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Fax Covering Note

FAX FOR: NATHANIEL MASEMOLA

DATE: February 10, 1989

NUMBER OF PAGES INCLUDING THIS ONE: 5

Please call above telephone number in London to respond or for any queries or missing pages.

Natlumiel: Iwonder ifyou could read the enclosed draft nores about an agenda far out meetmg, and let me â\\200\\234ave you: theaghts. I intend :9 send. the i-\\201mzl dr aft along with invitations, so that people will know what I think we should be talking about.

Page 1

South Africa and the Rule of 13w

Numbam Park

Numbam Abbey, Oxfordshire

June 3â\200\23025) 1.989

## 1. Organization

The meeting Will be organized in roughly the style used for confer-

ences at Ditchely Park, though I have someone adapted that style for this  
nrraelnn The- entire mnun .. T emec: about 40 mrdeioants -- Will meet ICP  
gemer on rnaay anemoon, June 13, tor nitrottucwty renum, iulu lm 4  
general and preliminary discussion of a variety of issues. On Saturday we  
will divide into three smaller groups, each of which will discuss one of the  
three sets of issues tentatively descî-\201bed below, as expanded and  
amended following your suggestions. The groups will meet throughout  
Satm'day meaning, with a break for coî-\201ee, and will meet again, in the  
afternoon, between tea and dinner. (The early aftermoan will be kept for  
walks and informal discussion among the participants.) On Saturday eve-  
ning rapponeurs î-\201om each group will prepare a short report of the dis~  
TJSSECâ\200\230î-\201fâ\200\230...in hie n: ha!- gnu â\200\230P {n î-\201nneuâ\200\230lto  
î-\201nn with î-\202u: Phainâ\200\230nî-\201n nr'nhî-\202if.  
uemen of the group, aî-\201î-\201fâ\200\230î-\202pthâ\200\230lg to captme the division of  
-oâ\200\230pinions as well  
as agreement. These repons will be duplicated Saturdayâ\200\230night, and made  
available to all participants before the î-\201rst meeting on Sunday. We will  
once again meet allmtogether on thatday,dismssing the reports of the

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decide to spend more time on certain issues orsets ofissues than on  
Others We will expect to î-\201nish by tea-tlme on Sunday The general confer-  
ence rapporteur will prepare a summary of the Sunday dismsions for  
later disu'ibun'on to -- but only to -- the participants. It should be un-  
derstood by all that the entire discussion will be off the record, and no  
publicity should be given to it.

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If you 'are able to attend, please indicate which of the three Satur~  
day gwups you would prefer to join. I will of course try to homer Such re-  
quests,â\200\230 though I may not be able fully to do so if some groups prove much  
mom popular than others. As soon as I have heard from those I have in-  
vited, and the composition of the meeting is î-\201xed, I will ask some  
participants to act as chairmen and rapperteurs of the three groups. I will  
also ask two or three members of each group to prepare short papers that  
participants might read in advance, developing and expanding the groupâ\200\230ls  
agenda, and setting out their own views as a basis fer discussion. I will ar-

range to circulate any other material any member of the conference might think it helpful for members to look at in advance or to have at the meeting (I have promised some participants that they Will not be asked to read, in advance, much more than can be managed on the i-ight fmm South Africa.) Each chairman will be responsible, taking those papers into

RCComit,xvi. piuposnag d- TILCâ\200\231LCauâ\200\224Libe'urtiu agCuua w FuS'"ui' hClâ\200\230â\200\2359311?,  
which allocates issues over the course of the day.

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Conference Agenda: Draft Feb. 9, 1989, 4:48 PM

Page 2

## 11. Topics

The conference has as its general theme the role of the concepts

of legality and the rule of law in a changing South African situation. I propose three main topics of discussion tentatively described as follows.

### Group 1. Legality and Judges in South Africa.

What are the responsibilities of a judge -- as an official whose duty is to enforce the law rather than try to improve it -- when the legislature enacts statutes whose political motivation seems contrary to the principles of justice and fairness that underlie the general legal traditions and history of the community? What standards should judges use in interpreting and applying such statutes, when the statutory language is abstract or vague or otherwise inconclusive, as, to some extent, statutory language inevitably is? Does a sound view of legality suggest that judges should adopt whatever interpretation would best serve the concrete political purposes of the executive, or of a majority of the legislators who enacted the statute? Can that view be defended as a successful jurisprudential analysis of the concept of law? Or do judges have a legal responsibility to interpret particular laws, so far as the text of these is vague or indecisive, in the light of fundamental principles of legality and justice, as these have been reflected in the general legal traditions of the community? Do they have a responsibility, that is, to try to make the law as a whole coherent in principle?

Should the answer to these jurisprudential questions be different with respect to criminal than to civil cases? Should the

answers depend On how fundamental are the rights the stanltes = might be interpreted as abridging" ShOUId they be different during a period when national security is threatened, and, if so, who should decide -- judges or government -- about the gravity of any security threat?

Majority and dissenting Opinions in recent decisions of the courts in South Africa, both in lower courts and in the Appellate Division, seem to divide abOut these crucial issues of legal theory, partiCularly in cases involving detention and race. It is therefore to be expected that discussion of this topic will in~ elude consideration of several of these recent decisions. But it is undersmod that some of the participants might feel it in-appmpriate for them to comment directty on the merits of particular decisions, or on speciï~\201c issues likely to arise in cases in the near future, and might merefore wish to limit their own remarks to the iSSuCS of general jurisprudence I described.

Group 2. Democracy, Consï~\202tutionalism and the Protection of hï~\202nories.

How far is it possible to achieve genuine democracy and yet protect the fundamental i~\201ghts and legitimate expectations of all members of the society? Though that is an important question in

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Conference Agenda Draft Feb. 9, 1989, 4:48 PM

Page 4

legality provide any special warrant for civil disobedience or revolution?

Does the rule of law cease to have any meaning during periods of revolutionary activity, or for groups or governments that claim a justification for revolution? Or does the idea furnish Standards that must be respected even during such periods and by such groups?

Can these standards furnish a law-behind-the-law that would govern the transition from one form of positive government to another? Is violence directed at the innocent wholly forbidden by principles of legality, for example, even on the part of revolutionary groups who believe their cause justified? HOW far does the idea of legality require a new government to recognize and protect rights to property vested under a former legal system? How far does the idea require compensation for any change in economic arrangements? HOW far does it limit the forms of government -- the practices of courts, for example -- any new government is permitted to institute? In what other ways can the idea of the rule of law itself provide continuity for South Africa's future?

I recognize the overlap among these different sets of issues, and I

mean them only as a set of tentative suggestions about an agenda, which participants might wish to expand or alter in any number of ways. I am therefore anxious to have your thoughts about them, as an agenda, as soon as possible.