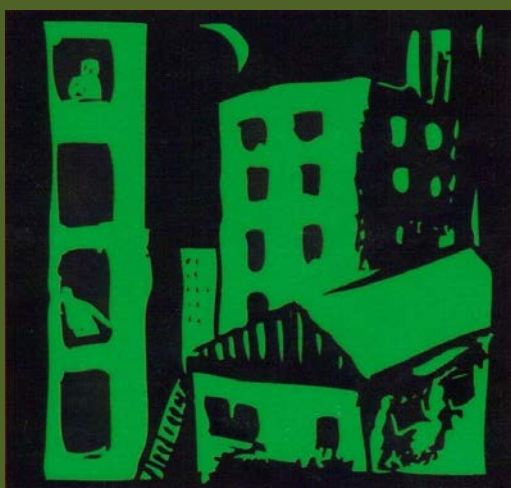


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Fundamental rights and democratic contestation: reflections on freedom of assembly in an unequal society

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1 INTRODUCTION

Demonstrations and protests are a regular feature of political life in South Africa. People take to the streets to protest against inadequate public services, interruptions in the supply of electricity, corruption, the violent use of force by the police, a lack of democratic accountability on the part of local government, hikes in student fees, outsourcing, etc. Of course, the high incidence of demonstrations and protests is not a new phenomenon in SA – protests, demonstrations, labour strikes, consumer boycotts and numerous other forms of resistance

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were integral parts of the anti-apartheid struggle, and mass mobilisation and demonstrations continued to play an important role during the constitution-making process. Given these historical and present realities, it is not surprising that a link is made in constitutional literature between freedom of assembly and democracy. It is stated that the right to assemble, to demonstrate, to picket and to present petitions, institutes a form of direct democracy,¹ and that exercises of this right amount to “a direct expression of popular sovereignty”.²

And yet, freedom of assembly is not as rigorously protected in South Africa as one would expect. The terminology used in the Regulation of Gatherings Act 205 of 1993 sits uneasily with the language of section 17 of the final Constitution, as a “demonstration” is restricted to no more than 15 persons, whereas a “gathering” consists of more than 15 persons. While demonstrations are exempt from the requirement of prior notification, gatherings are subject to onerous notice requirements. These requirements, coupled with the tendency of municipalities to issue blanket prohibitions, have frustrated the realisation of this right, and rendered its exercise far too dependent on the discretion – and goodwill – of local authorities.³

The protection of section 17 by the judiciary has also left much to be desired. In its most important decision to date on freedom of assembly,⁴ the Constitutional Court upheld the constitutionality of section 11(2) of the Regulation of Gatherings Act. This subsection imposes onerous requirements on the organisers of gatherings. In order to escape liability for riot damage, the organisers must prove, inter alia, that the act or omission which caused the damage was not reasonably foreseeable, and that they took all reasonable steps within their power to prevent it. The Court recognised that the provision “significantly increases the costs of organising protest action”, and that it may well inhibit “poorly resourced organisations that wish to organise protest action about controversial causes that are nonetheless vital to society” from doing so.⁵ However, it nevertheless held that the limitation of section 17 was reasonable and justifiable in an open and democratic society. The judgment, despite its rhetoric about the importance of freedom of assembly in giving a voice to the powerless and in promoting democracy,⁶

¹ Currie I & De Waal J *The new constitutional and administrative law vol 1: constitutional law* (Cape Town: Juta 2001) 88-89; De Vos P, Freedman W et al *South African constitutional law in context* (Cape Town: Oxford University Press 2014) 87.

² Woolman S “My tea party, your mob, our social contract: freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)” (2011) 27 *SAJHR* 346 at 348; Woolman S “You break it, you own it: South African assembly jurisprudence after *Garvis*” (2015) 9 *Vienna Journal on International Constitutional Law* 548 at 550.

³ See Woolman S “Freedom of assembly” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* 2ed (Cape Town: Juta 2005) 43-8 – 43-14.

⁴ *South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*).

⁵ Paragraph 57.

⁶ Paragraphs 61 & 63.

has a chilling effect on protests and significantly narrows the space for civil society organisations to help mediate the tension between the State and disaffected citizens.⁷

How are we to understand the disconnect between frequent assertions of the fundamental importance of freedom of assembly to democracy, and the relative ease with which legislatures and courts subordinate section 17 to countervailing considerations? In this article, I put forward one possible answer to this question, namely, that the restrictive interpretation of freedom of assembly by Parliament and the courts, and its neglect in academic literature,⁸ rest on certain assumptions about the kind of democracy instituted by the Constitution. These assumptions concern the relationship between: (i) the power of the people, as instituted and channelled through established democratic institutions, and the power of the people, as exercised outside of these institutions; (ii) representative and direct democracy; (iii) reason and power; and (iv) speech and action. I hope that, by examining and interrogating these assumptions, the article can contribute to a richer understanding of the possibilities and limits of demonstrations and protests in opening up spaces of democratic contestation.

2 INSTITUTIONALISING THE POWER OF THE PEOPLE

Narratives about South Africa's constitutional transition provide a first clue to the way in which assumptions about the kind of democracy instituted by the Constitution have shaped interpretations of section 17. These narratives emphasise the fundamental shift brought about by the new constitutional dispensation in the relationship between the State and the people, as the Constitution moved away from the restrictive racial citizenship of the past, instituted universal adult suffrage, and sought to base government on the will of the people. The notions of "the people" and "people's power" no longer referred to something diametrically opposed to the power of the State. Instead, they were now thought to be the very foundation of the State's authority. Put differently, the new constitutional order institutionalised the power of the people – through their democratic representation and through a variety of mechanisms aimed at ensuring open, accountable and responsive government.⁹

It does not follow from this that the people transferred their sovereign power to the State, without holding any of it in reserve.¹⁰ It also does not follow that, henceforth, the people would speak only through the ballot box, and in the participatory spaces into which they have been invited by the State. The institution of an inclusive representative democracy should not be seen to foreclose forms of democratic engagement that involve more direct participation by citizens, or that take place within political spaces

⁷ Woolman (2015) 569. For a more sympathetic appraisal of the judgment, see Rautenbach IM "The liability of organisers for damage caused in the course of violent demonstrations as a limitation of the right to freedom of assembly: *SATAWU v Garvas* 2012 8 BCLR 840 (CC)" 2013 *TSAR* 151.

⁸ With the exception of a number of important contributions by Stuart Woolman, not much has been written about s 17. The supposed link between freedom of assembly and (direct) democracy is also underdeveloped in the literature.

⁹ See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) paras 110-112.

¹⁰ *Doctors for Life* para 110.

that are not of the State's making. At the same time, however, it was widely assumed that, after 1994, the politics of the street had to give way to the orderly processes of representative government, and that the power of the people would – ordinarily – be channelled through representative institutions, rather than be exercised directly.

This assumption does not appear unreasonable. The South African Constitution seeks to overcome the division and strife of the past by building and consolidating democratic institutions. Moreover, the assumption resonates with narratives emphasising the break between the culture of lawlessness under apartheid and the centrality of the rule of law under the new constitutional dispensation.¹¹ The politics of the street fits uncomfortably with this vision, particularly given its strong historical association in SA with anti-statism (making the country ungovernable), violence, self-help, and justice dispensed by street committees and people's courts. Moreover, it is not as if there is no place for direct democratic action in terms of this vision. The point is rather that its place has become more circumscribed, that it is viewed as a supplement to ordinary (institutionalised) democratic processes, and, perhaps, that it is best invoked when the ordinary channels of democracy have, for whatever reason, become unresponsive or blocked.

There are nevertheless good reasons to be wary of this narrative, insofar as it relegates direct democratic action and the insurgent power of the people to a marginal position and/or treats it as something that is presumptively uncalled for. First of all, this narrative assumes that the history of constitutionalism is a linear process through which formal constitutional guarantees are progressively translated into reality and that we can, accordingly, trust the ordinary democratic processes to promote and develop the rights of citizenship in accordance with their own internal logic. This assumption overlooks the constitutive role of contestation and struggle. Democratic constitutionalism depends on what Balibar terms the differential between “the constitution of citizenship” and “the insurrectional power of universalistic political movements that aim to win rights that do not yet exist or expand those that do”.¹² It is through the transformations that result from contestation and insurrection that democracy is able to sustain itself. These instances of conflict and insurrection take many different forms and do not always involve popular protests and demonstrations. However, a view of democracy which accords a too limited role to extra-institutional politics in supplementing and disrupting the ordinary democratic process, would deprive the political community of an important source of its own vitality and self-renewal.¹³

Secondly, this narrative underplays the profound structural barriers to the attainment of full citizenship and the realisation of fundamental human rights. These barriers arise from South Africa's colonial, apartheid and patriarchal past. But they also

¹¹ See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 93, *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) paras 16-20 & 22; and *President of RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) paras 40-45.

¹² Balibar *É Equaliberty: political essays* (Durham: Duke University Press 2014) 8.

¹³ See Brand D “Writing the law democratically: a reply to Theunis Roux” in Woolman S & Bishop M (eds) *Constitutional conversations* (Pretoria: Pretoria University Law Press 2008) 97.

have to do with global and contemporary conditions. There is a substantial literature on the ways in which neoliberalism, through its reconceptualization of the State and the individual subject in economic terms, has hollowed out democratic citizenship and subverted the promise of fundamental rights. According to authors like Wendy Brown and Margaret Somers, the logic of capital and the market has been extended to all spheres of social and political life, thereby reducing the State to the status of a firm which is governed by economic imperatives, and shifting responsibility for social problems to individuals who must optimise their own human “capital”. Inequality becomes normalised – and thus depoliticised – and is no longer kept in check by the idea of equal citizenship, as citizenship itself is conceived as a contractual relationship. In countries characterised by historic inequality, existing patterns of disadvantage, based inter alia on race, class, unemployment, gender and non-conformity with mainstream norms and roles, are deepened as a result of the marketization of citizenship.¹⁴

In South Africa, the high incidence of protests sparked by the privatisation of public services, electricity and water cut-offs, outsourcing, evictions, unemployment and rising socio-economic inequality suggests that a strong link exists between civil resistance and neoliberal policies which restrict the capacity of the post-apartheid State to respond to poverty and inequality.¹⁵ The legitimation and naturalisation of disadvantage and exclusion in terms of neoliberal rationality, and the resulting protests, raise serious questions about the idea, inherent in the narrative of the shift from popular to institutional politics, of the progressive expansion of the enjoyment of the rights of democratic citizenship. How can the presumption that the people’s power should be channelled through ordinary democratic processes withstand scrutiny if formal constitutional guarantees of citizenship and fundamental rights are eroded by persistent inequality and a governing rationality which measures an individual’s worth in economic terms? Does it not amount to yet another form of dispossession, if those who are already dispossessed are deprived of one of the only ways of challenging their exclusion? Does the depoliticisation of their struggles – by treating their grievances as the result of neutral market processes or their own failure to develop their human capital – not risk depriving them of membership of the political community, and thus of reducing them to a condition of mere life?¹⁶

Thirdly, while it is true that there was a significant reduction in the incidence of protests in the years following South Africa’s democratic transition, this trend was reversed in the mid-2000s. According to Booyesen’s periodization of public participation in post-apartheid South Africa, the early years of our democracy were characterised by government consultation with civil society in the formulation of policy, rising levels of trust in government, and a diminution of popular mobilisation. This persisted into the early 2000s, when new, more structured opportunities for consultation and community

¹⁴ Brown W *Undoing the demos: neoliberalism’s stealth revolution* (New York: Zone Books 2015); and Somers M *Genealogies of citizenship: markets, statelessness, and the right to have rights* (Cambridge: Cambridge University Press 2008).

¹⁵ See Desai A “Neoliberalism and resistance in South Africa” (2003) 54 *Monthly Review* 16.

¹⁶ See Brown (2015) 43.

engagement were introduced. However, the mid-2000s saw a sharp rise in the number and frequency of protests.¹⁷ Today, the very high incidence of social protests¹⁸ arguably bears witness to the limits of our democratic institutions – the distance between the people and their representatives, the lack of responsiveness to the needs of the marginalised and poor, the ways in which democratic representation is distorted by party-political interests and alliances between public and private power, Parliament’s failure to hold the executive to account, and the fact that the participatory spaces into which the public is invited, mirror many of the power imbalances that they were meant to overcome.¹⁹

To summarise, we need to be wary of narratives of South Africa’s constitutional transition which, in emphasising the shift from a racial oligarchy to a non-racial democracy and from lawlessness to the rule of law, unduly circumscribe the capacity of the people to mobilise and act in concert outside of formal institutions. These narratives underplay the role of social mobilisation and contestation in the re-interpretation and re-enactment of constitutional guarantees. They tend to underestimate the extent to which fundamental rights are eroded by systemic inequality and neoliberalism’s governing rationality. They also sit uneasily with the history of social protests in South Africa over the past decade, which appears to suggest that the representative institutions and participatory mechanisms created in terms of the Constitution have had limited success in overcoming the gap between the promise of universal citizenship and the continued marginalisation and dispossession of a substantial section of the population.

3 BETWEEN DIRECT AND REPRESENTATIVE DEMOCRACY

A second clue to the set of understandings of democracy which has shaped legislative, judicial and academic interpretations of section 17 can be found in the distinction between representative and direct democracy. As pointed out above, freedom of assembly is often linked to direct democracy in South African constitutional literature.²⁰ A similar link has been made in Germany. The German Federal Constitutional Court

¹⁷ Booyesen S “Public participation in democratic South Africa: from popular mobilisation to structured co-optation and protest” (2009) 28 *Politeia* 1 at 19-22.

¹⁸ See Powell DM, O’Donovan M & De Visser J “Civic protests barometer 2007-2014”, available at <http://dullahomarinate.org.za/multilevel-govt/mlgi/civic-protests-barometer-2007-2014> (accessed 27 May 2016).

¹⁹ The disconnect between the Constitution’s democratic design and the ways in which legislatures and state organs actually operate is explained in the literature with reference to, inter alia, the ANC’s electoral dominance, the subversion of the independence of State institutions through cadre deployment, corruption, poverty, and the degeneration of opportunities for deliberation and public participation into rituals for the legitimisation of decisions that have already been taken. See Van der Westhuizen C “Democratising South Africa: towards a ‘conflictual consensus’” in Botha H, Schaks N & Steiger D (eds) *Das Ende des repräsentativen Staates? Demokratie am Scheideweg/ The end of the representative state? Democracy at the crossroads* (Baden-Baden: Nomos 2016) 75 at 87-95; and Choudhry S “‘He had a mandate’: the South African Constitutional Court and the African National Congress in a dominant party democracy” (2009) 2 *CCR* 1.

²⁰ Currie & De Waal (2001) 88-89; De Vos, Freedman *et al* (2014) 87; Woolman (2011) 348; and Woolman (2015) 550.

stated, in a judgment delivered in 1985, that freedom of demonstration entails a form of “original, untamed, direct democracy”, which prevents politics from “petrify[ing] into the routine of daily business”.²¹ In the Court’s view, this is so because, in a parliamentary representative system with limited room for referendums, freedom of assembly provides one of the most important opportunities for citizens to influence the democratic process between elections.²²

These references appear to provide a corrective to the tendency, critiqued in the previous section, to absolutize institutional politics at the expense of extra-institutional struggles. However, this idea of “direct democracy” exists at the margins of constitutional thought, as it is difficult to square with mainstream constitutional conceptions of democracy. The Constitutional Court’s understanding of democracy has fluctuated between two visions. The first is a formal conception of representative democracy which foregrounds the legitimation of public power through regular elections.²³ The second is a more deliberative and participatory vision which emphasises the duty of the State to secure conditions in which citizens, political parties and civil society organisations can participate in dialogic processes designed to promote the democratic values of openness, accountability and responsiveness.²⁴ Despite the obvious differences between these two conceptions of democracy, both place a high premium on representative institutions. Moreover, both are concerned with forms of democratic participation that take place within spaces designed (or co-designed) by the State. Neither of these visions provides a natural home for the idea of “direct” forms of democratic engagement which take place outside of established institutions. The disinclination of South African constitutional lawyers to address questions of (popular) sovereignty further contributes to direct democracy’s position as a constitutional anomaly.²⁵

It is also not clear how the right to assemble and demonstrate can be said to be a form of direct democracy. If direct democracy is defined as “a system of government in which decisions are taken by the members of the political community themselves,

²¹ BVerfGE 69, 315 347 (1985), as translated by Salát O *The right to freedom of assembly: a comparative study* (Oxford: Hart Publishing 2015) 48.

²² BVerfGE 69, 315 347 (1985).

²³ The judgment in *United Democratic Movement v President of the Republic of South Africa* (1) 2003 (1) SA 488 (CC); 2002 (11) BCLR 1179 (CC), in which the Constitutional Court rejected a challenge to floor-crossing legislation and infamously declared that between elections, “voters have no control over the conduct of their representatives” (para 49), has become emblematic of this understanding.

²⁴ This understanding is evident from certain judgments dealing with public participation in the legislative process (*Doctors for Life; Matatiele Municipality v President of the Republic of South Africa* (2) 2007 (1) BCLR 47 (CC)); the accountability of political parties to their members (*Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC)); and Parliament’s internal processes (*Oriani-Ambrosini v Speaker of the National Assembly* 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC)).

²⁵ On one view, the Constitution was designed precisely to fragment and weaken the sovereignty of the people. See Ramose MB “In memoriam: sovereignty and the ‘new’ South Africa” (2007) 16 *Griffith LR* 310; Motha S “Archiving colonial sovereignty: from ubuntu to a jurisprudence of sacrifice” (2009) 24 *SA Public Law* 297; Botha H “Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment” (2010) 26 *SAJHR* 66; and Van der Walt J ‘Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: a case of competing retroactivities’ (2010) 26 *SAJHR* 102, for different perspectives on these issues.

without mediation by elected representatives”,²⁶ it is only in the rarest of cases in contemporary democratic States that exercises of the right to assemble and demonstrate would amount to direct democracy. This is so because crowds are not vested with State power and cannot claim to embody “the people”.²⁷ As Salát argues in response to the judgment of the German Constitutional Court in which demonstrations were said to amount to a form of democracy that is original, untamed and direct:

“Assemblies are not exercising public power, and rightly so, as they do not possess any legitimacy for it. Assemblies are anything but untamed ... as law, German law included, imposes so many limits on the exercise of this right that for some it might appear to be not a right at all. It is not direct, as it is not an exercise of legitimate public power because “the People” (*das Volk*) is never present at a demonstration, nor even the majority, or any significant number compared to the entire polity.”²⁸

Perhaps, then, it could be argued that freedom of assembly is best seen not as a form of direct democracy, but as a supplement to representative democracy which can bolster the legitimacy of representative institutions by helping to keep them open, accountable and responsive. This it can do by enabling minorities to participate in processes of democratic opinion and will formation,²⁹ by providing an opportunity for ordinary citizens and movements that lack economic power and political influence to make their voices heard,³⁰ by allowing for alternative sites of political mobilisation, and by acting as an early warning system through which popular disaffection can be detected and addressed.³¹ Even though – or perhaps rather, precisely because – freedom of assembly enables collective forms of public action which occur outside of the spaces created by representative institutions, it provides an important mechanism for safeguarding the inclusivity of the public sphere and strengthening the ability of the representative system to address its own failures and distortions.³²

²⁶ Roux T “Democracy” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* 2ed (Cape Town: Juta 2006) 10-4.

²⁷ Demonstrators can only be said to exercise public power without the mediation of representative institutions in those exceptional cases in which, in an exercise of originary or constituent power, they supersede the power of established institutions by acting in the name of the people. Even in such cases it is problematic to equate assembled crowds with “the people”. It seems more appropriate to state that crowd action can come to be recognised as an exercise of constituent power through its subsequent attribution to the people. It is therefore validated only retroactively. Lindahl H “Constituent power and reflexive identity: towards an ontology of collective selfhood” in Loughlin M & Walker N (eds) *The paradox of constitutionalism: constituent power and constitutional form* (Oxford: Oxford University Press 2007) 9.

²⁸ Salát (2015) 48.

²⁹ BVerfGE 69, 315 347.

³⁰ In the words of the Constitutional Court in *Garvas* para 61: “The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms.” Salát (2015) 50 also refers to Justice Black’s assertion in *Martin v City of Struthers* 319 US 141 (1943) 146 that certain forms of expression and assembly are “essential to the poorly financed causes of little people”.

³¹ BVerfGE 69, 315 347.

³² Ballard, Habib and Valodia argue that, in the absence of a strong parliamentary opposition, protests and social movements fulfil an important democratic role by introducing an element of substantial

But can the idea that freedom of assembly serves, first and foremost, to enhance representative democracy, make sense of the pervasiveness of protests in South Africa? Is the point of many of these protests not precisely to bypass established institutions and procedures? Are they not an expression of a profound distrust of the representative system? Are we not witnessing a growing disconnect between electoral politics and the politics of the street, not only in South Africa but also in many other countries in which mass political protests have erupted during the past few years?³³ Don't these protests point to the growing irrelevance of the representative State, rather than representing a tool for its improvement?

Christi van der Westhuizen argues that the high incidence of protests, together with substantial decreases in voter turnout since the first democratic elections in 1994, signals popular disaffection with representative institutions. This is, however, not tantamount to a “disengagement from politics” or a “loss of support for democracy as political regime”,³⁴ as institutional disaffection has gone hand in hand with the intensification of efforts to keep government accountable through protest action. Van der Westhuizen's analysis suggests that there is, indeed, a rift between representative institutions and the politics of the street, but that the two nevertheless remain connected. She points out that protests “peak during election years”, and that “protestors direct their demands at elected representatives, which suggests they remain convinced that representatives can respond to their needs using the levers of state”.³⁵

Freedom of assembly and demonstration thus occupies a space somewhere between direct and representative forms of democracy. Exercises of this right do not normally amount to direct democracy in the strict sense of the term, as those assembled neither have State power nor embody the whole people. However, the right to assemble allows citizens to engage in processes of democratic opinion and will formation, within spaces of their own choice and where the issues have not already been framed by legislatures, the executive, the State administration or political parties. To that extent, it guarantees a space for political action in which “the will of the people is not always mediated by political parties and the elites that run them”.³⁶ At the same time, however, freedom of assembly remains closely linked to representative democracy. Exercises of this right can reinforce representation by drawing representatives' attention to causes

uncertainty into the political system: Ballard R, Habib A & Valodia I “Conclusion: making sense of post-apartheid South Africa's voices of protest” in Ballard R, Habib A & Valodia I (eds) *Voices of protest: social movements in post-apartheid South Africa* (Pietermaritzburg: University of KwaZulu-Natal Press 2006) 397 at 413-415.

³³ See Krastev I *Democracy disrupted: the politics of global protest* (Philadelphia: University of Pennsylvania Press 2014). According to Krastev (at 62), voter apathy and the eruption of mass political protests – in countries such as Brazil, Bulgaria, Russia, Thailand and Turkey, as well as established democracies in Western Europe and North America – are symptomatic of a worldwide distrust of representative democracy. Elections have lost their capacity to confer legitimacy on those in government, and are being displaced by other forms of political action, such as litigation, ad hoc civic activism and taking to the streets.

³⁴ Van der Westhuizen (2016) 86.

³⁵ Van der Westhuizen (2016) 86.

³⁶ Woolman (2011) 348, as quoted with approval by the Constitutional Court in *Garvas* para 63 note 29.

and interests that have been overlooked in the course of the ordinary political process, or by bolstering their ability to hold government accountable.

But protest action not only has the capacity to reinforce representation. It also highlights the divide between the constitutional vision of democracy and its actual operation, and calls attention to the distance between the people and their representatives. The system's dark underside is evident, inter alia, from the very different treatment meted out to different categories of protestors. Tshepo Madlingozi shows how some social movements – mostly well-resourced ones that operate nationally and use rights based strategies – have been able to contest unjust laws and policies within a relatively safe space secured by civil and political rights, while others – mostly counter-hegemonic ones that are based locally and resist participation in established structures – have been the target of State repression and violence.³⁷ The wide variations in the State's tolerance of, and responsiveness to, protests thus raise fundamental questions about the legitimacy of the representative system and the capacity of the poor and marginalised to rally against their continued exclusion.

4 CONTESTATION AND DELIBERATION

The South African Constitution is sometimes said to institute a deliberative form of democracy.³⁸ On this understanding, the legitimacy of law depends not solely on its enactment by representative institutions in accordance with pre-established procedures. Something more is needed: laws and decisions must emanate from processes that enable informed discussion among free and equal citizens. Such discussion is aimed at mutual understanding and is characterised by the willingness of participants to listen to others and to give defensible reasons for public actions.³⁹ A deliberative-democratic reading of the Constitution is grounded, inter alia, in constitutional requirements relating to public participation in the legislative process⁴⁰ and the participation of minority parties in the processes of legislative assemblies and committees.⁴¹ It further relies on the constitutional demand for the justification of all exercises of public power⁴² and the idea that the Bill of Rights safeguards the right of

³⁷ Madlingozi T "Post-apartheid social movements and legal mobilisation" in Langford M, Cousins B, Dugard J & Madlingozi T (eds) *Socio-economic rights in South Africa: symbols or substance?* (Cambridge: Cambridge University Press 2014) 92.

³⁸ See Davis D *Democracy and deliberation: transformation and the South African legal order* (Cape Town: Juta 1999).

³⁹ Benhabib S "Toward a deliberative model of democratic legitimacy" in Benhabib S (ed) *Democracy and difference: contesting the boundaries of the political* (Princeton: Princeton University Press 1996) 67.

⁴⁰ Bishop M "Vampire or prince? The listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*" (2009) 2 *Constitutional Court Review* 313.

⁴¹ *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) paras 42-43; *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) paras 47-48; *Mazibuko v Sisulu* 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) para 44; and *Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 577 (CC) paras 11-17.

⁴² Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 3.

individuals and communities to be active participants in decision-making processes which affect them.⁴³

Deliberative democrats recognise that freedom of assembly and demonstration, together with other fundamental rights and freedoms, can play an important role in safeguarding democratic processes of opinion and will formation, and that exercises of this right can lead to reforms to make institutions more inclusive and deliberative. At the same time, however, deliberative conceptions of democracy privilege rational discussion over protest action. Deliberative democrats are often critical of protests' tendency to be disruptive of deliberative processes and to rely on slogans and emotional appeals, rather than reason. Moreover, as Iris Marion Young indicates, protest action may strike proponents of deliberative democracy as too close to interest-group politics. Instead of being grounded in a form of communication in which participants rely on principles that are widely shared and transcend their immediate interests, protest action is sometimes aimed at the pursuit of strategic interests. It may even be seen as similar to lobbying by interest based pressure groups that engage in power politics and are not interested in deliberation and persuasion.⁴⁴

Conversely, activists are often suspicious of deliberative forums, even when the latter strive to be inclusive. They fear that they will be co-opted through their participation in these bodies and find it difficult or impossible to draw attention to certain injustices. This is so because deliberative forums do not stand outside of the power relations within a society but tend to reproduce them. In the words of Young, activists believe that

“[i]n a society structured by deep social and economic inequalities, ... formally inclusive deliberative processes nevertheless enact structural biases in which more powerful and socially advantaged actors have greater access to the deliberative process and therefore are able to dominate the proceedings with their interests and perspectives”.⁴⁵

But the problem goes deeper than that. It is not simply a matter of unequal access and resources, but also has to do with the terms of the discussions within deliberative forums. As Young points out, deliberative processes typically take certain constraints for granted. These constraints derive from the logic of existing social and economic structures. For example, a deliberative process pertaining to social welfare reform may be constrained to such an extent by the terms of existing policies and legislation, that it is unlikely to create room for the consideration of proposals for more radical change.

⁴³ See Liebenberg S “Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of ‘meaningful engagement’” (2012) 12 *African Human Rights Law Journal* 1 at 6-13 on the implications of a deliberative model of democracy for understandings of fundamental rights adjudication, particularly within the context of the Constitutional Court’s jurisprudence relating to meaningful engagement in eviction cases.

⁴⁴ Young I “Activist challenges to deliberative democracy” (2001) 29 *Political Theory* 670 at 675-676.

⁴⁵ Young (2001) 679. See also Hicks J & Buccus I “Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa” (2007) 65 *Transformation* 94; and Liebenberg S & Young K “Adjudicating social rights: can democratic experimentalism help?” in García H, Klare K & Williams L (eds) *Social and economic rights in theory and practice: a critical assessment* (New York: Routledge 2014) 75 on the ways in which deliberative and participatory spaces tend to reproduce the inequalities of power that they were meant to overcome.

Participants are forced to accept that they are not free to “question existing institutional priorities and social structures”,⁴⁶ and that there is only a narrow range of alternatives that they can choose from. The constraints are also ideological in nature. Because of the hegemony of dominant discourses, certain biases and distortions are inscribed into the deliberative process. Young mentions, as an example, the widespread assumption that poverty is caused by “the failure of individuals to develop various skills and capacities”,⁴⁷ and the accompanying belief that poverty must be redressed through measures which will make individuals better equipped for wage employment. Social actors who wish to challenge these assumptions and advocate a more radical restructuring of the economy, must do so outside of existing structures and often have to resort to non-discursive means of communication, such as “pictures, song, poetic imagery, and expressions of mockery and longing performed in rowdy and even playful ways aimed not at commanding assent but disturbing complacency”.⁴⁸

Given their uneasy relationship, it could be asked whether a deliberative conception of democracy can enable us to come to terms with freedom of assembly and demonstration. Do we not need an alternative understanding of democracy that places greater emphasis on the ways in which structural power relations shape, influence and constrain political discourse, and on the capacity of political speech and action to disrupt the power of the already instituted?

In a recent contribution, Christi van der Westhuizen problematizes deliberative-democratic understandings of politics in post-apartheid South Africa.⁴⁹ She does so with reference to Chantal Mouffe’s political philosophy of agonistic pluralism. Mouffe is critical of the conceptualisation of politics in terms of a rational consensus. This idea is premised on the distinction between substance and procedure: it posits that, while substantive disagreement is inevitable in view of the pluralism of values characterising modern societies, such disagreement can be bracketed from a public sphere that is concerned with rational processes of opinion and will formation. Mouffe argues that substance and procedure cannot be separated so neatly, as procedures are underpinned by ethical commitments. Value conflicts cannot be excluded from the public sphere, but are constitutive of politics. The challenge is not to “eliminate power”, but to “constitute forms of power more compatible with democratic values”.⁵⁰ This requires democratic institutions, discourses and practices that are able to transform antagonistic struggles between enemies into agonistic struggles between political adversaries, who disagree but treat each other as legitimate opponents. Mouffe concedes that, even in a pluralist democracy, a degree of consensus on fundamental values is required. However, “such a consensus is bound to be a ‘conflictual consensus’”⁵¹ which is staged around competing understandings of citizenship.

⁴⁶ Young (2001) 684.

⁴⁷ Young (2001) 686.

⁴⁸ Young (2001) 687.

⁴⁹ Van der Westhuizen (2016) 80-81.

⁵⁰ Mouffe C *The democratic paradox* (London: Verso 2000) 100.

⁵¹ Mouffe (2000) 103.

Van der Westhuizen reads the parliamentary activism of the Economic Freedom Fighters (EFF) as a form of radical democratic contestation which invokes such a conflictual consensus. She states that the EFF “brings a previously excluded voice that is socio-politically marginalised into the parliamentary discourse and, with its activism, multiplies the discourses that form democratic citizens”.⁵² She also notes that the governing party and parliamentary officials rely on the idea of rational deliberation to legitimate their attempts to suppress the EFF’s radical politics.⁵³

It seems plausible, then, to claim that the marginal position of freedom of assembly and demonstration within South African constitutional discourse, as evidenced by its restrictive interpretation in legislation and case law and neglect in academic literature, has something to do with the dominance of deliberative-democratic readings of the Constitution. Deliberative conceptions of democracy privilege the proceedings within deliberative institutions over the politics of the street. Moreover, they favour rational discourse over non-discursive means of communication, and conceive political discourse in terms of an “ideal speech situation”⁵⁴ which is far removed from a world of conflict and antagonism, and is untouched by relations of structural power.

An agonistic theory of politics can provide an important corrective to these tendencies. In the first place, agonistic theories are better placed than deliberative understandings of democracy to come to terms with the relation between political discourse and the structural dimensions of power. As Mouffe is at pains to point out, democratic interaction does not take place within a conflict free zone unconstrained by social power, amongst subjects who have an independent, prior existence. Rather, it occurs through the mediation of institutions and practices that express a particular hegemony, amongst participants whose identities and subject positions are themselves shaped by power relations.⁵⁵ What is needed is an array of discourses, institutions and practices that enable a variety of conflicting articulations of political values such as freedom, equality and democracy, which preclude any particular consensus from ossifying into a “final” understanding of social relations. Secondly, an agonistic understanding of democracy seems better able to make sense of the capacity of protest action to disrupt existing power relations. Agonistic theories pay more attention to the performative aspects of democratic engagement, through which dissent is staged and existing configurations of power are confronted with new democratic imaginations.⁵⁶ They also view both individual and collective identities as sites of conflict and

⁵² Van der Westhuizen (2016) 100.

⁵³ Van der Westhuizen (2016) 98.

⁵⁴ Habermas J *Between facts and norms: contributions to a discourse theory of law and democracy* (Cambridge: Polity Press 1996) 322-323.

⁵⁵ Mouffe (2000) 99-100.

⁵⁶ For Jacques Rancière, who conceives democracy in terms of disagreement, democracy presupposes a space of appearance in which new subjectivities can be asserted which expose the contingency of existing configurations of power. By declaring a dispute, those who have no business being heard in terms of current distributions of bodies and places, can invoke a common political stage on which the wrong complained of can be articulated and understood. Rancière J *Disagreement: politics and philosophy* (Minneapolis: University of Minnesota Press 1999) 26-27.

antagonism, and hold open the possibility of a multiplication of discourses and subjectivities through the mutual articulation of different struggles.⁵⁷

What is at issue is not the reversal of the hierarchies inherent in deliberative-democratic theories by privileging the politics of the street over parliamentary politics, non-verbal over verbal political communication, and/or partisan over universalist causes. The idea is, rather, to rethink these oppositions by recognising that power is constitutive of all political engagement, whether inside or outside of existing institutions; that protest action is often committed to universalist causes;⁵⁸ that parliamentary proceedings can become the site of agonistic politics, as Van der Westhuizen's analysis shows; and that radical democracy requires a combination of extra-parliamentary struggles and strategies for effecting institutional change.⁵⁹

5 PRIVILEGING SPEECH OVER ACTION AND REASON OVER AFFECT

A final explanation for the relatively weak protection afforded to freedom of assembly, which has already been touched upon above, lies in the distinctions between speech and action and between reason and affect. Woolman notes that “assembly – like other forms of *conduct* – is often viewed merely as a condition for freedom of speech, and that it is the *content* of the speech itself that is thought to be of paramount importance”.⁶⁰ This is confirmed by Orsolya Salát's recent comparative study, which finds that there is a tendency to privilege freedom of expression over freedom of assembly. She refers, for example, to the distinction made by the United States Supreme Court between the “physical” or “external” dimensions of an assembly and “what is considered ‘the message’”.⁶¹ In accordance with this distinction, restrictions on the time, manner and place of an assembly are subjected to much less exacting scrutiny than restrictions on the substantive message to be communicated.

The idea that the modalities of expression merit lesser protection than the actual content of speech is problematic within the context of assemblies and demonstrations. First of all, a neat separation between speech and action is untenable, as action also has expressive value. The time and place chosen for a demonstration may have special symbolical significance. The same goes for the form of a demonstration or protest and the type of action engaged in (eg singing, chanting, toyi-toying, marching in formation,

⁵⁷ According to Mouffe, individual identity is never definitely established, but exists at the intersection of multiple subject positions, relations of social power and forms of subordination: Mouffe C *The return of the political* (London: Verso 1993) 12. This creates room for the establishment of a “chain of equivalence”, through which the democratic struggles of “women, blacks, workers, gays and others” can be articulated with each other. Mouffe (1993) 77.

⁵⁸ Young (2001) 675.

⁵⁹ Contrary to some analyses of the Occupy movement and other global protests which see in these developments a withdrawal from existing institutions and a move towards the self-organisation of a multitude that resists institutionalisation, Mouffe insists that parliamentary and extra-parliamentary struggles need to be combined in order to launch a joint “counter-hegemonic offensive against neo-liberalism”: Mouffe C *Agonistics: thinking the world politically* (London: Verso 2013) 127.

⁶⁰ Woolman (2005) 43-21.

⁶¹ Salát (2015) 29.

burning objects etc). As Salát states, with reference to an American case in which sleeping in a public space was used to demonstrate the plight of the homeless, demonstrations involving

“re-enactment and concrete, even theatrical display are not only more apt to induce empathy and emotions, but also more precisely express, because they more directly represent and demonstrate a particular issue, drawing attention to a situation of crisis in our common life, and thus making it comprehensible”.⁶²

Secondly, even though the distinction between the content and the modalities of expression is usually justified on the basis of the idea that the State may not discriminate against certain viewpoints, it nevertheless tends to privilege certain types of speech over others. Viewpoints that are unpopular, or that fall outside of the dominant narratives advanced by the State, the media or other influential sections of civil society, become even less likely to get a fair hearing in the court of public opinion if they are subjected to a range of restrictions relating to the modalities of their expression. Since the odds are already stacked against them, the capacity of such viewpoints to be heard depends inter alia on the ability of participants to resort to non-discursive means of communication. These include: staging the injustices against which they protest; dramatizing the gap between the society envisaged by the Constitution and the one which continues to be characterised by inequality and exclusion; and/or disrupting the assumptions and attitudes of the broader public. Restrictions on assemblies and demonstrations which are based on broad considerations of public order and aesthetics may end up reinforcing the very boundaries and exclusions that the demonstrators are calling into question, and may thus diminish the space for contestation.

Approaching this from a slightly different angle, a number of other distinctions, such as those between reason and passion, between intellectual discourse and rhetoric, and between the “disembodiment” of the thinking individual and the corporeal existence of the crowd, are closely related to the dichotomy between speech and action. The combined effect of these dichotomies is to privilege certain forms of expression over others, and to reinforce the perception of assemblies and demonstrations as potentially dangerous, irrational, susceptible to manipulation and violence, and worthy of less protection than “pure speech”.⁶³

What is needed is not only a recognition that action has expressive value, but an understanding of the ways in which the embodied existence of the crowd can serve to challenge boundaries, problematize exclusion and reconfigure public space. Judith Butler notes, with reference to Arendt, that it is through political action that a space is brought about in which citizens can appear to each other.⁶⁴ What is missing from Arendt’s thinking, though, is a politicisation of the bodily dimensions of politics, of the

⁶² Salát (2015) 46.

⁶³ See Young I *Inclusion and democracy* (Oxford: Oxford University Press 2000) 63-70 for a critique of the exclusionary effects of these dichotomies.

⁶⁴ Butler J *Notes toward a performative theory of assembly* (Cambridge, Mass: Harvard University Press 2015) 72-73.

material support that is needed to be able to engage in action.⁶⁵ Politics is never simply about the creation of a space of appearance – it is also about the contestation of existing boundaries which allow some to appear while excluding others, which relegate some to a state of destitution outside of the body politic, and which confine the space of appearance through the division between public and private. Demonstrations and protests often involve a (re)claiming of public space, a reconfiguration of who is part of the public, and a politicisation of the boundary between public and private.⁶⁶

Put differently, today many people are considered disposable since they belong to the great mass of the unemployed, or since they can be cast aside once their labour has been exploited. On one interpretation, which has been influenced by Arendt, they are reduced to mere biological life and thus stand outside of the realm of politics. Butler resists this interpretation.⁶⁷ For her, it is precisely through the coming-together of bodies – in streets, on public squares etc – that the division between the public space of appearance and its outside can be politicised. These bodies have material needs, are exposed to the elements, and are vulnerable to the possibility of State brutality. And yet they persist in their occupation of public space and refuse to be relegated to a private world. Their bodies thus assume a public dimension. Their bodily needs – for protection, food, etc – become matters of public concern. The power relations in which they are immersed, become more visible, and their “mere life” becomes politicised.⁶⁸

Viewed thus, the occupation of public space, and the disruptions caused by it, are not simply incidental to the message that demonstrators seek to convey. They are, often, integral to their struggles for visibility and recognition.

6 CONCLUDING REMARKS

In this article, I related the impoverished conception of freedom of assembly displayed in legislation and case law, as well as its neglect in academic literature, to a set of dominant understandings of democracy. These understandings are structured in terms of certain binary oppositions: between institutional and extra-institutional politics; between representative and direct democracy; between rational deliberation and political antagonism; between reason and affect; and between speech and action. These oppositions are hierarchical in nature, as the first term of each pair is taken to be superior to the second and/or is considered to be the norm rather than the exception.

⁶⁵ See Butler (2015) 44-48 (criticising the dichotomy in Arendt’s thought between a public sphere of freedom and a private sphere in which we are confronted with the necessity that arises from our existence as embodied beings) and 73-77 (arguing for a rethinking of Arendt’s conceptualisation of appearance to take account of the bodily dimensions of public action).

⁶⁶ Butler (2015) 71-72 & 90.

⁶⁷ Butler (2015) 78 argues that this view implicitly ratifies the “regime of appearance” that excludes those considered disposable from political life, and “disregards and devalues those forms of political agency that emerge precisely in those domains deemed prepolitical or extrapolitical and that break into the sphere of appearance as from the outside, as its outside, confounding the distinction between inside and outside”. See also Butler (2015) 79-80 for a critique of Giorgio Agamben’s notion of “bare life”.

⁶⁸ Butler (2015) 57-59, 81-85 & 97-98; Butler J “Bodies in alliance and the politics of the street”, available at <http://www.eipcp.net/transversal/1011/butler/en> (accessed 22 February 2016).

I argued that these understandings, together with the narratives which help to sustain them, are problematic for a number of reasons. First, they do not pay sufficient attention to forms of power that are deeply ingrained in societal structures. In South Africa, historical patterns of disadvantage based inter alia on race, class and gender are deepened by neoliberalism's governing rationality, which normalises and depoliticises inequality and exclusion. These structural power relations make it difficult or impossible for the poor and marginalised to participate, and for certain viewpoints to be heard in representative and deliberative forums. Secondly, these understandings underestimate the constitutive role of conflict and antagonism in political life. Because they deny that the social and political order reflects a particular hegemony, they brand counter-hegemonic struggles as illegitimate, and constrict the space for alternative democratic imaginations. Thirdly, these understandings underplay the role of affects and passions in democratic struggles. They privilege rational discourse over non-verbal forms of communication, and reinforce the perception of demonstrations as irrational and potentially dangerous. By treating democratic subjects as disembodied beings, they foreclose an understanding of the ways in which protests can politicise the relegation of some to a state outside of the body politic.

My critique of these understandings does not amount to a call for the inversion of the hierarchical oppositions underlying them, by privileging extra-institutional over institutional politics or crowd action over discursive means of communication. The point is not to substitute direct for representative democracy but, rather, to develop a critical awareness of the limits of representative and deliberative institutions, to recognise the importance of forms of democratic action which take place outside existing institutions, and to find new ways of articulating institutional and extra-institutional struggles. Such an articulation of different forms of politics should be aimed not at resolving the tensions between them, but at a multiplication of discourses and the creation of a "chain of equivalence" among different struggles.⁶⁹

Freedom of assembly is fundamental to democracy, as it creates spaces for those whose voices are ordinarily not heard in representative and deliberative institutions, to challenge their exclusion. It enables them to contest the boundaries which allow some to appear in the public realm while excluding others, through the coming together of their bodies and through non-discursive means of communication which dramatize certain injustices. Ironically, though, it is precisely the poor and marginalised whose demonstrations are most likely to be suppressed by local authorities and the police. A generous interpretation of section 17, and a resolve to subject limitations of this right to rigorous scrutiny, are crucial to the ideal of equal citizenship.

But even though a more adequate understanding of freedom of assembly on the part of judges can play an important role in opening up spaces for democratic contestation, it is not a panacea. I have criticised narratives which suggest that the fundamental rights guarantees in the Constitution institute a linear process through which inequality and exclusion are progressively eradicated. I have also raised critical questions about the capacity of deliberative institutions, such as courts, to be fully

⁶⁹ Mouffe (1993) 77.

inclusive and to challenge the hegemony of dominant discourses. The relationship between rights discourse and popular struggles is therefore complex. On the one hand, rights based litigation can help social movements to secure strategic victories. The politics of the courtroom can thus coexist with, and provide added impetus to, the politics of the street.⁷⁰ On the other hand, rights based litigation strategies cannot undo the structural violence that is inherent in South Africa's colonial and apartheid legacy,⁷¹ or achieve goals such as "decommodifying basic necessities" or "achieving radical redistribution of economic and political power".⁷² Human rights discourse can therefore supplement, but not replace, counter-hegemonic struggles.

⁷⁰ Jackie Dugard writes, for example, that the Anti-Privatisation Forum's resort to litigation in the Phiri water meters case succeeded in "dramatising the issues and energising the struggle", and is best "considered in a dialectical and potentially cumulative relationship with other tactics in the political struggle". Dugard J "Civic action and legal mobilisation: the Phiri water meters case" in Handmaker J & Berkhout R (eds) *Mobilising social justice in South Africa: perspectives from researchers and practitioners* (Pretoria: University Law Press 2010) 71 at 94.

⁷¹ Linda Stewart argues that human rights discourse entrenches a particular mode of subjectivity (that of "the average adult-white-heterosexual-European-male speaking a standard language"), and conditions the protection of rights on conformity to that model. Stewart L "Rights discourse and practices, everyday violence and social protests: who counts as subject and whose lives are real in the neo-colonial South African nation state?" (2014) 18 *Law Democracy & Development* 1 at 17.

⁷² Madlingozi (2014) 123.