Vox populi: *on the idea popular public, somewhat paradoxically*

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Unprocedural strike action accompanied by high levels of violence pose challenges to union collective bargaining and other representative structures and institutions, evoking notions of the unruly crowd threatening constitutional values, political legitimacy, and public order. This article critically examines the oppositional terms in which this scenario tends to be constructed, and probes the limits to the political along different lines. While wishing to withhold an unproblematical attribution of 'political' from populist mobilisations, this article will explore the spaces in, and modes through which the democratic people appear. In particular, it will chart, in outlines, a genealogy of popular sovereignty, which could impel a revisiting and revising of notions of revolting populism.

Hope in, and fear and loathing of mass action are twin affects elicited in the course of social restlessness[1] in South Africa, which is "testing democratic institutions and the political order, as well as throwing the collective bargaining system into question" (Sosibo 2012: 12). Correspondingly, the unfolding scenarios are cast in mostly binary oppositional, more seldom in ambivalent terms, raising either the spectre of the unruly crowd, or that of the might of the state. Portrayals of the mob in revolt against the pillars of institutional order are painted as threats to democracy (see Glaser 2009). More measured

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1   This invokes the title of William Gumede's recently published book, *Restless nation* (Cape Town: Tafelberg, 2012).

responses tend to pitch democratic citizenship bound by the constitution and the rule of law, with participation through democratic institutions, cultivating civic virtues, against invocations of mass action as forms of direct democracy expressing legitimate demands for social justice and socio-economic rights, distantly echoing doctrines of natural law.

Unprotected and protracted strikes of miners and truckers over the past two years have sent management structures, local police and security services, negotiators, strike committee spokespersons, trade union officials, subcontracting firms, and labour brokers (back) to the drawing boards. Responses come down heavily on the side of economic and financial modelling, international financial market forecasts, attempts at restoring collective bargaining mechanisms, re-establishing credibility of trade union representation of workers' interests, re-constituting trade-union and management liaison structures, of membership and job grades, reviewing of wage structures and wage offers, as well as firing and (selective) hiring. Other responses on this side continue driving towards a call for a general strike.

One of the main sources for framing social restlessness in relation to legal provisions is the double articulation, in the Declaration of 1789, of the Rights of Man as biological living being, and of the Citizen as politically qualified living being and universal bearer of rights in a specific polity. In this renewed rendition of the exclusive inclusion/inclusive exclusion constitutive of the Greek *polis* in terms of the Aristotelian distinction between ζωή – bare life – and βίος – qualified life, political existence, the realm of freedom, the conditions of biological life in the realm of basic needs are separated from the conditions of the political that lie in the participatory construction of a public realm. This opposition finds systematic application in Arendt's accounts of the French Revolution and the American Revolution, respectively. Revolutions launched by claims related to bare life tend to combine need with violence, releasing the force of necessity into the course of the Revolution

> ... necessity and violence, violence justified and glorified because it acts in the cause of necessity, necessity no longer either re belled against in a supreme effort of liberation or accepted in pi ous resignation, but, on the contrary, faithfully worshipped as the great all co ercing force which surely, in the words of Rousseau, will 'force men to be free' (Arendt 1963: 111).

In this casting, the goal of freedom is lost in the aim of liberating the life process of society from the fetters of scarcity so as to attain abundance (Arendt 1963: 58).

More specifically for the particular mobilisations described at the beginning of this article, what mainly falls out of the picture of the social restlessness is the consideration of the public sphere beyond an analysis of poverty and property, beyond claims of and on rights, beyond various forms of protest, and beyond trade-union consciousness. This is not entirely surprising, as a public response seems to take off from the perceived imperative of 'making poverty visible', on the one hand, and from measuring its cost, on the other. This raises the pathology of the political entailed in the idea of hitching the visibility of poverty in the public sphere to its natural visibility – i.e. on the basis of a logic that justifies itself in terms of nature, that is, organic life (Borren 2008: 215). In this formulation, the political programmatics naturalistically reduce civil rights to human rights, when civil rights would, on the contrary, be conditional upon public appearance and natural invisibility: who appears in public is not 'natural' (wo)man, but (wo)men-as-citizens (see Arendt 1951: 302, Borren 2008: 219-24). Thus, it is not so much a matter of 'making poverty visible', but of the question as to how public appearance can be gained or reclaimed through civic participation, without having to rely on the exhibition of bare necessity in the process (Borren 2008: 233).

Asking about the possibility of making a public appearance (rather than simply visibility) would make me want to turn to the other side of the divide – that of the Rights of the Citizen, of participation in a common political space. Here things are no less foggy, not only for the difficulty of publicising matters of common concern, but also for structural impediments.[2] As Ivor Chipkin (2012: 7) contends,

> … the ANC in government does not have a liberal conception of politics and of the state. This is not a normative claim, but an ana lytical one. In pursuit of its political programme of overcoming the legacy of apartheid …, the ANC has simultaneously sought to transform the structure of the state itself.

The ANC in government has partly done so by expanding "the role of the market and … introduc[ing] business principles into the workings of government" (Chipkin 2012: 8); partly by "embark[ing] on programmes to undo the legacy of apartheid (legislative reforms, massive housing programmes, the implementation of Affirmative Action, the introduction of Black Economic Empowerment measures)"; partly by giving ANC members strategic positions in the public service in an attempt to strengthen the ANC's control over the public service, and partly by promoting the emergence of a Black capitalist class (ANC 1998) shored

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2   See, for example, the Protection of State Information Bill, a public service sector beset with numerous charges of corruption on numerous levels, the ANC's patronage networks, and threats of intimidation and violence discouraging free flow and exchange of information and public debate.

up through government procurements and, hence, amenable to influence from the ANC (Chipkin 2012: 9).

The public sphere as we have come to know it is pervaded by private interest, imbricated with the structures of the ruling party, divesting the party and democratic ideals of authority and representative capacity.[3] Yet representation, by a political definition, cannot be a matter of private interests, private law or management, private economic or financial pursuits. It properly belongs to the public sphere, as the public sphere properly belongs to it. Parliament stops being representative, for instance, if and when parliamentary debates are no longer conducted in public (see Schmitt [1928] 2003: 208). If, as Schmitt sees it happening in Germany from the end of the nineteenth century onward, parliament simply presents certain interests, without representing a constituted political formation, the excluded interests have to jostle with each other to make their case, turning parliament into an executive serving, and expressing as public opinion, the clamourings of a plurality of interest groups (Schmitt [1923] 2003: 312, 314).

I would like to trace the genea-logic of these structures and their relations, not so much by way of a historical account of the structural transformation of the public sphere, as through the principles of political forms which Carl Schmitt identifies as Representation and Identity,[4] in order then to analyse the dynamic of popular mobilisations making their entry into the public sphere.

Representation as political form enjoys primacy in Schmitt's account – historically, logically, and normatively, and it has prior claim on the public sphere. For it is only something pre-eminent – an authoritative person or figurehead or a leading idea - in political life that can be represented in a way that something private and serving private interests cannot (Schmitt [1928] 2003: 210). It is through representation that political unity manifests itself (Schmitt [1928] 2003: 215 – see also n3).

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3   Schmitt ([1923] 1931: 65) explains why a representative's office cannot and should not be confused with a player's part: "The principle of representation ... depends so entirely on the conception of personal authority, that both the representative and the party represented must possess and assert a personal dignity. Representation is no materialistic concept. Only a *person* can represent in the highest sense of the term, and moreover ... he must represent some person in authority or some ideas, which latter, directly it is represented, also becomes personified. God or The People of democratic ideology, or such abstract ideas as Liberty or Equality are conceivable subjects for representation, but not so Production and Consumption" (Schmitt [1923] 1931: 60 61).

4   In a sequence of writings related at the start to his 'Political Theology' of 1921, viz. *Römischer Katholizismus und politische Form* (1923), *Volksentscheid und Volksbegehren* (1927), and *Verfassungslehre* (1928).

This was historically the case with the French Revolution in 1789. It was through the prior establishment of France as a unitary state under the absolute monarchy that citizens could gather in the National Constituent Assembly to reach decisions on their own political existence (Schmitt [1928] 2003: 78). In the classical accounts of sovereignty, even the absolute monarch is the representative of the political unity of the people; s/he alone is the lawgiver and represents the state. Representation, in this instance, is personalised. It is representation that constitutes political unity - the state is "united in the person of one Sovereign", in the words of Thomas Hobbes (Schmitt [1928] 2003: 214). The monarchy representing political unity is analogous to God ruling the world (Schmitt [1928] 2003: 282).

Whereas the monarch is the source of the law in a monarchy, the source of the law in a democracy is the decision of the people who constitute themselves as polity in giving themselves the law. Stating this epochal change in a simple analogy, however, is misleading; for the political principle changes fundamentally; the political form of the state is redefined along the idea of the identity of the people with itself as subject and object of its own laws. The problem, in this instance, lies in the fact that 'the people' are called to decide on its political form and organisation, without being itself formed or organised. 'The people' would have to exercise its constituent popular will in an unmediated form, independently of any predetermined regulations or procedures or determinations of the content of the political decision. 'The people' would have to be present to itself, identical with itself, in giving itself the law to which it becomes subject – hence Rousseau's notion that 'the people' cannot be represented (as only something/someone absent can be represented) (see Schmitt [1928] 2003: 243).

This identity of 'the people' with itself at its constituent moment is carried over into its constituted formation – it becomes immanent to its own field of operation. The source of authority, law, and legality can be grounded only within itself (see Van Haute 1993: 264). It is only within its own field of operation that, within a democracy, the governing and the governed can differentiate themselves from each other (Schmitt [1928] 2003: 236).

All forms of state – monarchy, aristocracy and democracy, monarchy and republic, monarchy and democracy -, but primarily monarchy and democracy, according to Schmitt, are variations on the theme of this decisive opposition between representation and identity (Schmitt [1923] 2003: 205; see also 282). However, the self-identity that constitutes the political unity in democracy is premised on an internal division (rather than a preceding externalising division deriving its authority from reference to a transcendent source, as in the case of monarchy). Thus, the political unity cannot reside in its self-identity. No state

can do without any and all structural elements of representation (see Schmitt [1928] 2003: 205). Even in the presence of all active citizens, even in the most direct forms of democracy, there is not one unitary people: "An absolute identity, without remainder, of any particular present people with itself as political unity is not to be found anywhere, at any time" (Schmitt [1928] 2003: 207). This constitutes the democratic limit: the demos is always reliant on the *representation* of political unity; for the political agent is not there in his/her capacity of a private individual, but as citizen (Schmitt [1928] 2003: 206; see also 207). For the citizen, this involves an act of identification as opposed to an identity. A self-present, self-identical political unity would self-destruct.

The internal division of the democratic people finds its correlate in an asymmetry in which two of its defining elements run counter to each other: the undivided, constituent power of legislative sovereignty, on the one hand, and a strict division of powers between law-making (*Rechtssetzung*), law-enforcement (*Rechtsdurchsetzung*) and law preservation (*Rechtserhaltung*), on the other (see Maus [2007] 2011: 396). The latter two, combining between them the monopoly of the means of violence, could only be legitimated by the first – the constituent power of popular sovereignty (see Maus [2007] 2011).

Conversely, no state could function without elements of identity, for the principle of representation cannot take hold without a presentist notion of the people (Schmitt [1928] 2003: 208).

In a complex society, Parliament is one possible instance of the public sphere as the locus of participatory deliberation of common concerns and decisions and democratic will-formation, in publicly putting forward and debating positions and counter-arguments. Schmitt sees a combination of different and partly contrary political elements of forms of governance and legislation at work in this instance, which should ideally balance each other in their contrariety. A parliamentary system uses monarchical constructions and symbols; it embodies an aristocratic idea of a representative corporate body, and it relies on ideas of unmediated democracy in its evocation of the decision of the directly present voters (Schmitt [1928] 2003: 302, 304-5).

Yet Schmitt notes its representative function severely curtailed in modernity, with the incursion of direct democracy, in which the *vox populi* announces itself immediately only in terms of either acclamation or rejection (Schmitt [1928] 2003: 83): "... the people cries 'up with' or 'down with', it exults or complains, takes up arms and calls another leader; it consents to a deliberation with any word or withholds its acclamation with silence" (Schmitt 1927: 33-4). Between these poles, historically dating from its practice in the Roman Republic, lies a spectrum of enunciations: exclamation of praise, of a desire for victory, of a wish

for long life and fertility, for strength and salvation, of invocation and prayer, of triumph and applause, of *laudatio* or disapproval accorded to athletes, actors, magistrates, and later the Emperor (see Peterson (1926), cited in Schmitt (1927) and in Agamben [2007] 2011: 169).

Erik Peterson's study of acclamation in its occurrence in religious ceremonial, liturgical formulae, and judicial performativity (*Heis Theos. Epigraphische, formgeschichtliche und religionsgeschichtliche Untersuchungen*, 1926) was known to Schmitt, who quotes it in his 1927 *Volksentscheid und Volksbegehren*. Contrary to the reduced function that he accords acclamation in his *Verfassungslehre* of 1928, acclamation features in a dual articulation in this earlier essay of Schmitt's: as direct democracy in the form of immediate expression of the people – a cry of approval or rejection – and as speech act of constituent power. In this essay on the 'Referendum and Petition for a Referendum' (literally "popular decision" and "request from the people") Scmitt thereby implicitly endorses Peterson's contention that "... [acclamations] could acquire juridical meaning in certain circumstances" (Peterson 1926: 141, 177) in Roman public law:[5] acclamations to the victorious commander, endowing him with the title of *Imperator*, and that of *Caesar* in the imperial era; acclamation of senators to a message from the Emperor attaining the status of a decision; "... and, in the electoral meetings, it could act as a substitute for the votes of individual voters" (Agamben [2007] 2011: 170). Ritualised speech acts of this kind are sovereign performatives that found, inscribe, and legitimate a system of law (see Agamben [2007] 2011: 181, 230). Thus, even in the most reduced form of public appearance of the demos of direct democracy shouting approval or rejection, Schmitt notes an expression of popular sovereignty which he accords a constituent capacity.

Where, for Schmitt, the political character of a democratic public falls apart is where the decision is taken out of the constituent power of popular sovereignty, in the (secret) ballot, where everyone can only elect a candidate presented to them, dissolving public opinion into the opinions of millions of private individuals who, even taken together, cannot constitute a polity (Schmitt [1928] 2003: 244-6, 277); for the collective cannot be modelled on the individual, as it exceeds the sum of its parts.

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5   But, for Peterson, the acclamations and liturgies express the juridical and public character of the Christian people, based on the link between Christian liturgy and Roman public law, out of which he crafts the juridical foundation of the liturgical public political character of Christian celebrations: "public character of the liturgy through the acclamations of the people united in an *ekklesia*" (Agamben [2007] 2011: 174), as opposed to Schmitt, who sees in it both an instance of direct democracy and constituent democratic power.

In the dissolution clocked up by Schmitt to de-politicisation and the excoriation of the public sphere, I note not, as Agamben does, "the habits of a theorist of pure or direct democracy in order to pitch it against Weimar liberal democracy" (Agamben [2007] 2011: 172) but, at this stage still (in the early to late 1920s), a theorisation of the democratic limit. Whether we agree with this assessment or not, it remains that popular sovereignty, which inaugurates, animates, and legitimates modern democracies, has become subtracted from what it has brought forth. A constitutional concept of popular sovereignty tends to be conflated and confused with a rather unspecified sociological notion of populism. Such conflation obfuscates a complex dynamic between an institutionalised legal-constitutional notion of popular sovereignty, and non-institutionalised popular mobilisations opening and occupying anomic spaces – a dynamic vital for a democratic polity.

Furthermore, the conflation described earlier de-links popular sovereignty from legislated institutions and executive arms subject to legislative power. While more radical political theory (including Schmitt's Constitutional Theory of 1928) still locates popular sovereignty at the pole of constituent power, it is increasingly voided of any relation to constituted power in political modernity. Repressing and obliterating the relation between popular sovereignty and constituted power in modern democracies produces an impoverished understanding of populism, rendering it politically amorphous and antithetical to the rule of law.

Thus, the spectre of populism unleashed (dramatically instantiated, for instance, in the term 'Zunami', coined by COSATU General Secretary Zwelenzima Vavi at the 2006 COSATU Congress) is produced in the course of these conflations and obfuscations themselves.

Opening up the perspective of the relation of popular sovereignty to constituted power, on the other hand, would question some of our received wisdoms. As Maus's history of the concept and forms of popular sovereignty shows, popular sovereignty does not revolve around the principle of the quantitative extension of democratic participation, as evidenced in percentage polls, but around political-legislative power in relation to government and state institutions bound to it, and around contestation leading to legislative changes and innovations (Maus [2007] 2011: 367-8). To the extent that theories of modern democracy privilege the former, at the expense of the latter, they are re-writing the failures in the history of twentieth-century democracy as its successes (Maus [2007] 2011: 367).

For the twentieth century has seen the de-linking of popular sovereignty from state institutions, subject directly to ordinary law; sovereignty is being transferred to the power of the state in its executive-administrative role, leaving popular sovereignty to operate in an extra-legal space.

This consideration, with the spectre – a revolting populism antithetical to constitutionalism – that it issues forth, would give us cause for revisiting and pondering the meaning of "the people shall govern".

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