

Sir William Dale Annual Memorial Lecture

The South African Constitution and the Transition from Apartheid: Legislating the Reconciliation of Rights in a Multi-Cultural Society

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When I was approached by the Sir William Dale Centre for Legislative Studies of the Institute of Advanced Legal studies over a year ago to deliver the Sir William Dale Annual Lecture for 2006, I should have heeded the sage advice of Lewis Carroll's young man, when he addressed his father:

'You are old, Father William', the young man said,
'And your hair has become very white;
And yet you incessantly stand on your head –
Do you think, at your age, it is right?'

'In my youth', Father William replied to his son,
'I feared it might injure the brain;
But now that I'm perfectly sure I have none,
Why, I do it again and again'.

The fact that I am here with you tonight reflects my tendency towards perversity – I continue to frustrate my guardians. There are three reasons for this. First, there was a personal need to return after more than forty years to the Institute for Advanced Legal Studies, where I spent a delightful year, as an LSE student, using your great library and being bemused by the Schwarzenberger onslaught on the Oppenheimer school of international law. It would be interesting to be beguiled by that wily central European's view of international law today. Thank you to the Centre for the invitation.

Second, it is an honour to be asked to deliver this lecture in memory of Sir William Dale in this hundredth year of his birth. He was, it seems, a man who anticipated a number of the developments and challenges of which I hope to speak tonight. Having worked and spent time in Palestine, in Sarawak, in Libya and in Central Africa, in addition to his native England, it would seem hard to imagine that he was not appreciative of the diversity of ways being, of living in community, of configuring society and pursuing the good that exist in our world.

* The Sir William Dale Memorial Lecture for 2006 was delivered on 10 November 2006 at the Institute of Advanced Legal Studies, Chatham House, London, by Professor Asmal, Member of Parliament and former Minister of Education, South Africa.

And yet he also very obviously appreciated the need for stable, reliable legal systems – for the rule of law – to operate within such diverse cultures and societies. Sir William was, after all, the man who conceptualized and went on to run for many years the Government Legal Advisors' course in which legal training, particularly in respect of legislation and international law, was provided to officials from developing states within the Commonwealth.

But if much of the last century was taken up with the project of preparing newly-independent states, new democracies, with the means, legal and other otherwise, of addressing the challenges of modern governance, the legacy of colonialism, of newly minted nationality; it seemed, as the old century made way for the new, as if the post-independence project was replaced with an entirely new one. This project addressed both developing and developed country alike, as in part through the migrations fueled by colonialism, very few states could claim ethno- or cultural-homogeneity. The new project – the word 'new' is misleading for it suggests that societies have not dealt with these questions over the ages – has, in the considerable public discussion devoted to it, been given the term 'multiculturalism'.

So I come to my third reason for being here. When the African National Congress began to draw up a draft Bill of Rights and the constitutional principles which would guide our negotiating positions, we had to tackle challenges – how to legislate diversity; how to adjudicate difference – in a country with a *baasskap* identity. This issue is only now moving to the forefront of politics and society in Europe.

Globalisation, while no doubt an ugly word, has enormously shaped this new terrain. Pressures of globalisation have given many communities, individuals and cultures a feeling of threat and marginalization. There is no point in denying this. These forces cannot be turned back. We need to define, just as we have in terms of individual rights, a balancing new concept of cultural diversity, liberty and rights. We need to do this not only because of corrosive risks – from radically new patterns of international migration, for example – but because 'identity' politics is one of the most dangerous forces now at play. In Europe, in particular, there is an intense exercise in many countries to identify so-called 'core values' faced by 'alien forces'. Issues of 'us' and 'them' remain a razor sharp division embedded, all too often, in the landscape of nations and the wider international community.

It has received enormous attention over recent weeks here in Britain with Chancellor Gordon Brown seeking to articulate a "British national identity", that "everyone should learn Magna Carta"; poor Jack Straw having cultural problems with Muslim women wearing their veils when consulting with him in his constituency and your education secretary prescribing "non-negotiable British" values.

More seriously, and no less dangerously, the issue of unresolved minority integration in Europe keeps coming up as a set theme in threat analysis.

If one were partial to Samuel Huntington-like distinctions (and I myself am not) one might suppose that South Africa represents the tail-end of the post-independence project, its great triumph, but that it might be relegated footnote-status in the intellectual endeavour devoted to multiculturalism. I would disagree.

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The dynamics which give rise to these projects can hardly be separated and I would suggest, with requisite modesty of course, that there is reason to observe closely how South Africa seeks, by its new Constitution and by its laws and practices, to meet what I have referred to, for ease of reference, as the multicultural project – although I fear that this may suggest that South Africa's constitution and multiculturalism are things apart.

My address tonight is titled: *The South African Constitution and the Transition from Apartheid: Legislating the Reconciliation of Rights in a Multicultural Society*. But it might also be titled, to borrow from L. P. Hartley's famous opening line in the Go-Between, *The Past is Another Country*, because as I will argue, it is the construction of our society on the basis of a shared vision of the future, rather than on any mythologizing of our past, that best guarantees a peaceful, just, multicultural society in which each is offered the best chance for flourishing and fulfillment.

Many of you familiar with South Africa's Constitution will know that we celebrate its tenth anniversary this year. It is a Constitution that speaks both of the past and to the future. It guarantees civil and political rights (called first-generation rights) and holds out the realisation of social and economic rights (called second generation rights). It promises protection of the rights which best guarantee our freedom to be individuals, unlike any other, but also the rights we enjoy only in and through our communities – that protect our enjoyment of the society of those like ourselves.

I must emphasise that those of us involved in the multiparty negotiations that led to the enactment of the Constitution and who had fought against apartheid were determined to fashion a founding document that enabled South Africans to participate in and enjoy, in every sense, their diverse communities – continuing a tradition which had seen the Freedom Charter declare that "South Africa belongs to all those who live in it" and that all South Africans had the right to their own languages and to develop their own cultures and customs.

In some sense, this determination on our part might have seemed counter-intuitive. After all we had come from an apartheid past under which difference was not erased, but was, in fact, elevated – our difference becoming our defining feature, the basis on which the state determined the rights, resources and level of care we were due.

It is this history of division, of separation, that made it so essential that the new constitutional order have as its objective a unified South Africa. But as the preamble states, we were to be united in our diversity. There was never a question that South Africa adopt a policy of assimilation – that we would seek to erase difference. To do so would have merely perpetuated a system of inequality and dominance. As A. Sivanandan explained recently, a policy of assimilation is one that deems there is one dominant culture, one unique set of values, one nativist loyalty.

South Africa's break with the past did not involve then a denial of difference. South Africans instead were free to celebrate it, but without it determining the rights, resources and level of care to which they are due. Of these goods, we

are each guaranteed equal claim, irrespective of our difference. We have, as has been underlined by Justice Sachs, the right to be the same and the right to be different.

This pluralist and multicultural vision for South Africa has been criticised by some precisely because it is said to accentuate difference: Rather than unite the disempowered, multiculturalism emphasises social divisions and exaggerates cultural differences among them. In this scenario, the politics of identity is counter-productive to nation-building.

I strongly disagree. Multiculturalism in South Africa is to be valued – not only because we recognize that life in our modern world makes for multiple allegiances and loyalties that are enriching and because individuals require different means to develop their fullest abilities. But it is to be valued because a society in which each is able to demonstrate her difference and diversity equally is a society much more likely to encourage its members to see beyond signifiers of religion, race or ethnicity as the sole markers of identity.

For these reasons – in pursuit of a genuinely multicultural society – South Africa's Constitution provides for detailed language protections in the founding provisions, establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and inscribes a host of rights in the Bill of Rights that have relevance to our ability to participate in and enjoy diverse communities – such as equality, dignity, freedom of association. However, the South African Constitution most explicitly protects multiculturalism (and here I mean multiculturalism in the narrow sense of bestowing special rights and privileges on minority cultures and ways of life) in two separate types of provision. It guarantees community or multicultural rights along two different axis.

The first provisions flow from the orthodox type of religious freedom clause that finds its genesis in the earliest documents seeking to inscribe the rights of humankind. South Africa's provision protecting the right of every person to freedom of conscience, religion, thought, belief and opinion admittedly entitles persons to do so all on their own but, in practice, it guarantees a right that generally only has meaning and value when shared in community with others, however small that community may be. The Constitution also similarly guarantees the right of each person to use the language and participate in the cultural life of their choice. Under these provisions,¹ it is the individual's right to have a belief or opinion, to use a language, or to practice a culture, in community with others that is promised.

But the Constitution, in an entirely different section, and in line with much more recent human rights documents, also guarantees the rights of persons belonging to cultural, religious or linguistic communities – qua community – to practice their culture, faith or language and to undertake activities that would promote such community.² Under South Africa's Constitution individuals' rights

¹ See S 15 South African Constitution.

² See S 31 South African Constitution.

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to participate in community are thus protected, as is the community's right to exist, to engage in its practices, traditions and belief as a community.

How these sections interrelate, how the internal limitations clauses function³ as opposed to the general limitations clause contained in the Bill of Rights – whereby rights may be limited provided such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom – are issues our courts have only begun to deal with. Yet, already they have faced some peculiarly difficult questions.

At a time when I was Minister of Education, a Christian education alliance challenged the ban on corporal punishment in schools, including private religious institutions, arguing that this violated their rights to religious freedom – as individuals and as community. The Constitutional Court issued a decision on the basis that, assuming in petitioners' favour that physical chastisement did constitute a genuine religious belief and that the prohibition on such punishment constituted an infringement, such infringement was nonetheless reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Tonight, however, I do not propose to explore the workings, and possible interpretations of specific clauses in South Africa's Constitution. Nor do I propose examining the core values that animate our constitution – human dignity, equality, freedom, non-racism and non-sexism – despite their very obvious and tremendous importance in making for a country in which diverse groups and communities find their home.

Rather my intention is to outline an approach or ethos, a critical way of thinking, that must guide all three branches of government – the courts' jurisprudence, Parliament's legislative function and the executive's action – in reconciling rights within our multicultural society.

South Africa's Constitution is unequivocally what Ruti Teitel has called a "transitional constitution"⁴ – both backward- and forward-looking. But it is backward-looking only in that it involves a repudiation of an undemocratic and illiberal past. And a repudiation of the past requires the construction or marshalling of reasons in the present-day in order to justify the rejection of values and practices of the past. This transitional constitutional project is not about safeguarding, making inviolable the traditions and practices of our past. It is not a reification of history.

Obviously, we in South Africa especially want to reclaim and restore histories that have been negated – histories of marginalized groups and societies. But I would venture that in our constitutional project – in the courts' jurisprudence, in

³ For instance Section 31, in protecting the rights of cultural, religious and linguistic communities, provides that the rights protected "may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

⁴ R. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 Yale Law Journal 2009, at 2015 (1997). See also at 2078:

In ordinary times constitutionalism is conceived as entirely forward-looking in nature, designed to endure for generations. Constitutionalism in transitional times is particularly retrospective in nature, justificatory and constructive of the political transformation.

Parliament's considerations for enacting legislation – we should be unapologetic in our reference to South Africa's shared future, and what we want that to look like, and how it involves a departure from our past, as justification for our decisions. This mode of reasoning – an articulation of the society we are reaching for – bears sharp parallels with what South African legal scholar, Etienne Mureinik, called a "culture of justification", a culture he and other South African human rights lawyers hoped would be firmly entrenched by a Bill of Rights. As he explained:

they have been looking to [the Bill of Rights] not only for its explicit content, but also to enrich laws by fostering justification-thinking, because it was the poverty of law, in the shape of pervasive authority-thinking that made apartheid possible. A bill of rights, they have been hoping, would restore discipline to a legal system grown slothful about justification.⁵

Were it to be otherwise, were it our past (even a mythical past), and not the future, that was our lodestar, than I fear we would venture too close to divisive, contemporary political projects, as seen in Britain today with the espousal of 'British values', what Chancellor Gordon Brown has called "a clear shared vision of national identity." This imagining of Britain, based on its rediscovery (a redrawing, if you like) of its past brings with it the alienation of many immigrants and communities who have had no place in the Britain that gave rise to such 'values' – many whose own experience, anyway, would necessarily refute the imagining of a Britain that has always held dear the values of liberty, tolerance and social justice – and who, by virtue of their multiple identities, and sometimes conflicting allegiances, must necessarily contest this 'clear, shared vision of national identity'.

Recently in a case that continues to generate much debate in South Africa involving the right of same-sex couples to marry, the Constitutional Court showed itself acutely conscious of the need to formulate a jurisprudence that speaks to a shared future, that is formulated in response, as a rejection of what was unconscionable in our past. Justice Sachs, writing for the Court in the same-sex marriage case (*Fourie*), noted:

Our Constitution represents a radical rupture with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough. In the memorable words of Mahomed J: 'In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and ringing rejection of, that part of the past that is disgracefully racist, authoritarian, insular and repressive and a vigorous identification with and commitment to a democratic, universalistic, caring and

⁵ E. Mureinik, *Emerging from Emergency: Human Rights in South Africa*, 92 Michigan Law Review 1977, at 1986 (1994).

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aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.⁶

The past should be referenced not only in order to applaud traditions we wish to preserve but to stare down the spectre that we as a society are determined to avoid.

As Justice Mahomed made clear, in South Africa, our constitutional justification should be unequivocally aspirational, future-bound, preserving from the past only that which is justifiable. And while this style of reasoning, of justification, may seem especially suited to South Africa, I would suggest that it is fitting for much of the world as well.

In our public life and discourse, in our laws and jurisprudence, we need to encourage a culture of justification that seeks to shape a shared future based on a very critical examination of our past. This culture of reasoning or justification is much less likely to alienate peoples whose cultures and societies are not well represented in our past – at least our official past. And it means that peoples who make their homes in South Africa today, without any representation in our past, are much more likely to find a place, a sense not just of being, but of well-being, in South Africa, as they too participate, as full members, in articulating a vision of a shared future.

I have proceeded thus far in my lecture with reference to multiculturalism as if its value were self-evident. Indeed, for many of us that value is self-evident and if not self-evident it is at the very least an inevitable outcome. Nonetheless it is worth rehearsing why we would want to embrace multiculturalism, a diversity of ways of living within society. And here I would suggest, that as the great South African Bram Fischer spoke of nationalism, that it is “if anything a means to an end, and before we seek to further it we must have some idea of the end for which we are striving”, so we should think of multiculturalism and diversity: not as ends in themselves but as means to an end.

It was as means to an end that John Stuart Mill celebrated diversity within society in his work *On Liberty*, more than a century and a half ago:

If it were only that people have diversities of taste that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development: and can no more exist healthily in the same moral, than all the variety of plants can exist in the same physical, atmosphere and climate. The same things which are helps to one person towards the cultivation of his higher nature, are hindrances to another. Unless there is a corresponding diversity in their modes of life, they can neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable.⁷

⁶ At para. 59. *Minister of Home Affairs and Another v. Fourie and Another* (Doctors for Life International and others, Amicus Curiae); *Lesbian and Gay Equality project and Others v. Minister of Home Affairs and Others*, CCT 60/04; CCT 10/05.

⁷ J. S. Mill, *On Liberty*, in J. M. Robson (Ed.), Essays on Politics and Society, Vol. 18 of The Collected Works of John Stuart Mill (1977), at 270.

This defence has been updated by scholars like Will Kymlicka, the foremost contemporary proponent of cultural collective rights, who has argued that these groups have “societal cultures” that provide “members with meaningful ways of life across the range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres”⁸ and that membership within rich and secure cultural structures, with their own languages, histories, cultures, is essential both for the development of self-respect and for giving persons the means by which they can develop the abilities to make choices about how to lead their lives and realize their fullest potential.

We therefore value multiculturalism because we want to preserve a wide range of human conditions, allowing free people the best chance to make their own lives. And it is not only that we seek to value allegiances of long-standing, that cut across the reductive classifications of nationality, but also to value contemporary trends towards global citizenship; as evidenced by the growth of the human rights movement, new forms of women’s citizenship and of ecological citizenship.⁹

Notwithstanding these very obvious benefits, there remain a number of critics, many of them whose intentions and qualifications cannot be gainsaid, of the multicultural project. They do so chiefly on two grounds: first that the rights accruing to such groups in democratic societies, protect and shore up groups and communities who seek to undo democracy, and who use those selfsame rights and liberties in order to destabilize democracies. This line of criticism has attracted greater currency in the wake of 11 September and the London bombs of July 2005.

The second set of critics argue that the extension of special recognition and rights to minority cultures might enable oppression of vulnerable individuals – such as women and children – within the group and shield such discrimination from outside scrutiny. I want to attempt what must necessarily be a brief response to both sets of critics.

In respect of the first set of critics – those who hold out the spectre of fundamentalism (principally Islamic) and the destruction of democracy – as a basis for the rejection of partisan, particular (relative) values in favour of a shared national identity (the universal), I turn to Kwame Anthony Appiah. In his book, *Cosmopolitanism: Ethics in a World of Strangers*, Appiah argues that today’s fundamentalists are themselves of a universalist creed, engaging in the same quest for “a universal community beyond cultures and nations.”¹⁰ The debate then is not one between relativists and universalists – as to why minority cultures require special preservation as against the larger society – but rather of competing universalities.

⁸ W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 76 (1995).

⁹ For a more comprehensive account of these loyalties and allegiances, see my Bram Fischer Memorial Lecture for 2004, *Globalisation, Human Rights and the African Diaspora*, Oxford, 9 July 2004.

¹⁰ K. A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* 140 (2006).

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And in this context, the pressing question, as Appiah frames it, is “how, in principle, to distinguish benign and malign forms of universalisms.”¹¹ For Appiah benign universalism is cosmopolitan in character, admitting of difference in its value for plurality:

Cosmopolitans think that there are many values worth living by and that you cannot live by them all. So we hope and expect that different people and different societies will embody different values (But they have to be values worth living by).

Another tenet of cosmopolitanism is fallibilism: “the sense that our knowledge is imperfect, provisional, subject to revision in the face of new evidence.”¹² This seems consistent with an outline of constitutional justification that would have it be unapologetic in looking to the future, clearly articulating what it is we want that future to look like, in order to determine what it is from the past we might wish to preserve.

For counter-cosmopolitans, or fundamentalists, universalism issues in uniformity. This is their objective. In cases where these universalities compete (cosmopolitan as against counter-cosmopolitan or fundamentalist), where they come head to head – the often overstated quandary of our day – cosmopolitan beliefs are to be preferred on the basis not of the past that they have delivered but of the future they promise. This is a future in which we want to “preserve a wide range of human conditions because it allows free people the best chance to make their own lives.”¹³

And so the fear of fundamentalism, of democracies’ destruction from within, can ground no coherent rejection of multiculturalism. In fact it is the fear of fundamentalism, of those who would have all be like them, think like them, who would tolerate no diversity, no plurality of opinion, that must lead us inexorably to an embrace of multiculturalism.

What then of the second group of critics? Those who fear that multiculturalism might facilitate abuse, those who, like Susan Moller Okin, ask “is multiculturalism bad for women?” I fear these issues are more intractable. Already in South Africa we have dealt with situations in which certain sectors of our society have felt their community rights to religious practice were violated by the prohibition on corporal punishment in schools – a measure that sought to guarantee the welfare of children. And the recent Constitutional Court decision holding that the failure to provide for same-sex marriage in our common and statutory law infringes rights to equality and dignity has generated enormous religious and cultural opposition in South Africa. Or, even more seriously, the intersection between traditional law, especially relating to marriage and inheritance, and the constitutional prescriptions on equality and dignity.

We can in South Africa point to the Constitution and insist that the provisions guaranteeing the rights of cultural, religious and linguistic communities are clear

¹¹ *Id.*, at 143.

¹² *Id.*, at 144.

¹³ *Id.*, at 105.

in stipulating that such rights shall not be exercised in a manner inconsistent with any other provision in the Bill of Rights. We can reason, as the Constitutional Court has done that:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

Still, the sense among religious and cultural communities that their practices, their ways of being, have been diminished or are under threat, is real. And we would be disingenuous in pretending that our Constitution always allows for a reconciliation of rights, that it does not sometimes require choice, the sacrifice of one right for another.

However, much more disingenuous, I fear, are those who take issue with certain cultural or religious practices and beliefs on the ostensible basis that they are concerned for the abuse of those most vulnerable within the minority grouping when, in fact, they seek only to secure their own comfort.

During my tenure as Minister of Education, we produced a seminal document on *Values in Education*. We said that values cannot be imposed. Diversity should be encouraged. In schools, especially, outward showing of dress, in particular, allows for diversity to be valued – not only because it promotes that bland value of tolerance but also enables our children to work and live in an environment in which all can demonstrate their affiliations equally and which is more likely to do that than one in which all such signs have been artificially erased.

Mr Straw, I understand from The Economist, has received support from his colleagues concerning his request that Muslim women remove their veils when consulting with him. It is a request that appears to have some resonance with theorists like Okin concerned for women's inequality. However, an examination of Mr Straw's reasons for making such a request reveals that this concern was not foremost in his mind.

Rather, it appears that personal levels of comfort were most at stake when he defended his action on the basis that comprehensive communication can be achieved only by looking someone full in the face – ignoring as Ziauddin Sardar reminds us the wealth of scholarship testifying that communication, particularly by way of facial expression is not universal but culturally constructed.¹⁴ Straw also argues that wearing the veil is a “visible statement of separation and difference”, and in doing so he disparages a core value of any liberal multicultural society in which the right to be different and belong in a participatory democratic sense is protected, recognizing that this is what is needed to give every individual the best chance of personal fulfillment.

¹⁴ New Statesman, 16 October 2006.

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Too often the attacks that minority cultures must withstand, ostensibly in the name of concern for the least well-off and most vulnerable among their number, are sadly simply attempts to force the minority culture to assume the ways of the majority, to insist that it assimilate. Nonetheless we cannot afford to ignore discrimination of vulnerable individuals – whether that be children, women, homosexuals – wherever that occurs, whether in minority or dominant culture and so we must take seriously Appiah's caution that: "There simply is no decent way to sustain those communities of difference that will not survive without the free allegiance of their members."¹⁵

My own hope is that South Africa's culture of constitutional justification, one grounded in an articulated vision of the future, necessarily up for debate – where the past really is another country – will inform the communities and cultures of all the peoples who find their home in South Africa. The practice of taking from the past that which a vision for the future endorses may then become part of the way in which we all view and approach our own cultures and traditions.

Then, perhaps, what Salman Rushdie said of *The Satanic Verses*, the novel that attracted his *fatwa*, might also be a fitting description of South Africa for a country where racial 'purity' had been virtually elevated into a constitutional principle under apartheid:

[It] celebrates hybridity, impurity, intermingling, the transformation that comes of new and unexpected combinations of human beings, cultures, ideas, politics, movies, songs. It rejoices in mongrelization and fears the absolutism of the Pure. Mélange, hotchpotch, a bit of this and a bit of that is how newness enters the world. It is the great possibility that mass migration gives the world, and [it has] tried to embrace it.

¹⁵ Appiah, *supra* note 10, at 105.