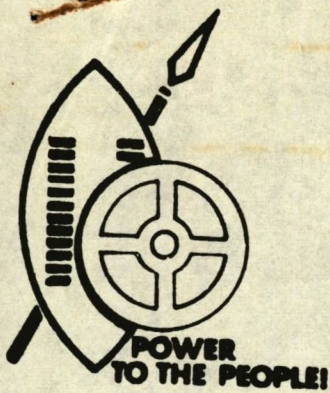


MCH 91-31-2-10



# AFRICAN NATIONAL CONGRESS

DEPARTMENT OF LEGAL AND CONSTITUTIONAL AFFAIRS  
P.O. Box 31791, Lusaka, Zambia. Telephone 219656/7 Telex 45390

Our Ref: ZNJ

15.12.1987

Your Ref:

Cde Albie Sachs  
c/o ANC(SA)  
CHIEF REP  
MAPUTO

Dear Comrade Albie,

RE : PLENARY MEETING : CONSTITUTION COMMITTEE & 2. IN-HOUSE SEMINAR.

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This is to inform you that our next meeting as the Committee will be held on the 8th January, after the press conference Chief shall have addressed.

I further wish to inform you that our in-house seminar on constitutional proposals will be held from the 1st to the 4th March, 1988.

Chief has already indicated that he will attend both meetings.

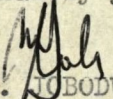
Chief has also passed on to us a letter dated 26th October, 1987, with annexure entitled : SUGGESTIONS FOR CONFERENCE ON SOUTH AFRICA AND RULE UNDER LAW:

We forward you herewith both documents for your perusal and comment.

THESE documents will be placed before our next meeting for discussion. In the next coming meeting we shall also discuss in detail preparations for the coming in - house seminar.

Could you be in Lusaka before 8th January, 1987.?

Comradely yours,

  
Z. N. MUBODWANA  
SECRETARY

ENCLS



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October 26, 1987

President Oliver Tambo  
The African National Congress  
P. O. Box 31791  
Lusaka, Zambia

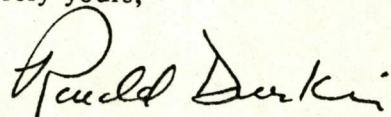
Dear President Tambo

Anthony Sampson suggested that I write to you describing proposals for an agenda for the first of the two conferences on rule under the law that we discussed over lunch in London, and that Anthony described to you in more detail at the recent conference in Harari.

I must emphasize that the enclosed agenda represents only my own suggestions, though I have sent Anthony a copy of it. I have tried to indicate the kind of issues I now think could profitably be explored at a small working conference. You will see that I describe issues that include technical issues of legal doctrine and legal philosophy. I believe these would be suitable to a small conference of some twenty people, though not so suitable to the larger conference for which the smaller one might plan.

It was a pleasure to meet you in London, and I hope I will have another opportunity to talk with you soon again.

Sincerely yours,





## SUGGESTIONS FOR CONFERENCE ON SOUTH AFRICA AND RULE UNDER LAW

### I. Introduction

The following agenda proposes certain issues for a preliminary conference about South Africa and the idea of legality or rule under law. The preliminary conference would be small, and would aim at detailed and technical consideration of issues similar to those proposed here. It would be charged with considering, however, whether a larger and less technical conference should be planned on the same themes and, if so, when, where and in what form such a larger conference should be held.

This agenda separates two major questions about legality. The first considers legality as a standard against which to measure, criticize and perhaps ameliorate the performance of the present South African government. The second addresses a different issue about legality: whether and how that idea is pertinent to a dramatic transition from one form of government to another.

### II. Legality as a Standard for Testing the Record of the Present Government.

#### 1. Legality as a Distinct Moral Standard.

- A. Since the conference is to be devoted to the idea of legality, or rule under law, it might well begin with some general and abstract consideration of what that is. What meaning can we give to the concept of rule under law? Is that only a procedural idea, so that any regime that in general obeys whatever rules it lays down, until it changes them, is a law-respecting regime? Or does the idea of legality have substantive as well as procedural aspects? If so, what are the distinct substantive aspects of legality that distinguish the idea of rule under law from the more general idea of justice? Is *integrity* -- the requirement that a state must extend to all circumstances the moral principles it recognizes in some circumstances, and must extend to all



citizens the principles it recognizes for some -- a distinct standard of legality, for example? The present South African government claims that at least it respects the rule of law, whatever its other deficiencies. But if virtues like integrity are part of legality, then it has no right to make even that claim. Is state violence a contradiction of legality? Then the present government might be thought to violate legality for that reason as well.

2. Legality as a Standard of International Law.

A. What standards of international law govern how a government may treat its citizens or others over whom it exercises dominion?

B. How far has South Africa respected those international standards?

3. Legality as a Standard of Internal South African Law:

A. Does South African law *itself* contain principles of legality that the government has failed to respect?

B. Jurisprudential aspects of this question. South Africa does not have a written Constitution that stipulates individual rights which act as limitations on state power. In that respect South African law is like the law of the United Kingdom and unlike that of the United States. But various academic lawyers and judges in South Africa believe that South African law nevertheless contains, as well as the statutes and explicit rules a legal positivist recognizes as law, latent common-law principles of legality that courts can also cite, at least in the absence of a clear and specific legislative to the contrary, as limiting the powers of the police and other departments of the executive. The conference must consider whether that claim makes sense as a piece of jurisprudence (that is a hotly debated among legal philosophers just now in many parts of the world) and, if so, whether it makes sense in the context of South African law.

C. Doctrinal aspects.



- a. The conference might make a somewhat detailed study of carefully chosen areas of South African law, to see how far the suggestion of latent principles of legality is confirmed in these areas, and how important those principles are. The areas chosen for study would presumably include a variety of issues in criminal and administrative law, and perhaps also some parts of the law of evidence, property and tort.
- b. The conference should also review the small but promising number of lower-court decisions in which South African judges have in fact taken the approach the conference is studying, citing general principles embedded in the law to hold actions of the executive to legal account. These few lower-court decisions have excited the attention of legal scholars in many countries.

D. Political and Educational aspects.

- a. In present circumstances, is it realistic to suppose that judges will entertain arguments that appeal to general embedded principles of legality in particular cases? How might their willingness to do so be improved?
- b. Would changes in legal education help? How far does legal education in South Africa already make lawyers sensitive to arguments of principle? Does the prevailing positivist legal philosophy play an important part in limiting such sensitivity, or is professional habit and convention more responsible?
- c. What response would the present government make to any increased use of the idea of latent principles of legality? Does it have sufficient control over the higher courts to continue to reverse all decisions made in that spirit? Would the government-dominated legislature simply overrule any judicial decisions it disliked? Or would some sense of embarrassment make this less likely?



### III. Legality and Continuity

#### 1. General Philosophical issues about Legality and Succession.

- A. Can a succession that is revolutionary in the sense of being resisted by the established government nevertheless be justified by appeal to the rule of law? Does the fact that the established government does not respect legality provide an especially powerful argument for its overthrow?
- B. Must a succession that is revolutionary in that sense itself be guided by the rule of law to be justified? What constraints must political activity observe in order to respect that idea? Are legal principles protecting individual persons from violence particularly central to legality, for example? Under what circumstances, if any, can violence be justified as consistent with legality? Does state violence on the part of the established government mitigate any principles condemning violent political action in opposition? Or does political violence in any circumstances violate the ideal of the rule of law?
- C. What is the connection between legality and respect for property? How far does the rule of law require respecting private property acquired according to existing rules of property law even though under an unjust political regime?

#### 2. Continuity through Legal Principle.

- A. If South African law does contain general principles, of a moral character, about individual rights and dignity, and if these principles are embedded in the substantive common law and general statutory schemes of property, contract, business organization tort, and criminal law, can the principles themselves furnish the basis for continuity across even a dramatic change in government?
- B. That question, like the parallel questions in the first part of the agenda, must be approached in some detail in order for the study to be helpful. Property law might furnish a useful example. Do



the various discrete rules of South African law about the circumstances in which contracts or transactions can be set aside for fraud, mistake or unfairness, for example, presuppose, by way of justification, some general egalitarian principles of distributive justice? Are such principles also presupposed by rules having less apparent connection with property, like the law of nuisance, negligence, and other aspects of tort? If so, then new schemes of property, business and union organization and power, which seek a fairer distribution of property, might be justified by appeal to integrity and legality, that is, as making available to all citizens the principles that are already presupposed as latent in South Africa's own legal tradition.