

Justice Albie Sachs
Oliver Tambo's Dream
[A lecture in four parts]

Part One: Oliver Tambo Centenary Lecture
Auditorium, Faculty of Law, University of Pretoria
22.02.2017

The Dream of a Quiet Revolutionary

I start with three questions.

What was the one good thing that apartheid created?

If you did a paternity test on the Constitution, whose DNA would come up?

And finally, was the object of the freedom struggle to get a share for ourselves of the spoils of war or to enable all the people to share in the fruits of liberation?

I begin with the first: What was the one good thing produced by apartheid?

The answer: anti-apartheid. It was the anti-apartheid struggle that enabled someone like myself, who had grown up in a very secular, internationalist, socialist and urban environment, to meet and eventually become close to and be strongly influenced by someone who had grown up as a committed Christian in a deep rural and traditionalist environment, Oliver Tambo. Our connection started when, after taking part in the Defiance of Unjust Laws Campaign in Cape Town as a second-year law student in 1952, on every visit I made to Johannesburg I would pay a courtesy call at the offices of Mandela and Tambo, the first black law practice in the city. And either Tambo or Mandela would take a few moments to meet this earnest young activist from Cape Town. They offered me a cup of tea, but much more than that, a courteous and embracing introduction to a warm and inclusive African Nationalism that welcomed all who were willing to dedicate their lives to the struggle for national liberation.

As the years went by, I would hear OR speak at public meetings with the same clarity and thoughtful delicacy he would use when offering me tea. Part of me wished he would be more fiery – that he would inspire us with muscular emotional language. Yet another part of me responded positively to his quiet and carefully articulated way of communicating. When he spoke you felt that truth was being conveyed openly and honestly in its most direct form. The emotion lay in the thought, not in the power of delivery.

This special Tambo mode came through vividly for those of us living then in exile in London when he made what we had been told would be a dramatic announcement: that the Albert Luthuli detachment of Umkhonto we Sizwe had crossed the Zambezi on its way to launch armed struggle in South Africa. The MK combatants, he told us in carefully measured tones, had engaged with Ian Smith's Rhodesian troops, sending them reeling from the field after a battle of several hours, taking their wounded and dead with them. We stood up and cheered. At last we were fighting back. Then a voice from the back of the hall shouted: 'That's murder! That's murder'

We looked to OR to see how he would react. He was clearly taken aback. He paused for a moment and stepped away from the microphone. Then he came forward and said in a thoughtful, troubled voice: 'Yes, this is what the situation in our country has led to.' And he went on to explain to the heckler how patiently the African people had struggled over the decades for their rights, how eagerly they had sought the negotiation of a non-racial democracy. And whenever they had come up with new initiatives for peaceful change, the response had always been the same; greater and greater repression. 'The tragedy of our country,' he told us, 'is that our finest and most honourable children, who otherwise might

have dreamed of becoming doctors and nurses and teachers and engineers are being forced to turn themselves into killers.' A tape recorder might have captured the words differently, but this is how I remember them. I was stunned, and deeply moved by the depth of his humanity. In a few soft sentences he was re-defining what the style, tone and ethical energy of a revolutionary leader could be.

Not long afterwards, he was using similar thoughtful language when, knowing of his long wish to become an Anglican minister, John Collins, the Canon of St Paul's, had arranged for him to occupy the pulpit in the Cathedral. We came in numbers, most of us non-believers uncertain how one should dress when going to church. At first we smiled at the idea of the mysterious way in which the Lord had moved to perform the wonder of getting us into His House – someone commented that OR was preaching to the un-converted! But soon we found ourselves wafted away with joy through hearing his proud African voice filling the Cathedral with his dignified, eloquent and deeply-felt pronouncements.

Later, I got to hear the tale of how, when the black consciousness people arrived across the border to join MK, everybody loved Yusuf Dadoo, who spoke with the bravura of a lifetime freedom-fighter, with a picture of Lenin pinned to his office wall. They were dismissive of soft-spoken Tambo, who, they said, expressed himself like a schoolmaster or lawyer. But within a few years they all adored OR, as we affectionately called him. He cared, he listened, he took steps to respond to complaints. And his quiet and warm determination to see the struggle through to ultimate victory was resilient and inspiring.

When I later moved from London to work as a Professor of Law in newly independent Mozambique, I myself got to know OR not as a speaker up there on the platform, but as a gentle yet intensely alive face-to-face interlocutor across the desk. With great grace and courtesy, he had asked if I could fly to Lusaka to assist with a problem that had arisen. On my arrival at his very modest office in Lusaka, he explained that the ANC had captured a number of agents sent by Pretoria to infiltrate and destroy the organisation. Yet the ANC's Constitution (which, incidentally, he had helped to draft, working with Albert Luthuli in Durban in 1957) made no provision for how to deal with these captives. I confidently told him there were international instruments that prohibited the use of cruel and inhuman punishment or treatment and forbade the use of torture. 'We use torture,' he told me, with a bleak face.

He then asked me to help draft a Code of Conduct to deal not only with the treatment of captives, but with all violations of the norms and standards of the ANC. Perhaps the most important legal work I've done in my life [and I include working on the Constitution and writing judgments for the Constitutional Court] was to help develop a set of institutions, procedures and values to deal with everything from assault, drunken driving and theft, to working for Pretoria to sabotage the work and kill the leaders of the ANC. As far as I know, it was the only equivalent of a Bill of Rights for a liberation movement in the world. OR then insisted that the Code not be a document issued by him in a top-down way as President, but that it should first be discussed by the whole membership and then presented by me for discussion and adoption by the Consultative Conference of the ANC to be held in Kabwe in 1985.

OR was a natural democrat to his very soul. He insisted on being called the Acting President of the ANC because he had not been elected to the position by a full conference of the organisation, and, as he once told me, Nelson Mandela, not he, was Commander-in-Chief. [I might mention that years later Mandela was to emphasise to me that Tambo was the organisation's leader, not himself.] At Kabwe, he refused to allow slates of candidates who done deals to support each other to support one another as a bloc. He insisted that there be secret ballots for each contested position and each individual member of the NEC. Position papers on issues like whether non-Africans could be in the leadership, or the relationship between intensifying the armed struggle and starting negotiations, had to be circulated well in advance and discussed openly and freely by all ANC units, from Lusaka, to Maputo, to the camps in Angola to the branches in London, New York, Moscow and Delhi. And the Code of Conduct had to be examined by delegates in detail so that its meaning would be fully understood and internalised.

Lusaka means many things to many people. At its best, in my memory it represents a Tambo-inspired style of democracy that created real voluntary cohesion amongst comrades from the widest backgrounds performing the most varied tasks in the most difficult of circumstances. In this year when we celebrate the centenary of his birth, anyone claiming to speak in the name of Oliver Tambo would know that the qualities that made us proud to have him as leader were his integrity, open-mindedness and total commitment to the freedom struggle. His intrinsic sense of political honour made him totally and utterly opposed to attempts by people to use the name of the struggle for material accumulation, personal or family enrichment, sexual favours or individual ambition.

From time to time these days, I hear people speaking about the difference between exiles and 'inziles'. Though the lived experiences of those of us who were in exile and those who were fighting in the trenches at home, were undoubtedly totally different, I doubt that the deep moral dilemmas that beset us in each case varied all that much. There were people at home, fortunately the great majority, whose objectives were for all to share in the fruits of liberation. But there were also those who found opportunities to accumulate for themselves what they regarded as legitimate spoils of war – now it would be their turn. Hopefully then, the honest exiles and the honest 'inziles' will get together, rather than permit divisions to be made between those who fought from outside and those from inside.

So when, surrounded by large numbers of Zambian troops to protect us from possible commando raids from South Africa, it came to presenting the Code of Conduct to the delegates at the Kabwe Conference it was comforting to know that OR was on the platform. And it was thrilling to see the delegates one after the other demanding that torture should never, never, never be used. As one MK delegate said: We are fighting for life, how can we be against life? This sentiment fitted in completely with OR's general philosophy on the morality underpinning our struggle. The end never justified the means. We did not take our morality from our enemies.

And just as he was totally opposed to the use of torture, so he had taken a firm and consistent position against the use of terrorism. This was not only because its employment would lead to a racial war that would make it impossible to achieve the goal of a free and united South Africa [see the experience of Algeria]; it was because of what it would do to us as freedom fighters. Thus, even though he fully supported politically-directed armed

struggle – Mayihlome! – he believed profoundly that if we allowed ourselves to become indiscriminate instruments of death we would destroy the very humanity that lay at the heart of our fight and that kept us together as freedom fighters.

Meanwhile, as the struggle inside South Africa advanced and Pretoria's international isolation intensified, proposals for new Constitutional arrangements in South Africa came pouring in from all parts of the world. Invariably they were based on forms of power-sharing between whites and blacks. Their basic assumption was that, given the deep historical and cultural cleavages in South Africa, the only way that the white minority could be expected to surrender its monopoly on power was to grant whites secure constitutional protection against a newly-enfranchised black majority. The style and tone of the constitutional proposals varied enormously, but they shared two premises, both essentially racist in character. The first was that of South African exceptionalism – democracy might work in Europe or North America but was not for our part of the world. The second was that black majority rule would automatically produce chaos, and social and economic collapse.

OR's response was both conceptual and practical. At the conceptual level he announced in his 8 January statement in 1987 that the ANC stood for a multi-party democracy. On 8 January the next year, he declared that the ANC supported an entrenched Bill of Rights to protect the fundamental rights of all South Africans. At the practical level, he established the ANC Constitutional Committee in Lusaka to work directly with him and report to the NEC on a new Constitution for South Africa. Headed initially by Jack Simons and then by Zola Skweyiya, it included people like Penuell Maduna, Ted Phakane, Kader Asmal, Brigitte Mabandla, Jobs Jobodwana and myself.

One of the first queries to us was whether we could produce our own ANC Draft Constitution. The Constitutional Committee proposed and the NEC accepted that it would be inappropriate for us to do so while in exile. We believed that the final outlines of any new Constitution would be heavily influenced by the manner in which the system of apartheid was brought down. So much would depend upon the balance of forces at the time. But further, as a matter of principle, the new democratic Constitution should be drafted on South African soil by a Constituent Assembly with a mandate from the whole nation. What we could do in the meantime, however, was to set out the basic principles on which we believed a new constitutional order should be created.

Accordingly, in 1988 a workshop organised by the NEC and the Constitutional Committee in Lusaka produced a document entitled Constitutional Guidelines. The object was to convert the principles of the Freedom Charter into an operational document for the structuring of government in a democratic South Africa.

It should be noted that this had nothing to do with the collapse of the Berlin Wall, which was only to occur years later. It had everything to do with the fact that the ANC had first adopted a Bill of Rights in 1923, had later included a Bill of Rights in its African Claims document in 1944, and had finally adopted the Freedom Charter in 1955. At the same time, in the atmosphere of the late 1980s when we would regularly speak about a 'seizure of power by the revolutionary masses', it sounded strange to our members to refer to the adoption of a Bill of Rights. Some thought of it as a 'Bill of Whites'. Black students in Durban actually set up an anti-Bill of Rights committee.

I recall the moment when I was walking **through** the microphone in a small room in Lusaka to explain why, in fact, we needed a Bill of Rights. About forty delegates were there, some perhaps directly from the underground at home, but most comrades living in exile, a couple from the MK military camps, others from various political structures. I had three arguments and my heart was racing. How would these comrades at the heart of the struggle, many risking their lives on a daily basis, take my reasoning?

The first argument, the diplomatic one, was easy. Being seen to support a Bill of Rights would put the ANC in a positive light. It would tell people – ourselves, the world – that we were not power-hungry terrorists waiting to seize power, to get revenge. On the contrary, it supported the idea that we were aiming to achieve a free, democratic and law-governed South Africa. The delegates nodded their agreement, no problem.

The second reason was the strategic one. It was Tambo's response to power-sharing. Even our closest friends internationally, from East, West, North and South, were urging us to 'get real' and adopt some form of power-sharing. It is a nice term – '**power sharing**' – but power sharing between whom? Between racial groups? The problem wasn't only that the Constitution would, in effect, be entrenching a grossly inequitable status quo in which the 13 percent white minority happened by law to own 87 percent of the land and 95 percent of productive capacity. It would also be relocating a form of apartheid from the sphere of separate development and Bantustans right into the central institutions of the state itself. And at the same time, race discrimination would continue to be shielded in the private sphere by means of constitutionally-guaranteed rights of property and freedom of

association.

Oliver Tambo advanced a completely different vision. The objective was not that black and white groups should live side by side in separate communities protected by power-sharing arrangements. Rather, it was to secure the fundamental rights of all – black and white – in a united, non-racial South Africa. He had no problem in principle about accepting group rights for workers, or women, or children, or members of language groups and faith communities. But he refused to introduce constitutionalised markers of identity, culture and historical provenance into the very formal structures of government itself. Instead, people would have their fundamental rights secured not because they belonged to a majority or a minority but because they were human beings. The delegates cottoned on quickly. Once more I noticed nods of agreement. No need for my heart to go boom, boom, boom.

What was the third reason for having a Bill of Rights? It was advancing this, perhaps the most profound and deeply principled reason of all, that was causing my heart to race. We needed a Bill of Rights, I said, against... ourselves. What would the delegates think? It was easy for me, a lawyer who had grown up with the privileges that went with a white skin, to come up with these ideas... I looked into the eyes of the audience. To my joy, instead of hostility or repudiation, I saw looks of delight. It was as though they all felt a sense of reassurance that the Constitutional Committee, fulfilling the mandate given to it by Oliver Tambo, was urging the creation of institutional mechanisms against any abuses of power from any quarter whatsoever in our new democracy.

This was not for us a matter of pure political or legal philosophy. We were living in societies

where many people who had fought very bravely for their freedom had gone on to become authoritarian heads of state themselves. Jomo Kenyatta was held up as a prime example; jailed by the British for years, he had gone on to use his status as President of Kenya to seize land and amass a fortune for his family and imprison his pro-poor Vice President Odinga Odinga. Indeed, we had seen how Oliver Tambo, with the support of people like Chris Hani and Joe Slovo, had from time to time been obliged to take firm and principled initiatives against unacceptable forms of conduct and abuses of power inside our own organisation. A Bill of Rights would emphasise that we were fighting for a country in which everyone, especially the poor and the marginalised, on not just a new elite, would have rights.

I sometimes get praise [or blame] for being the person who introduced the Bill of Rights into the ANC. It was completely the other way around. If anything, I had been a rights-sceptic. Strongly influenced by critical legal studies, I had inclined to the view that it was wrong for essentially political issues to be decided by the courts. It was, in fact, the ANC, Oliver Tambo, who persuaded me that, in South African conditions, a Bill of Rights could enunciate the quintessence of all we had been struggling for, convert the Freedom Charter into an operational document, and become the cornerstone of our country's new constitutional order. The judiciary would then become a crucial instrument for ensuring that core elements of political morality would be maintained in the new society. Independent judges would also have a role to play in seeing to it that the rights of workers, women, children, the disabled and the poor were respected.

Before moving on, I should stress that I do not wish to imply that only one organisation or movement was responsible for liberating our country. If I refer only to what was being

debated inside the ANC it is because that is where I was and what I know about from first hand experience. The fact is that many people from many different organisations made huge contributions, and I would like to salute them all. But, even with this qualification, I am convinced that the answer to the second question I posed – namely: if you did a paternity test on the Constitution whose DNA would come up? – is unequivocal. There can be no doubt; the DNA that would come up would be that of Oliver Tambo. From concept to conception, the trajectory from the ideas of Oliver Tambo in the 1980s in Lusaka to the final text of our Constitution in 1996 is clear and undisputable.

A month after the workshop where I had urged acceptance of a Bill of Rights, I was blown up. I lost my right arm and sight in one eye, and after Mozambican doctors had saved my life, I landed up in hospital in London. OR sent a handwritten note to me condemning the ‘dastardly’ attack. I wish I had kept it! More than that, he arranged that the Constitutional Committee would meet with me in London as soon as I was out of hospital. And, as fantastic as the intervention of surgeons and physiotherapists and occupational therapists had been, the best, best, best medicine I was to receive was to be asked by the Committee to work with Professor Kader Asmal on drafting the first text of the ANC’s Bill of Rights for a Democratic South Africa.

So, in rainy Dublin in 1988, sitting at a kitchen table in the home of Kader and Louise Asmal, we began the task of preparing the Bill of Rights – I’d actually imagined that it was a wooden table – in my head it became a wooden table – but apparently it wasn’t; it had a plastic-covered top. I would do the textual side and Kader would deal with the enforcement, and then we would swop. I sat down at that table with a clean piece of paper – no books, no

documents, no charters, no constitutions, no preambles – the idea being that a Bill of Rights should speak from inside of you, it should proclaim itself. I was writing with my left hand – I had had to learn to write with my left – and I jotted down a number of fundamental rights that the people of South Africa should have. And afterwards we checked; Kader went through it, he made some textual changes, and we checked it against the great instruments of the world, and all the fundamental rights were there. It wasn't because we were particularly clever or astute. It was because we'd been so deeply immersed in a struggle involving millions of oppressed people expressing their demands, that we were able to find the language. And have that first, amazed 'pinch-me' moment of our political lives: 'Is this really happening? Is it really true?' To be building, constructing, affirming, not merely denouncing and demolishing.

A feature of the draft was that, inspired by the Freedom Charter, it projected an emancipatory rather than a conservative vision of fundamental rights, putting social, economic and cultural rights, together with gender rights and workers' rights, firmly on the agenda. In this way, using the OR vision of conjoining majority rule in a non-racial democracy with an emancipatory, pro-people Bill of Rights, we were wresting the debate away from power-sharing between separate racial groups and placing the issue of achieving a non-racial democracy serving the interests of the dispossessed at the centre of discussion. It was encouraging to see how swiftly and well ANC members and supporters came to back the humane, rights-based, rather than power-based, Tambo vision.

In 1989, not long after I got out of hospital, I found myself in Canada for the first time. The ANC chief representative in Ottawa received me with a warm embrace, looked at my face,

and using the language of the time said: 'Comrade Albie, the boers have Africanised you, giving you scars, just like Oliver Tambo.' I felt quite wonderful hearing those words.

I now turn to the third question. Was the objective of the struggle to enable everyone to share in the fruits of liberation or to facilitate a coterie of freedom-fighters sharing in the spoils of war? Looking back now, it is clear that there were always currents in our struggle that were attuned to accumulation. Often, I would have strong doubts about the conduct of certain people in our movement. But I would console myself by saying that the whole was greater than the parts. So much depended upon the quality of the leadership being given at the time. If those at the top had been avid for the spoils of war, our struggle would soon have turned in on itself and imploded. Everybody would have been after what he or she could get out of it. Fortunately for us, for our struggle, and for South Africa, people like Oliver Tambo, Chris Hani, Joe Slovo, Ruth Mompati, Yusuf Dadoo and Reggie September provided honest, principled and dedicated leadership. Integrity, democratic functioning, and respect for people's rights shone through everything they did. Happily they proved to be in the majority, and the movement never lost its central thrust, which was to create a society in which the fruits of freedom would truly be made progressively available to all.

Thinking back on those days it is clear that OR needs to be remembered as more than just the international public face of the organisation, more than the mobiliser-in-chief of the exiled freedom fighters, more than the co-ordinator of the world-wide campaign to isolate apartheid and get Mandela and other political prisoners released. OR was the symbol of honesty and selfless endeavor at the head of what was becoming an increasingly great movement. He set the example of integrity. Leaders can set positive examples and negative

examples. He was a positive example.

We learnt that if our leaders were honest and democratic, dedicated to the struggle and willing to listen to others and acknowledge failures, then those of us lower down in the ranks would feel encouraged to conduct ourselves in the same way. But if our top leader and those around him had lacked integrity and been corrupt then soon the whole organisation all the way down would have been engulfed by opportunism, manoeuvring and self-enrichment. And the later process of constitution-making, to which I will now turn, would have become a question of how best to arrange institutions to facilitate the sharing out of the spoils of battle between the negotiating parties rather than to enable the fruits of liberation to be enjoyed by the people as a whole.

South Africa is crying out for the spirit of Tambo to become the norm again.