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The "Conference Nationale Souveraine" in Zaire and the Convention for a democratic South Africa: a comparative study through Claude Lefort's theory of democracy

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III. CODESA: SEEDS OF COMPROMISE IN POST-APARTHEID SOUTH AFRICA

The history of Codesa, like that of the CNS in Zaire, marks the foundation of South African democracy. It marks the passage of the old to the new, from the apartheid regime to multicultural and multiracial democracy. Richard SPITZ (1998) correctly qualifies it as a "way of compromise" and Steven FRIEDMAN (1993) refers to the "seeds of compromise". In the quest for constitutional solutions for the institution of a new South Africa, Codesa was a very crucial moment. So, it is as important, to better understand it, to link it to a South Africa's previous history. However, it is also important to mention that we do not limit Codesa to the talks of December 1991 to May 1992. Codesa is the whole process that culminates in the final Constitution of December 1996, which started with the negotiation of Kempton Park in 1991. Although Codesa itself collapsed in May 1992, the Multi-party Negotiations of 1993 and the Negotiation on the final Constitution seem to me as the logical continuation of the talks of Kempton Park.

3.1. Historical Context

The core issue of South African politics was apartheid. In 1948, the NP came to power and under Prime Minister Daniel François MALAN, apartheid was introduced. Under this concept, it was necessary to discover a "doctrine of the separate development of races". The implications of this doctrine were of various kinds. On the legislative and constitutional point of view, the former racial laws such as the Land Act of 1913[42] were hardened, and other new segregationist regulations were voted in. In February 1950, the four fundamental laws around which apartheid was organized were voted:

- *The Population Registration Act*, which classified the population into four racial groups: Whites, Blacks, Indians, and Colored. Belonging to such group determined for an individual all other registers of his life: residence, studies, transport, social relations, friendship, and so forth.
- *The Group Areas Act,* which hardened the existent regulations on the place of residence. It is thus that Black people were evicted from rural white areas and removed to the reserves where the *Bantu Authorities Act of 1959* prepared the institutionalization of the Bantustans.

[42] This law declared more than four fifths of the country's land surface the sole property of whites. It is in protest against this law that the ANC was formed in 1912.

- *The Immorality Act* added to the ban on interracial marriages, any sexual interracial relationship.
- *The Suppression of Communism Act*, which made apartheid an instrument of capitalism by the fact of violently suppressing all anti-capitalist struggles. The same regulation considered all battles against apartheid as struggles conducive to subvert the social and economic order of the country. This law was the principal repressive instrument against the fighters for human rights and the activists of liberation; and it allowed, in 1960's, the condemnation in perpetuity of activists of the liberation movements, such as Nelson Mandela and Walter Sisulu of the ANC.

At Malan's resignation in 1954, Johannes Strijdom came into office as Prime Minister. He intensified the segregationist policy and put in place the black Bantustans, 'autonomic' territories administered by the indigenous population, on 13 percent of South African territory.

In response to this policy, the African, Colored, and Indian people found cause to unite in action, and launched a defiance campaign on 6 April 1952, the 300th anniversary of the arrival of Jan Van Riebeeck, the leader of the first Dutch settlers in South Africa (H. EBRAHIM, 1998: 14).

In June 1955, the Congress of the People organized by the ANC took place, a meeting to which all political parties were invited. At this occasion, delegates met in Johannesburg adopted the *Freedom Charter*, sketching the fundamental demands of Blacks, viz the equality of races.

In 1959 after the sudden death of Strijdom, Hendrick Verwoerd came to power as head of government. At this period, South African politics became internationally contested, precisely by the United Nations.

On the internal level, various efforts were undertaken to negotiate a new political order. Thus, on 25 March 1961, an "all-in Conference" met and called for the negotiation of a democratic dispensation. Fourteen hundred delegates from all over the country representing 150 different religious, social, cultural and political bodies gathered. At this conference, Nelson Mandela's call for a national convention of elected representatives to determine a new non-racial democratic constitution for South Africa was adopted (H EBRAHIM, 1998: 15).

Unfortunately, this call for a Sovereign National Convention went unheeded. On 31 May 1961, the government, after holding a whites-only referendum, declared South Africa a republic (H. EBRAHIM, 1998: 17). At the same time, the government banned the ANC and other organizations of liberation. They were left without any legal framework to pursue their activities (H. EBRAHIM, 1998: 17). Thus, the ANC was transformed from a non-violent movement into an armed movement of liberation. The "Umkhonto we Sizwe" became the armed branch of the ANC, operating from neighboring countries.

Basically, the proclamation of the Republic of South Africa, accompanied by the creation of the first black Bantustan, the Transkei, marked the peak of apartheid. Most of the ANC's leaders were jailed, such as Nelson Mandela and Walter Sisulu in July 1963. Blacks were henceforth concentrated in Bantustans without any civic power, their only future that of working in the rest of the country.

In September 1966, Verwoerd was killed. His successor, Balthazar John Vorster, endorsed the apartheid doctrine but in a pragmatic way by slackening its implementation and by multiplying exceptions to the implementation of segregationist laws. For instance, the black ambassador of Malawi and the personnel of the Embassy were exempted from racial laws because they were qualified as Whites by honor. Also, people from Taiwan or Japan were catalogued as Whites. Vorster undertook at the same time a policy of rapprochement with some moderate African countries, such as Côte-d'Ivoire. The moderate tendency of Vorster brought him into conflict with the heirs of the politics of his predecessor, Verwoerd.

In 1970's, South Africa was sternly criticized by the international community. In 1974, the General Assembly of the United Nations refused the letters of accreditation of the ambassador of the RSA, on the ground of non-representativeness of his 'people'. Following the independence of Mozambique and of Angola, and the coming to power of Marxist governments in the region, South Africa remained then the last rampart against communism in Southern Africa. This allowed Vorster to obtain the more or less tacit support of western countries. And, thanks to Israel and France, South Africa became a nuclear power.

In June 1976, the government met its fiercest resistance from the black students of the townships, protesting against the imposition of Afrikaans as a medium of education by the Minister Andries

Treurnicht. The march of protest was organized in Soweto, near Johannesburg and was attended by more than 20 000 students. Several hundred of them were killed and thousands left the country to join the liberation movements (H EBRAHIM, 1998: 18). One year later, Steve Biko, emblematic figure of the "Black Consciousness Movement" – a resistant movement trying to fill the vacuum during the ANC's banning – was arrested and assassinated by the security forces.

Upon coming to power in 1978, Prime Minister and later President P.W. Botha, former Minister of Defense in Vorster's government, began reorganizing the State. His administration was characterized by a dual approach to the growing military strength of the anti-apartheid forces – reform and repression (H EBRAHIM, 1998: 18).

The most significant reforms of Botha administration were "*the creation of a new governmental department, the Department of Constitutional Development and Planning. This Department was mandated to introduce 'reforms' while the security establishment took over the major strategic decision-making responsibilities of the State*" (H EBRAHIM, 1998: 18). Another development took place in 1983 with the creation of a new Tricameral Parliament and a President's Council. Parliament was made up of three houses: the White House of Assembly, the Colored House of Representatives, and the Indian House of Delegates. By this reform, the function of Prime Minister was suppressed and Botha took the place of State President. Africans were totally excluded from this dispensation (H EBRAHIM, 1998: 18).

The strategy of reform and repression, argues H EBRAHIM, had only limited success (H EBRAHIM, 1998: 19). In 1984, armed actions against the regime had risen to an average of fifty operations per year. In 1985, the ANC first deployed landmines and began to develop a presence in rural areas. The organization declared 1986 the year of the people's army, *Umkhonto we Siswe (MK*).

Following the pressure of international anti-apartheid lobbies, which demanded an end to racial discrimination and multiracial elections, and, at the same time, as a result of the demands of mines' entrepreneurs to adopt a liberal politics and to engage in a process of talks with black organizations, Botha was constrained to negotiate a new "social contract" including the interests of the excluded majority of society.

It was in this context that the first exploratory discussions began in 1985 between Nelson Mandela and representatives of the Botha administration. In 1986, Botha abolished certain emblematic laws of apartheid, for instance, “the interior passport”. He relaxed too the banning of mixed marriage.

Although Botha was aware of the fact that constitutional changes were necessary at this point in thef South African crisis, and should include representatives of the black majority, he was not bold enough to negotiate.

However, his arrogance did not last much longer (H EBRAHIM, 1998: 22). In 1988, Botha’s illness provided an opportunity for the NP to look to new leadership in the figure of F.W. de Klerk. Close to the economic environment, De Klerk knew that international sanctions were less and less supportable for the country. He was also aware of the demographic weight of Blacks (Whites were only 18 per cent of the population). He understood that apartheid had reached its limits and had failed to prevent Blacks from becoming the majority everywhere, except in the Western Cape where Coloreds remained the majority and Pretoria where Afrikaners still dominated significantly.

In the summer of 1989, Botha was forced to resign by the members of his Cabinet, who wished to replace him as rapidly as possible with De Klerk as president in order to get the country out of the crisis by encouraging new alternatives.

Soon after taking over, De Klerk committed himself to seeking a new constitution that would offer “full participation” to all South Africans in a new federal constitution dispensation. Its goals would be to eliminate the domination of any one group by another; the maintenance of community life in a non-discriminatory manner; a strong economy based on free enterprise and social competition; social and economic upliftment for those communities suffering backlogs, and the firm maintenance of law and order” (H EBRAHIM, 1998: 22). This would be possible only by organizing inclusive negotiation among the leaders of different parties.

Thus, in autumn 1989, he called for an accord among all peoples of the country that would offer full political rights to everyone (H EBRAHIM, 1998: 25). The last apartheid laws were suppressed, despite the opposition of the CP (Conservative Party). At the opening of the Parliament on 2 February 1990,

F.W. de Klerk made a dramatic speech in which he announced the unbanning of the liberation movements – especially the ANC and the PAC - , the release of political prisoners, and a series of measures intended to address obstacles to the process of negotiation. Mandela was released the weekend following this speech, and the view of the media was that substantive negotiations on a new constitutional dispensation could now commence.

However, De Klerk remained implacably opposed to a one person-one-vote system, which he argued would lead to domination by the majority (H EBRAHIM, 1998: 22).

International pressure, right-wing resistance, economic concerns, the changing political situation in Eastern Europe all led De Klerk to the inescapable conclusion that clinging to power would only lead to a bloody conflict.

But for sometime after February 1990, there was no positive move towards talks. In January 1991, Mandela broke the deadlock by calling for an all-party Congress to negotiate the route to a constituent assembly, the body which would draft a new constitution, and by agreeing on the principle of a government of national unity. In February 1991, the De Klerk government agreed to the suggested all-party congress. In September 1991, political parties and interest groups committed themselves to a joint peace effort by signing the National Peace accord – the first multilateral agreement of the post-1990 period (Richard SPITZ & Matthew CHASKALSON, 2000: 16). At the end of the "pre-negotiation phase" in October 1991, further talks would take place within a forum called the Convention for a Democratic South Africa, CODESA.

3.2. CODESA, A SETTLEMENT OF CONFLICT BETWEEN MINORITY AND MAJORITY DEMANDS

Codesa comprised two steps, Codesa I and Codesa II. The first plenary assembly of Codesa, Codesa I, took place on 20 and 21 December 1991, at the World Trade Centre in Kempton Park, just outside Johannesburg. The venue was neither imposing nor rich in history. It seemed to be a neutral venue because of its lack of political symbolism (S. FRIEDMAN, 1993: 21). Thus, the first formal attempt to negotiate the future was sited in a venue with little connection to the past.

More symbolic, perhaps, was the identity of the Codesa's chair. Two judges, Piet Schabort and Ismail Mohamed, had been chosen. The latter was the country's first black judge, who had previously gained his reputation as advocate for the defense in political trials; and the other had won respect for both fairness and competence, and was a pillar of the established judicial system (S FRIEDMAN, 1993: 21).

The first plenary session was attended by nineteen organizations and political parties, in the absence of the Pan Africanist Congress (PAC) and of Mangosuthu Buthelezi. Although a IFP delegation agreed to attend the Convention, Buthelezi had chosen very deliberately and loudly to stay away. He objected to the organizers' refusal to allow the IFP and the Kwazulu government as well as the King of Zulus, Goodwill ZWELITHINI, seats around the table (R SPITZ, 2000: 19).

The NP and the ANC were the two main parties within the negotiations. The ANC was joined by its allies, the SACP and the Transvaal and Natal Indian Congress (who shared a delegation). The NP was joined by a government delegation – in order to distinguish, presumably, the ruling party from the State. Five parties which controlled the four TBVC administrations, three parties drawn from the tricameral parliament, the IFP and the DP (Democratic Party), completed the list.

The agreed agenda for the Codesa plenary consisted of general constitutional principles, a constitution-making body or process, transitional arrangements or interim government, the future of the TBVC territories, and the role of the international community (H EBRAHIM, 2000: 98).

The standing rules prescribed that where consensus failed, a principle of "sufficient consensus" would be applied. What did "sufficient consensus" mean? Steven Friedman and others note that, "publicly this rule was never explained in understandable terms, but no one was in any doubt about its real meaning: 'sufficient consensus' was achieved whenever the ANC and the NP agreed" (S FRIEDMAN & al, 1993: 25). This did not mean that other parties were entirely passive however.

According to H Ebrahim, five noticeable statements characterized Codesa I (H EBRAHIM, 1998: 102). Firstly, the speech by Dawie de Villiers, speaking for the NP, in which he expressed deep regret and officially apologized for the policy of apartheid. Secondly, the compromise suggested by De Klerk when

he signaled his government's agreement to an elected constituent assembly provided that it would also act as an interim government.

The third remarkable feature arose at the end of De Klerk's speech, when he criticized the ANC for not ending the armed struggle and thereby breaking the undertakings of the Pretoria Minute. Mandela responded forcefully to this speech, and lambasted De Klerk on the conduct of his government.

The fourth exceptional characteristic of this meeting was the *Declaration of Intent*. The Declaration consisted of statements of goodwill and designed primarily to avoid possibilities for disagreement; it committed participants to an undivided non-racial South Africa, peaceful constitutional change, a multi-party democracy with universal suffrage, a separation of powers, and a bill of rights (S FRIEDMAN et al, 1993: 25). H. Ebrahim argues that "in the South African context the statement was revolutionary, and represented, in a sense, the *preamble* to the first democratic constitution" (H EBRAHIM, 1998: 103). All parties except the IFP and the governments of Ciskei and Bophuthatwana signed the Declaration. In the IFP view, the reference to an "undivided" South Africa in the Declaration ruled out the options of a federal dispensation. However, both the IFP and Ciskei signed the Declaration later, after an amendment confirming that the term "undivided' did not commit Codesa to a unitary state (H EBRAHIM, 1998: 103).

The last important statement of Codesa I came in an address by parliamentary veteran, Helen SUZMAN. She demanded that a great role be given to women to prevent accusations of gender discrimination. In a speech, which embarrassed most delegations, she argued: "Here we are in this great hall at a momentous time, and I can't believe my eyes and ears when I see the number of women in the room. As with racism, so with sexism – you can enact legislation, but despite this, racism and gender discrimination exists. When I look around, there are maybe ten out of 228 delegates who are women. Codesa, as a way forward, must include more women" (H EBRAHIM, 1998: 103).

3.2.1. THE STRUCTURE OF CODESA I

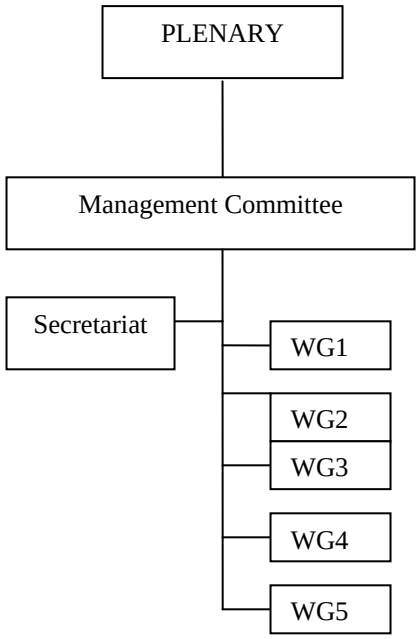
The first plenary of Codesa established five working groups and a Management Committee, whose task was to prepare the way to a second plenary in March 1992. Each party was represented by two delegates and two advisors in each working group. The task of working groups was to reach

agreements on key issues assigned to each one of them and to compile reports, reflecting a consensus, to the next plenary. However, the Management Committee consisted of one delegate and one advisor from each party. According to H Ebrahim, in total, Codesa involved more than 400 delegates representing nineteen parties, administrations, organizations, and government (H EBRAHIM, 1998: 104).

A Daily Management Committee of eight individuals, each drawn from a different delegation, and a Secretariat was appointed to assist the Management Committee in its task (*cf. Table No.0.5*). This daily Management Committee played an important role in steering the Convention. The Secretariat headed by Fanie van der Merwe and Mac Maharaj, respectively former Constitutional Development Director General and ANC's delegate, was responsible for administration and for the implementation of the decisions of the Management Committee. A Consultative Business Movement offered administrative personnel and support (S FRIEDMAN, 1993: 33).

Table 0.6. Codesa's Structure

N.B. This table is borrowed from H EBRAHIM, 1998: 104



The five Working groups (WG1, WG2, WG3, WG4, WG5) began their discussions on 20 January 1992. For the sake of efficiency and effectiveness, WGs sat for two days per week (H EBRAHIM, 1998: 108).

3.2.2. THE WORKING GROUPS' TASK

3.2.2.1. Working Group 1

Its task was to create a free and fair political climate, which would replace coercion. Thus, it had to deal with the issue of political violence. It was divided into three sub-groups, each with a specific task. Sub-group 1 was to examine issues around the reconciliation process, including the release of political prisoners, the return of exiles, and the elimination of discriminatory laws. Sub-group 2 was to focus on the issue of political intimidation, the successful implementation of the National Peace Accord, the prevention of violence related to crime, and the role and composition of the security forces in the country and the TBVC states. Sub-group 2 had to deal as well with the need for improved socio-economic conditions; fostering tolerance among political parties; and the role of education and information campaigns on political tolerance (S FRIEDMAN, 1993: 34).

The issue of the climate and opportunity for 'free political participation' was reserved for Sub-group 3. Among the specific topics on which it had to focus were, for instance, political neutrality and fair access to State-controlled media, including those of the TBVC states; the funding of political parties; fair access to public facilities and meeting venues; and the advisability of laws guaranteeing equal opportunity to all parties to establish and maintain their own means of mass communication (S FRIEDMAN, 1993: 35).

Richard SPITZ notes that, none of the sub-groups reached substantive agreements. Most of these issues remained unsolved. The sole agreement in principle which was reached was the establishment of an independent broadcasting authority (R SPITZ, 2000: 20).

3.2.2.2. Working Group 2

It was charged with agreeing on a set of constitutional principles and a mechanism for drafting a new constitution. Under this task were issues such as the balance between Central, Provincial, and Local government, and the meaningful participation of political minorities. WG2 held its first meeting on 20 January and met in plenary 14 times. By the end of April 1992, it had agreed that an interim government Council with both legislative and executive powers would take decisions by "sufficient

consensus" (R SPITZ, 2000: 21), and would control all existing administrations in the country. Besides, elections to a constitutional body would occur no more than three months after the establishment of an interim government Council.

Most importantly, its success consisted in getting the two main parties, the NP and the ANC, to agree on a common ground around the basic process of transition: Codesa would produce an interim constitution, and elected representatives of the people would write the final constitution. This was a real success because the NP and the ANC held conflicting views about the purpose and the lifespan of Codesa itself, i.e. what it was to achieve and for how long should it exist?

The ANC sought a rapid transition from minority rule to majority rule. This meant the existing order must give way as quickly as possible to an interim government and an elected constitution-making body. In effect, argues R SPITZ, the ANC "wanted Codesa to *determine as little as possible*, because the ANC would be well placed to shape the new order more or less as it pleased after elections" (R SPITZ, 2000: 19).

According to the NP/government and its allies, the transition had to be as slow as possible. The longer it lasted, the slower the change to a new order would be (S FRIEDMAN, 1993: 26) thanks to a long period of shared rule. Codesa's role, therefore, was to *agree as much as possible*, because that would guarantee the NP an active part in shaping key decisions and structures (R SPITZ, 2000: 19).

3.2.2.3. Working Group 3

It was to suggest transitional measures, including arrangements for an interim government or transitional authority, which would manage South Africa prior to the drafting of a new constitution. Its report recommended the formation of a Transitional Executive Council (TEC) and Sub-Councils, independent elections and media commissions. But, since it was dependent on consensus in other working groups, differences in those groups rendered its agreements fragile (R SPITZ, 2000: 21).

3.2.2.4. Working Group 4

Its topic of discussion was the future of the four “independent states”, e.i. the TBVC states (Transkei, Bophuthatwana, Venda, and Ciskei). The abolition of these states and their reincorporation into a united South Africa was perceived by the ANC and many others to be an obvious sign of the end of apartheid.

Four sub-committees were established to deal with testing the will of TBC citizens on reincorporation, citizenship, the administrative, financial and practical implications of reincorporation, as well as the political, legal and constitutional implications.

3.2.2.5. Working Group 5

Its mandate was limited to find ways to ensure the maximum involvement of women in the transitional process.

3.2.3. Conclusion

Assessing Codesa I, H Ebrahim can argue that, “the importance of this first plenary meeting of Codesa cannot be over-emphasized, for it represented the first formal multilateral meeting to negotiate a settlement of the conflict in South Africa. The meeting generated a great deal of confidence and enthusiasm, reflected in the behavior of the parties and the views expressed by economists and editorials in the media. (…) Codesa’s first plenary session boosted the chances of a speedy resolution to South Africa’s conflict and of substantive negotiation towards democracy” (H EBRAHIM, 1998: 105 & 107).

3.3. CODESA II

The plenary of Codesa II started on 15 May 1992. It focused first on procedural issues. After discussions, both the NP and the ANC agreed on a 70 percent majority for all decisions relating to the constitution and 75 percent for the bill of rights (H EBRAHIM, 1998: 128). Despite the fact that Codesa II did not ratify any agreements, the session was adjourned. This provided a useful opportunity for Mandela and De Klerk to meet.

On the second day of the plenary, it was agreed that the meeting adjourn to allow parties to refer the matter to their principals. The Management Committee was instructed to convene another plenary session to adopt agreements entered into later (H EBRAHIM, 1998: 130).

Considering those facts, it seemed that, after assembling amid optimism in December 1991, Codesa broke up in May 1992 amid acrimony (R SPITZ, 2000: 26). "*It broke down not because of constitutional majorities but because basic differences separated the major actors and there was reluctance on the part of some sides to attempt to bridge these differences*" (R SPITZ, 2000: 26). Another mistake was that parties distributed written position papers to the media at the same time as delivering them to delegates. This had the unhelpful effect of entrenching parties' positions. A general criticism of this forum concerned transparency. Codesa looked to many South Africans like a mysterious cabal. Nonetheless, Codesa provided instructive lessons to the politicians. Among key lessons people learnt from it was that effective negotiation could not occur in working groups containing nearly eighty political representatives and advisers (R SPITZ, 2000: 27); and such procedural issues are sometimes as important as substantive matters. But, for better or worse, Codesa was a start; it planted "the seeds of compromise, because participants learnt to tolerate each other and, crucially, to develop faith in the process itself" (R SPITZ, 2000: 27). Even if it did not reach agreement in some fundamental areas, significant issues were broached and certain principles placed on the table.

However, because of the problems of Codesa, a new way of negotiations had to be found in order to draft the constitution of the country. Between May 1992 and May 1993, the country fell into mass violence, whilst politicians – under international and internal pressure – tried to find the best way to resume a new framework of negotiation. At the beginning of February 1993 it became apparent that most role-players had realized the urgent need for the resumption of multi-party negotiation. But the question was, where to start? The ANC and the NP/government wanted to build on the agreements arrived at in Codesa and to consolidate their bilateral agreements multilaterally, especially that of an elected body in charge of drafting the final constitution. On the other hand, IFP and COSAG (the Concerned South Africans Group, an alliance formed by the IFP, the CP, the AVU, and the Afrikaner Freedom Foundation in October 1992), rejected Codesa's agreements and called for a planning conference to determine both prospective form of the state and the negotiation process itself (H

EBRAHIM, 1998: 149). They argued that non-participants in Codesa could not be bound by its agreements.

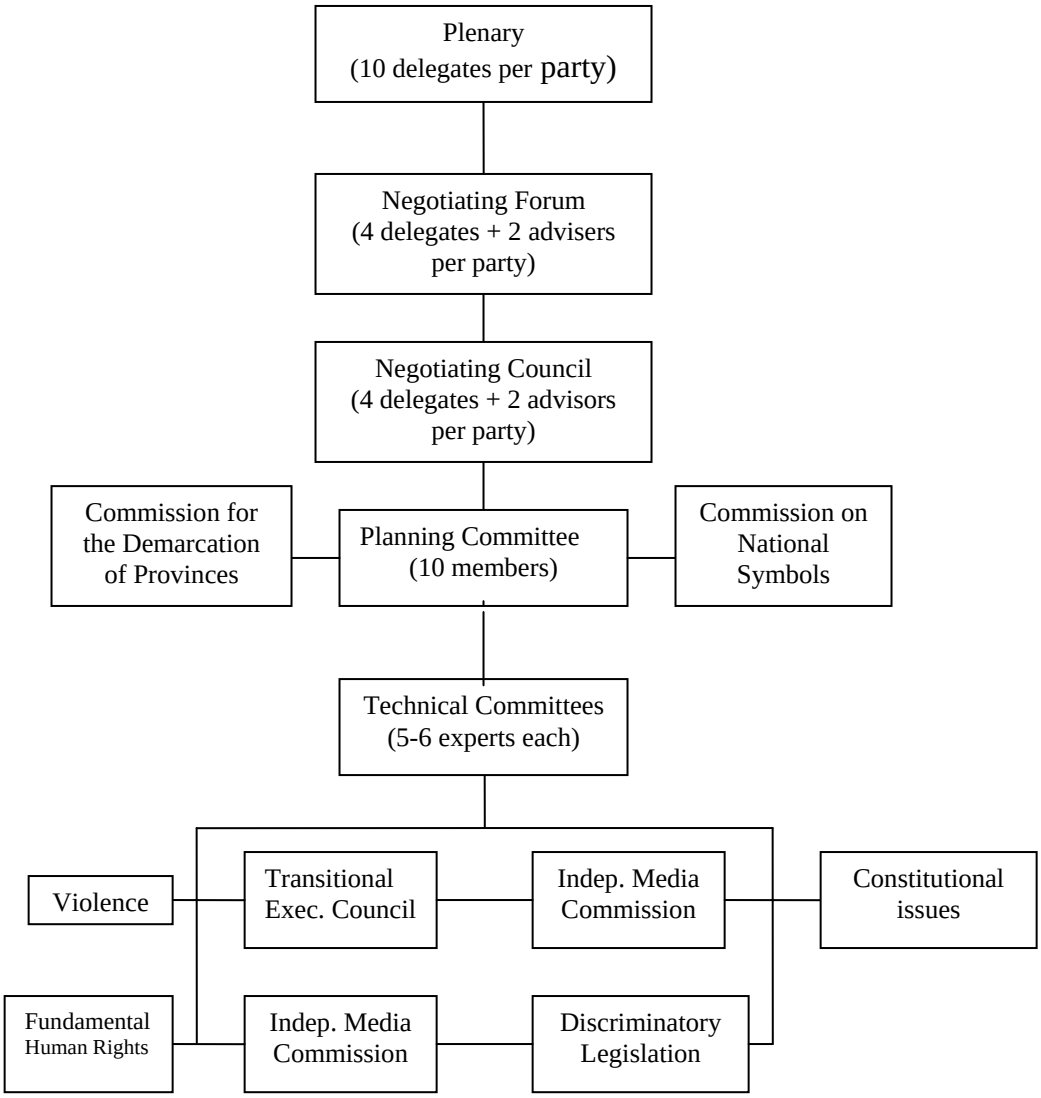
On 4 and 5 March 1993 a Multi-party Planning Conference convened at the World Trade Centre with the objective of setting a date for the resumption of substantive negotiations. The Planning conference, which was more inclusive than Codesa, adopted a resolution calling for the resumption of negotiation, and also resolved that a new negotiating forum be established to meet first on 1 and 2 April 1993. The forum received the name of the Multi-party Negotiating Process (MPNP). This was in order to mark the divorce with Codesa, in response to a request from other parties who did not attend this former forum. However, despite the name given to the new forum, parties who took part in Codesa saw the new negotiating process as a continuation of Codesa (R SPITZ, 2000: 36).

3.4. THE MULTI-PARTY NEGOTIATING PROCESS

The Multi-party talks began on 1 April 1993, when twenty-six participants, including the PAC, the CP, and the AVU, met (H EBRAHIM, 1998: 151). Assessing this phase of negotiation, H Ebrahim argues, "the meeting was a success, so much so that participants managed to complete a two-day program in one day. This meeting identified the issues requiring attention and the structures necessary. The structure of the MPNP was more efficient than Codesa because instead of negotiating issues in different working groups, a Negotiating Council became the effective negotiating forum" (H EBRAHIM, 1998: 151).

The structure of the MPNP was made up of a plenary, which had to ratify all agreements. A Negotiating Council reported to the negotiating Forum, which had the responsibility of finalizing agreements. The Technical Committees consisted of non-party political experts, whose task was to consider all written parties' views submitted to the Negotiating Council. The Planning Committee replaced the Management Committee of Codesa. The role of the Subcommittees of the Planning Committee was that of the Codesa Secretariat. In order to discuss matters of a specialized nature, the Council established two commissions which were non-partisan and were to deal with the demarcation of regions and with national symbols (H EBRAHIM, 1998: 153).

Table 0.7. The Structure of the MPNP (Table borrowed from H EBRAHIM, 1998: 152).



3.4.1. The first stage

After discussion, on the 21 July 1993 the Technical Committee on Constitutional Issues published its first draft constitution subject to further discussions by the Negotiating Council. On 6 August 1993, it published its second draft, and on 20 August 1993 its third draft constitution. The final agreement by the MPNP on the text of the interim constitution was to come in the early hours of the morning of 18 November 1993. Last-minute agreements between the NP and the ANC, which came to be known as the “six-pack”, were incorporated into the text. The six-pack resolved outstanding provisions on Cabinet decision-making, a government of national unity, provincial powers and boundaries, provincial constitution, elections, and deadlock-breaking in the Constitutional Assembly. In a concession to the Democratic Party (DP), the NP and the ANC agreed that an independent judicial service commission would play a role in the selection of judges for the new Constitutional Court. Parliament enacted the interim Constitution Bill on 28 January 1994. This Constitution came into force on 27 April 1994, and the general election followed this was the product of negotiated agreements to bring an end to conflict and usher in a new process of negotiation towards the final constitution (H EBRAHIM, 1998: 177).

By voting in this election, South Africans voted to provide their newly elected leaders with two separate and distinct mandates: one, to govern a new democratic society, and two, to draft the final constitution. The establishment of a national executive government, transitional provincial governments, an interim Constitutional Assembly, and transitional provincial legislatures, constituted the first stage of this process (H EBRAHIM, 1998).

3.4.2. The second stage

The second stage of post-election transition included the drafting and adoption of a final constitution. The interim constitution obliged the elected representatives to establish two particular structures for the purpose of drafting and adopting a new constitution, namely the Constitutional Assembly and the Independent Panel of Constitutional Experts. The Constitutional Assembly consisted of both houses of Parliament – the National Assembly and the Senate – totaling 490 members (400 in the National Assembly and 90 in the Senate), representing seven political parties proportionally in accordance with the outcomes of the 1994 elections (cf. Table. No. 0.7. H EBRAHIM, 1998: 181).

Table 0.8. The parties' seats in Parliament after the 1994 elections

Party	No. of members	Leaders
African National Congress (ANC)	312	Nelson Mandela
National Party (NP)	99	F.W. de Klerk
Inkatha Freedom Party (IFP)	48	Mangosuthu Buthelezi
Freedom Front (FF)	14	Constand Viljoen
Democratic Party (DP)	10	Tony Leon
Pan Africanist Congress (PAC)	5	Clarence Makwetu
African Christian Democratic Party (ACDP)	2	Kenneth Meshoe

The Independent Panel of Constitutional Experts was in charge of conflict resolution; it aimed as well to avoid deadlocks or potential deadlocks between parties. Its other role was to advise the Constitutional Assembly through the chairperson on any matter to do with the functions of the Constitutional Assembly.

A Commission on Provincial Government was also established with the task of bringing about the establishment of provincial government in terms of the new arrangements outlined in the constitution. It also had the important mission of advising the Constitution Assembly on provisions in the new constitution boundaries, structures, powers, functions, and transitional measures for the provinces (H EBRAHIM, 1998: 186-187).

The drafting of the final constitution offered a golden opportunity for *inclusivity*. The new constitution had to be the product of an integration of the ideas of all major role-players of the country. Among them were political parties represented in the Constitutional Assembly, political parties outside the Constitutional Assembly together with organized civil society, and individual citizens.

Two other principles were related to the first one: *accessibility and transparency*. Accessibility meant the creation of a space reachable by as many South Africans as possible in order to be part of the process. This task was made possible in part thanks to the media campaign. By transparency was meant that all meetings of the Constitutional Assembly and its structures were open to the public (H EBRAHIM, 1998: 180). In general, the legitimacy of the final constitution depended on the extent to which the exercise of drafting itself was credible. Equally important is that the final text had to be accepted by all, and in order to be fully legitimate, its drafting had to be accessible to all. The two fundamental issues which required some compromise found a solution in the interim constitution. The first one was the demand for majority rule in a unitary state, and the second one, the demand for

structural guarantees for the protection of minorities. By comparing the Interim constitution with the final constitution, using the tables we borrowed from Siri Gloppen (1997: 206 &214), we find that there is an even closer correlation between the final Constitution and the corresponding provisions of the interim constitution.

The Interim Constitution of 1993

Dimensions	The Interim Constitution Position within the range of variation	
(i) Institutional set-up		
Institutional focus	*legal system*	*political system*
Electoral system	majoritarian	*proportional*
Legislative-executive relations	presidentialism/*quasi-presidentialism*/parliamentarism	
Composition of legislature	unicameral	*(quasi)bicameral*
Composition of executive	one party *Single executive*	*coalition* Collective exec. body
Decentralization	unitary state	*federal state centralized* highly decentralized
Decision-making mode	adversarial *majoritarian*	*consensual* minority vetoes
(ii) Interpretation of reality		
Methodological focus	*individual*	*collective*
Problem focus	*structural* *Inequality, poverty*	*cultural* ethnicity
(iii) Central value	*Justice* *Positive liberty*	*Stability* cultural autonomy Negative liberty
(iv) Objective	*transformation*	*regulation*
(v) response to pluralism	Assimilation/*non-interference*/separation	
(vi) State-Society relations	*participation*	representation
(vii) The constitutional domain	democracy rule of law *pre-commitment*	*constitutionalism* *rechtsstaat* foreclosure of issues
(viii) Normative foundation/Justification	Liberalism	Communitarian contractarian philos. philosophy

The "Final" Constitution of 1996

Dimensions	The "final" Constitution Position within the range of variation	
(i) Institutional set-up		
Institutional focus	*legal system*	*political system*
Electoral system	majoritarian	*proportional*
Legislative-executive relations	presidentialism/*quasi-presidentialism*/parliamentarism	
Composition of legislature	unicameral	*bicameral*
Compostion of executive	*one party*	coalition
	Single executive	Collective exec. body
Decentralization	unitary state	*federal state centralized*
		highly decentralized
Decision-making mode	adversarial	*consensual*
	majoritarian	minority vetoes
(ii) Interpretation of reality		
Methodological focus	*individual*	collective
Problem focus	*structural*	cultural
	Inequality, poverty	ethnicity
(iii) Central value	*Justice*	Stability
	Positive liberty	cultural autonomy
		Negative liberty
(iv) Objective	*transformation*	*regulation*
(v) response to pluralism	Assimilation/*non-interference*/separation	
(vi) State-Society relations	participation	*representation*
(vii) The constitutional domain	democracy	*constitutionalism*
	rule of law	rechtsstaat
	pre-commitment	foreclosure of issues
(viii) Normative foundation/Justification	*Liberalism*	Communitarian contractarian philos. philosophy

The final constitution was adopted on 8 May 1996. 87 per cent of the members of the Constitutional Assembly voted in favor of the new text. The missing 13 percent comprised the members from the IFP, which boycotted the Constitutional negotiations, the Freedom Front members who abstained, and the two African Christian Democratic Party members who voted against the Constitution on doctrinal grounds. Surprisingly, both the interim constitution and the final constitution are very similar. As notes Richard Spitz, "*when one looks at the final constitution as a whole, one sees very few examples of a substantial departure from the interim constitution. Those that there are fall into two categories:*

changes necessitated by the failure of an interim constitution institution or mechanism to perform its constitutional function, and changes explicable in terms of the completion of the interim phase of the constitutional transformation process" (R SPITZ, 2000: 429). The replacement of the Senate by the National Council of Provinces and the concomitant changes to the national legislative process, fall into the former category. The integration of the High Court, Supreme Court of Appeal and Constitutional Court into one Court system without a bifurcated jurisdictional structure straddles both categories, and the removal of the consociational government of national unity provisions at national, provincial and local government level falls into the latter category. "*Apart from these three substantial changes, most of the differences between the provisions of the final Constitution and the corresponding provisions of the Interim Constitution are differences of nuance which reflect the increased bargaining strength of the ANC in the Constitutional Assembly, but they are not fundamental differences*" (R SPITZ, 2000: 423).

According to a provision of the interim constitution, before a new constitution can take effect, the Constitutional Court – as the guardian, protector, and enforce of the law – must certify that the text is in compliance with the 34 Constitutional Principles (IC, section 73, 2). Following its adoption, the text was submitted to the Constitutional Court for certification. The Constitutional Court heard submissions for and against certification from political parties and private persons in a hearing which lasted nine court days.

On 6 September 1996, the Constitutional Court gave judgment refusing to certify the text, after identifying nine elements in contrast with certain Constitutional Principles. Then, the text was returned to the Constitutional Assembly for amendments, in accordance with the judgment, and resubmitted on 18 November 1996 after corrections to the Constitutional Court for its certification, which was duly granted on 4 December 1996. On 10 December 1996, President Nelson Mandela signed the Final Constitution into law in Sharpeville, in Vereeninging. The Constitution was come into effect on 4 February 1997.

There were a number of factors responsible for the successful negotiation and the adoption of the final constitution. Some of these factors were the willingness of the majority party to compromise to gain wider support on important issues. Furthermore, the political will of major role-players allowed them to complete the process timeously. The political maturity and the quality of the leadership in the

Management Committee were also a great advantage. The personal chemistry and camaraderie that developed between negotiators laid the foundation for future co-operation as well, and the dynamism of the chairperson also made a valuable contribution. The suitability of the political structures and the degree of flexibility in the structural process greatly facilitated negotiations, and the brilliance of the technical and expert advice was indispensable. Finally, the energy and enthusiasm of those involved in administrative and logistical support ensured an environment conducive to successful negotiations (H EBRAHIM, 1998: 189-190).

Let us draw this discussion of CODESA to a close by considering it from the point de view of Lefort's theory of democracy. A very significant feature of CODESA was its attempt to take into account all – or at least as many as possible – of the pertinent political positions and projects in South Africa. Of course, these were 'filtered' through several criteria emanating from the fundamental democratic principle animating CODESA before they could be accommodated in the constitution-making process. Nonetheless, it is very difficult to deny that that CODESA strove, within the limits of the possible, to incorporate a maximum of pluralism within its process and its product. As noted by H Ebrahim, "*the South African people not only had to feel a part of the process, but the content of the final constitution itself had to be representative of their views. In addition, the process had to be seen to be transparent and open*" (H EBRAHIM, 1998: 241).

Thus, on 24 January 1995, Cyril Ramaphosa, chairperson of the Constitutional Assembly, said "*it is therefore important that as we put our vision to the country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which they feel they own a constitution that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate, a constitution that will represent the aspiration of our people*".

On 15 August 1994, Ms B. Mbete-Kgositsile, member of the ANC in the Interim Constitutional Assembly, declared "*the people of South Africa must be involved. They must be consulted in an*

organized fashion, on specific issues in order for the new law to be sensitive to and shaped by their realities and for it to address these realities".

And on 17 July 1995, Chief Emeka Anyaoku, Commonwealth Secretary-General, addressed to the International Round Table on Democratic Constitutional Development in these terms, "*an important difference between this exercise and the negotiations at the World Trade Centre is that all the proceedings of the Constitutional Assembly are open to the public. Submissions have been invited – and two million received! Information on the Constitutional Assembly is available on the Internet. And you have solicited the views of ordinary citizens in hundreds of meetings around the country. Whilst proceedings may at times appear cumbersome, they have given real meaning to the phrase 'participatory democracy*'".

This pluralism means, first, political pluralism. But it also means the involvement of social organizations in the redefinition of the State. The implication of this is that the separation between the public and private spheres of action became much more distinct than during the apartheid regime.

Also important is that the final constitution involved *consensus.* The constitution is the greatest and most visible sign of this consensus. That means, despite some differences, that all South Africans agreed on the substantial goals to achieve as a nation, and on the role of the State.

Finally, the "Checks and Balances" system consecrated in the final constitution shows once again how democratic power is the "power of none", as a result of the systematical mutual control of the different branches of government. The executive is accountable to the legislative, and the legislative to the judiciary, and vice-versa. But more importantly, all of them are ultimately accountable to the citizenry as a whole, the people. CODESA was thus a moment when South African society was "present-to-itself" in an unprecedented way. Right across all social sectors, South Africans were caught up in the drama of the protracted negotiations during which opposing conceptions of South African society were brought into interaction with one another. When sparks flew between Mandela and de Klerk the nation pulsated with feeling. Arguments and values were exposed to adversarial pressure with significant effects for the forging of a national bond able to accommodate the strains of democratic pluralism.

Neither the 1955 Congress of the People, where the Freedom Charter was drawn up and endorsed, nor any other popular assembly that has taken place, can match the status of CODESA in the history of South Africa. It was (Lefortian) ‘event’ which instituted a new socio-political logic, that of democratic ‘emptiness’.

What can be the lessons of Codesa in the Congolese battle for democracy? How can we understand the limits of the CNS through South African process of negotiation?