to large numbers of members of the ANC and also to women outside of the ANC. Tertius definitely did not like it and neither did the Minister of Health from the Ciskei. Colin Eglin also felt that it was not necessary to use such an imprecise phrase. I recall the two African men on the Committee strongly supporting the inclusion of the term. Both said: "Our women have suffered a lot in South Africa. We should put it in." We were split roughly 3/3 when Colin, seeing that it was important to us and not having violent objections, said in his rough but friendly way: "Oh well, let's put it in. We don't want to spend all day fighting over it."

We were of course working under great pressure of time. After the meeting Colin and I rushed to the administration to get the document typed and Colin said to me: "Let's get one of the girls to type it up." I responded: "Oh Colin, that girl you are referring to is Janet Love who has just spent 5 years in the underground. I don't think she would appreciate being called a girl." The next day when we had to get another document typed Colin said: "Let's get one of the ....., he hesitated, .... "one of the lassies to type it." And I said: "Colin, can't you say one of the typists?" We managed to retain the phrase non-sexist right through until almost the end. It was quite clear that a large section of the ANC and the organisations that supported the ANC firmly wanted the phrase to appear. It was also clear that the Government and most of its block were extremely unhappy with it. In the end I believe that the phrase was replaced in the final text of the Constitution at the instance of the Technical Committee responsible for drafting the Constitution. I understand that the argument was that the terms non-racial and non-sexist were expressed in the negative and did not convey positively what was required in constitutional terms. In the end the Preamble to the

Constitution speaks of "A state in which there is equality between men and women and people of all races." This is a very positive statement and it puts equality between men and women on a par with racial equality. From that point of view it represents a major achievement in relation to the emancipation of women. At the same time the term non-sexist has taken on special significance for the women's movement in South Africa and its deletion represented something of a retreat. It is one of those issues where you have to have someone on the spot doing battle for the term. Once it is eliminated, the onus is on you to get it in. This becomes difficult when you are looking for consensus and people say we have an alternative formulation that everyone can agree to. Non-sexism in fact is much wider than simply anti-discrimination. It deal with all the visible and invisible forms of subordination, marginalisation and oppression. However, the concept of equality if fully developed would be broad enough to deal with all these aspects as well. To my mind the ideal would have been to have characterised South Africa as a non-racial and non-sexist state in which equality between men and women and all races was to be achieved.

I doubt if the other members of the committee would say that this was the sharpest debate. In fact we laboured over many versions of the text. The ANC produced a draft (we always worked on the basis of a mandate). The NP produced a totally different draft in which there was a very strong emphasis on diversity and protecting the interests of all groups. Both these texts should be in the documentation. I remember pulling out some phrases from the Government text and amalgamating them with the ANC text to produce the final draft. The ANC was never against acknowledging diversity. On the contrary, the Freedom Charter has a whole section based on accepting language, cultural and religious diversity in this country. These principles are also found in international law. What we were against was the ascription of political rights on the grounds of language, culture or race. At a later stage the Government attachment to group rights came out in a new form namely power sharing at the level of Government, the creation of a special Senate that over-represented minority groups and various forms of constitutional veto. These measures were advanced in relation to political parties and not to race or language groups but the effect would have been similar and the intention was certainly to give representatives of the white Afrikaans-speaking community an equal say in all decisions and a veto over all future government policy and action. Our answer was that minority rights could be protected in other ways more consistent with democracy, namely

proportional representation so as to allow all groups to form their own parties and get appropriate representation; a strong Bill of Rights acknowledging rights to use language and rights of cultural and religious expression; and a broad constitutional principle acknowledging the diversity of South African society. We had to balance out the unity of citizenship, the integrity of the South African state and the basic equality of rights and duties, on the one hand, with the need to recognise the diversity and multi-cultural character of the South African nation. In essence we rejected the concepts of bantustans and race federation, while keeping open the possibilities of federalism within a single South African state. Looking back now I am sure that the Government strategy was to lock us into negotiations by getting agreement on broad principles which were internationally acceptable and then to spin the negotiations out for several years while attempts were made to undermine the cohesion of the ANC and to get the broad population to forget the days of formal apartheid so that the first elections would not be regarded as Uhuru elections. Even getting agreement on the broad principles however was not easy. The text which Delpont presented was a torturous one. Even although we took passages out of it (or possibly out of another Government document) Delpont chopped and changed. At one stage he indicated that he was happy with a consensus text that Colin Eglin had formulated on the basis of a text of mine which in turn included a passage from a Government proposal. Delpont indicated that he would fax his final agreement over the weekend. In the end the fax represented a brusque return to his original formulation. Delpont was not an easy person to negotiate with. He had a likeable and pleasant side where he both embraced internationally accepted progressive ideas and displayed a friendly and conciliatory manner. But he could also become suddenly sour and be both intellectually dogmatic and conservative and waspish in his manner. I have been pleased to see on television recently that the cooperative and expansive side of his nature seems to have come to the fore in his work on the Eastern Province MEC. Some time after the events I am describing I met up with him and Frank Mdlalose at a conference sponsored by the Economist in London. On the platform they both went for me tooth and nail. I found it unedifying for British business people to see South Africans squabbling and so preferred simply to advance ANC policy without referring to either the IFP or the NP. Immediately afterwards Tertius and I went by taxi to Bush House to do an interview for BBC Radio. On the way we drove past Trafalgar Square where Tertius told me he had met his wife when he was leader of an Afrikaans Studentebond tour to London and she was one of his party.

It was an affectionate and sentimental reminiscence on his part and I was happy to be introduced to his wife who greeted me with genuine charm and appreciation. When I see Tertius on the TV now I always think of the two sides. The last time I saw him was in what was called a Bilateral between the ANC and the Government right at the end of negotiations at Kempton Park. He was responsible for the section on local government. It was one of the last sections to be agreed upon. He was sour and he actually said to us at the session: "If I look sour and unhappy it is because that is how I feel. I don't think that the solution we have arrived at is the best one but I feel compelled to go along with it." It was quite clear that he had been overruled by De Klerk and whoever it was that took decisions and that Roelf Meyer was a pleased that a solution had been found as Tertius was unhappy. He featured again during the breakdown of CODESA 2 - I will deal with that in another memoir.

It was at this stage that Cyril Ramaphosa emerged as the key coordinator and strategist on the ANC side. At one of our planning sessions somebody raised the importance of the CODESA decisions being binding on the Government and all participants. What we didn't want was simply a statement of principles that would have no force or effect. In a way this was a challenge to the legitimacy of the Tri-cameral Parliament. In terms of the existing Constitution only Parliament could bind the Government. Here we were asking for negotiated agreements to bind Parliament. In technical terms we accepted that the agreement would be morally and politically binding on all the signatories and that since these signatories included a majority in Parliament, they would accept to be bound to take the necessary legislative steps to give full legal backing. This perspective acknowledged that Parliament still had a role to play and that there would be a continuity of constitutional government. It was at this stage that ANC people would say: "Comrade Albie, what does the word hiatus mean. The Nats keep saying we must not have a constitutional hiatus. " I think some of them felt that if the Nats didn't want it it was something we should fight for. I explained that a hiatus simply meant a gap where nothing existed and that we were not against continuity provided it led to democracy. I think I was the one who raised the question of the binding nature of the Declaration at the plenary meeting where the text of the Declaration was being discussed. If I remember correctly, the Government to-ed and fro-ed a lot on this question and it was only at the very last minute after a tense telephone call between Mandela and De Klerk that they finally agreed to accept that appending a signature meant

accepting a binding obligation. Let me stick in a word here about these phone calls between Mandela and De Klerk. We did not like them. Somehow Madiba seemed very pleased at what he felt he could achieve by personalised diplomacy. We never ruled out the importance of person-to-person contact for resolving a whole lot of questions in a short space of time. But we were unhappy about the unstructured way in which they occurred and the feeling behind them that somehow major issues confronting the country could be solved by two individuals. I think one of the reasons why Madiba was so angry with De Klerk at CODESA 1 was that he sensed that he (Madiba) had put himself out at the risk of distancing himself from the ANC mainstream by accepting De Klerk's assurances on trust. Thus when De Klerk reneged on an agreement not to discuss MK at CODESA, Madiba felt specially indignant and betrayed. I must say that the more negotiations proceeded the less did Madiba rely on personal diplomacy and more closely did he work with the structures of the ANC. In an interesting way his personal standing and charisma seemed to increase the more he worked with the NEC. On the other hand when he tried initiatives on his own sometimes the result was to increase his stature in the eyes of editorial writers in the daily newspapers but to diminish his standing in the ANC itself. I think some of the problems in the early period (1990/1991) stem from the fact that the ANC was having to adapt to drastic new situations. The leadership was reconstructed in a rather arbitrary way out of a core from Lusaka, a strong leading sector from Robben Island and a number of people with a UDF background. The 1991 Conference in Durban was definitely a turning point. It was there that a manifestly legitimate new leadership core was established. It was there that a couple of thousand delegates spent day after day thrashing out basic political questions. What had not helped until then were comparisons that many people were making between the leadership styles of Mandela and Tambo. Tambo had developed a very special manner of involving the widest sections of the movement in debate before expressing his own views. He had a particularly delicate manner of making everybody feel listened to and appreciated. You often did not know what his own personal preferences might have been. He was never afraid of confronting questions of principle but always sought through prolonged discussion to get consensus. In the period 1990-1991 it was not uncommon to hear middle and even senior ANC people commenting negatively on what they called Madiba's presidentialist style of work and lamenting the illness of OR which prevented the more parliamentary mode which they preferred. As I say, things got much better after the 1991 Conference and although Madiba did take a number of important political initiatives he always reported

back to the NEC, explained his positions and received a mandate for them. If I were to single out some of these initiatives I would highlight the work he did on developing the Patriotic Front and, later on establishing connections with the Afrikaner right wing. In both cases he used his extraordinary personal and diplomatic skills based on an extraordinary life, to develop an inclusive, national vision. In both cases it meant dealing with people whom the majority of ANC members considered reactionaries and with many of whom there had been intense conflict in the past. Yet I don't recall any major sense of opposition or having been let down in mainstream ANC circles in these respects. What had worried people were the direct dealings with De Klerk and the approval that came from sources that had never close or sympathetic to the ANC. By the time the election campaign started the relationship between Madiba and the NEC was an extremely warm one. The combination of the RDP and the active way in which he went about the Meet the People tours created a degree of love and affection and a sense of unity that was very powerful. I might mention in passing what turned out to be a small example of a Mandela initiative that misfired completely and that could have been damaging if he had not had the capacity to listen to the NEC. It must have been about half way through the negotiation process that he startled us all by proposing that whites should have guaranteed representation in Parliament in a way not dissimilar to what had been done in Zimbabwe. I can recall stating at an NEC meeting in a light-hearted way that our President had succeeded in uniting the whole country - absolutely everybody was opposed to his proposal! The Nats didn't want it, we didn't want it. I think he genuinely respected us for speaking our minds on these questions. He is a proud person and certainly at the Consultative Conference at the end of 1990 we saw him in a mood where he was fairly stunned and wanting to trade blows with his critics. But in the last couple of years he would say to us sometimes. "Well I tried to tell you and you wouldn't listen to me". But much more in sorrow and never in anger. We had a very tough couple of sessions with him over the question of minimum voting age. We never persuaded him that 18 was the appropriate age. I am sure that his concern was to make the youth feel part of the political process and to stem what could have been a dreadful rush to anarchic positions. Yet international precedent and the need for not overplaying the ANC hand in negotiations meant that his positions were completely unsustainable. All I can say is he went down fighting. This was a case where the NEC overruled the President in respect of an issue where the President chose to make a stand. I suppose the outcome was the best in the



circumstances - the 18 year principle was accepted in practice and Madiba had sent a strong signal out to the youth. I should add that at all NEC meetings he was extremely correct and courteous and during the breaks he always found time to make each and every one of us feel appreciated. I was once having a doughnut during a coffee break when I felt a heavy slap on my back. It came from my blind side and I swung around preparing to give whoever the comrade was a crack back with my fist. Fortunately something made me hesitate. I turned round. It was Madiba with that huge and embracing smile that he has. If there were special matters where he felt an individual member of the NEC could contribute he would always ask us to meet him during one of the breaks. For several NEC meetings he occupied the Chair. This was not satisfactory since his attention was taken up with ordering the discussion rather than perfecting on it. Someone must have spoken to him because after a while the Chair was given to Walter Sisulu or else to Thabo, sometimes to Zuma. We all felt much happier when Madiba listened in like the rest of us and then chose his moment to make an intervention. At one of the very early meetings of the new NEC he spoke at some length on a number of important issues fairly late in the proceedings. One of the NEC members stood up and bravely said that he appreciated very much the fact that the President was laying his thoughts before the NEC and that they raised matters of deep importance for the whole movement. This member said however that he disagreed with some of the assessments and felt that the NEC should be given the President's presentation at the beginning of proceedings so that because of its importance every issue could be fully discussed. We were all wondering how Madiba would take this comment. During the next break he went up to the comrade concerned and engaged him in friendly talk as if to say that he appreciated the candour of the comments. So it took a little while for the relationship between President and NEC to fully establish itself but certainly by the time of CODESA 2 the connection was a warm, friendly and productive one. I am sure that Madiba's cold explosion at CODESA 1 helped to remind membership at all levels that his heart beat with a passion of a patriot and that however conciliatory he was he would never settle for less than full democracy.

To return to the Declaration of Intent. Once it was made clear that Parliament would have the final say in terms of making a CODESA agreement legally binding but that the parties with the majority in Parliament would guarantee the Parliamentary approval would be just a formal process, the

binding nature of the Declaration of Intent was accepted by the Government.

The question of how decisions were to be taken proved to be most difficult. The idea was to make CODESA as inclusive as possible and what later came to be called statutory and non-statutory organisations were all to be included. This meant Rajbansi's Minority Front, or whatever it was called at the time, had the same degree of formal representation as the ANC or the NP. There was just no way in which different organisations could be weighted one against the other. It was meant to be an all-in process. I think there was some discussion at a certain stage about including trade unions and other bodies from civil society but in the end they were all excluded, although at a later stage special representation for traditional leaders was permitted. The problem then was, with a proliferation of parties, organisations and administrations, many of which had dubious histories and represented hardly anybody, how were decisions to be made. The establishment of the Patriotic Front to some extent helped to rally many of the Homeland parties and governments broadly behind ANC positions. It was the reneging by the PAC on Patriotic Front agreements that contributed to the marginalisation of the PAC with the result that when they withdrew from CODESA no-one followed them. Yet, a rough count indicated that of the 20 or so participants at CODESA about half allied themselves broadly with the ANC, about one third broadly with the Government, with the remainder oscillating between the two. In the early stage the Democratic Party played a particularly important role because it was not directly aligned with either group and because it had considerable prestige in the diplomatic community and with the Press. It was accordingly useful for either side to claim that their positions were being supported by the DP. Colin Eglin in particular made an impressive personal contribution towards setting the scene for CODESA 1 and getting agreement on the text of the Declaration of Intent. This was the first time that I had worked with Colin. I found him to have a most acute political intelligence with a capacity for clear explanation on constitutional questions which few lawyers seem to possess. Somehow we lawyers are so submerged in set formulae that we often lose the conceptual essence of the matter. Frequently I found that Colin Eglin who is a quantity surveyor and Valli Moosa who is a mathematician were able to articulate fundamental constitutional ideas with a precision and exactitude that we lawyers never managed to equal. As the negotiating process developed however the role of the DP seemed to become smaller and

smaller but that is something I will deal with in a later commentary.

So to resume discussion on how decisions were to be taken. A number of us debated long and hard on what the best formula would be. One proposal was to distinguish matters between important questions and other issues. Other issues could be determined by a simple majority. Important questions could be decided by a two thirds majority, said some, by three-quarters, said others. I can remember raising the matter with Cyril in a meeting in a small office at Shell House. I think that I was urging a special voting procedure along those lines. He shook his head emphatically. "No", he said. "Once you have voting based on numbers you encourage dissension and everything being put to the vote. Instead of looking for real solutions you look for ways and means of drumming support for yourself and opposition for the other side. This will give the small parties enormous power. They simply bargain with both sides to see who offers them the most. It is an invitation for corruption and pressure. Whatever numbers are used, whatever the formula, both sides will be trying to capture votes rather than trying to find ways of moving the process forward. "The real question, he continued, "is to get enough agreement to enable to process to go forward. Basically this means in practice, agreement between ourselves and the Government. If the ANC does not agree we cannot have a meaningful settlement. If the Government does not agree we cannot have an effective settlement. In essence, for negotiations to succeed the ANC and the Government must find common ground. This doesn't mean that the opinions of other participants are unimportant. They can play an important role in helping us to find common positions and they can enrich the debate with their own viewpoints but what really matters to enable us to break the constitutional deadlock and to arrive at a new dispensation is that those who are demanding change and those who are resisting change come to some agreement. What we need is not unanimity, not total consensus, otherwise any party can block the process. What we need is sufficient consensus for the negotiation process to move forward."

I must say that I was totally convinced by his argument. Again, I see it as one of those decisive moments in the negotiation process. If we had agreed on some mathematical formula we would have stored up enormous problems for ourselves. The solution which Cyril proposed was a creative one, as far as I know, without precedent anywhere in the world. We South Africans have contributed the phrase "sufficient consensus" to international political science

vocabulary. When I travelled abroad I took great pleasure in explaining it to different audiences. What Cyril was getting at was the need to look at the essence of decision making in a negotiating process. This is different from decision making in an assembly or other deliberative body where delegates have a democratic mandate. The process was inclusive but it was not democratic. One party one voice made it inclusive but no parties had a democratic mandate in terms of a proper election. That was why the two-stage process was agreed upon. The first stage would be all-inclusive. The second stage (the one South Africa is in now) would be democratic.

One of the problems with sufficient consensus was that someone had to decide whether it had been achieved or not. The advantage of counting votes is that it is objective. But who is to say if there is sufficient consensus. Here it was decided that independent persons who were not part of the negotiations should be given that responsibility. A bit of luck favoured this solution. It would have been impossible to have had only white judges making such a determination. Ismael Mahomed had long been invited to take a seat on the Bench. He had apparently indicated his willingness subject to there being no opposition from bodies such as the National Association of Democratic Lawyers. He had waited and waited and waited for either a yes or a no. Eventually, when no clear opposition was expressed, he agreed to take up a judicial appointment. Possibly he received indications from persons whose opinions he valued which facilitated his decision. In any case, he was now Judge Mahomed. This meant that at least one judge who had the confidence of the non-statutory sector of the negotiations could participate in deciding on sufficient consensus. The Government eventually went along with the process. I assume that they also realised that the key participants were themselves and the ANC and that it was agreement between themselves and the ANC that lay at the heart of any negotiated settlement. For their part they proposed Judge Schabard to sit with Judge Mahomed. They would both preside over the proceedings and decide whether or not sufficient consensus existed.

I seem to recall that in only two cases did they find it necessary to rule that although there was no unanimity, sufficient consensus existed for a binding decision to be taken. In the one case it was the PAC that dissented, in the other it was the IFP. I speak from memory. The documents might show otherwise. It was clear that the IFP were unhappy with the concept of sufficient consensus, particularly if such consensus could be achieved without

them. What this meant was that the IFP would not have a veto over the negotiating process. In other words, it would be possible to achieve a constitutional settlement in South Africa even if the IFP was not a party to it. In their later critiques the IFP strongly denounced the concept of sufficient consensus.