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(January-July)

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Fax Covering Note

PAX 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.

Nathaniel: I wonder if you could read the enclosed draft notes about an agenda for our meeting, and let me have your thoughts. I intend to send the final draft along with invitations, so that people will know what I think we should be talking about.

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South Africa and the Rule of Law

Nuneham Park
Nuneham Abbey, Oxfordshire
June 23-25, 1989

I. Organization

The meeting will be organized in roughly the style used for conferences at Ditchely Park, though I have someone adapted that style for this

The entire event about 40 participants - will meet together on a 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 described below, as expanded and amended following your suggestions. The groups will meet throughout Saturday morning, with a break for coffee, and will meet again, in the afternoon, between tea and dinner. (The early afternoon will be kept for walks and informal discussion among the participants.) On Saturday eve-

ning rapporteurs from each group will prepare a short report of the dis-

in the afternoon. Via a meeting in the afternoon. The 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

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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 flight from South Africa.) Each chairman will be responsible, taking those papers into

account, to add a more structured agenda to his or her group, which allocates issues over the course of the day.

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 propose three main topics of discussion, tentatively¹ 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 statutes might be interpreted as abridging? Should 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 threat¹

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 include consideration of several of these recent decisions. But it is understood that some of the participants might feel it inappropriate for them to comment directly on the merits of particular 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 jurisprudence¹ described.

Group 2. Democracy, Constitutionalism and the Protection of

Minorities.

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

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.