

Jack

African National Congress
Constitution Committee
P.O.Box 31791 Lusaka
13 December 1987

The President
African National Congress
Lusaka

Dear Comrade President

A comment on Ronald Dworkin's paper on "Suggestions for Conference on South Africa and Rule Under Law"

1. Dworkin wants ANC to held a conference on "the idea of legality er rule under law" in South Africa.

2. He distinguishes two "major questions about legality". The first considers legality as a moral standard against which to measure "and perhaps ameliorate" the performance of the Pretoria government. The second question is whether the rule of law should be considered binding on its successor". In this regard he puts a number of questions of theoretical interest to a discourse on the nature of political revolutions. (See p.4, III, A & B). I quote from his memorandum:

"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?"

"Must a succession that is revolutionary in that sense be guided by the rule of law to be justified? What constraints must political activity observe in order to respect that idea?" (My italics)

3. He goes on to explore the possibility of establishing a continuity though legal principles with the existing order in such areas as torts, criminal law, contract, business law, individual rights and respect for private property. The present state of commercial law might reveal "some general egalitarian principles of distributive justice". Schemes for a "fairer" distribution of property "might be justified by appeal to integrity and legality ...already presupposed as latent in South Africa's own legal tradition " (p.5)

4. The concept of "latent common law principles" or "latent principles of legality" occupies a central position in Dworkin's scheme. These latent principles would have to be uncovered by meticulous research in decided cases. Once established, these somewhat esoteric "principles" might be invoked to limit the executive's powers. He cites some "lower court decisions" which have relied on "general principles" embedded in the law to challenge the validity of actions taken by the executive. This is perhaps a reference to decisions handed down by Mr Justice R.N.Leon of the Natal bench in cases concerning political prisoners.

5. At a first glance Dworkin appears to be establishing a case for safeguarding 'minority rights' after the transition to majority rule. This is the familiar thrust of arguments for a Bill of Rights and might be more usefully dealt with on that plane /..

✓ rather

than through the somewhat laborious search for "latent" principles suggested by Dworkin. His proposals (see p.3, D. Political and Educational Aspects) strike me as being so far removed from the reality of the racist regime's oppressive policy as to give the appearance of a search for an ideal system of law and justice. It should not be allowed to divert us from the aim of developing a legal order that will promote the interests of our national democratic revolution.

We are in conflict with an authoritarian regime that uses the apparatus and agents of the state to crush all opposition and excludes the courts from protecting persons against state terror. Dworkin poses important questions such as the political education of the judiciary and the legal profession as a whole, but I doubt whether this is the time to discuss them in the abstract and outside the framework of the racist state.

My own feeling is that we should ^{thank} Dworkin for giving us the benefit of his proposals. They will be carefully considered by the Constitution Committee when it meets on January 8 1988 . We shall then be in a position to respond suitably to his proposals.

Maatla !

Jack Simons
Chairman