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FAX FOR.- Nathaniel Masemola
DATE: February 17, 1988
NUMBER OF PAGES INCLUDING THIS ONE: 4

Dear Nathaniel:

Many thanks for your extremely helpful cements on my draft.
You will see, from the enclosed revision, that I have accepted several of
your suggestions. I have marked the parts which reï-\202ect changes.

Of course I agree With you about the Soweto Omnibus. I tried to
set up the agenda in a rather academic way, to indicate to everyone that

â\200\230 we wanted to explore the issues at a jurispmndential and philosophical

level. but choosing language that made it inevitable that the right and emo-
tionally important subjects would have to be discussed as the nerve of the
jurispmndential issues. I intended that the "short papers" described under
the â\200\235Organizationâ\200\235 part of my draft would sharpen the connections be-
tween the jurispmndential issues of the agenda. and the reality of life in
South Africa. I thought it better to let the authors of those papers do this
than to attempt it in the agenda itself. Since some selection will be in-
evitable anyway, it would, I think, also be better to encourage the short
papers to raise some of the more specii-\201c items you report discussed in
Harare. I was awe of the Harare meeting, incidentally, and discussed its
agenda and'partieipants with Hugh Corder and others involved in setting
it up, and was trying to separate our conference from that one to avoid
unnecessary overlap.

Some of the changes in this draft agenda from the much earlier

agenda. of which you sent me a ccpy reï-\202ect changes in the legal situation
in South Africa, following the disgraceful decisions by the AD in Omar and
Other cases. And some reï-\202ect less emphasis on international law, which
has been much treated in other conferences, and more on the importance

of legality as an avenue of transition .. the idea of the third general topic,
which I think to be the most interesting, 0E5? behind the law.â\200\234

Please let me know what you think. You can send a fax to 960-

3154, but only by calling i-\201rst and telling me to switch the line to the fax. If
â\200\231Trmt home, just leave word on the answering machine, and Iâ\200\231ll call you
so the fan: will work.

Thanks again for your great help.

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1â\200\230 my as eqyals?How i-\202u- is it possible to aerueve such genuln5
democracym South Africa and yet protect the fundamegtgl
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How far can the participants at our conference agree On what
the ftmdamental human rights are? Are there fundamental eco-
nnmir; as are" ac r'ivi! right: Â«qr! if Sn whaf Fnrrn i-\201n thÃ©i-\201i-\201 tng?
How far are fundamental human rights now protected by legist
tion or practice in South Africa? How far, for example, would
South Aï-\201nâ\200\230can legislation and practice have to be altered if South
Africa adopted the European Convention of Human Rights, or
the Bill of Rights of the American Constitution or some similar
document, as a constitution of its own?_Â\$,gyggw
stitutional gratection in fact protegt{heights Qf individu215and
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Would judicial review in the American form be appropriate for
South Aï-\201tâ\200\230ca? What other institutional arrangements for identify-
ing and protecting minority rights, if any, might be more
suitable? Are the standards of either the European Convention
or the American Bill of Rights appropriate for South Africa? If
not, which of the rights either of these protect would it be in-
appropriate to recognize there? Does the political and security
situation of South Africa. justifythe constraints on freedom of
gress now in force in South Africa? Should university students
be free to refuse conservative views they disapprove a voice on
campus, on the ground that radical views are in effect banned
there?

It South Africa. became 2 genuine democracy, with rough equality of political power among all South Africans, white citizens would be a disunct political minority. Would that situation require or suggest a different form of constitution from the forms familiar in Western democracies? Should rights then be established for white citizens as a group, rather than simply for all citizens as individuals alike? I think not. It is better to have a single constitution for all South Africans. It is better to have a single constitution for all South Africans. It is better to have a single constitution for all South Africans.

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petuunateunjust advantages acquired during apartheid? Could group rights for white South Africans be enforced against a dear ; nrrai\201r maini\201rv nrvtim\202i\202rhrLâ\200\234 i\202u: Iiaht nf past antonnpic m hostility and widespread sense of injustice? What special institutions would be needed to enforce and protect such group rights? It is expected that discussion of this issue would include consideration of various draft constitutions for a new democratic South Africa that have already been proposed. But it is hoped that some participants will have prepared their own concrete suggestions for a constitution for a future democracy South Africa.

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Group 3. Legality and Transition.

Politicians of almost every political persuasion all claim to respect the ideas of legality and the rule of law. Does it follow that these ideas are empty? Or can we secure some measure of agreement, among the participants, about what they mean? Does

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the rule of law mean only ï-\201delity to whatever legal procedures and laws have been established? 0: is it an idea that we can use to evaluate and criticize existing legal structures? If so, then um det what circumstances can a legal system Which carefully observes its own legal procedures and follows its own laws nevertheless be said to fail the test of legality?What is state violence?Isstateviolenceitself a violation of the rule oflaw?

â\200\231 Doesa Muteoflegality Erovide aux special warrant for civil dis; obedience or revolution?W

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Does the rule of law cease to have any meaning during periods of revolutionary activity, or for groups or governments that claim a jusï-\201ï-\201eaï-\201cm for revoluï-\201on? Or does the idea furnish standards that must be respected even during such peï-\201ads and by such groups?

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Can these standards furnish} lawvbehindvthe-law that would govern the transition from 036 form of positive government to another? Is violence directed at the innocent wholty forbidden by principles of leplity, for example, even on the part of revolutionary grOups who believe their cause justii-\201ed? How far does the idea of legality require a new government to recognize and protect rights to property vested under a former legal system? I HOW far does it require 3 new_gWmeespccquidial Erecedents? How far does the idea require eomgensation 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

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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.

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South Africa and the Rule of Law

Nuneham Park

Nuneham Abbey, Oxfordshire

June 23-25, 1989

1. Organization

The meeting will be organized in to

ly the style used for confer-

ences at Ditchley Park, though I have some one adapted that style for this occasion. The entire group -- I expect about 40 participants -- will meet together on Friday afternoon, June 23, for introductory remarks, and for a general and preliminary discussion of a variety of issues. On Saturday we

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amended following your suggestions. The groups will meet throughout Saturday morning, with a break for coffee, and will meet again, in the

walks and informal discussion among the participants.) On Saturday evening rapporteurs from each group will prepare a short report on the discussions in his or her group, in consultation with the Chairman or Chairwoman of the group, attempting to capture the division of opinions as well as agreement. These reports will be duplicated Saturday night, and made available to all participants before the first meeting on Sunday. We will once again meet all together on that day, discussing the reports of the three groups and the issues these raise, though the conference may well decide to spend more time on certain issues or sets of issues than on others. We will expect to finish by tea-time on Sunday. The general conference rapporteur will prepare a summary of the Sunday discussions for later distribution to -- but only to -- the participants. It should be understood by all that the entire discussion will be off the record, and no publicity should be given to it.

If you are able to attend, please indicate which of the three Saturday groups you would prefer to join. I will of course try to honor such requests, though I may not be able fully to do so if some groups prove much more popular than others. As soon as I have heard from those I have invited, and the composition of the meeting is fixed, I will ask some participants to act as chairmen and rapporteurs 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 group's agenda, and setting out their own views as a basis for discussion. I will arrange 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 night from South Africa.) Each chairman will be responsible, taking those papers into account, for proposing a more structured agenda to his or her group, which allocates issues over the course of the day.

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II. 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
present three main topics of discussion, tentatively described as follows.

Group 1. Legality, Apartheid and Adjudication in South Africa.

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What are the responsibilities of a judge .. as an official whose
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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? Should judges adopt whichever inter-
pretation would best serve the concrete intentions of the exem-
tive, or of a majority of the legislators who enacted the statute?
Is that view consistent with the idea of an independent judiciale-
ry." Can it be defended jurisprudentially, that is, as flowing from
a sound analysis of the concept of law? Or do judges have a legal
responsibility to interpret particular laws, so far as they are
vague or indecisive, in the light of fundamental principles of
legality and justice, as these have been reflected in the best and
most general legal traditions of the community? Do judges 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 minority cases? Should the
answers depend on how fundamental are the rights the statutes
ought to be interpreted as abiding? Should they be different dur-
ing a period when national security is threatened, and, if so,
who should decide -- judges or government -- about the gravity
of any security threat?

ca, both in lower courts and in the Appellate

views of opinions in recent decisions of the
courts in South

Division, seem to divide about these crucial issues of legal
theory, particularly in minority cases. 1: is

therefore to be expected that discussion of this topic will include
consideration of several of these recent decisions. But it is
understood that some of the participants might feel it in-
appropriate for them to comment directly on the merits of particular

ticular decisions, or on specific issues likely to arise in cases in the near future, and might therefore wish to limit their own remarks to the issues of general jurisprudence described in the preceding paragraphs.

Group 2. Democracy, Constitutionalism and the Protection of Minorities.

1 Does the idea of the rule of law itself require genuine demo-

cracy, in which all citizens participate in politics and the econo-