

Ronald Dworkin

Professor of jurisprudence
University College, Oxford
08652 76602
143 Cbesterton Road, London W10 6T

â\200\235"96â\200\235â\200\2303â\200\2315â\200\235

([anuaryjuly)

/Mg?) ,2 [77% â\200\2317â\200\231eJâ\200\224m/

Professor of Law
New York University Law School
40 Washington Square South
New York, NY. 10012

Fax. 33232233:

(August-December)

February 26, 1989

Nathaniel M Masemola

3 Hendale Avenue

London NW4 4LU

Dear Nat

I am writing to invite you to participate in a small conference in Britain

from June 23-25 of this year, which will be held at Nuneham Park, a country house meeting center near Oxford, about 45 minutes from Heathrow. The conference will consider jurisprudential issues centering on the ideas of legality and the rule of law, with special reference to the problems of South Africa. I enclose draft agenda for the conference. This will, I hope, give you some idea of the range of issues I hope will be discussed; but (as the draft notices) the agenda is open in two ways. I hope that those who accept invitations will make suggestions for revising it. And the group chairmen and those who write short papers in advance will both elaborate and restrict it. I have received a foundation grant to cover all expenses, and I am able to reimburse air travel in business class.

I am inviting lawyers from very different backgrounds and situations, in-

cluding South African judges, judges from other nations, lawyers from South Africa and elsewhere, including South African lawyers in exile, and legal philosophers and scholars. Thdï-\201i-\201these lawyers are from different backgrounds, each is being invited only as an individual, not as a representative of or spokesman for any organization. During a brief recent trip to South Africa, I was able to speak to only a small number of those I had planned to invite. All the South Aï-\201â\200\230ican judges and lawyers I was able to speak to agreed to attend, including the ChiefJustice, Michael Corbett. I am also inviting aJustice of the Supreme Court and a member of the House of Lords.

I believe the conference provides an unusual opportunity to discuss jurisprudential issues of importance in South Africa in a lawyer-like and philosophical rather than only political way, so as to build on the ideas and concepts lawyers share professionally in spite of political differences. I am inviting participants, and designing the conference, with that goal most in mind; I expect constructive and developed argument not pieties or confrontation. I very much hope you will be able to join us. Please telephone or write to the London address above.

â\200\234â\200\2347

Page 2

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

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, Apartheid and Adjudication 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? Should judges adopt whichever interpretation would best serve the concrete intentions of the executive, or of a majority of the legislators who enacted the statute? Is that view consistent with the idea of an independent judiciary? 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 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 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 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 jurisprudence described in the preceding paragraphs.

Page 3

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

Does the idea of the rule of law itself require genuine democracy, in which all citizens participate in politics and the economy as equals? How far is it possible to achieve such genuine democracy in South Africa and yet protect the fundamental rights and legitimate expectations of all members of the society? How far can the participants at our conference agree on what the fundamental human rights are? Are there fundamental economic as well as civil rights, and, if so, what form do these take? How far are fundamental human rights now protected by legislation or practice in South Africa? How far, for example, would South African 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? Could any formal constitutional protection in fact protect the rights of individuals and minorities against arbitrary government power?

Would judicial review in the American form be appropriate for South Africa? What other institutional arrangements for identifying 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 inappropriate to recognize there? Does the political and security situation of South Africa justify the constraints on freedom of press 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?

If South Africa became a genuine democracy, with rough equality of political power among all South Africans, white citizens would be a distinct 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? Is the idea of rights belonging to a group as such coherent and defensible? Or would that idea perpetuate unjust advantages acquired during apartheid? Could group rights for white South Africans be enforced against a democratic majority, particularly in the light of past antagonism, 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 more 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 democratic South Africa.

Page 4

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 the rule of law mean only fidelity to whatever legal procedures and laws have been established? Or is it an idea that we can use to evaluate and criticize existing legal structures? If so, then under 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? Is state violence itself a violation of the rule of law?

Does a failure of legality provide any special warrant for civil disobedience or revolution?

â\200\230

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 it require a new government to respect judicial precedents? 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.

Page 1

South Africa and the Rule of Law

Nunebam Park

Nunebam Abbey, Oxfordshire

june 23-25, 1989

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 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 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 evening rapporteurs from each group will prepare a short report of 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 on 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 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