

[T]he fact of pluralism – is not a mere historical condition that will soon pass away; it is, I believe, a permanent feature of the public culture of modern democracies. Under the political and social conditions secured by the basic rights and liberties historically associated with these regimes, the diversity of views will persist and may increase. A public and workable agreement on a single general and comprehensive conception could be maintained only by the oppressive use of state power. Since we are concerned with securing the stability of a constitutional regime, and wish to achieve free and willing agreement on a political conception of justice that establishes at least the constitutional essentials, we must find another basis of agreement than that of a general and comprehensive doctrine. And so, as this alternative basis, we look for a political conception of justice that might be supported by an overlapping consensus.<sup>1</sup>

## **1 Introduction**

Difference around sexuality identifications is with us to stay. It is part of the ever-unfolding, multiple proliferations of Africanness that cannot be wished away by African political communities; instead, it is a permanent feature of the human condition. At the same time, as part of the process of embedding a culture of acceptance of difference in our polities, it is essential to develop an archive for understanding the ethics of the politics of sexuality difference. It would be naïve, say, for defenders of historically stigmatised and criminalised sexualities to assume that once such sexualities have acquired recognition under global or regional regimes of human rights it will be sufficient to convince national authorities of the merits of their case or lead to a social consensus. Developing an African archive around how, in a political sense, we ought to manage ‘dissensus’

1 J Rawls ‘The idea of an overlapping consensus’ (1987) 7 *Oxford Journal of Legal Studies* 1 at 4-5 (footnotes omitted).

in sexuality identifications is a necessary part of taking seriously the importance of deepening our political understanding of the ordinariness of difference in all its manifestations in Africanness: it is an adjunct to the construction of a hermeneutics of Africanness that addresses status subordination in all its manifestations.

Those who resist and contest the claims of sexual minorities should not be asked to abandon their own personal moral convictions or, much less, be required to concede that their convictions are irrational or wrong. Instead, they should become participants in a dialogue about the place of difference in a plural polity. This need is even greater in the face of strong communitarian or majoritarian contestation of the claims of a sexual minority. A goal of a discourse on inclusive Africanness should be to persuade dominant discourses of their cardinal political duty to mutually respect differences through a theory and a praxis that acknowledge and respect the place of pluralism in a liberal polity. By a liberal polity I broadly mean a political and constitutional commitment to governance in which all citizens share an equal political space or, at least, ought to do so.

Carl Stychin notes that political resistance to cosmopolitan claims about same-sex sexuality frequently is grounded in communitarian claims constructed around the self-determination of a nation.<sup>2</sup> Citing, as a case in point, resistance to homosexuality by Zimbabwean national authorities using communitarian claims constructed around difference, cultural authenticity and resistance against colonialism and imperialism, he underscores that the language of human rights can be a double-edged sword.<sup>3</sup> Stychin's observation that national authorities can resist same-sex claims using communitarian claims explains the political as well as juridical vulnerabilities of sexual minority rights to contestation by political, cultural or religious authorities with privileged access to state power. When premised upon the self-determination of a nation, the language of universal rights can be used by those resisting the same rights as well as those seeking the protection of those rights, such that we find ourselves at an impasse.<sup>4</sup> It is important, therefore, that we invest time in developing a political discourse on the ethics of overcoming such an impasse. The discourse should be understood as part of articulating an African self in which we accept that plurality and 'dissensus' in sexuality identifications are an integral component of the property of African humanity and a socially shared structure of Africanness.

2 CF Stychin 'Same-sex sexualities and the globalization of human rights discourse' (2004) 49 *McGill Law Journal* 951.

3 Stychin (n 2 above) 956.

4 Stychin (n 2 above) 957.

In this chapter my aim is to develop a grammar for mediating the contestation of sexuality identifications through promoting an understanding of the politics and ethics of pluralism. The ideas are expressed, not as an attempt to win over African polities to new and alien values but rather, as an amplification of existing values. In the last part of the chapter, I stress that as a consequence of their constitutions African polities already are disciples of the politics of pluralism,<sup>5</sup> even if frequently they do not live up to the creed. Nonetheless, they have formally committed themselves to political pluralism as part of the shift to constitutionalised liberalism on the continent, and away from one-party state polities.

My point of departure, therefore, is that in political communities committed to liberalism, differences are an ordinary part of our political lives. Even if we should agree on minimum ground rules as to how we should be governed as part of sharing a common political space, it is not necessary or even desirable that we should also reach agreement on all moral issues, including conceptions of our sexual selves. However, we need a theory and praxis for mediating difference in sexuality. I begin building my arguments through appropriating two derivative liberal political concepts – the notion of an ‘overlapping consensus’ as advocated by John Rawls<sup>6</sup> and the concept of ‘dissensus’ as advocated by Nicholas Rescher.<sup>7</sup> In the latter half of the chapter I extend the arguments around managing ‘dissensus’ to include political equality in a democracy. I draw on discourses that address difference, situating the concept in equal citizenship and democracy. In this connection, Iris Young’s argument with respect to recognising difference in a heterogeneous public sphere<sup>8</sup> and Hannah Arendt’s concept of citizenship in a plural political community are my main resources.<sup>9</sup>

Integrating into our understanding of fundamental rights – whether human rights or constitutional rights – Rawls’ idea of an overlapping consensus and Rescher’s principles for managing ‘dissensus’ creates

5 See discussion in sec 6 below.

6 J Rawls (n 1 above); J Rawls *Political liberalism* (2005) 131-172.

7 N Rescher *Pluralism: Against the demand for consensus* (1993).

8 IM Young *Justice and the politics of difference* (1990), especially ch 4 on ‘The ideal of impartiality and the civic public’.

9 In drawing on Arendt, I have relied mostly on an interpretation of Arendt’s vast body of work by Maurizio Passerin d’Entreves: MP d’Entreves *The political philosophy of Hannah Arendt* (1994) 139-166. D’Entreves’s interpretation draws from the span of Arendt’s work, including *The human condition* (1958); *Origins of totalitarianism* (1962) originally published in 1951; *Between past and future* (1961); *On revolution* (1963); *Men in dark times* (1968); and *Crises of the republic* (1972).

discursive pathways for achieving non-hierarchical inclusiveness and symmetrical relations of cooperation in sexuality identifications in a liberal polity. Ultimately, I argue that managing ‘dissensus’ in a liberal polity requires linking democracy with a vision of dialogic equality. It requires imagining an inclusive citizenship underpinned by a type of participatory democracy in which respect for pluralism and the eradication of relationships of dominance and subordination in social groups are foundational ethics.

Young’s seminal work, *Justice and the politics of difference*, and in particular, her robust critique of the ‘ideal of impartiality and the civic public’<sup>10</sup> provide the chapter with a template for participatory democracy that supports the construction of a diverse public sexuality realm for different social groups. Arendt’s concept of citizenship and its focus on the public sphere as a political space in which citizenship can flourish through recovering a common shared world and creating inclusive spaces for individuals to reveal their identities in conditions of reciprocity and solidarity, is a conceptual resource for imagining a sexual citizenship that protects not so much diversity among social groups as the right of every human being to make unexpected beginnings, even in the sphere of sexual identification. In appropriating Arendt’s thought the emphasis is on understanding plurality not only as something that registers equality among citizens and social groups, but also the uniqueness of every human being who has lived in the past, lives now and will live in the future.<sup>11</sup>

## 2 Rawls’ overlapping consensus

Overcoming the impasse around rights underpinned by moral and political controversy calls for thinking in terms of a conceptual methodology which mediates between competing rights and interests, and which resolves the competition in a framework that has a predictable approach for procedurally and substantively determining ‘which self, which group, and which rights to protect’ under conditions of fairness.<sup>12</sup> Any plausible methodology should emphasise promoting pluralism and diversity, which entails not merely envisioning a more egalitarian relationship between citizens so as to recognise their differences, but also finding ways to build on areas where there is agreement: areas that can be described as an

10 Young (n 8 above) ch 4.

11 Arendt *The human condition* (n 9 above) 8 176.

12 Stychin (n 2 above) 957.

'overlapping consensus'.<sup>13</sup> If it is to promote human freedoms, any regime of rights in a liberal polity should seek to protect overlapping consensus at the same time as it protects diversity. In order to promote diversity it should avoid becoming a consensus-seeking monolith that normatively requires oppressive and gratuitous homogeneity or uniformity. Rather, it should be pluralist, without assuming homogeneity or consensus in a situation in which moral doctrines or religious views differ. Support for these propositions derives from John Rawls' idea of the imperative of respecting pluralism within a liberal democratic polity in which 'dissensus' is a permanent feature of public culture.

Rawls posed a philosophical question: he asked how it is possible that there can be a stable and just society in which citizens are 'free and equal' and yet are deeply divided by conflicting, or even 'incommensurable', comprehensive religious, philosophical and moral doctrines.<sup>14</sup> Rawls answered his question by positing the idea of an 'overlapping consensus' as a derivative principle of justice that holds a diverse political community together. Rawls conceived the idea of an overlapping consensus as a supplement or adjunct to a principle of justice he had developed in his seminal work – *Theory of justice*.<sup>15</sup> He argued that social unity and cooperation in a liberal society do not depend on a convergence of selves or of group interests but rather on securing an 'overlapping consensus' in relation to a reasonable conception of justice.<sup>16</sup> It depends, in part, on allowing 'diversity' in general and comprehensive doctrines in particular. Above all, it lies in recognising a type of pluralism that allows incommensurable conceptions of the good to co-exist or even flourish.<sup>17</sup> Pluralism is not something that can be wished away in a society that has made a commitment to liberalism; on the contrary, pluralism is a permanent and defining feature of democracy.<sup>18</sup> Otherwise, to insist on reaching and maintaining consensus on a general and comprehensive doctrine requires the use of state power in ways that are oppressive and status subordinating to the point of detracting from the foundational ethos of a liberal polity.

A starting point for appropriating Rawls' concept with respect to contestation in the domain of sexuality is that in mediating conflicting

13 Rawls 'The idea of an overlapping consensus' (n 1 above); Rawls *Political liberalism* (n 6 above) 131-172.

14 Rawls *Political liberalism* (n 6 above) 133.

15 J Rawls *Theory of justice* (1971). In sec 4 (below) I discuss Rawls' theory of justice in the context of others' critique of the theory.

16 Rawls 'The idea of an overlapping consensus' (n 1 above) 1.

17 Rawls 'The idea on an overlapping consensus' (n 1 above) 4.

18 As above.

sexuality-identification claims there ought to be equality. This necessity is precisely because an overlapping consensus articulates fair terms of social cooperation between citizens and is not partial to one viewpoint. Equality serves to assure that in a constitutional democracy a public or political conception of justice should be as independent as possible from comprehensive religious, metaphysical or epistemological doctrines that are outside what is implied in the political conception. We ought to start from the premise of a fair system of social cooperation between citizens who are free and equal, are assumed to lead a good life and are entitled to protection by the design and implementation of the basic institutions of society, including its legal system. A liberal political dispensation assumes that there are many conflicting conceptions of the good with none better than the other and each compatible with the full rationality of human persons.<sup>19</sup> Equality assumes that where there is a plurality of reasonable and comprehensive doctrines, about which citizens differ uncompromisingly, it is politically unreasonable to use the sanction of state power to enforce one view or punish those who disagree with a state-privileged view.<sup>20</sup>

Rawls does not assume that it will always be possible to achieve an overlapping consensus on every political matter or that the features of an overlapping consensus cannot be contested.<sup>21</sup> Rather, his main thesis is that a liberal polity is established in no other way than through the development of a political conception of justice that subscribes to pluralism and protects basic rights, including the right to equality.<sup>22</sup> A liberal community should have a political capacity and be under an ethical duty to remove from the political agenda issues that are divisive (such as issues which surround serious moral uncertainty and contention), as well as to create norms and institutions that make it possible for citizens to cooperate on the basis of mutual respect.

### 3 Rescher's dissensus management approach

In his book, *Pluralism*, Rescher takes the thesis of an overlapping consensus forward by focusing on a philosophy of mediating conflict in relation to comprehensive religious, metaphysical or epistemological doctrines.<sup>23</sup> He underlines the futility of seeking to achieve consensus on comprehensive

19 Rawls *Political liberalism* (n 6 above) 135.

20 Rawls *Political liberalism* (n 6 above) 138-139; Rawls 'The idea of an overlapping consensus' (n 1 above) 4.

21 Rawls 'The idea of an overlapping consensus' (n 1 above) 8.

22 Rawls 'The idea of an overlapping consensus' (n 1 above) 17.

23 Rescher (n 7 above).

doctrines as a desideratum.<sup>24</sup> Rescher questions a social or political assumption that seeking consensus is something that should always be desired and actualised, arguing that it is more productive to recognise ‘dissensus’ as a permanent feature of public life.<sup>25</sup> Over and above advancing a defence of pluralism which, in itself, augurs well for the ethic of recognising an expansive sexuality domain, the persuasiveness of Rescher’s arguments in favour of a discourse on sexuality identifications lies in providing a pragmatic framework for an egalitarian praxis of ‘dissensus’ that appeals to substantive equality. Rescher’s discourse on pluralism does not allow room for legitimising a hierarchical sphere of pluralism. Mutual reciprocity and a rejection of ‘dogmatic uniformitarianism’ are precisely the pluralistic values a ‘dissensus’-recognising praxis seeks to affirm.<sup>26</sup>

Rescher’s thesis on pluralism is built around giving ‘dissensus’ centre stage in cognitive and social theory within a framework that rejects indifferent relativism.<sup>27</sup> Giving concrete expression to pluralism requires mutual respect based on egalitarianism. His argument is not that there is no social value at all in trying to reach agreement on comprehensive doctrines but that it is more productive to accept the reality that there is no ‘utopia’ or ‘perfect social order’ and that social harmony cannot be predicated on first achieving consensus.<sup>28</sup> In matters of opinion, consensus generally is unattainable, whether at the global, local, community or familial level, or between individuals. Therefore, liberal polities should invest more effort in creating political and social institutions and attendant regulatory principles for enabling people to live peacefully and productively despite the presence of ‘ineliminable’ disagreements.<sup>29</sup>

A concomitant strand in Rescher’s defence of pluralism is that in order to prevent populist tyranny, we should be careful not to equate even consensus reached by majority opinion as ‘intrinsically rational’ or a privileged viewpoint – much less ‘truth’ – as this only serves to deny the reality and presence of disagreement and cognitive ‘dissensus’ in human society.<sup>30</sup> In building his thesis for a pluralist-seeking and ‘dissensus’-promoting social order, Rescher has developed an attendant regulatory or ‘dissensus’ management approach for allowing us to come to terms with a

24 Rescher (n 7 above) 2.

25 Rescher (n 7 above) 1.

26 Rescher (n 7 above) 2.

27 As above.

28 Rescher (n 7 above) 4.

29 M Marsonet ‘Pragmatism and political pluralism’ (2009) 1 *European Journal of Pragmatism and American Philosophy* 1.

30 As above.

social order that can function effectively even in the presence of difference. His 'dissensus' management approach is built on respect for the quadruple values: legitimate diversity, restrained dissonance, acquiescence in difference and respect for autonomy. It is an approach which can be appropriated by political and juridical methodologies for addressing areas underpinned by deep moral and religious divisions, such as sexuality identifications are.

Respect for diversity stems from the existential reality that different individuals or, indeed, different social groups experience social situations differently. This reality alone makes it unexceptional or even rational that individuals or social groups should come to differ in cognitive, evaluative and practical matters.<sup>31</sup> Respect for restrained dissonance, acquiescence in difference and autonomy are corollaries of legitimate diversity. Once we concede the inevitability of legitimate diversity, it becomes essential not merely to depart from the imperative of a social order so organised around consilience as to require conformity, but also to find peaceful, productive and practical ways of managing diversity among opposing or heterogeneous sexual selves. Restrained dissonance allows us to manage differences between individuals and social groups in ways that seek to maintain social cohesion (the overlapping consensus) and avoid recourse to destructive interaction or conflict.

Acquiescence in a Rescherian sense is not submission or supplication but a praxis of restrained dissonance. It is a praxis which gives concrete expression to a preference for a heterogeneous public sphere over consilience.<sup>32</sup> Acquiescence is a principle of mutual reasonable accommodation which allows individuals and social groups to simultaneously differ and cooperate because it is mutually beneficial for the establishment and sustenance of a fair political community. It is important to bear in mind that acquiescence is more than merely being tolerant in a benevolent sense, as this may merely serve to control and subordinate that which is stigmatised.<sup>33</sup> Acquiescence is a 'live and let live' principle of mutual egalitarian respect.<sup>34</sup> Respect for autonomy is a *sine qua non* in recognising legitimate diversity. Allowing an individual his or her own choices is a way of recognising not just diverse moralities but also

31 Rescher (n 7 above) 6.

32 Rescher (n 7 above) 2.

33 AM Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4 *Health and Human Rights* 69 at 92; W Morgan & K Walker 'Tolerance and homosex: A policy of control and containment' (1995) 20 *Melbourne University Law Review* 202 at 206.

34 Marsonet (n 29 above) 7.



moral agency – the subjective self – and a way of seeing others as entitled to their views without necessarily agreeing with them. As Rescher highlights, to respect others means to regard them as bearers of rights not because it is a benevolent thing to do, but because it is a requisite for mutual co-existence under conditions of equality in diversity.<sup>35</sup> He says:

Morality unquestionably calls for seeing others as entitled to their views – their disagreement from ours notwithstanding ... To respect others is to regard them as the bearers of appropriate rights and entitlements and is – as such – a requisite for benign coexistence. But due respect does not require agreement. On the contrary, it requires a recognition of others as autonomous agents entitled to go their own way irrespective of our approval or disapproval, agreement or disagreement. And to respect another is to more than merely *tolerate* them; it is to see them as units of worth and bearers of rights.<sup>36</sup>

To gloss what Rescher is saying, we should not confuse or conflate Rescher's 'restrained dissonance' with the notion of more or less keeping silent as in Bruce Ackerman's 'conversational restraint'.<sup>37</sup> Despite having the laudable goals of ensuring that diversity is not eclipsed by one difference trumping another or requiring different parties to assume a transcendental perspective, Ackerman's conversational restraint seems to suggest that we push certain issues out of the public sphere as a pragmatic way out.<sup>38</sup> Seyla Benhabib argues there is democratic value in ensuring that we keep airing our different conceptions of good in the public sphere;<sup>39</sup> in that way we sustain the opportunity of democratic deliberation and the possibility of convincing those whose conception of the good differs from ours.<sup>40</sup> Benhabib's concern is with ensuring that we do not impoverish the public sphere through privatising public issues and pre-empting democratic deliberation.

Institutionalising conversational restraint carries the risk of serving as a strategic tool for concealing violence and impunity. Dora King argues that it risks implicitly promoting the 'public secret' as a social institution,

35 Rescher (n 7 above) 18.

36 Rescher (n 7 above) 18.

37 B Ackerman *Social justice in the liberal state* (1980) 11; B Ackerman 'Why dialogue?' (1989) 86 *Journal of Philosophy* 5 at 16-17.

38 S Benhabib *Situating the self: Gender, community and postmodernism in contemporary ethics* (1992) 96-99.

39 As above.

40 As above.

with its implications for legitimising homophobia, precarity and impunity.<sup>41</sup> In her essay on the poetics of mourning the brutal killing of Sierra Leonean lesbian human rights activist Fanny Ann Eddy, King draws on Michael Taussig's 'public secret' as a conceptual resource for explicating how taboos around despised sexualities protect dominant cultures from defacement.<sup>42</sup> She underscores that the tacit prohibition of speech serves as a technology of knowledge and power for the state and social institutions in maintaining the status subordination of despised sexuality identifications by requiring silence on what is known.<sup>43</sup>

In Taussig's work, a public secret constitutes 'knowing what not to know'.<sup>44</sup> It manifests when a given society institutionalises a cultural praxis of what is 'generally known but cannot be articulated'.<sup>45</sup> It is performative in that it is a reiterative and citational practice prompted by the obligatory norms of societal power which produce subjects who 'know what not to know'.<sup>46</sup> In the sexuality realm a public secret serves to protect and sustain what is normative in speech and the representation of sexualities. It accords space to dominant sexualities whilst requiring silence on stigmatised sexualities. King argues:

This tacit prohibition on speech that lies at the heart of social life and its institutions maintains a wide range of relationships between the powerful and the powerless, and also within the family and other social contexts. Each citizen must actively submit to its dynamic in everyday relationships since attempts to opt out may court various levels of danger ... Knowing what not to know, and not saying what not to say protect social taboos from defacement. It is a public performance.<sup>47</sup>

It should be highlighted that Rescher's 'restrained dissonance' is not moral apathy either. Rescher is careful to explain that where the interests of a third party would be harmed, moral concern for third parties requires limiting respect for other people's opinions.<sup>48</sup> Restraint dissonance should not be (mis)understood as promoting ethical self-sufficiency, where

41 D King 'The secrecy and poetics of witness: Mourning Fanny Ann Eddy' (2016) 155 *Journal of Theology for Southern Africa* 30 at 40-42.

42 King (n 41 above) 40, citing MM Taussig *Defacement: Public secrecy and the labour of the negative* (1999).

43 King (n 41 above) 40.

44 Taussig (n 42 above) 2.

45 Taussig (n 42 above) 4-5.

46 J Butler *Bodies that matter: On the discursive limits of 'sex'* (1993) 2; KJ Surin 'The sovereign individual and Michael Taussig's politics of defacement' (2001) 2 *Nepantla: Views from the South* 205 at 206.

47 King (n 41 above) 40.

48 Rescher (n 7 above) 19.

autonomy and pluralism become a right to satisfy one's desires independently of the desires of others. Normative self-sufficiency or egoism, Martha Nussbaum points out, renders the very idea of a political community unsustainable.<sup>49</sup> Building a community requires mutual cooperation and respect for the interests and desires of others. What restrained dissonance implies is that when constructing and sustaining a political community the demands of a collectivity should not be made the basic goal of politics.<sup>50</sup> Rather, the basic goal should be the ethic of recognising the freedom and uniqueness of each person.

Equally, to give expression to dissonance is not the same as remaining morally neutral or giving legitimacy to regimes of exception that *may* manifest in what Nancy Fraser calls 'subaltern counterpublics' in her discourse on recognition in a pluralist polity.<sup>51</sup> She notes that marginalised groups may find advantage in establishing alternative social spaces – 'subaltern counterpublics' – in which they can formulate oppositional interpretations of their marginalised identities, interests and needs. Subaltern counterpublics emerge as a response to exclusion from dominant publics. But, in serving as important sites for inventing and circulating counter-discourses, they concomitantly run the risk of succumbing to separatism, anti-democratism and anti-egalitarianism, thus marginalising and excluding others.<sup>52</sup> Fraser's point is not that subaltern counterpublics are unnecessary or intrinsically nefarious but that they should not constitute self-perpetuating 'enclaves' that operate using a participatory rule that detracts from inclusion and participatory parity.<sup>53</sup> In a stratified society with embedded structural inequality, counterpublics can serve as secure places for temporary withdrawal in order to regroup and train for advocacy in the wider public sphere.<sup>54</sup> However, in the long term, they should be part of a 'wider public' so that they are not insulated from the ground rule of parity in democratic participation where there is openness and no single voice is greater than another.<sup>55</sup>

49 MC Nussbaum *Sex and social justice* (1999) 59-62.

50 Nussbaum (n 49 above) 62.

51 N Fraser *Justice interruptus: Critical reflections on 'postsocialist' condition* (1997) 81-82.

52 As above.

53 Fraser (n 51 above) 82.

54 As above.

55 As above.

## 4 Young's critique of the ideal of impartiality and the civic public

Young's discourse on the politics of difference is a conceptual resource for thinking about the domain of sexuality as a microcosm of a heterogeneous public sphere.<sup>56</sup> In this sphere differences between sexuality identifications can be ethically mediated through normative reasoning as such reasoning is necessarily dialogic.<sup>57</sup> Dialogism implies a plurality of voices interacting with one another, each with its own unique but equal valence. At the same time, as the previous section underlined, rights cannot be held independently of the rights of others. Giving normative self-sufficiency to some and subordinating others, as did the apartheid state in South Africa, is to consign the others to zones of non-being. In a heterogeneous public sphere there is no dominant or subordinate voice precisely because the political goal is to level out asymmetrical power relations. If left undisturbed, asymmetrical power relations create a conducive environment for 'false universalism'.<sup>58</sup> No single voice can speak for all subjectivities. In this sense, Young's heterogeneous sphere captures the philosophy of the politics of 'nothing about us without us'.<sup>59</sup>

Young implicates a sexuality public sphere in which heteronormativity is both dominant and hegemonic as false universalism. Her counterpoint to the ideal of impartiality is participatory democracy as a way of linking democracy with lived equality.<sup>60</sup> Participatory democracy is a device for ensuring that moral and political norms are directly tested by participants who come to the discussion forum with their different needs, interests and perspectives.<sup>61</sup> A unified heteronormative sexuality public sphere that excludes and silences transgressive sexualities would be the antithesis of participatory democracy and renders dialogue pointless.<sup>62</sup> To level the playing field, participation must be porous to procedural as well as substantive equality so that representation is meaningful and not tokenistic.<sup>63</sup>

56 Young (n 8 above).

57 Young (n 8 above) 116.

58 Young (n 8 above) 115-117. I briefly discussed 'false universalism' in ch 2 sec 2.

59 See ch 2 sec 2.

60 Young (n 8 above) 60.

61 IM Young 'Asymmetrical reciprocity: On moral respect, wonder and enlarged thought' (1997) 3 *Constellations* 340 at 351.

62 Young (n 8 above) 183.

63 Young (n 8 above) 184.

Young should not be understood to be arguing for a heterogeneous public sphere as a haven for normative anarchy and unresolvable group conflict. She is careful to draw a distinction that serves to guard against legitimising normative self-sufficiency. She draws a distinction between, on the one hand, ‘interest-group pluralism’ in which each interest group promotes its own agenda at the exclusion of the interests of other groups and without the need to justify its decision (a non-dialogic praxis) and, on the other, a heterogeneous public where participants deliberate and come to a decision based on principles of justice and can be called upon to justify their claim (a dialogic praxis).<sup>64</sup> A dialogic praxis is necessary for realising participatory democracy.

In arguing for a heterogeneous public sphere, Young must be understood as necessarily parting company with the theory of justice that Rawls articulates in his *Theory of justice*.<sup>65</sup> In this seminal work Rawls constructs the ‘original position’ as a procedural requirement and a starting point for ensuring that the principles of justice chosen are indeed just. Parties in the original position have equal rights in choosing just principles. Furthermore, they command equal knowledge. Rawls constructs the ‘veil of ignorance’ to equalise their knowledge. The rationale for equalising procedural rights and knowledge is to create conditions that ‘represent equality between human beings as moral persons and as creatures having a conception of their good and capable of a sense of justice’.<sup>66</sup> Rawls’ ultimate point is that persons in the original position will choose two principles – the liberty principle (comprises basic civil liberties) and the difference principle (centres on equality as the cardinal goal) – as their foundational principles for a just political order that is consonant with the maximal promotion of conceptions of own good.<sup>67</sup>

The veil of ignorance is a critical component of Rawls’ methodology. It is a distinct counterpoint to Young’s requirement that dialogism entails an engagement in which subjectivity is not erased. In Rawls’ theory parties behind the veil of ignorance must leave their particularities behind so that they can be placed in a position – the original position – where they are able to decide rationally about their own welfare without knowing their own position (such as social class, material wealth and natural endowments), but knowing enough about the general facts of society. The rationale for

64 Young (n 8 above) 190.

65 Rawls *Theory of justice* (n 15 above). Note that here I am not referring to Rawls’s idea of an ‘overlapping consensus’, which I discussed earlier, and which is an adjunct to his theory of justice.

66 Rawls *Theory of justice* (n 15 above) 19.

67 Rawls *Theory of justice* (n 15 above) 60-65 75-83.

the veil, according to Rawls, 'is to nullify the specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their advantage'.<sup>68</sup> The supposition in Rawls' theoretical calculation for arriving at just principles of justice is that the original position and the veil of ignorance compel rational parties to design a society in which every individual is treated with dignity and is offered equal opportunity precisely because the chances of each party's finding themselves in a position of relative privilege or relative disadvantage are equal.

Young's objection to Rawls' theory of justice is that it universalises an arbitrary rational agent as the person who is omniscient and chooses for all.<sup>69</sup> Though Rawls' original position<sup>70</sup> and its adjunct, the veil of ignorance,<sup>71</sup> hold some attraction for Young, in the sense that, to a point, they accommodate a plurality of selves, in the end she sees them as monological in character. This is primarily because in the quest to render the original position impartial any differences among individuals in the original position are erased or invisibilised. Young says:

The veil of ignorance removes any differentiating characteristics among individuals, and thus ensures that all will reason from identical assumptions and the same universal point of view. The requirement that participants in the original position be mutually disinterested precludes any of the participants from listening to others' expression of their desires and interests and being influenced by them.<sup>72</sup>

Young's rejection of Rawls' 'original position' contrasts with her receptiveness, albeit qualified, to Jürgen Habermas' 'communicative ethics' in moral reasoning.<sup>73</sup> The attraction of Habermas' communicative

68 Rawls *Theory of justice* (n 15 above) 136.

69 Young (n 8 above) 101-102; S Darwall *Impartial reason* (1983) 231.

70 Rawls *Theory of justice* (n 15 above) 17-22 118-122 142-150.

71 Rawls *Theory of justice* (n 15 above) 136-142.

72 Young (n 8 above) 101. See also Matsuda's feminist argument that the abstractness in Rawls' methodology constructs a vision of socio-economic life without reference to the concrete realities of life and alternative conceptions of the nature of humankind. Matsuda is fundamentally opposed to abstraction because of its inherent capacity to exclude the experiences of marginalised groups. She says that the methodology used by Rawls is 'the first step down the road of androcentric ignorance': MJ Matsuda 'Liberal jurisprudence and abstracted visions of human nature: A feminist critique of Rawls' theory of justice' (1986) 16 *New Mexico Law Review* 613 at 617-619. In support of Matsuda's argument we can add a host of other forms of Rawlsian ignorance, such as non-heteronormative sexuality.

73 Young (n 8 above) 101; J Habermas *The theory of communicative competence Vol 1: Reason and rationalization of society* (1983); J Habermas *The theory of communicative competence Vol 2: Lifeworld and system* (1987). I say 'qualified' because, in the end, Young argues

ethics is that it is dialogic and is predicated on a plurality rather than homogeneity of subjects.<sup>74</sup> Dominance and hegemony are averted by interactions under conditions of equal power. The essence of Habermas' communicative ethics as an ethics of justice is that it is aimed at maximal citizenship through discursive interaction as an indispensable part of a democratic political practice. Its vision is that of citizens who are citizens because they deliberate their interests openly, free of domination and oppression, and with reciprocity and mutual tolerance of difference.<sup>75</sup> To ensure just outcomes, such deliberations ought necessarily to involve the participation of all those affected by the decision. In this way Habermas' communicative ethics is a conceptual resource for imagining a universe where substantive pluralism gives rise to participatory parity and where social inequality and domination and exclusionary practices, including in the realm of sexual identifications, are not given legitimacy.

The lack of recognition of a plurality of subjects who engage in dialogue renders Rawls' original position one of impossible impartiality or even false impartiality. In the sexuality realm it is apt to reproduce a heteronormative sphere. Young is at pains to underscore that differences in subjectivities cannot be reduced to a unity if the goal is dialogic engagement. Differences in sexual identifications, for example, are precisely that: irreducible or irreversible differences.<sup>76</sup> These differences cannot be mediated by a method which seeks to universalise sexuality so as to produce a sexuality that coheres with our individual selves. In putting the emphasis on irreducibility and irreversibility to maximally realise subjectivity in participatory democracy, Young is evincing an important philosophical departure, not just from Rawls' theory of justice in respect of which her position is poles apart, but also from Seyla Benhabib's principle

that Habermas relies on a counterfactual that is built into an 'impartial starting point' so as to get to the end point – the universal position. Young argues that this detracts from the notion of starting with a clean slate and allowing the subjects to reconstruct normative reason without an *a priori* conception of moral reasoning. It effectively amounts to appealing to a homogeneous public or at least it vacillates between a homogeneous public (which is tantamount to unacceptable universalism as it may ignore the needs of a particular group) and a heterogeneous public which Young has argued for: Young (n 8 above) 7 106-107. For Young, therefore, it is not enough that, as Rawls posits, persons in the original position and under the veil of ignorance know, for example, about the general facts about human society, understand political affairs and principles of economic theory, and know the basis of social organisation and the laws of human psychology: Rawls *Theory of justice* (n 15 above) 137. Ultimately, Young is opposed to the tendency to universalise which is inherent in Rawls's theory.

74 Young (n 8 above) 106.

75 Young (n 8 above) 33-34; A Heller *Beyond justice* (1987) 240-241.

76 Young (n 61 above) 348.

of symmetrical reciprocity with whose doctrinal egalitarian thrust Young is otherwise in agreement.<sup>77</sup>

Young's argument in disagreeing with those to whom she philosophically is very close, such as Benhabib, is that the Hegelian relation between self and other should be understood as specifically asymmetrical and irreversible if it is to yield mutual reciprocity in recognition.<sup>78</sup> She maintains that there is an infinity of possibilities in the dialectical process of the self in relation to the other which renders it impossible for the self to suspend its own position.<sup>79</sup> If we accept Young's argument, one of its implications for the hermeneutics of African sexualities is the necessity for an approach that has the conceptual capacity to account maximally for the range of existential sexualities. It also means that in the theory and praxis of identifications there can be neither fungibility between sexuality subjectivities nor mutual substitution as different sexual identifications cannot stand in the place of one another.<sup>80</sup> Thus, dialogism in the heterogeneous sexuality sphere should be understood as being aimed at securing asymmetrical rather than symmetrical reciprocity between different selves so that each self engages in a dialogue for mutual recognition but without leaving behind its concrete self, complete with its multiple needs, interests, perspectives, histories and temporality. For Young, reciprocity means equal respect and acknowledgement of asymmetry – how different the other is – so that the outcome is a meeting across the distances of time and space.<sup>81</sup>

Drawing on the phenomenological discourse of Emmanuel Levinas and the feminist discourse of Luce Irigaray, and more particularly, their maximal notions of subjectivity, Young cautions against a theory and praxis of dialogue that is driven by an impulse to abstract and reduce communication to a common measure or comparability.<sup>82</sup> The argument is not so much that we can dispense with comparisons when attempting to theorise justice and its relationship to equality; rather, it is that any comparison should not seek to disembodiment particular subjectivities through

77 Young explains her doctrinal differences with Benhabib in Young (n 61 above) especially 341-343 346-355. Young specifically responds to Benhabib's argument for symmetrical reciprocity in Benhabib (n 38 above).

Young (n 61 above) 348-349.

78 Young (n 61 above) 348.

79 Young (n 61 above) 348-349.

80 Young (n 61 above) 346.

81 Young (n 61 above) 351.

82 Young (n 61 above) 351, citing E Levinas *Otherwise than being or beyond essence* (1981) and other works interpreting Levinas; L Irigaray *Speculum of the other woman* trans GC Gill (1974).



treating subjectivities as fungible.<sup>83</sup> If our goal is mutual reciprocity in recognition, Young argues, then any comparison should treat subjectivity in a Hegelian sense as irreducible and irreversible. A plausible account of a heterogeneous sphere of sexual identifications and mutual recognition should include the recognition of identifications that speak in ‘different and incommensurate registers’.<sup>84</sup>

Through her thoughts on a methodology for mediating opposing identifications, Young (implicitly) is urging us to build into our African archive the ethics of mutual recognition, which takes into account different temporalities and the inexhaustibility of histories.<sup>85</sup> Histories are the accounts we tell and *retell*. Though there are never finished or permanent accounts but rather, unfinished accounts told in the ‘interval’, they can be told differently in different contexts.<sup>86</sup> Here we see a convergence between Young’s theory of the politics of difference and Stuart Hall’s cultural theory of identification. Young’s approach to understanding the conjunctural nature of subjectivities and their attendant histories comports in striking ways with the hermeneutics of Africanness I am advancing.<sup>87</sup> Young and Hall converge in resisting making concessions to power and privilege built around unities of closure and solipsism. Implicitly, they both speak equally against the legitimacy of a single African voice. Implicitly, both require a dialogue in which African subjectivities and identifications are affirmed in their multiplicity.

## 5 Arendt’s concept of citizenship in a plural political community

Arendt’s seminal body of work and, most importantly, her thinking about the place of pluralism has relevance for how we conceive sexual citizenship and accommodate ‘dissensus’ in African liberal polities. Arendt’s deep conviction that human beings are plural beings and that each is capable of new and unexpected beginnings ontologically is rooted in natality.<sup>88</sup> In his essay on interpreting Arendt’s concept of citizenship, D’Entreves highlights that the ‘public realm’ is the cardinal sphere in which a

83 Young (n 61 above) 351.

84 Here I am transposing Young’s argument to sexualities: ‘Asymmetrical reciprocity’ (n 61 above) drawing on Irigaray (n 82 above).

85 Young (n 61 above) 352.

86 As above. The ‘interval’ here is a Derridean interval: J Derrida *Positions* (1981); S Hall ‘Who needs “identity”?’ in J Evans & P Redman (eds) *Identity: A reader* (2000) 15-30 at 15-17. See discussion in ch 2 sec 4 of this book.

87 I laid the foundation for the hermeneutics in ch 2.

88 Arendt *The human condition* (n 9 above) 177-178 247.

democratic political community is realised to give form to pluralism in the Arendtian imagination of inclusive citizenship.<sup>89</sup> What is crucial to Arendt's concept of citizenship is not merely that none of us is excluded from a democratic political community precisely because the recognition of one's rights depends, in the first place, on being counted in, but also that we are all allowed to differ without suffering the consequence of losing membership of a political community.

It is not so much the abstract articulation of one's fundamental rights in a constitution or a human rights treaty that is foundational for equal citizenship, but inclusion in membership of a political community.<sup>90</sup> It is this membership which speaks to the recognition of political equality and, in turn, determines the 'right to have rights'.<sup>91</sup> What is also crucial to Arendt and, ultimately, definitive of the public realm and its connection with equal citizenship, is how the public realm addresses 'dissensus' in ways that are porous to recognising radical difference.

Arendt's public realm is agonistic. 'Dissensus' is addressed through pluralism to which Arendt ascribes a foundational status in a political community, highlighting that it has more than a fleeting presence. Plurality is not just a *conditio sine qua non* but also a *conditio per quam* of all political life.<sup>92</sup> Arendt's public realm is a political space for revealing, contesting and resolving differences democratically, and without presuppositions about the attainment of an undifferentiated communitarian common good. Arendt was at pains to emphasise that what sustains democratic political action and the construction of a durable democratic political community is not the attainment of a *volk*, or an ethnic or religious universe but rather, an agreement or consensus to share a public space and to construct institutions and practices commensurate with this goal.<sup>93</sup> Thus, it is not shared values in the sense of shared beliefs that sustain a democratic political community but shared political institutions and a political language. This public realm is as much a 'space of appearance' as it is a 'world we hold in common'.<sup>94</sup> It is these two dimensions that give recognition to pluralism and allow equal citizenship to be realised without consigning those that are different to a zone of political non-beings.

89 D'Entrevs (n 9 above).

90 D'Entrevs (n 9 above) 145.

91 Arendt *Origins of totalitarianism* (n 9 above) 296-297; D'Entrevs (n 9 above) 145.

92 Arendt *The human condition* (n 9 above) 7.

93 D'Entrevs (n 9 above) 145.

94 Arendt *The human condition* (n 9 above) 50-52.

Arendt's space of appearance is of particular relevance to the recognition of sexuality identifications because it protects the overlapping consensus at the same time as it protects the recognition of difference. To use Arendt's terms, it is a space that retrieves the 'world we hold in common' by protecting the 'world which lies between us', thus protecting what is common among members of the political community as much as protecting their differences.<sup>95</sup> Metaphorically, the Arendtian world which lies between us is a 'table' around which we gather to unite in a common enterprise but without sitting on top of each other so that, concomitantly, we retain our separation from each other.<sup>96</sup> Difference is *distinctiveness*, a unique attribute of what it is to be human, not *alterity*.<sup>97</sup> Therefore the achievement of unanimous agreement and the elision of differences is not the aim or desideratum of the democratic political encounter; rather, it is the shaping of individual views, their transformation and enlargement through political argumentation and collective deliberation.<sup>98</sup>

In *The human condition*, Arendt says that 'plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live'.<sup>99</sup> The space of appearance is where members of a political community can reveal themselves in speech and action, especially in their political subjectivities, in conditions that engender relations of reciprocity and solidarity. This space is absolutely crucial to the attainment of plurality. Without inclusive equality, mutuality and solidarity neither the concrete identifications of others nor their public autonomy can be realised. Without autonomy, there is no parity in participation but instead marginalisation, exclusion and alienation.

The concept of a political community and citizenship espoused by Arendt is ultimately an insurgent against totalitarianism of whatever genus, and its alienating effect. Unlike totalitarianism, Arendt's 'world which lies between us' is a table with a spatial topology designed to ensure that we are *not* compressed increasingly together by totalitarian regimes until we are formed into one.<sup>100</sup> Arendtian insights can become a basis for understanding as well as remedying the shortcomings of citizenship and perforce the recognition of identifications in both the colonial era and the era after independence in ways that speak to African sexuality-citizenship.

95 As above.

96 Arendt *The human condition* (n 9 above) 52; D'Entrevés (n 9 above) 147.

97 Arendt *The human condition* (n 9 above) 176.

98 D'Entrevés (n 9 above) 152.

99 Arendt *The human condition* (n 9 above) 8.

100 Benhabib (n 38 above) 92-93.

Her public realm admits of a plurality in a manner that allows individuals a moral and psychic space to imagine and re-imagine their identifications in ways open to radical difference.<sup>101</sup>

Arendt's concept of citizenship is a conceptual resource for imagining the African public realm as a realm where we can recover a 'common lost world' and thus overcome any of our sexuality identifications that were subordinated by existential cultural and political institutions and are subjected to governmentality. At the moment of establishing the colonial state, there was no human relation between the colonisers and the colonised but a relation between human (colonisers) and things (colonised). Manifestly, there was no community of essence between the colonisers and the colonised.<sup>102</sup> The colonial state, which had a monopoly on violence, repudiated the ethic of sharing a common world. It was a regime of exception which disenfranchised black inhabitants on the basis that they were a category of persons outside the realm of self and the other – a zone of subjective non-being.<sup>103</sup> At the beginning it utterly refused to recognise the embodiment of the colonised person, his or her language, works and life of being as products of human activity and, as such, manifestations of human consciousness, that is, subjectivity.<sup>104</sup> Once subjectivity was denied, the gateway to circumventing the doctrine of the Enlightenment and to departing with equanimity from democratic principles was prised open. Colonial statecraft inscribed the juridical status of black inhabitants as 'natives': subject peoples but not citizens.<sup>105</sup> In an Arendtian sense, the colonised were divested of the 'right to have rights'. They could be inhabitants of the only geographical space they called home but not members of a political community.

Thus, to those at the receiving end of colonial rule, the colonial state was a totalitarian political space which rendered the majority of its inhabitants virtual strangers in their own home. Viewed from the perspective of a totalitarian past, the moment of African independence can be understood as the opportunity to retrieve an Arendtian lost world and to restore a political community complete with the public realm. In practice, however, the rhetorical commitment to the restoration of a

101 H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 1 at 5.

102 JA Mbembe *On the postcolony* (2001) 27.

103 Mbembe (n 102 above) 25-35.

104 JA Mbembe 'African modes of self-writing' (2002) 14 *Public Culture* 239 at 246.

105 M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996); M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359 at 372-373; M Mamdani *Define and rule: Native as political identity* (2012). See, generally, the discussion in ch 3 sec 3.1 of this book.

political community that subscribes to democracy and pluralism has not gone hand in hand with creating the requisite institutions, much less the requisite political language, jurisprudence and praxis – the political culture. The sexuality sphere is a sphere in which most African states practise a totalitarianism which denies transgressive sexualities their public autonomy and thus manifestly fails to protect a ‘world which lies between us’.

## 6 Finding an overlapping consensus and asymmetrical reciprocity in African political and constitutional frameworks

Despite a chequered history in constitutionalism, an African formal purchase in democratic liberalism, which is generally tethered to human rights values has emerged in two main historical phases in modern times.<sup>106</sup> For the majority of African states the first phase took place mainly in the 1960s as part of a colonial bequest to newly independent African states by erstwhile colonial powers. As transitional constitutional instruments, African states adopted ready-made constitutions that both marked their juridical status as independent countries and inscribed democratic governance, including the protection of civil and political rights contained in a Bill of Rights.<sup>107</sup> However, in both form and substance this was a short-lived phase. With few exceptions it was followed by the widespread abrogation of constitutionalism and formal renunciations of democratic governance through the emergence of military dictatorships and one-party states.<sup>108</sup> Though the 1970s and 1980s witnessed change and a return to formal democracies in some isolated

106 The typology of only *two* historical phases here is intended to explain the existence of an overlapping consensus in the African region, rather than to engage in deeper historical analysis. Historical developments are always open to different understandings and categorisations. Crawford Young, for example, identifies three phases – three waves of democratisation in the African region, the first being the regimes created by the independence constitutions, the second being mostly the late 1970s before the adoption of the African Charter when, as prime examples, Ghana and Nigeria returned to the fold of civilian government following periods of military rule, and the third being the 1990s as a fall-out from the Cold War: C Young ‘Africa: An interim balance sheet’ (1996) 7 *Journal of Democracy* 53; F Viljoen *International human rights law in Africa* (2012) 159.

107 Again this a generalisation, as there are exceptions. For example, South Africa, which was already an independent republic before the transition to democratic rule in 1994, does not fit into this picture.

108 Viljoen (n 106 above) 159.

instances,<sup>109</sup> the more significant transition did not take place until the 1990s.

The 1990s can be described as marking the advent of the second phase of democratisation, which continues to this day. Even if civil society agitation for democracy played a significant role on the domestic front, the more important historical development, which initially spurred a regional transition towards a renewed commitment to democratic governance, was the end of the Cold War.<sup>110</sup> The second phase has witnessed the demise of one-party states, the introduction of domestic constitutional reforms and the adoption of redrafted constitutions with liberal-oriented Bills of Rights that seek to renew the commitment to democracy and to reinforce the respect, protection and fulfillment of human rights, including the rights to equality and freedom of conscience. Basic civil and political rights espoused, for example, by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and which speak to the influence of Western liberal theory are enshrined in African constitutions. Some constitutions have gone further, including socio-economic rights as part of embracing more diverse political philosophies, but without abandoning the core liberal philosophy. In the end the remaining question is not whether African polities have a purchase in democratic liberalism that speaks to an overlapping consensus but rather, to what extent they practise it. An-Na'im has observed that the fundamental framework for a liberal democracy can generally be found in every African constitution, even if repressive governments pay lip service to it or find numerous ways to circumvent it.<sup>111</sup>

As part of our understanding of the reach of the second phase and its relevance in providing formal evidence of an overlapping consensus that speaks to liberalism and pluralism in political doctrines, it is important also to take into account the transition towards liberal democracy at the level of regional frameworks and institutions. The most significant regional political development in this regard is the transition in the African region from the Organisation of African Unity to the establishment of the African Union in 2000 by the Constitutive Act of the African Union.<sup>112</sup> In its preamble, the Constitutive Act speaks not only to African solidarity and the achievement of political and economic union, it also speaks to a determination to 'promote and protect human and peoples' rights,

109 The return to civilian rule following military rule in Ghana and Nigeria serve as the main examples of the isolated instances: Viljoen (n 106 above) 159.

110 Viljoen (n 106 above) 161; R Murray *Human rights in Africa* (2003) 25-33 73-115.

111 AA An-Na'im (ed) *Human rights under African Constitutions* (2003) 17-18.

112 Constitutive Act of the African Union of 2000.

consolidate democratic institutions and culture and to ensure democratic principles and institutions of good governance and the rule of law'.<sup>113</sup> Under the Constitutive Act the principles of promoting and protecting democratic institutions and participation are rendered a constituent part of the substantive objectives and foundational principles of the African Union.<sup>114</sup>

My point in this final part of the chapter is to underscore the constitutional and historical inadequacy of majoritarian resistance to the recognition of non-heteronormative sexualities based on the argument that such sexualities are a Western cultural imposition and a form of imperialism.<sup>115</sup> The formal juridical inscription of liberalism in self-made African constitutions alone, even without adding to the picture the formal commitment to human rights values under global and African regional systems, permits us to counter-resist partly by pointing to a Rawlsian overlapping consensus implicit in the Bills of Rights of African constitutions. If taken seriously, the African Bills of Rights necessarily invite the imperatives of mutually respecting legitimate diversity, of restrained dissonance, of acquiescence in difference and respect for autonomy in the realm of sexuality. A refusal to recognise diversity means that some Africans are consigned to the zone of non-beings solely on the basis that their sexualities are non-heteronormative compliant.

What is sorely lacking in cultural relativist discourses opposed to recognising sexual minorities is a discussion about the 'world we hold in common' in an Arendtian sense. We are asked to accept that the African public realm has no space of appearance for the exercise of public autonomy. There is no discussion about whether pluralism and participatory democracy, which give African citizenry equal voice, are part of modern African polities. Seemingly, partaking of social reflexivity, which allows members of a political and cultural community to critique and challenge normative cultural practices, beyond being merely compliant adherents, is something foreclosed to African peoples.<sup>116</sup>

113 Preamble to the Constitutive Act.

114 Arts 3(g) & (h) and art 4(m) of the Constitutive Act.

115 See O Nnamuchi 'Towards a new human rights paradigm: Integrating hitherto neglected traditional values into the corpus of human rights' (2014) 14 *Chicago-Kent Journal of International and Comparative Law* 26 at 58-66; JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309.

116 S Benhabib 'Cultural complexity, moral interdependence, and global dialogical community' in M Nussbaum & J Glover (eds) *Women, culture and development* (1995) 235-255 at 238-241.

A particular difficulty with nationalistic and Afro-radical discourses that subscribe to thick communitarianism is that they go far beyond merely asserting an African self so as to depoliticise Africanness.<sup>117</sup> In order to counter Western cultural hegemony and invest communitarian claims with indigenous autochthony and authenticity, culture is reified. It is given an age-old essence that speaks for all. Once culture is naturalised and essentialised, the ground is set for depoliticising the domain of sexuality. Anything outside heteronormative sexuality becomes unacceptably subversive and is rendered outside constitutional protection. The door is left open for African polities to be presented without the political accoutrements bestowed by modernity, such as modern constitutions which clearly embrace pluralism. African *cultures* are presented by national authorities as a self-standing, single, national and continental cultural self that is pre-social, hermetically sealed, unchanging and uniquely homogeneous. The possibility is never articulated that such a cultural self could be drawn from knowledge built on hierarchies of power and privilege tethered to socio-political and cultural institutions that deny equality to some social groups.<sup>118</sup>

From a historical perspective, majoritarian claims about a unified African culture and sexuality miss the point that virtually all African constitutions and their Bills of Rights are not the outcome of an evolutionary progress to chart abiding consensus and continuity.<sup>119</sup> They are, rather, an outcome of conflict in the past: they register discontinuity rather than continuity. If liberalism in Western Europe was forged in the crucible of the political struggles between secularism and religion, African liberalism is the outcome of the struggles against polities (initially the colonial state and, latterly, one-party states) that denied the subjectivities of African peoples, consigning them to a zone of non-being. Given this backdrop, accepting essentialised notions of African culture as the only permissible part of the African public realm not only constitutes unconstitutional political instrumentalism, but also, dehistoricisation.

117 I elaborated on this argument in ch 7.

118 L Alcoff 'Democracy and rationality: A dialogue with Hilary Putnam' in Nussbaum & Glover (n 116 above) 225-234 at 225-226.

119 Here my arguments benefit from Chanock's insights in a critique of cultural essentialism: M Chanock 'Human rights and cultural branding: Who speaks and how' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 38-67 at 38-40.