

# Contested Legacies of the South African Constitution: An Engagement with Albie Sachs's *Oliver Tambo's Dream*

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Albie Sachs's *Oliver Tambo's Dream* is based on a series of four public lectures that he delivered on four separate topics at four different universities in South Africa. The golden thread that runs through the four lectures is Sachs's application of the South African Constitution to various social questions and his recounting of Oliver Tambo's influence on its drafting and content.

In the first lecture, Sachs opens with three 'burning' questions: (1) What was the one good thing that apartheid created? (2) If you did a paternity test on the Constitution, whose DNA would come up? And, lastly, (3) Was the object of the freedom struggle to get a share for ourselves [fighters of the liberation movement] of the spoils of war or to enable all the people to share in the fruits of liberation?

Sachs should know that question (1) validates the racist narrative which suggests that apartheid (and therefore colonialism) was not all that bad. He suggests that the one good thing about apartheid was that it created anti-apartheid. The logic is that, for people like Sachs who come from a socialist yet urban environment, the anti-apartheid struggle was the only way to come close to and be strongly influenced by someone of Tambo's stature. It is a matter of uncertainty, at this point in the lecture, whether Justice Sachs appreciates the fact that he had made the point that apartheid's only necessity was to pave space for an elite group of people with middle-class aspirations to commit class suicide, and thus forge working relationships with the people on the underside. A problematic feature in these types of argument is that they tend to have a tinge of wanting to trivialise ahistorically the assault that apartheid has had on the black body.



Question (3) is crucial because it responds to the primary contestation about the Constitution. Whereas there is sufficient theorising on and studied speculations about the DNA of the Constitution, which responds to Albie's second question, the heart of the contestation currently lies in the object, aims, goals and ownership of the Constitution. To respond to question (3), as a self-confessed socialist, it could have been helpful for Sachs to apply a method synonymous with Marxists. A classic Marxist probe seeks to ascertain in whose class interests the Constitution has been promulgated. This is a method that Marxists use to determine the group of people on whose behalf any revolutionary struggle is waged.

With the exception of the Bill of Rights, the response to question (3) suggested that the system of checks and balances was at the zenith of the constitutional framework. An anti-colonial struggle that culminates in a constitution-making process needed to be one that is both forward-looking yet also attentive to the 400 years of slavery, colonialism, neo-colonialism, apartheid and neo-apartheid that continues to define the life of a black body.

Tshepo Madlingozi does not dismiss the Constitution in its totality. However, he argues that the Constitution falls short of addressing severe questions of social justice in a society plagued by deep socio-economic disparities, racist spatial planning and the entrenchment of class inequalities that follow colonial racist patterns.<sup>1</sup> His criticism stems from the claim that the drafters of the Constitution neglected to study the ontological and epistemic designs of South Africa's colonial dispensation,<sup>2</sup> and hence missed the opportunity to make an assessment of the causes of South Africa's bifurcated society. To this end, Madlingozi does not pessimistically propose doing away with a constitutional democracy, but rather calls for a 'Ramosean'<sup>3</sup> or post-conquest constitution.<sup>4</sup>

Zitzke<sup>5</sup> breaks rank with anyone who suggests that the Constitution is an instrument with which to decolonise South Africa. He does so by suggesting that the Constitution is actually a Eurocentric document that acts as a repugnancy clause towards the

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1 Tshepo Madlingozi, 'Social Justice in a Time of Neo-apartheid Constitutionalism: Critiquing the Anti-black Economy of Recognition, Incorporation and Distribution' (2017) 1 Stellenbosch LR 123.

2 See *ibid* 124–128. The author makes a sterling argument in this article, using the lexicon of zone of being and the zone of non-being to express the point that the South African Constitution adopts a blanket approach in responding to various societal ills, which makes it impotent in bridging the gap between the rich and the poor.

3 Mogobe Ramose, 'Justice and Restitution in African Political Thought' in P Coetzee and A Roux (eds), *Philosophy from Africa: A Text with Readings* (Oxford University Press 2002).

4 Madlingozi (n 1) 140. See, further, Tshepo Madlingozi, 'On Settler Colonialism and Post-conquest Constitutionness: The Decolonizing Constitutional Vision of African Nationalists of Azania/South Africa' (November 2016).

5 Emile Zitzke, 'The History and Politics of Contemporary Common-law Purism' (2017) 1 *Fundamina Journal of Legal History* 23.

development of both customary law and the creation of new laws that seek to decolonise the condition of the black body.

Sachs's second lecture delves into a discussion of how negotiators on either side, as days and months passed, discovered each other's humanity and realised that they have shared collective anxieties about the future of South Africa.

Certainly, there is a contestation about what the struggle's primary objective was in the first place or how the founding fathers of the ANC responded to the question of colonial oppression in 1912. But it cannot be accepted that the arrival at the Promised Land will be signalled by seeing black and white people using the same queues and public toilets. The reality of colonised people necessitates imagining a post-conquest constitution, an imagining that goes beyond sharing queues and public toilets, but rather a constitution that would legislate the practical sharing of the means of production, the equal sharing of the wealth and sorrows of the country, the creation of quality jobs, and a revolutionary land-redistribution/reform programme.

Although this horse has bolted, given that parliament has already concluded its work and has forged ahead with amending the Constitution, the third lecture provides a response to one of the questions that consistently emerges in the land debate.

The reader may grapple factually with the possibilities of land reform in the current constitutional dispensation, yet it has still not been implemented effectively in the 24 years of democracy. The reality of non-implementation of land reform may lead us to draw various conclusions about the extent of such purported possibilities. From the numerous inferences that can be drawn, the popular one in conservative middle-class circles is that substantive land reform has failed because of the government's innate ineptitude and incompetence. Another inference that could be drawn is that land reform is stifled by a Constitution that does not expressly provide for the expropriation of land without compensation.

Sachs suggested that the ANC's position on land must be deracialised. The reality is that even to the present day, law, power and knowledge remain deeply racialised, and legal scholars<sup>6</sup> agree that there are various ways to respond to this anomaly, but deracialising the discourse is not one of them.

Sachs's intervention produced three propositions on land: (1) the Constitution as whole should be a transformatory document; (2) the victims of forced removals after 1913 should either get their land back or receive some form of alternative restitution, and (3)

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6 Joel Modiri, 'The Colour of Law, Power, and Knowledge: Introducing Critical Race Theory in (Post-) apartheid South Africa.' (2012) 3 South African Journal of Human Rights 28.

extensive programmes of land reform should be embarked upon to deal with colonial dispossession before 1913.

Propositions (1) and (2) limit landlessness to economic activity and mere ownership, while neglecting the questions of the dignity and subjectivity of the historically dispossessed. More pointedly, proposition (1) tended to want to postpone and defer the land debate to a democratically elected government. Sachs explains ‘transformatory’ to mean: ‘The Constitution should leave it to the democratically elected parliament to find the best way to achieve substantive equality for the formerly oppressed people in their daily lives.’

The deferment lends credence to the accusation that the reason for slow land reform is the Constitution’s lack of express terms to expropriate land without compensation. Proposition (3) is set to consider the pre-1913 dispossessions, but it fails to qualify succinctly the nature, form, extent and practical operation of the proposal.

In his fourth lecture, Sachs intervenes in the decolonising debate by claiming that Oliver Tambo’s whole life was dedicated to decolonising South Africa. This claim is at the heart of the contestation between Tembeka Ngcukaitobi and Tshepo Madlingozi’s discussion, in which the former suggests that the ANC’s formation in 1912 was with the intention of decolonising South Africa, while the latter rebuts this by arguing that the intention of the 1912 ANC was to include an elite group of black professionals in the all-white settler system.<sup>7</sup>

According to Sachs, the attainment of non-sexism, socio-economic rights, workers’ rights and other related freedoms is directly proportional to achieving decolonisation. While it is true that there are various interpretations of the meaning of ‘decolonisation’, it appears that Sachs’s conception differs markedly from the one called for by the generation of Fees Must Fall students. A careful reading of the demands, as put forward by student leaders of the Fees Must Fall movement—the likes of Chumani Maxwele and Alex Hotz—shows that calls for decolonisation were directed at coloniality and not precisely at colonialism.<sup>8</sup> The message from students does not come clearer than it did from EFF Wits leader Vuyani Pambo: ‘We don’t want to treat the symptoms, we want to decolonise the university—that is at the heart of the cause.’ The voice of students is inherently important in this discussion, because Sachs continues to claim that, ‘I have

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7 Tshepo Madlingozi, ‘South Africa’s First Black Lawyers, amaRespectables and the Birth of Evolutionary Constitution – A Review of Tembeka Ngcukaitobi’s *The Land is Ours: South Africa’s First Black Lawyers and the Birth of Constitutionalism*’ (2018) 3 *South African J on Human Rights* 32.

8 The appreciation of this distinction is critical because it acknowledges the reality that although colonialism has been defeated in Africa, its effects, legacy and remnants remain deeply entrenched in all aspects of our being as a people. This reality in totality is therefore one of coloniality.

no doubt that he [Oliver Tambo] would have been keen to hear personally and directly from student protestors about their concerns and objectives.’

Sachs’s conception of decolonisation, therefore, required him to begin having a deepened engagement with the concept(s) of coloniality and decoloniality. The conclusion that the Constitution could be an instrument for decolonisation would not have been arrived at had he revisited the literature on decolonality. Sabelo Ndlovu-Gatsheni helps us to read Anibal Quijano in order to point out that there are four levers of coloniality: (1) the control of the economy; (2) the control of authority; (3) the control of gender and sexuality, and, lastly, (4) the control of knowledge and subjectivity.

The ideals of the Constitution, as set out by Sachs, tend to have a limited scope, considering that they have not gone to the depth of the question of the control of knowledge and subjectivity (as but one example).

In the conversations about the impact of colonial relations of power there is a need to assess the impact of the understanding of being (read ‘subjectivity’). Maldonado-Torres uses Rene Descartes’ formulation of *ergo cognito*: ‘I think, therefore I am’ when he writes:

The ‘I think, therefore I am’ presupposes two unacknowledged dimensions. Beneath the ‘I think’ we can read ‘others do not think’, and behind the ‘I am’ it is possible to locate the philosophical justification for the idea that ‘others are not’ or do not have being.<sup>9</sup>

In using this dialectical method, Maldonado-Torres teaches us that the coloniser was able to exclude their colonial subjects from *Being*. In line with this dialectical analysis, we deduce that part of the colonial project was to reject the ‘Beinghood’ of black bodies. Sachs’s claims of decolonisation unfortunately do not take some of these questions into consideration.

*Oliver Tambo’s Dream* uses a non-verbose language to articulate and negotiate Justice Albie Sachs’s engagement with Oliver Tambo’s life, and it clarifies the position of the ANC in the negotiations. Most importantly, the book contributes to archiving the memory of an icon whose contribution to the struggle for a democratic South Africa remains under-told. True to his politics, Justice Sachs remains brazenly honest about his feelings regarding the state of affairs in South African politics. He bemoans the corruption in government and decries how post-apartheid leaders of the ANC have become willing victims of crass materialism and the disgusting display of excessive opulence.

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9 Nelson Maldonado-Torres, ‘On the Coloniality of Being’ (2007) 2–13 *Cultural Studies* 21.

*Oliver Tambo's Dream* is an insightful reading for anyone who wants to have an engaged academic discussion about both the history of the ANC and that of South Africa's democratic Constitution.

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