



1985

A Response

Sheena Duncan

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Recommended Citation

Sheena Duncan, *A Response*, 11 YALE J. INT'L L. (1985).

Available at: <http://digitalcommons.law.yale.edu/yjil/vol11/iss1/4>

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A Response

Sheena Duncan†

Any post-apartheid government is going to have tremendous challenges to face if it is to be able to even begin to meet the expectations of the people. This paper will focus on the three issues of the land, the bureaucracy, and the rule of law.

To repeal all apartheid laws immediately would be a simple matter. South Africans would wake up one morning freed from Race Classification,¹ the Group Areas Act,² the Pass Laws and Influx Control,³ and the citizenship laws which have denationalized nine million black South Africans. There would be little change, however, in practical terms for the majority who have been dispossessed and marginalized during the long years of the apartheid regime and the decades before that when the white settlers pushed the black population inexorably to the peripheries.

The tricameral Parliament will have gone and hopefully will have been replaced by a democratically elected government within a new constitutional structure. The towns and cities will quickly be reunified with the disappearance of the racially separated local authorities.

There will also be one educational policy and no racial differentiation in educational administration, and no legislated segregation in schools. Affirmative action by the new government, such as has been undertaken in Zimbabwe, would rapidly improve the quality of education.

† President, Black Sash. Black Sash is an independent organization, centered in Johannesburg, whose membership is composed largely of white, middle-class women. Black Sash devotes its efforts towards helping Africans defend themselves against Pass Law prosecutions and overcome the bureaucratic pitfalls that typify the administration of these Pass Laws, as well as fighting for the abolition of the entire Pass Law structure. *See* N.Y. Times, Mar. 1, 1986, at A2, col. 3.

1. The Race Classification laws are extremely extensive and detailed. *See, e.g.*, Statutes of the Republic of South Africa, Classified and Annotated (Issue No. 17), Title: Blacks, "Preliminary Note," at 9-21 (brief review of the statutes comprising the system of racial classification and the structure of apartheid). The Black Laws Amendment Act, No. 42 of 1964, as amended by Act No. 102 of 1978, substituted the words "Black" or "Blacks" for the words "Bantu" or "native" wherever they occurred in any law, thereby changing the original titles of numerous South African laws.

2. Amendment of Black Land Act of 1913, No. 41 of 1950 (popularly known as the Group Areas Act of 1950).

3. Black (Abolition of Passes and Coordination of Documents) Act, No. 67 of 1952; Black Laws Amendment Act, No. 54 of 1952; Black (Urban Areas) Amendment Act, No. 16 of 1955.

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All these things could be done quite quickly by rewriting the laws, but will changes in the law necessarily bring about the radical transformation of the society which is essential if there is to be justice?

Economic factors would ensure that the majority of black people would remain in the ghettos. The more prosperous would penetrate slowly into the hitherto white suburbs. Legislation would be required to prevent white communities from building "whites only" clauses into title deeds and rental agreements. That too would not be difficult.

Market forces would ensure that prices of houses would skyrocket because of the tremendous shortage of accommodation. This would happen in the present black suburbs as well, and the poor would be increasingly excluded. Ultimately, massive site and service schemes would be required in all urban areas, and this must inevitably mean state expropriation of urban land on a vast scale.

The Land

It is the question of the land which will probably prove to be the most difficult to resolve. It is the most deeply felt issue for black people. "The land shall belong to those who work it." "Give us back our land." "The land belongs to us." "They have taken our land away from us." These cries are very much in the centre of the present political conflict and the post-apartheid government will have to respond as a matter of urgency and act to fulfill its promise.

In Rhodesia, fifty-four percent of the land was set aside for black occupation. When Mr. Mugabe came to power, and Rhodesia became Zimbabwe, he was able to move rapidly to establish a highly successful land resettlement program by purchasing land which was offered voluntarily for sale. Expropriation or nationalisation of the land has not been necessary.

The scale of South Africa's problem is much greater. Less than fourteen percent of the total land area is presently set aside for black occupation. This is the land that constitutes the area of the ten homelands. The other eighty-six percent of the land is basically for white people, with certain limited areas set aside for occupation by Indian and colored people and for black townships in urban areas. It is difficult to see how any post-apartheid government will be able to avoid massive State intervention in order to ensure that that redistribution of land which is essential to the achievement of justice takes place. This must be the case whatever the economic policies of the new government may be.

Free market forces cannot possibly redress the present injustices. Without State action, all that would happen would be the transfer of

some land to wealthy black people so that the land-owning class would no longer be so totally white in complexion. Nothing would happen to relieve the plight of the landless majority.

Economic forecasts are that by the year 2000, forty-one percent of South Africa's population will be unable to find a job in the formal sector. Part of this unemployment problem will be resolved by the restoration of freedom of movement and the unrestricted growth of an informal sector in the urban areas. However, not all people can find their economic survival that way. Without land, most of the forty-one percent will continue to live in abject poverty and will continue to be powerless to help themselves. They will continue to be at the mercy of those within the homeland areas who control the allocation of totally inadequate land resources.

Dismantling the homeland structures is going to be a problem of considerable magnitude in itself. Most of those who wield power now in those governments and bureaucracies will be reluctant to relinquish that power, and this is another source of potential conflict for the future. But even supposing the present political, legislative, and administrative structures were to be successfully dismantled, the fact would remain that more than half the total black population is resident within those geographical areas. Many are in "closer settlements"—the government-designated resettlement areas, and in newly created high-density housing schemes far away from urban growth points. Those who are living on agricultural land rarely have security of tenure and are dependent on the goodwill of the Chief for the allocation of a field or a strip of land to plough, and for grazing rights. Unless a way is found for these people to settle with security of tenure on agricultural holdings, their condition will remain miserable.

So something will have to be done to address the land problem. It is most unlikely that sufficient land would be offered for sale by white owners. White people in South Africa, unlike those who left Rhodesia, have no place of easy refuge. This means that there will have to be extensive expropriation, if not nationalisation. This is not a new concept for South Africans. White people have appropriated black land on an enormous scale and have nationalised much of the land in the homeland areas.

Even a government committed to free enterprise and individual land ownership will not be able to avoid this. It is both a political and an economic necessity.

South Africans have a passionate and mystical relationship with their land. This is a factor which is best expressed in religious terms perhaps not appropriate for a law journal. It is deeply felt by white farmers and

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deeply felt by black people for whom the land where their ancestors are buried is held in sacred trust for future generations. Here lies the potential for bitter future conflict. Lawyers and law makers must take into account the most strong and emotionally felt instincts of ordinary people who have to find a way to live together.

The minimum steps that could be taken by a future government in order to address the problem and to minimize the likelihood of violent conflict over the land would be:

1. To expropriate the land of absentee landlords who keep their farms for weekend and holiday leisure and recreation. There are many city people who are wealthy enough to purchase farms for fun or for tax avoidance, but who are not dependent on them.

2. To expropriate all farms where the owner has more than one, leaving him with a single unit.

3. To expropriate from the present owners all land which was owned by black people prior to their removal in pursuance of the apartheid government's resettlement policy, and to restore that land to those from whom it was taken away. This would mean fixing a date, for example 1936 (the year of the second Land Act,⁴ when the allocation of land for black occupation was fixed at fourteen percent of the total area of South Africa), 1948 (when the National Party came to power), or 1960 (when the resettlement program was intensified). In a sense, all land presently owned by whites was taken from those who worked it, grazed their herds on it, and hunted over it, prior to the penetration of white people into the interior. However, some limit in time must be fixed in order to avoid chaos and historical claims that are impossible of proof. Wars were fought over land before white invasion was a factor, and some point must be fixed for the same reasons that the Organization of African Unity holds firmly to the preservation of arbitrary and ridiculous colonial boundaries.

This raises an interesting question for a future government. Those black people who have had their land taken from them in pursuance of apartheid set tremendous store by the fact that they had title deeds and held their land freehold. It is doubtful whether they would be satisfied with anything less than restoration of full ownership rights. They are unlikely to be impressed by any suggestion that the land now belongs to the State and that they are to be tenants of "the people."

4. To encourage the formation of associations such as the Native Farmers Association, which in the early years of the twentieth century

4. Amendment of Black Land Act of 1913, No. 18 of 1936.

assisted many black people to purchase land. This was stopped by the Land Act of 1913,⁵ which prohibited the transfer of any further land to black ownership.

5. It is doubtful whether all the above steps together would be sufficient to release land on the scale required. Hence, a fifth step would have to be some kind of nationalisation of the vast land areas presently controlled by agribusiness.

Agribusiness is encroaching very rapidly into South Africa's farming areas. More and more land is falling into the hands of large companies, and very often the type of farming changes radically with the change of ownership, from the production of staple food crops for local consumption to the production of crops for export or for the luxury market. Mechanization takes place on a wide scale, and people are pushed off the land into the urban peripheries. Profits are not distributed to those who have been impoverished by the process, although the few workers who are allowed to remain may well be earning a proper wage for the first time in their lives.

Through some kind of nationalisation of these enormous agricultural holdings, or at least an arrangement for a fifty-one percent state to forty-nine percent private ownership, people could then be brought back into occupation of the land to their mutual profit through productive work in cooperation with one another.

Land is not to be understood as a resource to be used for the profit of any one owner, whether that be an individual or a company. It is to be held in stewardship for the benefit of all the people, for its preservation for future generations, and for the production of food surplus to the needs of those who actually own and work the land.

All this probably seems extremely radical to people in capitalist first-world countries, but so much evil has been done by apartheid that radical steps are required to begin to put things to rights.

Were a post-apartheid government to be more radical than this and seek to nationalise all land, there would undoubtedly be a backlash from those white farmers who own their own land and use it productively and who have the same passionate feelings about their land as do black people. There might well be some who would take up arms again to defend their land and to institute a new guerrilla war with devastating consequences for reconstruction.

Consideration of the land issue includes consideration of what is to be done about the wealth of mineral resources which lies under the land. At

5. Black Land Act, No. 27 of 1913.

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the present time this wealth is owned by private companies. In the current financial year, gold and diamond mining companies are paying 45% tax plus a surcharge of 25%. All other mining companies pay 50% plus a surcharge of 15%. Because South Africa's government is not a democratic one and is representative only of the minority, the state revenues gained from this taxation have not been equitably used for the good of the whole society.

It is self-evident that the majority of the people have not benefited from the enormous profits made by the mine owners. Indeed the mining industry is responsible for the origins of the homelands as reservoirs of cheap labor, for the alienation of black people from the land, and for the migratory labor system which has wreaked such havoc in black communities and black families throughout Southern Africa.

Nationalisation of the mines is therefore the declared policy of several extra-parliamentary opposition political groups. These groups will certainly be part of the post-apartheid government, but they may not be able to carry out an outright nationalisation when they come to power. Mining interests have their own cards to play. Gold accounts for close on fifty percent of South Africa's export earnings. When export of other minerals is added, the mining sector is responsible for approximately eighty percent of the country's foreign earnings. If nationalisation is not practicable it seems likely that the government will enter into forty-nine/fifty-one percent shared ownership arrangements.

The Bureaucracy

When the National Party government came to power in 1948, one of the first programs it put into action was the Afrikanerization of the civil service. The new government was responding to the demands of its constituency. Afrikaner people were understandably bitter about the domination of British imperialism and resentful of the subjection of afrikaner interests to those of english-speaking people.

The takeover by Afrikaners was not dissimilar to what will happen when the first post-apartheid government comes to power. In 1948, state intervention was essential in order to redress the hold on power of english-speaking people in the bureaucracy. It will be necessary again. The next shake-up promises to bring much greater difficulties in its wake.

In Zimbabwe, the civil service has maintained its self-identity as the servant of the people through all the upheavals in that country. The bureaucracy was there to carry out the policies of whatever government came to power, and Mr. Mugabe was not faced with any major revolt by state officials.

This will not be the case in South Africa.

In the years since 1948, the civil service has been staffed almost entirely by people who are dedicated to carrying out the policies of the National Party. The situation is analogous to that in any one-party state or communist country where membership of the ruling party is a prerequisite for appointment and advancement.

The post-apartheid government may well be faced with a bureaucracy that will refuse to carry out decisions of the legislature. Indeed, even Dr. Koornhof, then-Minister of Co-operation and Development, in 1979 grumbled about the bureaucratic tortoise which quite simply refused to implement the very limited adjustments to the apartheid policy which he desired. At the moment, this resistance on the part of government employees merely matches the lack of will on the part of the legislators to initiate any real dismantling of apartheid.

But for the post-apartheid government, the situation will be much more serious. Government will be seeking to implement programmes that will be anathema to the officials who have to carry them out. It is difficult to see how a multitude of dismissals is to be avoided. There will have to be a rapid Africanization of the civil service, and new officials will inevitably be those who are supporters of the new ruling party.

This may be highly undesirable in western eyes, but it is inevitable. Once the idea of a "neutral" bureaucracy has been destroyed, as it has in South Africa, it must take time before it can be restored. Public servants who simply drag their heels at all levels and refuse to implement new laws can prevent policies from being carried out. This would obviously present serious consequences for a government that must move quickly to make freedom a reality.

South Africa has a very high percentage of its economically active population employed by government, provincial and municipal, administrations.⁶ Although there are more black than white state employees, most senior and technical posts are occupied by white people. Close on half a million disaffected people in key positions, large numbers of them facing

6. The following table shows the numbers of people employed in central government and some other administrative structures as of June, 1984:

	<u>Total employees</u>	<u>White employees</u>
Central government	394,110	153,553
Provincial administrations	264,102	132,208
Local authorities	235,300	61,100
Posts & telecommunications	94,593	53,157

See SURVEY OF RACE RELATIONS (1984) [table provided by the author].

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possible loss of a job, is bound to be a major problem for any future government.

The Rule of Law

If there is significant white resistance to a new government and its policies, will that government be willing and able to establish and protect civil liberties?

Well over fifty percent of the population is under twenty years of age. Detention without trial has been a fact of life in South Africa for more than twenty years and has been used ruthlessly against political opponents of the present government. Thus, millions of people have never known what it is to live under the protection of the courts, free from fear of arbitrary arrest and punishment, or what it is to live in a society where the activities of police and security forces are strictly controlled. Young South Africans do not know or understand that the law should be a protector of the people. Their experience has been of law as predator.

As in Zimbabwe, the temptation to use laws inherited from the previous regime will be very great if those laws have not been completely abolished *before* the coming to power of the new government. Many would argue that it will be necessary to retain South Africa's security legislation until such time as resistance to new policies and to a totally new form of government has been subdued.

This is a dangerous argument. Black South Africans will not be able to experience true freedom unless they have the protection of due process of law in all respects. All governments, however democratically they have been elected in the first place, can fall prey to the temptation of maintaining power by force unless there are constitutional safeguards against such attempts. The South African experience for almost forty years now has been of a government that had maintained its power by force. There will be no real change if a new government seeks to do the same.

A constitutional bill of rights cannot, of course, prevent a government from abusing its power, but it can help to create a climate in which democracy and justice can grow and eventually flourish. It is to be hoped that the post-apartheid government will regard this as a priority. To do otherwise would be a denial of the very basis of "the freedom struggle."