

THE ANC CODE OF CONDUCT.

[Some observations and suggestions on the document by Cde Nelson Miya.]

INTRODUCTION:

In view of the extremely important task that the Department of Legal and Constitutional Affairs has been assigned by the National Executive Committee, and, in particular, the role that I have been entrusted with, I have, in consultation with the Head of our Department, Cde Zola Skweyiya, decided to make some recommendations pertaining to the document itself.

1. THE TITLE OF THE DOCUMENT:

The term "Code of Conduct" is normally associated with standards and norms of behaviour expected of the membership of a smaller unit that has basically similar tasks and duties to fulfil (e.g. members of the Health Dept., members of certain state organs, Traffic Dept., members of the Legal Association, etc.)

Although a Code of Conduct entails some forms of sanctions (penalties) which may be imposed on the membership in case of violation of the required standards of behaviour, these are, by nature, rather light and the heaviest penalty is usually permanent exclusion from that body or association. The norms enunciated in a code of conduct are themselves derivatives of norms entailed in some more wider and universally binding documents, e.g. Labour Code, Civil Code, including also the Criminal Code. The basic source, ofcourse, is always the constitution.

Our Code of Conduct provides for quite heavy penalties with deprivation of liberties which can range from 5 to 15 years in case of grave offences (see Schedule of Penalties, 2(e), page 8). The Code of Conduct also provides for capital punishment , which is termed "Maximum Penalty" (Schedule of Penalties, 1, page 7). In view of these possible measures which are necessary, I would therefore suggest that the NEC agrees to rename the said document a PENAL CODE.

2. STYLE OR NUMBERING SYSTEM:

In line with current international methods of numbering legal documents, i.e the norms thereof, I would suggest a uniform system of numeration, such that in our document[s] there is, for instance, only one article 3 or 4, etc. Needless to say, this system is much more simple and eliminates a system where there are, for example, so many Articles 5 or 8, etc.

3. CATEGORIES OF CRIMES:

The Code of Conduct provides for three types of offences, viz.

- (i) Crimes against the Struggle.
- (ii) Serious offences and
- (iii) Violations of Discipline.

Consistent with the suggestion already made to rename the document the PENAL CODE, the author feels that three categories of offences ~~of xxxxxxxx~~ be formulated thus:

- (i) Grave Crimes Against the People;
- (ii) Serious Offences
- and (iii) Petty Crimes or offences.

3.1. SUBSTANTIATION *

I decided on the term "Grave Crimes Against the People" (instead of the struggle) because the struggle is itself only a means to changing the lot of the people. The same applies to the "revolution". The Freedom Charter places the people, and not the struggle, at the very heart of the political struggle when it declares that the People shall Govern (Clause 1). ^{A tradition already exists in the ANC where on receipt of awards, accolades, etc., we declare that} we serve the people of South Africa.

Individuals who have committed crimes which we seek to punish can always claim they disagree with our struggle. The argument therefore should rather be that they have acted to prolong and perpetuate the sufferings of the people of South Africa who, in terms of the United Nations Charter [clause 2], have, like all peoples, the right to self-determination. That has nothing to do with one's ideological position towards the ANC.

4. ON THE CONCEPT OF MAXIMUM PENALTY:

The author takes the view that the terminology used here to mean the death penalty is not quite precise. It raises serious juridical and philosophical arguments concerning the "objective" or permanent existence of the death penalty. To describe the death penalty as the maximum penalty suggests we move from the premise that legal sanctions or penalties are already given, the death penalty being the maximum. This implied position that forms of punishment are objectively there cannot be accepted.

On a legalistic plane it is not also acceptable to talk of one maximum punishment when there are various legal institutes within our Code of Conduct with each having its own "maximum penalty", e.g. Articles 2 and 4 have as maximum penalty a period of 5 years' deprivation of liberty.

The term maximum penalty as a euphemism for the death penalty should be dropped and instead we should adopt the more specific term "Death Penalty" unhappy as we are at having to have this measure in our statutes. The popular term maximum price should not inadvertently be translated to the vague term "Maximum Penalty".

In the adjective "maximum" one reads some identification, sympathy and respect in the term "maximum price" [the price for the freedom we all strive for]. In a similar vein, one can talk of a maximum price in commercial terms; the ideal being that there is mutual assistance between the buyer and the seller.

5. ON THE CRIMES LAID DOWN IN THE CODE:

The Code of Conduct lays down two [2] types of grave crimes, viz. sabotaging activities and infiltration. It is the considered opinion of the author that this is obviously not enough. Sabotage as a grave crime is itself not laid down. Actions that have an effect of "sabotaging the activities of the organisation" can be wide-ranging. In some cases they can fall below the category of grave crimes, e.g. suppressing useful information, interfering with the correspondence of the Organisation, etc.

I therefore suggest to the NEC that grave crimes consist, inter alia, of the following :

- Treason
 - assassination
 - co-operation with the enemy
 - murder and manslaughter
 - misappropriation of funds
 - crimes against humanity (cf. Witdoek actions at Crossroads; Inkatha attacks on civilians).
- espionage
 - rape
 - mercenary activities
 - attack on friendly [allied] forces
 - robbery
 - armed robbery
- sabotage
 - mutiny
- and

I further suggest that planning and /or attempting to carry out any of the aforementioned criminal acts be punishable under that same crime, but of course, with consideration of the fact that the pertinent crime was not actually fulfilled.

6. SERIOUS OFFENCES:

Like grave crimes, serious offences have not been succinctly spelt out with the result that some acts included in this category should actually have been considered as grave crimes. A case in point is the pending case of the ANC (SA) versus PAUL NKOMO and ELIAS SIBONI where the two accused are alleged to have criminally incurred the ANC an expenditure of US \$40 000.00, but can only be charged for a serious offence in terms of Article 2(f), page 4 of the Code of Conduct.

Article 2(c), page 4, Code of Conduct can, unless it involves misappropriation of large funds or corruption, be a very light offence which would not need to be in this category but in that of Petty Offences or Violations of Discipline. An example herewould be that of a driver who uses an ANC vehicle at his disposal for things that are not related with his work. Experience has shown that drivers tend to take advantage of this situation and it is not a very serious offence unless it is carried to extremes. I would therefore suggest that Articles 2(c), (f) and (g) P.4 of the Code be put in the category of Petty Offences or Violations of Discipline.

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7. STRUCTURE:

7.1. PREAMBLE

As the first part of the document, I would suggest that we have a preamble instead of an introduction. Following the preamble, I would suggest that we have General Principles.

7.2. GENERAL PRINCIPLES

Under the General Principles I would suggest inter alia, provision for:

- age consideration in case of penalties involving deprivation of liberty or life;
- diminished responsibility: this is directly related with the above but also includes people who are not mentally sound(though not mentally incapacitated) and those who may be under the influence of drugs but NOT out of their making;
- that the administration of justice in the form of trials is the sole prerogative of the bodies thus assigned in terms of our statutes;
- that a person shall be deemed to be innocent until proven guilty by a competent body on the basis of the statutes in force at the time of the commission of the offence;
- that being under the influence of alcohol or drugs is no mitigating factor for an offence committed under such circumstances;
- that only actions (commissions or omissions) can be punishable and not one's views or thoughts;
- that a person can never be allowed to give evidence for or against his/her spouse;
- that the purpose of a trial or hearing would be to obtain the truth and that the accused should assist to that end;
- that the death sentence can never be imposed on a pregnant woman, or a woman who was pregnant at the time of the perpetration of the offence. Even after giving birth the death penalty may not be imposed;
- that the death sentence can never be imposed on juveniles or those who were juveniles when the offence was committed;
- that the death penalty can never be imposed on the mentally insane;
- that the accused would always be entitled to a defence and would be always informed of his/her rights;
- that the judgement/verdict would always be passed in the name of the people of South Africa; not the revolution;
- that the accused would always be entitled to the Last Word before judgement can be passed.
- that a person cannot be charged more than once for the same offence/s

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- that no one can reap benefits or rights from an illegal act; and that punishment shall be proportional to the crime.
- that the violation of any legal norm will not constitute an offence if the purpose thereof was to prevent the commission of a heavier offence by someone or was manifestly in the interest of society. The action thus taken to prevent the commission of the crime will be commensurate with the imminent or conceived danger to society.
- a member of the Health Department who is qualified in any medical field to treat patients shall not be obliged to reveal incriminating evidence against his/her patient;
- a defence lawyer may also not be asked to divulge incriminating evidence against his/her client.
- an accused may reject his/her defence counsel if he/she has lost confidence in him/her. The tribunal will have the right to accept or reject this proposal but will ensure there is a defence counsel for the case, especially in case of accusation of a grave crime;
- a member of a tribunal (court) may recuse himself/herself if he/she can declare a personal interest in the case which would put in question his/her impartiality.
- that no member of the ANC can be handed over to a foreign authority (where this is avoidable) FOR TRIAL AND PUNISHMENT. The ANC would, on the basis of its statute and evidence provided, initiate proceedings against the alleged offender(s);
- the ANC will seek the repatriation of those of its members who have fallen foul of the criminal codes of other countries to serve punishment under its jurisdiction. The provisions of the ANC Penal Code will be considered in relation to the sentences imposed by the foreign court that sentenced the person concerned.

7.3. Grave crimes.

7.4. Serious offences.

7.5. Petty offences.

7.6. Legal definitions.

8. Removal of the Schedule of Penalties

I would suggest that the NEC agrees to abolish the system of having a separate Table of Possible Penalties, and rather integrate these and many other forms of sanctions into the relevant offences themselves by, for instance, stipulating that murder shall be punishable by a minimum of four years' deprivation of liberty and a maximum of fifteen years or a death sentence, depending on the manner in which the crime was carried out or prepared.

In reading British newspapers, the author has noted that the system of stipulated minimum and maximum sentences for offences is in force in the United Kingdom, the GDR and, unfortunately, in racist South Africa as well. In the author's opinion, PLEASE TURN OVER...../this system.....

this system ensures uniformity in dispensing justice by ensuring that no patently light sentences are passed in one area whilst stiffer penalties may be meted out for the same offence in another area eventhough the maximum penalty provided for the same offence may not be exceeded in both instances. Regulated sentences are even more needful when we consider that our law courts would have an important role to play in the dismantling of apartheid^{and} racism. There could, however, be a need to pass a lighter sentence, particularly when the accused clearly repents and genuinely regrets his/her actions. For this situation we can make provision by having, in place of a Schedule of Penalties, a special category of reduced or mild sentences. In making recourse to this category, the tribunal(court) would have to give good and convincing reasons to show cause why it felt it should **decide thus**.

9. Additional serious offences

The Code of Conduct augments the list of actions that fall in the category of violations of discipline by including those actions that are meant to be considered as offences because one reads on page 5 of the Code that:

"In addition to the forms of misconduct mentioned in the Section of Offences, Violation of Discipline shall include:....."

This would then negate the existence of the category of Serious offences. Whatever the case may be, it would be much more preferable to have as the third category of punishable offences Petty Crimes or offences so that breaches related to the Discipline may be handled in the Regional Disciplinary Committees and not in the National People's Tribunal.

I would plead that instead of trying to enumerate all the acts that we are to regard as violations of discipline, we mention about three or four of such acts which we consider to be commonplace and then give a definition of what we consider to be behaviour that constitutes violation of discipline. In any case, "rowdy and aggressive behaviour"[Item (a), page 5] and "disrupting meetings and interfering with the orderly functioning of the Organisation" are essentially one and the same.

Under serious offences I would suggest we have as punishable offences the following :

- false accusation against those in authority
- false accusation against any member of the Movement
- slandering and character assassination
- raising a false alarm
- theft, including receiving stolen goods, assisting in the commission of an offence, helping or giving an undertaking to assist a culprit after the commission of an offence, assisting to hide commission of an offence, incitement to an offence, burglary
- forgery and fraud
- endangering the health of others
- bigamy

- car theft
- embezzlement
- violation of the obligatory primary school attendance for children
- bigamy
- sex assault
- sexual harassment
- child abuse
- assault
- impersonating
- violation of the dignity and integrity of a human being
- violation of the freedom of conscience
- failure to give assistance in case of injury, danger or threat to life
- reckless driving resulting in loss of life, serious injuries or damages
- wrongful imprisonment (where the imprisoned was himself/herself not responsible thereof)
- suppression of information that would be useful to the ANC
- intruding into private lodgings

10. Guilt

Guilt as a constituent element for proof of the commission of a crime or offence needs to be clearly spelt out in our Code of Conduct-Penal Code. Culpable action can either be as a result of:

- i) WILFUL (deliberate) ACTION
- ii) NEGLIGENT ACTION
- iii) INDIFFERENT ATTITUDE

For every type of crime or offence it would be necessary for the Code of Conduct (Penal Code) to give guidance as to which of the three above-mentioned psychological aspects (subjective factors) need to be proved. In the case of theft it is necessary to prove the intent; negligent stealing does not exist. However, in the case of manslaughter, negligence is a sine qua non for this type of an offence to be proved to have been committed.

11. Verdict

One reads on page 12 Item 6(c) that "The accused shall not be obliged to testify, but failure to do so will normally be considered as admitting the allegations not directly rebutted by him/her". This position cannot be accepted as it clearly contradicts the principle that a person is innocent until proven guilty. This principle actually means that even when a person admits to the commission of an offence, that admission alone would not be sufficient ground to find him/her guilty. A person can own responsibility to an offence if only to shield someone who perhaps might be worse off (because of a previous conviction, for example), whereas the confessing "culprit" would know that he would not be so severely punished because of a combination of several factors. A person can admit to an offence simply because he/she is under threat from someone or may be having certain incentives in assuming the responsibility.

Under Item 10 (b),page 14, Code of Conduct,it is stated that "If(the Tribunal) is satisfied of the innocence of the accused, it shall so declare." This suggests that the tribunal(court) can return a verdict of "innocent". To be consistent with the principle of innocence until proved to be guilty, it would seem logical that under such circumstances (where the tribunal is satisfied of the innocence of the accused)a verdict of "not guilty" BE RETURNED BY THE TRIBUNAL.

As possible types of verdict, we may therefore have: GUILTY and NOT GUILTY.

Whether "guilty" is accompanied by a suspended sentence or caution,that would not alter anything from the nature of the verdict itself,viz. being found guilty. The principle "IN DUBIO PRO REO" would equally not permit a verdict of"Guilty but not proven". If some doubt still persists despite all intensive measures to throw light on the case, then the accused must be set free by being found not guilty as guilt could not be proved beyond all reasonable doubt.

12.THE ADVISOR

Whilst I have no quarrels with the term "Presenter", I nevertheless feel that the term "Defence" or "Defence Counsel" should be adopted instead of the term"Advisor". Item 2(g) page 10 of the Code lays down that the Advisor is to assist the accused in his/her defence(my emphasis - N.M.), whilst Item 4(d),page 12 of the Code of Conduct stipulates that the defence shall be conducted in a dignified manner... I see the terminology in these and other similar articles as admitting, albeit indirectly, to the unavoidability of the use of the appropriate term -DEFENCE.