

MC HQ 1-31-2-8

3 Hendale Avenue
Hendou

LONDON, NW 44 LU

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President

Dear O.R.

Your note (and enclosures) dated 29 December last raises fundamental national and international questions. I cannot do these issues justice in the given time, especially having regard to the limited amount of information I have on their background. This is no excuse for not making comments or for making shoddy comments. Let me say this at once.

It is, indeed sensible to split the proposed conference into two parts - the first preliminary or preparatory and the second final. The first part should, properly, prepare the draft agenda for the second one. This (agenda) must be broad, deep, comprehensive, and address most if not all the technical issues involved in the whole exercise. It should do more than that. It should also face such basic policy issues as the following:

What results do we want the conference to yield? How will they advance the cause of the struggle for liberation and freedom? Can they be distorted or abused by the enemies of our cause? Is there anything we can do to prevent that from happening? Does it matter? What follow-up action must be taken towards the implementation of the result of this conference? How do we square all this with the provision of the Freedom Charter? And so on. All these results will then be submitted to the second or full conference for consideration, adoption and action.

The achievements of the preparatory conference will be limited unless participants are carefully screened as to number and standing in the disciplines they represent. I say "disciplines" advisedly because law, be it constitutional or otherwise, is not a subject apart from or independent of Political Science, History, Economics, Sociology, Psychology, Philosophy, etc. It interacts with all these disciplines; fertilises them and is fertilised by them. No intellectual Apartheid here. Only unity, cohesion and integration. And so our participants must be imbued with this philosophy if they are to make the fundamental impact on our constitutional future that our country and people deserve. In this respect I am delighted that someone of the international stature of Professor Ronald Dworkin is associated with the project.

I know Professor Ronald Dworkin (not personally) as Professor of Jurisprudence at Oxford University. He has written extensively on legal philosophy. His latest book, TAKING RIGHTS SERIOUSLY is far and away the leading book in its field and perhaps in Law (i.e. Anglo-American-Commonwealth Law) in the sense that our contemporary notions of land, property, contract, tort, crime, constitutionalism, etc. is determined in no small way by our philosophies of law or jurisprudence. Dworkin is without doubt a leader in these matters at the present time. This is no mean achievement having regard to the fact that this is a field which has been dominated down the years by such names as H.L.A. Hart, John Austin, Jeremy Bentham, Lon Fuller, Pound - and really Hegel, Kant Aquinas, Plato and Aristotle before them. So I am making a big claim for Dworkin. He is no socialist. He is a Liberal with a capital letter L and a small letter l - at least as I understand him. He is so highly regarded by his contemporaries and peers that a book was published recently by a dozen or so of them, all distinguished and renowned jurists, on how they view his philosophy of law. They take him seriously because he honestly "takes rights seriously" - as he should. As all of us should do. His presence in the conference will raise the quality of its work and gain its results respectability and a good hearing in quarters that, for good or ill, do matter in the world as it is. And here I must sound a note of warning (if I may say so):

The circles to which I refer, "respectable circles" in the West, in so far as they think at all about our freedom, link it with the granting by the ANC government of Constitutional guarantees for the Whites in general and the Boers or Afrikaaners in particular. Such guarantees take different forms and shapes. The standard form is that of entrenched Bills of Rights of Man and the Citizen. On the Dworkin model, if I understand it correctly, such guarantees would extend to tinkering with the fundamental assumptions on which the law relating to property, contracts, crime, etc. is based so as to ensure that even if constitutional guarantees are violated or amended, individual private rights will remain secure. If such guarantees underpin capitalism or the free market economy inherited at liberation by an ANC government, then so be it. In fact all the better. Obviously the benefits of such protection will extend to the economic and financial and other interests (eg. strategic, military, etc.) of foreign investors, corporations, nations. The poorest of the poor at the bottom of the pile can, to use a colloquialism, stuff or lump it. For me this takes us into very deep waters indeed. It also challenges us to go beyond the general guidelines contained in the Freedom Charter to detailed concrete specifics as to how we see the future of our country. Generalities will not do - either for us in the last quarter of the 20th century or for our friends in the west, to say nothing of our enemies. And god knows they are still many and powerful.

What it all boils down to is that attempts could be made during this reat of transition from White minority race rule to majority African rule to build into the very sinews of our society certain technical, legal and other mechanisms which will fetter an ANC government's freedom of action under such rubrics as "freedom under law", "due process", "Limited government", "constitutional government", "the rule of law", etc.. These concepts, relying as they do, ultimately, on a carefully selected judiciary for enforcement, could very easily deteriorate into a conflict between the "elitist" judiciary and the sovereign parliament of a sovereign people and country.

That is its turn will have serious implications for the relations between the two branches of government - the Executive and the People. Our sovereignty earned in the field of battle, could thus be lost in the staid courtrooms of what would in fact be a sovereign judiciary where judges are not elected and lack popular support. So a popularly elected ANC government could be subject to the diktata of a self-perpetuating judiciary which is answerable only to itself and to nobody else. This is certainly one meaning of the independence of the judiciary. Can we afford it? The two conferences, if they are ever held, could do no worse than devote a thought or two to this issue. What, for example, has been the role of the judiciary in our society since 1910? Addresses to the courts by Nelson Rolihlahle Mandela and Robert Mangaliso Sobukwe on these questions are only a starting point. More recently Dr. Corder (then at Stellenbosch University) and Dr. Forsythe have reviewed at great length and depth the way the South African judiciary has dealt with cases relating to land, franchise, property, trade unions, treason, subversion, security, race relations, etc. during the period 1910 - 1980. They have shown how the courts have responded to challenges in these areas, depending on whether these challenges were White, Coloured, Indian or African. It is a deeply disturbing story. Let us face it! The judges, even liberal ones, are part and parcel of the South African state and society. They benefit from it. At the end of the day they have to protect it just as viciously as does the South African Police and Defence Force. We can not entrust our future and that of our children to them. The conference might wish to address these issues.

Well, Chief, I apologise for inflicting all this on you but then you asked for it! Of course I realise that I have not addressed the document you sent me paragraph by paragraph. I did not think that this was what you wanted me to do. I have taken this broad view because I feel it is an area over which I can best contribute to the on-going discussions on the long-term future of our country.

By the time this note reaches you I will be in Lusaka for the meeting of lawyers.

It is marvellous to be part of the process of thinking together with others on the legal and constitutional framework for and foundation of a free, independant, dynamic and proud South Africa.

As always

Nathaniel M. Masemola

p/S Extracts from some reviews of Dworkin's book

- (1) "Dworkin's writing launches a frontal attack on the two concepts, utilitarianism and legal positivism, that have dominated Anglo-American jurisprudence in the 20th century....."
- (2) ".....in developing his theme, he draws on and contributes to Political theory, moral philosophy and even theory of knowledge and philosophical logic."
- (3) "Nobody has written or expressed more persuasively the case for discrimination in favour of racial minorities. Not a book for those who value their prejudices."