MCH91-18-2-11

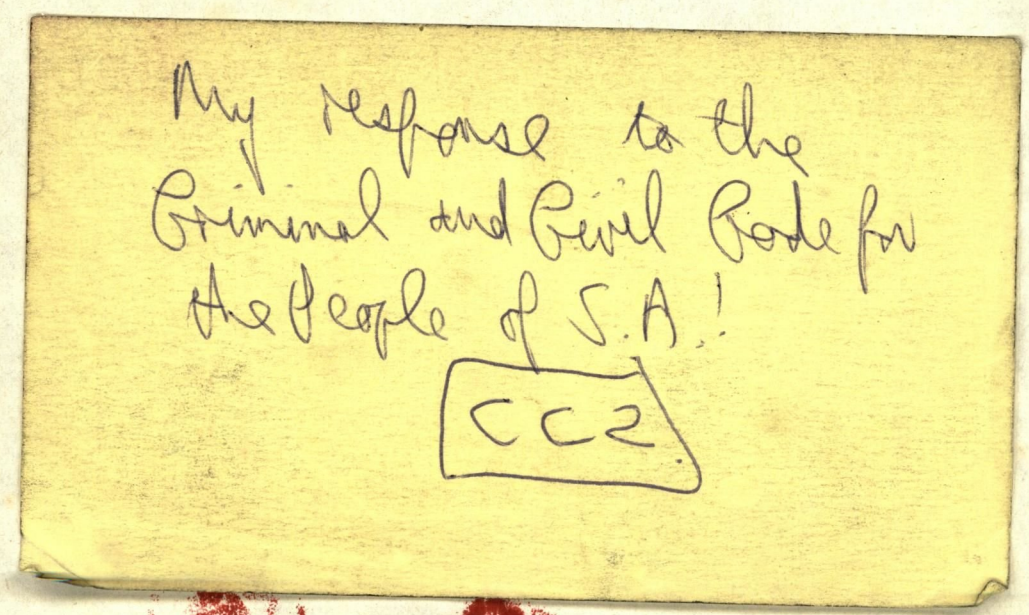
29/10/80

Dear Comrades,

The document: Criminal and Civil code of the people of South Africa, dated June 4, has been given very late to the RPC for discussion. I have quickly jotted down my initial reactions as someone especially concerned with legal aspects of our struggle. As will soon be clear, I have very fundamental reservations about the document. My only regret is that I did not receive it early enough to make my comments in more dignified language that paid proper tribute to the hard work of and creative solutions advanced by the comrades responsible for its preparation. I trust that these comrades treat my severe statements as part of discussion liberated by their endeavours. And the movement as a whole can only benefit from serious and honest argument about these important and difficult matters.

AMANDLA!!!! POWER TO THE PEOPLE!!!

Albie Sachs.



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On the proposed criminal and civil code.

This document raises important questions about the nature of power. If it leads to a discussion of the nature of authority, the difference between a party and a state, and the relationship between political, administrative and peral methods of dealing with problems, it will have performed a very valuables service. But as draft civil and criminil code for South Africa it is fundamental misconceived.

The document attempts far too much, and as result, does nothing in a way that gives satisfaction. An the contrary, it is full of ammunition for the enemy.

Confusion number one - ~~imputation~~ confusion of functions: a political party is not the State. Its composition and methods of work are completely different. Basically a party is an organisation of people who voluntarily associate with and dedicate themselves to achieving certain objectives - in this case the overthrow of the apartheid regime and the establishment of a non - racial democratic society based on the Freedom Charter. It is held together essentially by the shared co consciousness of its member, an inner discipline in terms of which members guide their conduct with a view to achieving common aims. Misconduct and departure from the norms of the organisation are regarded (as basically political matters to be treated by political methods, that is, by mobilisation and persuasion. In extreme cases the ultimate sanction is exclusion from the organisation itself. That is all. Comrades who fall down on the job, who do not turn up to meetings, or came late, or spread confusion, who talk too freely or drink too much, are not send to prison - where would we get the guards if every infraction or lapse was treated in this way? - but are dealt with by the process of criticism and self-criticism.

It is true that our organisation, as the builder of the new South Africa, exercise certain functions of a state in embryo form. We have an army, we have comrades responsible forthe security of the organisation and its leaders. In exercising their functions, these structures necessarily are involved in coercion. Accordingly, to this limited extent, it would be quite appropriate for the eg organisation to lay down certain guideline as to the ways that serious breaches military discipline and security are to be dealt with. This could be formulated in such a way as to indicate in broadway terms the kinds of activities to be subject to peral sanctions (treachery, desertion, corruption, criminal neglect etc)

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the range of sanctions (this could be classified information; in any event they could have to depend on the circumstances); the person or tribunal responsible for the decisions; the kind of deference available, including at least the right to be heard: the reporting and appeal procedure. Possibly a distinction could be made between front-line and other areas -- clearly the procedures will be affected by battle conditions. These guidelines (instructions, orientations) must be essentially political in character. The whole mode of operation, the basis of the charges and the character of the sanction s must be political. The basic document could not be regarded as a code which in legal terms denotes a formalised and carefully structured document setting ott precise rights, duties and procedures. At present we have too little experiences to try to get it all down in a code: a code comes after a considerable body of practice, not before.

Another area in which the organisation exercising embrionic state functions is in looking after refugees and providing education for victims of apartheid. Large numbers of people are living in ANC communities subject to ANC discipline. Here too it would be useful to establish a set of norms, a range of sanctions and a mode of procedure which is politically correct, the function of the process being to reinforce the intergrity of the organisation and raise the the political consciousness of all its members, and not simply to repress negative behaviour (though this must be done). Again, it owould be inappropriate and unduly gradiloquent to call this document a code for the people of South Africa. It would essentially be be a code of morality and descipline, that would be couched in affirmative, consciousness -- raising language, including a section on disciplinary measures emphasising at all times their political rather than peral content. One looks in vain in the document for any reference to the people principle of re-education, the basis of peral regimes in all progressive countries. The whole document has the spirit of 'stamping out' evil in the movement. Repression is necessary. People's power has to be defended.

But the basis of the health and integrity of the organisation is the political consciousness of its members, and not its capacity to punish.

Confusions

Confession number two- Confusion of time; Unfortunately we are not yet in power. The d
The draft document leaps from the present pre-revolutionary phase, with its own special requirements, into the future post-revolutionary phase, which will pose a who a whole new range of problems. The two simply do not mix. When we bear in mind that other post - revolutionary societies took an average fifteen to twenty years to produce new civil and Criminal Codes (G.D.R., Cuba), it is a little premature to produce our now

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to produce our code now. Jurists in other countries who have laboured for years and years to distill the experience of their countries into legal codes, will hardly be impressed by the idea of a code knocked together in such a hurried and premature fashion. It is not suprising that in purely technical terms the code leaves a lot to be desired - the offences are arbitrarily chosen, the definitions not always opposite, and many fundamental principles are not touched on. It is not realy detailed enough to be a real Criminal Code (it says nothing about defences, nothing about elementary principles of procedure etc.) Nor is it general enough to be a code, for example it does not outline any comprehensive general principles of liability and punishment.

All in all, it presents a picture of a harsh and vengeful future South Africa in which anyone who does not agree with the new leadership's interpretation of the Freedom Charter is likely to be put up against a wall and shot (c/f volume 11)

Any proper code for the future would have to give people confidence in the law make it plain that torture and degrading imprisonment will themselves be punishable as crimes against the citizens, that abuse of office for personal gain will be a crime, that the law will guaratee the rights of the people, be used to re-educate those who violate the peace and security of the people, and be an instrument of repression only in the case of those who unrepentently work towards a restoration of the criminal system of apartheid (and then it will be im implacable).

Confusion number three: Confusion of persons.

It is not clear who the document is aimed at: members of the organisation who stray from its principles; or persons or from the other side who might fall into our hands. In the case of the former, as has already been argued, the remedies should be essentially political rather than juridical. In the case of the latter, International Law requires a far more carefully thought out scheme. Right now we a are demanding prisoner of war status for our captured guerillas. The corallary of this demand is that a state of war exists, and that we will treat enemy captives in the same way that we demand the enemy treat us.

Here again, there is something very specific that can and needs to be done, that would immensely enhance the legal standing of the ANC in the eyes of International Law and put the enemy really on the defensive, and that is ratify the Protocols to the Geneva Conventions on Prisoners of War.
(I have already made written observations on this point to Lusaka). A simple act of that kind would carry conviction, whereas the publication of a loose and not very

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coherent document that lumps together all and sundry can only damage the prestige of the organisation. (Note: Captives guilty of war crimes are not immune from punishment. It is always in our interest to distinguish these from the rest, and not lump them all together)

Confesion number four: Confusion of country.

It is an elementary principle of sovereignty that punishment in the sense of death sentences, prisons, fines etc. belongs to the state and its judicial organs. Courts of one country simply cannot operate in the territory of another. Sometimes the host country permits foreign courts to operate on its soil, for example, military courts in the case of soldiers stationed on foreign bases. But this is always done according to treaty. The document could create serious problems in the case of many countries where we have RPC's.

In fact, except where special security factors apply, it would seem in principle more correct for our members to be subject to the laws of the country ~~in~~ where they happened to be stationed. It has always been the imperialists who have claimed ~~immunity~~ immunity from local jurisdiction, Our attitude is that we value the right to live and work granted to us by foreign governments, and that we will conduct ourselves always in a manner which shows respect for the laws and customs of the respective states. Should the governments hand over responsibility to us for dealing with ~~elements~~ elements in our ranks who transgress the law, that is consistent with sovereignty and quite acceptable. But setting up our own courts with power of imprisonment, just would not be sanctioned in many countries. One can imagine the hullabaloo the enemy could make, and the mistrust that could be sown between us and local regimes.

Confusion number five. Textual confusion. The document jumps around between ~~different~~ different levels that are puzzling to the reader. The texts of the Conventions on the Suppression of apartheid, and on Genocide are incorperated into the Code in an artificial manner, without explanatory preamble. Then follow sections which attempt to put revolutionary wine in counter-revolutionary bottles. The imprint of the English legal system, conservative and technical, is stamped all over the document. Words like felony, misdemeanour and indictable offence abound. The whole 6 format is dry and technical. It imposes a single court system on a multiplicity of situations that have virtually nothing in common. It presupposes that the primary mechanisms of dealing with transgressions are juridical rather than political. This is the 'juridical fallacy' at its most dangerous - a fallacy ~~be~~ because it presupposes that the problems of behaviour in the struggle and after victory can be resolved by lawyers or by the movement applying prescribed formulas to all situations that might arrise, dangerous because it deals with the management of

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of power in a technical rather than a political fashion.

All of us are schooled in the English legal system, influenced by its procedures, vocabulary and style. Certainly there are useful features in it which we can incorporate into our present and practice and statutes, and carry over to the future as well. But it is not the only model, nor is the only alternative to it, the so called Continental Code. In fact, one can say that we do not need model, wehter British type or Continental, or traditional African or whatever. We shape the instruments we need in terms of the pressing problems that require solution (do we realy need the definition of forgery or public indecency at this stage?) We would do better to look to the struggles of other countries, more especially revolutionary ones, rather than to their Codes - how did they deal with traitors in their ranks, how did they control indiscipline?

In the case of Mozambique, for example, it appears that the whole process of correction was based on two principles: first, public meetings of criticism and correction, in which persons responsible for misconduct were made to appear before public meetings of their comrades, who decided on the appropriate form of punishment or re-education; second the existence of liberated zones in which Frelimo already exercised a form of state power. This permitted the confinement of traitors, deserters, persons guilty of corrupt of abusive behaviour or so on; it also alllowed the execution (rare) of enemy agents infiltrated into their ranks with a view to assassinating their leaders. The base camp in Tanzania also operated as a little piece of Mozambican territory, although frequently the Tanzania authorities were called upon to imprison person guilty of grave breaches of revolutionary discipline. It is noteworthy that although no Code were produced, and only the flimsiest of statutes dealing with procedures published the system of popular justice quickly became well established, and today is the foundation of the whole new legal system in independent Mozambique Incidentally, the old Criminal and Civil Codes still remain in force, though largely passed by history. The basic legal transformations were affected by the Constituation, which establishes new rights and duties for citizens, by the system of courts established three years after independence, and by a special law, adopted more recently because of Rhodesian aggression, called the law dealing with Crimes against the Security of the People.

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Mention is made of Frelimo experience not as a model for us, but to stress the importance of relating legal strategy to the concrete circumstances of our struggle. Certainly the MPLA must have had very rich experience in this field, which would underline the importance of relating questions of discipline and authority to the realities, the traditions and the possibilities of our struggle, and not to some scheme thought up in advance.

Without a briefing on why the document is necessary, on the needs that it is responding to, it is difficult to make concrete proposals. Simply to send out a document like this without a covering explanation, is not a very good start, valuable though it is that all members are being given the chance to study it and make comments. The need that gave rise to the setting up of the working committee should have been explained, and the principles that guided them in their work outlined. (It is typical, by the way, of the English tradition, to publish a draft law without a explanatory text - the assumption is that the legal profession is always on hand to do the explaining, or else to argue amongst the themselves. A document for the people should not come out in this form - it should be justified and interpreted, or else be so clear in its language and form, so well explained by its own preamble, as not to require further comment.)

My first recommendation: the grandiose concept of a general Code, applicable now and for the future, must be scrapped. It looks like rhetoric, playing at power, and not the real exercise of power; it will puzzle our members, cause our friends to shake their heads, and give pleasure to our enemies, who will find lots of nuggets in it to frighten the people.

Second, the document must justify itself, explain the needs that give rise to it. Thus it should begin with a preamble that sets out why it has become necessary at this stage to elaborate a series of documents dealing with the rights and duties of members, problems of discipline, treatment of enemy agents and captured enemy soldiers (or whatever the needs are). This preamble would of necessity include the section in the Freedom Charter dealing with justice (we sometimes do not value our own basic document sufficiently; the Freedom Charter must appear and spell out very clearly the principled relationship

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between political mobilisation and the application of sanctions in the movement.

The question of revolutionary discipline should be dealt with in several sections: General Principles; Procedures in the Regions for dealing with serious problems (essentially political procedures with active membership participation); the priciples to guide the imposition of ~~the~~ sanctions, with the emphasis on useful work and re-education as the primary priciple, a list of posible type sanctions, without limiting the discretion of the general meeting, or disciplinary sub-committee, or the RPC or whatever organ is made responsible (not a court). Very serious cases can be handed over to the authorities in the host countries where the relationship is appropriate, or else transfered (with a full written report) to some centre where proper final sanctions can be imposed. That Revolutionary Council should have a special Security and Discipline sub-committee, directly responsible to the President, to deal with grave cases, and to impose appropriate penalties. The situation is developing so rapidly, that to attempt to lay down in advance procedures and penalties would be quite inappropriate. There should instead be confidential general instructions drawn up - reviewable from time to time - which stress the importance of harmonising the great humanitarian traditions of our struggle with the need implacably to defend the revolution. The guarantee of justice in these cases lies essentially in proper political control, and not in juridical devices. The procedures have to depend on the circumstances, but there could be general principles:

The defendant has the right to be heard and , in answer of the allegations, and, where security and pratical considerations permit, to confront his accuser;

- At no stage should torture or any form of violent or degrading treatment be used against the defendant - we do not take our standards from our enemies;

- Guilt should be clearly proved on all the evidence available;

- Punishment should be aimed at re-educaton where possible, isolation from the rest of the movement where absolutely necessary, and death in the most exreme cases (persons send to assassinate our leaders etc.)

Decisions should wherever possible be unanimous, and in the case of extreme measures, be subject to confirmation by the President, who for this purpose ma may be assisted bya a small advisory body.

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It would seem that the treatment of breaches of discipline in battle conditions, the underground, or prison, needs to be dealt with quite separately.

As far as the International law position is concerned, I would comment:

The NEC publishs a document affirming our adhesion:

a) To the provisions in the Freedom Charter on justice.
b) To the International Convention or the Supppression of the Crime of Apartheid.
c) To the Protocols to the Geneva Conventions on the Treatment of Prisoners of War.

In the case of b), only States can adhere to the cc Conventions, but we could draft the document in appropriate language, speaking in the name of the people of South Africa who are denied proper statehood, indicating our adherance as well as our commitment to incorporating the provisions of the Convention into our internal law as soon as a democratic, no-racial state is established.

In the case of c) (the Geneva Conventions) we can lawfully sign as a national liberation movemnt conducting a war against a racist regime. This should be done as a solemn act, and would redound very much to the credit of the ANC as an organisation concerned about its international responsibilities, while at the same time strengthening the claim that our captured guerillas be treated as prisons of war.

Albie Sachs.