

Fifth J.D. Baqwa Memorial Lecture
National Identity and Cultural Diversity

by
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When I was approached by Mr Chupe Serote on behalf of the Forest Hill Residence of the University of Cape Town to deliver the 5th J. D. Baqwa memorial Lecture, 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 reflects a life-long tendency towards perversity. After all, the young man is right. In the twilight of my days, I ought to bask in the admiration of my family, if no-one else will, and enjoy a graceful retirement.

But I shall continue to be a cranky old man, and provide you with three reasons why I am here with you.

First, I am deeply touched to be asked to deliver the 5th J D Baqwa Memorial Lecture. Like the other lecturers, I would like to congratulate the University for inaugurating this lecture in memory of a humanist snatched away from us in the prime of his life. Tributes to Professor Baqwa have drawn attention to his role as a critical intellectual, engaged academic and a social activist.

But it was not his professional or academic roles that made the biggest impact on me. It was his belief in people. Professor Leslie London in his tribute to Professor Baqwa referred to what made him into such an 'extraordinary leader – his belief in people as being capable of change and agents of change', much like

Nelson Mandela's great anti-imperialist speech in 1952 when he castigated the world order for treating people as objects. As subjects, they have the capacity to influence and change the environment they live in.

I only had two personal contacts with him, one indirectly and the other directly. Indirectly, as a former vice-president of the International Defence and Aid Fund, I was associated, with Louise Asmal, with the Canon Collins Educational Trust which in 1990 awarded the young Baqwa a scholarship to study for a Masters degree at the Liverpool School of Tropical Medicine, from where he never looked back.

While he was Warden of Forest Hill he invited me to speak to the students. His naturalness and genuine rapport with young people struck me forcibly. Unlike other intellectuals, he had a genuine interest in young people. He was, as they say, a real *mensch*.

The second reason I am here is that as the university is the most appropriate place for the contest of ideas, we must ensure that the constitutional provision dealing with my right to be here is not only constantly affirmed but strengthened.

Academic freedom is not, as the chairman of the Communist Party (who also doubles up as the Minister of Higher Education and Training), said, something that 'human rights fundamentalists' invented to serve the interests of the elite, who want to block transformation. Rather it is a constitutional right, interestingly presented as part of freedom of expression (section 16).

It must though be borne in mind that the freedom the academy has is the freedom to canvass the truth. The problem is not so-called human rights fundamentalists who insist on the exercise of a constitutional right but ideologues who would deny its existence. So there.

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 in the nineties, which would guide our negotiating positions, we had to tackle political challenges – how to legislate diversity; how to adjudicate difference – in a country with a *baasskap* identity which excluded the vast majority. 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. We need to define, just as we have in terms of individual rights, a balancing new concept of cultural diversity, liberty and rights and what

constitutes the elusive notion of national identity. 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’. Issues of ‘us’ and ‘them’ remain a razor sharp division embedded, all too often, in the landscape of nations and the wider international community.

In Britain Gordon Brown has been seeking to articulate a ‘British national identity’ by such means as everyone learning Magna Carta, and a former British education secretary advocated prescribing ‘non-negotiable British’ values in the school curriculum. In France poor President Sarkozy has been having cultural problems with Muslim women wearing their burkas.

Australia has now made it compulsory for the indigenous population to learn English so that they can talk to each other and become good Australians. So it appears the basis of inclusion in the national stock is assimilation into the mores of the dominant.

More seriously, and no less dangerously, the issue of unresolved minority integration in Europe is now being examined from a military point of view, and included in threat analysis. We see this in Asia as well, most recently in western China.

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 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 could well 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 our Constitution will know that 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 realization of social and economic rights (called second generation rights). It promises protection of the rights which best guarantee our freedom to be individuals, 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 emphasize 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.

But we made a serious mistake in 1989 when as the Constitutional Committee of the ANC we produced the Constitutional Guidelines for a Democratic Society, the first such initiative by a liberation movement. The contents were evaluated and highly praised by lawyers everywhere, but none of the commentators recognised the folly of the entry under National Identity:

[...] It shall be state policy to promote the growth of a single national identity binding on all South Africans. At the same time (sic) the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.

In some sense, such a 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. We would seek to erase 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 therefore not involve a denial of difference. South Africans instead were free to celebrate it, but without it determining the rights, resources and level of care which are due to them. 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.

Unification of a country and the acknowledgment of its identity has historically been the results of the triumph of hegemony by a race, a religious group or a

class. Power has been usually maintained by force. The danger implicit in our 1989 proposal was vividly drawn to my attention by a French admiral on a visit to Cape Town when, following a discussion on what South Africa was, he said: 'Be careful, Mr Minister, a single identity, when people have multiple identities, is always imposed by force of arms'. He should know. He was French, but he came from Brittany where the Breton language was banned until 1982, and it was forbidden to give children Breton names.

This pluralist and multicultural vision for South Africa has been criticized by some precisely because it is said to accentuate difference. It has been alleged that, rather than unite the disempowered, multiculturalism emphasizes social divisions and exaggerates cultural differences among them. In this scenario, the politics of identity is counter-productive to nation-building. Effectively, it is said, we have constitutionalised separate development.

I strongly disagree. Multiculturalism in South Africa is to be valued – not only because we recognise 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. 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.

So what about the assertion that we are Africans, or that there is an African culture, and that we should, as the Judge President of the Western Cape has demanded, apply 'African' law? Should we not be talking about South African law, which the Constitutional Court has done so much to promote.

Edward Said succinctly rejected this kind of collective description, when he said: "Nothing is more common in public discourse than phrases like 'the English' or the 'Arabs' or the 'Africans', each of them suggesting not only a whole culture but a specific mindset".

For these reasons - in pursuit of a genuinely multicultural society – South Africa's Constitution includes detailed cultural, religious and language 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. While we rightly denied 'group rights' during the negotiations, we did recognise 'associational' or 'community' rights, which have been firmly

strengthened by the decisions of the Constitutional Court, sparing the country much of the trauma and travail which has afflicted other countries.

Apartheid denied us a shared citizenship and a common identity. Is multiculturalism averse to a shared identity?

Before 1994, there was no nation in South Africa, even though one test of a nation is the nationality description on a passport. To be a national of a country is to be a citizen of it.

But this limited element of identity was removed for millions of Africans with the independence of each 'homeland', when Africans, wherever they were in South Africa, became citizens of that homeland!

There must be more to identity than a description on a passport. Writers have referred to the need for a sense of solidarity, participation in resources without discrimination, a sense of belonging to a polity or more, controversially, being part of social capital!

There were no South Africans in 1994, as the 'politics of difference' were oppressive and counterproductive in creating a sense of loyalty.

So, is there a resonance in our times to what Massimo d'Azeglio famously observed in post unification Italy:

'We have made Italy, now we must make Italians'

Recently in a case that generated 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 and rejects 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 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.”

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. It seems that our Constitution has done more for transformation than anything achieved by politicians..

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. It means that people who make their homes in South Africa today, who had no presence here in the past, should 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. Xenophobia is inconsistent with the values of our Constitution, and must be actively repudiated.

I have proceeded thus far in my lecture with reference to multiculturalism as if its value were self-evident. Even if this were so for all of us, 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.

What happens when rights clash? Rights may be limited provided such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom – 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, even assuming in the petitioners' favour that physical chastisement did constitute a genuine religious belief and that the prohibition on such punishment constituted an infringement, such an 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 or the possible interpretations of specific clauses in South Africa's Constitution. Nor do I propose to examine 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 court's 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" – both backward- and forward-looking. In ordinary times, she says, constitutions are entirely forward-looking: ours is transformational. It is backward-looking only in that it involves a repudiation of an undemocratic and illiberal past; we have to understand our past, and marshal the reasons why we reject it today.

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

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 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'. This myth of a snared past based on alleged common values seems to pervade some European countries.

And in this context, the pressing question, as Appiah frames it, is 'How, in principle, to distinguish benign and malign forms of universalisms' 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).'

For counter-cosmopolitans, or fundamentalists, universalism results 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.'

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, and who wonder, for example, whether multiculturalism is 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 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.

Not all traditional and cultural practices are worthy of protection under the guise of diversity. In *Mrs Hassan's* case, the Constitutional Court held that in a polygamous Muslim arrangement, the first wife was entitled to receive part of the estate, as otherwise the succession legislation invalidly discriminated against her.

In the *Bhe* case, the African practice of inheriting property by primogeniture favoured men over girls and was declared unconstitutional.

Can the annual ritual murder of dozens of our young men in provinces like Eastern Cape be justified in the name of culture and tradition in the face of constitutional rights to dignity and bodily integrity? Is birth fate?

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 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'.

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.

That is why the new curriculum advances human rights as the unifying instrument and why religious education, rather than religious instruction will advance understanding of different faiths.

Our schools are a microcosm of South African society. We had Afrikaner and English schools, Indian and Coloured schools and African schools run by the Bantustans and the apartheid regime. We did not have and do not now have a unified South African school philosophy.

In our *Values Document*, we emphasised that the comforting principles of equality, freedom, dignity and justice – the foundations of our Constitution - are the unifying features of a national identity based on solidarity.

This may not be revolutionary, but as a democrat, I hope that this approach is unifying, rather than divisive.

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 just attempts to force the minority culture to assume the ways of the majority, to insist that it assimilate, accept or conform to prescribed or ordained national identity. Nonetheless we cannot afford to ignore discrimination against vulnerable individuals – whether that be children, women, the poor, 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.'

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 mongrelisation 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'.

Our sense of belonging, of what we are, is not determined by a DNA test which establishes racial purity – indeed tests might show we are all mongrels.

But the values of our Constitution – of dignity, equality, justice and freedom – help us to find out how to be *me and we*. That is the promise of 1994 which we can share with the world.

Somehow I feel that Dumo Baqwa would have looked down kindly at this conclusion.
