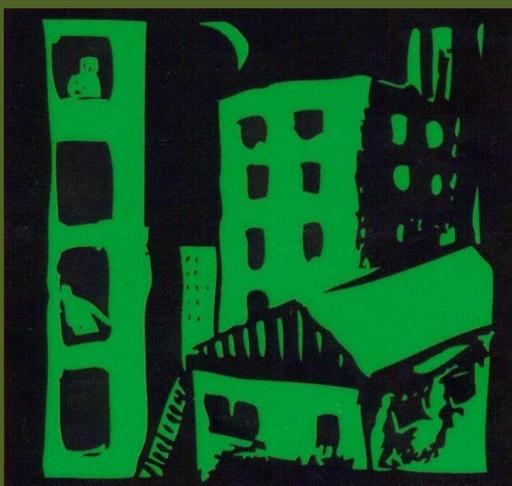


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**Rights discourse  
and practices,  
everyday violence  
and social protests:  
Who counts as  
subject and whose  
lives are real in the  
neo-colonial South  
African nation  
state?**

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**1 INTRODUCTION**

A concern for human rights shouldn't lead us to extol the 'joys' of the liberal capitalism of which they're an integral part. There's no democratic state that's not compromised to the very core by its part in generating human misery.<sup>1</sup>

I seek to provide an explanation for the disjunction between the lived realities of marginalised, displaced and impoverished collectivities in the neo-colonial South African nation state and the language, politics and practices of human or constitutional rights that represent them. I focus on individuals

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<sup>1</sup> Deleuze G *Negotiations* (1995) (tr Joughin M) at 172-173.

and groups and their struggles to participate in decisions affecting their needs and material existence, in the absence of assistance by public interest litigation, formalised civil society organisations or organised social movements, while facing economic constraints, complicated legal and political processes, and being bound to dismal structural and spatial conditions. I argue that individual/collective bodies suffer from everyday violence and that the modernist legal construction of the subject “derealises” their suffering and silences their needs. Therefore, I aim to examine some of the human rights discursive and non-discursive practices that produce the body as a subject of constitutional rights<sup>2</sup> in the context of the neo-colonial South African nation state, and to question how to “realise” the suffering of the individual and of groups.

Before I commence my discussion it is necessary to explain what is meant by the “derealising” or invisibility of the individual/collective body and the everyday violence experienced by it. Judith Butler links her theory of performativity<sup>3</sup> with precarity or “conditions that threaten life in ways that appear to be outside of one’s control”.<sup>4</sup> She stresses that although the State is designed to address the needs of the population, it may also adopt global and internal measures whereby segments of the population are treated differentially leading to injury, violence and vulnerability. Butler’s question as to who counts as a subject is significant in the context of individual/collective bodies living in shack settlements on the boundaries of modern South African cities, who daily face

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<sup>2</sup> For the purposes of this article I will refer mostly to constitutional rights which include the categories of civil, political and socio-economic rights. The example I use (that of the women of the Marikana area) is indicative of an infringement of civil-political rights, socio-economic rights and environmental rights. It should, however, be said that the Constitution of the Republic of South Africa 1996 (the Constitution) guarantees a wide variety of socio-economic rights in the Bill of Rights, and the State has the same obligations to respect, protect, promote and fulfil socio-economic rights as it does civil and political rights. For a detailed discussion see Liebenberg *S Socio-Economic Rights Adjudication under a transformative Constitution* (2010).

<sup>3</sup> Butler *J Bodies that matter: On the discursive limits of “sex”* (2003) at 2-3, argues in terms of her notion of performativity that the body is discursively constructed by language. Her argument is based on Michel Foucault’s conception of juridical power, which claims that juridical systems of power produce the subjects they afterwards represent. She further argues that “the subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures”. If this is the case, she continues, “the juridical formation of language and politics that represent[s] the individual as a subject is in itself a discursive formation and effect of a given version of representationalist politics” (Butler *J Gender trouble: Feminism and the subversion of identity* (1990) at 2). In terms of Butler’s notions of performativity, human rights discourse, which is based on the juridical form of negative power, defines and reproduces the subject in accordance with the requirements of the system (Butler *J “Foucault and the paradox of bodily inscriptions”* (1989) 86 *Journal of Philosophy* 601). Hence, the formation of language and politics that represents the impoverished body as a subject of rights becomes a discursive formation taking the form of representationalist politics (Butler (1990) at 2). In doing so the impoverished “subject” turns out to be discursively constituted by the same system that is supposed to facilitate the social and economic emancipation of the “subject”. The subject of rights in terms of Butler’s notion of performativity can access socio-economic rights only through a form of representationalist politics, and as such it delegitimises and renders the subject as sub-human and immobilises, excludes, silences and stigmatises her in the decisions affecting her needs and the structural conditions intrinsic to her daily life. This results in liberal managerialism of the impoverished body.

<sup>4</sup> Butler *J Frames of war* (2009) at 25-26.; Butler *J “Performativity, precarity and sexual politics”* (2009) 4 *Revista de Antropología Iberoamericana* at i.

economic hardship and everyday violence despite being the bearers of constitutional rights.<sup>5</sup> She explains that

[P]erformativity has everything to do with “who” can become produced as a recognizable subject, a subject who is living, whose life is worth sheltering and whose life, when lost, would be worthy of mourning.

She further asserts that “precarious life characterizes such lives who do not qualify as recognizable, readable, or grievable”.<sup>6</sup> She therefore poses the question of who counts as a subject and whose lives are real? In Butler’s sense bodies situated in shack settlements, who have no, or limited, access to public interest litigation and are faced with dealing with complicated legal and political processes to participate in decisions affecting their material existence, have been “derealised”.<sup>7</sup> Drucilla Cornell, in her interviews with S’Bu Zikode, leader of the shack dwellers’ movement in South Africa, quotes Zikode as arguing that “[t]he systematic oppression of the majority of South Africans has disappeared from the official political discourse of the country”. Cornell therefore asks how the suffering, or what she calls day-to-day violence, can be “derealised”? She argues that social movements in South Africa, like that of Zikode, are aimed to “make lives matter in Butler’s sense, so that the systematicity of violence against the poor, not only as a deprivation but also as police force, can be seen and named as violence”.<sup>8</sup>

Gilles Deleuze rejects the idea of a defined and ahistorical list of invented human rights and the traditions that advance human rights - what Deleuze refers to as human rights discourse.<sup>9</sup> He argues that the outrages which people have suffered are not the violation of abstract rights but are real monstrous cases.<sup>10</sup> Deleuze is therefore not only concerned with “capital C catastrophes, i.e., the kind of major outrage associated with human rights, but also with everyday violence”.<sup>11</sup> For him human rights discourse sustains this second kind of violence because it is premised on the person as a closed concept of representational thought.<sup>12</sup> In other words, when individual/collective bodies have limited or no access to water, sanitation, shelter, adequate food and healthcare and continually struggle to access complicated legal and political systems,<sup>13</sup>

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<sup>5</sup> Butler (2009) at iv.

<sup>6</sup> Butler (2009) at xii.

<sup>7</sup> Cornell D “The politics of grieving” (21 May 2011) *Social Text*. Available at <http://www.socialtextjournal.org/periscope/2011/05/politics-of-grieving---drucilla-cornell.php> (accessed 24 November 2012).

<sup>8</sup> Cornell (21 May 2011).

<sup>9</sup> Deleuze G “On Human Rights” (1996) *Generation-Online: extract from L'Abécédaire de Gilles Deleuze, avec Claire Parnet, Vidéo Éd. Montparnasse*; Patton *Deleuzian concepts philosophy, colonization, politics* (2010) at 151-152; Lefebvre A “Human rights in Deleuze and Bergson’s later philosophy” in de Sutter L & McGee K (eds) *Deleuze and law* (2012) 48 at 51.

<sup>10</sup> Deleuze G & Parnet C *Dialogues* (tr Tomlinson H & Habberjam B) (1987).

<sup>11</sup> Lefebvre (2012) at 51.

<sup>12</sup> Lefebvre (2012) at 51.

<sup>13</sup> Such as formalised civil society organisations, organised social movements and assistance by NGOs and public interest litigation NGOs.

this infringement is an infringement not merely of their constitutional rights, but it is also a form of systematic and structural violence that accompanies their everyday living, placing their very existence in danger. Deleuze therefore criticises (human) rights discourse as a pure abstraction stripped of meaning and unresponsive to attempts to move it beyond the formal legal construct of a subject in thought.<sup>14</sup> Put differently, our faith in human rights prevents us from seeing the suffering of others and justifies everyday violence as part of the natural ordering of economic affairs in a constitutional state.<sup>15</sup>

In what follows I commence the article with a discussion of the relationship between neo-liberal capitalism, complex legal organisation and the rising number of social protests in South Africa. I use the example of the shack settlements on the outskirts of South African cities and specifically focus on the lethal and everyday violence experienced by marginalised, impoverished, female individuals and groups in the area of Marikana, Rustenburg in the North-West Province. It is not the purpose of this article to focus on the Marikana massacre, the event that occurred on the day of the 16<sup>th</sup> of August, but rather to focus on the everyday violence experienced by the women of Marikana after the loss of their spouses.

This is followed by a discussion of Gilles Deleuze and Felix Guattari's machinic ontology to illustrate how different assemblages produce the subject. Deleuze and Guattari present a different way of thinking about individuals and groups, their connections with each other and their milieus.<sup>16</sup> Deleuze and Guattari in *What is philosophy?* describe philosophy as the creation of a new concept, where this concept "in itself call[s] for a future form, for a new earth and people that do not yet exist".<sup>17</sup> Their concepts provide us with a "collection of potentialities, which can only be affirmed in their use".<sup>18</sup> I focus on their concepts "minority", "majority" and "the state apparatus" to illustrate how collective bodies are captured, ordered and dealt with by the modernist legal construction of the subject, because they do not conform to the standard of the majority whereby the rights and duties of citizens are measured by the axioms of a capitalist society.

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<sup>14</sup> Deleuze "On Human Rights" (1996). Available at <http://www.generation-online.org/p/fpdeleuze10.htm> (accessed 22 October 2012).

<sup>15</sup> Patton explains that Deleuze does not oppose human rights proper but criticises the manner in which rights are represented. Patton (2010) at 23 and 152.

<sup>16</sup> Deleuze and Guattari extended "complexity theory" or the notion of self-organising material systems in scientific research to the social, linguistic, political and economic realm. For them, social systems do not require transcendent organising agents such as gods, leaders, capital or subjects. Bonta M & Protevi J *Deleuze and geophilosophy* (2004) at 3-7.

<sup>17</sup> Deleuze G & Guattari F "What is philosophy?" (1994) 2 at 108.

<sup>18</sup> Hickey-Moody A & Malins P "Introduction: Gilles Deleuze and four movements in social thought" in Hickey-Moody A & Malins P (eds) *Deleuzian encounters: Studies in contemporary social issues* (2007) at 2; Watson J "Theorising European ethnic politics with Deleuze and Guattari" in Buchanan I & Thoburn N (eds) *Deleuze and Politics* (2008) at 201.

## 2 NEO-LIBERAL CAPITALISM, SOCIAL PROTESTS AND VIOLENCE

### 2.1 Introduction

South Africa is one of the most inegalitarian societies in the world and the gap between rich and poor is still strongly correlated with differences of race.<sup>19</sup> Referring to Rosa Luxemburg, Cornell explains that “capitalism must always produce a surplus population both for the sake of dumping excess goods, and thus for solving ‘underconsumption,’ and for the sake of finding a work force that can be ‘superexploited’”.<sup>20</sup> She continues to explain that in South Africa with its legacy of colonialism and apartheid, the surplus consists of those who are excluded from the formal first and the informal second economy, and that this should be understood as “an inevitable result of the dynamics of neoliberal capitalism”.<sup>21</sup> One of the consequences of neo-liberal capitalism is the escalating incidence of social protests in South Africa.<sup>22</sup> Organised<sup>23</sup> and spontaneous movements<sup>24</sup> turn to social protest when threatened with eviction, when evicted by forceful measures. They express their continued struggle to access basic needs, such as, water, sanitation and energy and/or to express their discontent with poor service delivery, structural living conditions, inaccessible bureaucratic systems and complicated, often prejudicial, political networks.<sup>25</sup> These protests are often unconnected and have no overreaching political aim. They are also over-simplified by the popular media and depicted as service delivery protests.<sup>26</sup> Jean Comaroff contends that these social movements “in the wake of the growing spectre of [human] disposability” signify a struggle for “the basic right to exist,” although this struggle is

<sup>19</sup> Bangstad S, Eriksen T, Comaroff J & Comaroff JJ “‘Anthropologists are talking’: about anthropology and post-apartheid South Africa” (2012) 77 *Ethnos: Journal of Anthropology* 115 at 129. The current Gini coefficient in South Africa is 0.69; see National Planning Commission (20 December 2012) *National Development Plan*; Milanovic B *The haves and the have-nots: A brief and Idiosyncratic history of global inequality* (2011) at 29-30.

<sup>20</sup> Cornell (21 May 2011).

<sup>21</sup> See also Harvey D *A brief history of neoliberalism* (2005) at 23; Bond P *Talk left, walk right: South Africa’s frustrated global reforms* (2006) at 4-10; O’Connell P “The death of socio-economic rights” (2011) 74 *Modern Law Review* 532 at 551-552.

<sup>22</sup> Alexander P “A massive rebellion of the poor” *Mail & Guardian* 13 April 2013; See also, Centre for Civil Society (University of KwaZulu-Natal, South Africa) *SA Social Protest Observatory*. Available at <http://ccs.ukzn.ac.za/default.asp?2,27,3,1858> (accessed on 17 May 2013); De Visser J & Powell D “Service Delivery Protest Barometer 2007-2012” (2012) *Multi-Level Government Initiative: Community Law Centre*. Available at <http://www.mlgi.org.za/barometers/service-delivery-protest-barometer> (accessed on 15 March 2013).

<sup>23</sup> Organised social movements, such as, the Shack Dwellers Movement, the *Abahlali baseMjondolo* Movement, the Unemployed People’s Movement, and the Rural Network; and more recently the Democratic Socialist Movement and the Workers and Socialist Party.

<sup>24</sup> Madlingozi T “Post-apartheid social movements and legal mobilisation” in Langford M, Cousins B, Dugard J & Madlingozi T (eds) *Symbols or substance: The role and impact of socio-economic rights strategies in South Africa* (2013).

<sup>25</sup> Bangstad, Eriksen, Comaroff J & Comaroff JJ (2012) at 133; Alexander P “Rebellion of the poor: South Africa’s service delivery protests – a preliminary analysis” (2010) 37 *Review of African Political Economy* 25.

<sup>26</sup> Mottiar S & Bond P “The politics of discontent and social protest in Durban” (2012) 37 *Politikon* 309.

often expressed differently in terms of a demand for basic services, resistance against displacement, and disconnection from water or electricity.<sup>27</sup> When these groups express their anxiety about the material conditions threatening their existence they are often met with direct state resistance, political confrontation, and conflict with the law, and a disturbing feature is the involvement and interference of the growing private security sector.<sup>28</sup> These protesting groups describe what is taking place as a “war against the poor” directed to “drive the poor out of the cities” and to contain them in “the human dumping grounds and repress” their “struggles”.<sup>29</sup>

## 2.2 Complex legal organisation

A report by the National Planning Commission (NPC) diagnoses the growing instability in State/citizen relations as a result of the complex nature of legal and political organisation and the obstacles faced by impoverished collectivities in their attempts to participate in decisions affecting their needs and living conditions.<sup>30</sup> The NPC argues:

Giving voice to the poor and facilitating constructive participation, whether at a community level around service delivery, with organised labour, or with forums representing the unemployed, can contribute to building a strong, stable government. Such engagement enhances delivery, enables government to tailor policies to the needs of citizens and formulate an effective implementation plan, and can help secure buy-in from those most affected. To formulate and implement *pro-poor policies* there must be effective mechanisms for the voices of citizens to be heard, and the administrative and political elite must be prepared to listen to and engage with the views of the most marginalised.<sup>31</sup>

The diagnostic report proposes to address these paucities by creating advisory councils to bring together policy-orientated academics and activists to advise government on anti-poverty measures, pro-poor agendas and pro-poor policies. The NPC, therefore, redirects engagement to be facilitated through formal processes and organisations while perceiving “impoverished” categories of people as a predefined and fixed group which is denied the ability to participate independently in decisions concerning its needs.<sup>32</sup> As such it assigns attributes to “impoverished” individual/collective bodies without inquiring otherwise.<sup>33</sup> It presumes that poverty is somehow built into the basic structure of society, including law systems. It suggests that “poor” people are somehow

<sup>27</sup> Bangstad, Eriksen, Comaroff & Comaroff (2012) at 133.

<sup>28</sup> McMichael C “South Africa: The South African Police Service and the public order war” *Think Press Africa* (3 September 2012). Available at <http://thinkafricapress.com/south-africa/police-service-and-public-order-war-saps-marikana-lonmin> (accessed 3 April 2013).

<sup>29</sup> McMichael (2012); see also Cornell (21 May 2011).

<sup>30</sup> Department of the Presidency of South Africa: National Planning Commission *Institutions and governance diagnostic report* (2010) at 16-17.

<sup>31</sup> National Planning Commission (2010) at 16-17.

<sup>32</sup> National Planning Commission (2010) at 16-17.

<sup>33</sup> Ross T “The rhetoric of poverty: their immorality, our helplessness” (1991) 79 *Georgetown Law Journal* 1499 at 1499-1500; Stewart L “The politics of poverty: Do socio-economic rights become real only when enforced by courts?” (2012) IV *Diritto Pubblico Comparato ed Europeo* 1510; Brand D *Courts, socio-economic rights and transformative politics* (2009) at 65 -66, 151-152, 176-180, and 182-186.

illiterate, unable to speak for themselves and helpless. The Report appears to create a binary based on economic wealth between the haves and the have-nots.<sup>34</sup>

John Comaroff claims that neo-liberal governance in post-colonies requires States to create complex legal systems as part of their bureaucratic functions, to manage the population.<sup>35</sup> He asserts that adjudicatory and other legal measures often become the default mode of solving differences, protecting interests and demanding rights. He remarks that “the law does not, in itself, empower; nor does it yield an ordered world. That world, the shape of power within it, is produced as people seek to impose their wills on others by whatever means come to hand”, and he further warns that “legal instruments have become the weapon of first resort for many, often encouraged and facilitated by NGOs dedicated to the support of those who would otherwise lack the means to take their fights to the courts”.<sup>36</sup>

Furthermore, the South African Constitution anticipates that a significant portion of social change should occur through judicial adjudication and choices made by the judiciary.<sup>37</sup> In the context of the interpretation and implementation of socio-economic rights, the judiciary (as the least democratic branch of government) is thereby given the mandate to deal with complex issues regarding poverty, needs and social provisioning of the State. Apart from the mandate placed on the judiciary to interpret socio-economic rights, the legislature and executive also have a duty to define and implement socio-economics rights. Legislation and policy are managed, administered and organised by three different branches of government, on three different levels of government (national, provincial and local). The functions of national, provincial and local government are further divided into different areas of competence on each level (for example, health, water, social security, housing etc). All this is overseen by various independent constitutionally mandated structures working with different segments of civil society involved formally and informally with socio-economic issues.<sup>38</sup>

A complexity in legal organisation is thus inherent in the functioning of the State apparatus. Although it is often argued that the Constitution oversees the system and processes through the Constitutional Court, it is doubtful that the judiciary would be prepared to institute structural socio-economic change and in essence challenge its own institutional boundaries by fundamentally questioning the way legislation and policy are formulated, implemented or not implemented at all.<sup>39</sup> For example, when the South

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<sup>34</sup> Ross (1991) at 1499.

<sup>35</sup> Bangstad, Comaroff & Comaroff (2012) at 128.

<sup>36</sup> Bangstad, Comaroff & Comaroff (2012) at 128-129.

<sup>37</sup> Klare K “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 149; see also Liebenberg (2010).

<sup>38</sup> Brand (2009) at 1-57; O’Connell (2011) at 551-552.

<sup>39</sup> This is typical of the tension between democracy and constitutionalism. See Christodoulidis E “Paradoxes of sovereignty and representation” (2002) *TSAR* 108; Brand “Judicial deference and democracy in socio-economic rights cases in South Africa” (2011) 22 *Stellenbosch Law Review* 614; Davis DM “The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of powers?” 2012 *Potchefstroom Electronic Law Journal* 3.

African judiciary deals with the interpretation of socio-economic rights it side-steps giving content to these rights by addressing impoverishment through the creation of a “framework of procedures and institutions within which the market can work its distributive magic”.<sup>40</sup>

Evans<sup>41</sup> argues that the modern discourse of international human rights is primarily based on a legal as opposed to a political or a philosophical construct. These juridical procedures take the form of procedural repairs, such as, the clarification of legal rules or the creation of new juridical norms and principles. He proposes a more critical, substantive reconsideration of the effectiveness of the current register of international law, and challenges “*our abilities to imagine new futures*”.<sup>42</sup> The fact that the human rights discourse is primarily a legal discourse aimed at procedural repairs is equally evident in the way the judiciary has dealt with some of the constitutional socio-economic rights in South Africa.<sup>43</sup> In cases where the judiciary was expected to make a decision on the positive obligation of the State to take measures to realise a socio-economic right, the court was reluctant to provide normative content to socio-economic rights. The court argued that it was institutionally incapable, and ill-equipped, to deal with the complexity of socio-economic choices.<sup>44</sup> The judiciary<sup>45</sup> resorted to a procedural and formalistic approach, or so-called “good governance measures”, questioning the reasonableness of the measures taken by the State to realise these rights.<sup>46</sup> In other cases,<sup>47</sup> where courts have encouraged the political agency of collective bodies and have required government and the collective body to enter into meaningful engagement, the danger remains that “meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively empty process of

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<sup>40</sup> Brand (2009) at 180 with reference to *Mazibuko and Others v City of Johannesburg & others* 2010 (4) SA 1 (CC).

<sup>41</sup> Evans T “International human rights law as power/knowledge” (2005) 27 *Human Rights Quarterly* 1046 at 1056

<sup>42</sup> Evans (2005) at 1053 (my emphasis).

<sup>43</sup> *The Government of the Republic of South Africa & others v Grootboom & others* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 72 (CC); *Mazibuko & others v City of Johannesburg & others* 2010 (4) SA 1 (CC).

<sup>44</sup> Brand (2011) at 614. O’Connell (2011) at 551-552 argues that the *Mazibuko* judgement resembles a court adhering to a neo-liberal world view which led to the “jettisoning of the transformative vision of the Constitution, and the recasting of the socio-economic rights guarantees as some form of hyper-procedural requirement, rather than a guarantee of substantive material change”.

<sup>45</sup> For example, in *Mazibuko* case the Constitutional Court observed that “...it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice (para 61) and “Courts are ill-placed to make these assessments for both institutional and democratic reasons” (para 62).

<sup>46</sup> Brand (2011) at 614; Liebenberg (2010) at 470 & 466-480; O’Connell (2011) at 551-552.

<sup>47</sup> Such as *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

local dispute settlement”.<sup>48</sup> Furthermore, in the context of socio-economic realities these “judicial procedures, interpretive methods and doctrinal categories” are often “blunt instruments for dealing with particularity and difference”.<sup>49</sup> For example, when courts rely on predefined fixed identity categories, such as, “the vulnerable” and “the poor”, they create binary codes of categorical interpellations that often legitimise the existing social order and strengthen the dominant relations of power.

### 2.3 The women of Marikana

On 16 August 2012 in the area of Marikana, Rustenburg, on the platinum belt of the North West Province, the South African Police Force killed 34 and injured 78 protesting mineworkers during a labour wildcat strike.<sup>50</sup> The event occurred in the context of abject poverty, sub-human living conditions and squalor that surrounded the mining area. The living and structural conditions in Wonderkop squatter camp where many of the deceased miners lived, have been described as deplorable, and in stark contrast to the wealth and mineral riches represented by the buildings of the world’s third biggest platinum producer, Lonmin Platinum Mines.<sup>51</sup> In Wonderkop,

Sewerage literally does flow through the streets, water is bought from the few that can afford to install a standpipe, shacks sit at lopsided angles facing onto narrow allies or deeply eroded dirt roads, there are no health services, no electricity, and schools are at a distance away.<sup>52</sup>

Despite the mineral riches of the region poverty is stark.<sup>53</sup> An estimated 67 per cent of the households, many of them headed by women, earn R 1 600 per month or less.<sup>54</sup> Hargreaves explains:

People are here for work and survival reasons only – the men to work or have a chance to labour on the mines, and the women either having followed their men, or coming there to work on the mines or to benefit from the presence of male workers, some of them alone and distant from their families.<sup>55</sup>

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<sup>48</sup> 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 12.

<sup>49</sup> Liebenberg (2012) at 6.

<sup>50</sup> Bond P “South Africa’s political economy after the Marikana massacre” (18 October 2012) *Links International Journal Of Socialist Renewal*. Available at <http://links.org.au/node/3063> (accessed 22 October 2012); Gilmore I “Marikana massacre: police shooting video footage” (27 January 2013) at *Channel 4*. Available at <http://www.channel4.com/news/marikana-massacre-police-shooting-video-footage> (accessed 3 March 2013).

<sup>51</sup> Hargreaves S “And what of the women of Marikana?” (13 September 2012) *Amandla Media*. Available at <http://amandla.org.za/amandla-magazine/124-amandla-issue-2627/1588-and-what-of-the-women-of-marikana--by-samantha-hargreaves> (accessed 12 May 2013).

<sup>52</sup> Hargreaves (13 September 2012).

<sup>53</sup> Bench Marks Foundation *Rustenburg Community Report Johannesburg: Bench Marks Foundation* (2011); Bench Marks Foundation *Action Voices - Community Monitoring Project Johannesburg* (2012).

<sup>54</sup> Hargreaves (13 September 2012).

<sup>55</sup> Hargreaves (13 September 2012).

She further reiterates that “not all women are there out of choice with the 2012 Benchmarks report citing disturbing examples of women being 'imported' from Mozambique for the purpose of sex slavery”.

The everyday violence experienced by the women in the area of Marikana received public attention after this event. The women in the area complained that, since the strike had begun about six weeks before the 16 August event, “women and children in Marikana have been subjected to daily harassment and intimidation, late-night police raids in which doors have been beaten down, and men beaten and arrested, and denied freedom of movement and association”.<sup>56</sup> They further pointed out that the violence experienced by them as a result of the police action further coincided with a lack of “decent housing, adequate water and electricity, schools, medical facilities, sanitation, roads and other basic infrastructure in their communities”.<sup>57</sup>

In reaction to the everyday violence experienced by women in the area and the brutal massacre of 16 August,<sup>58</sup> the women of the Wonderkop Community Development Association attempted to organise a public demonstration to express their “unity, sorrow, outrage, and mourning that democracy is dying”.<sup>59</sup> The Madibeng and Rustenburg Municipalities twice prohibited them from organising the protest.<sup>60</sup> The only option left to them was to launch an urgent application with the High Court to get permission to exercise their right to assemble. The Centre for Applied Legal Studies (CALS) assisted them *pro bono*.<sup>61</sup> This illustrates how vulnerable groups struggle to exercise a basic political right. It is ironic that the media should proclaim that they “won” the right when finally given permission to protest.<sup>62</sup> In terms of section 17 of the

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<sup>56</sup> SABC “Woman’s death in Marikana prompts march” (22 September 2012) *SABC News*. Available at <http://www.sabc.co.za/news/a/57633c004ccf33729a3fdbb8fc2f576b/Womans-death-in-Marikana-prompts-march-20120922> (accessed 12 May 2013).

<sup>57</sup> SABC (22 September 2012).

<sup>58</sup> De Waal M “SA’s banned gatherings: Goodbye Constitution, we hardly knew you” (28 September 2012) *Daily Maverick*. Available at <http://www.dailymaverick.co.za/article/2012-09-28-sas-banned-gatherings-goodbye-constitution-we-hardly-knew-you#.UcGoDhbEO-I> (accessed 12 May 2013); Wonderkop Community Women’s Association “North West High Court ruling that the Women of Marikana have the right to march” (27 September 2012) *Creamer Media Reporter*. Available at <http://www.polity.org.za/article/sa-statement-by-wonderkop-community-womens-association-on-north-west-high-court-ruling-that-the-women-of-marikana-have-the-right-to-march-29092012-2012-10-29> (accessed 12 May 2013).

<sup>59</sup> SABC (22 September 2012).

<sup>60</sup> Duncan J & Royeppen A “Inside Rustenberg’s banned protests” (7 March 2013) *Perspective*. Available at <http://www.ru.ac.za/perspective/perspectivearticles/name,79323,en.html> (accessed 12 May 2013); De Waal (28 September 2012).

<sup>61</sup> Hardy K “Urgent court proceedings brought- CALS assists women of Marikana” (28/9/2013) [www.wits.ac.za/.../17091\\_academic\\_clm\\_law\\_cals\\_news\\_17091\\_news\\_it](http://www.wits.ac.za/.../17091_academic_clm_law_cals_news_17091_news_it) (accessed 20 June 2013).

<sup>62</sup> Wonderkop Community Women’s Association (27 September 2012); Du Plessis C “Marikana’s women win right to march” (29 September 2012) *City Press*. Available at <http://www.citypress.co.za/news/marikanas-women-win-right-to-march-20120929/> (accessed 2 February 2013).

Constitution “[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”.<sup>63</sup>

In what follows I discuss Deleuze and Guattari’s machinic ontology to describe their way of thinking about a subject as a process or assemblages forming a subject. I focus on their concepts “minority”, “majority” and “the State apparatus” to illustrate how collective bodies are captured, ordered and dealt with in constitutional rights processes because they do not conform to the standard of the majority whereby the rights and duties of citizens are measured by the axioms of a capitalist society.

### 3 THE SUBJECT OF CONSTITUTIONAL RIGHTS

#### 3.1 Introduction

In *Negotiations*, Deleuze emphasises that the formation of new forms of transcendence and new universals to produce a reflective subject as the subject of human rights is no philosophical advance.<sup>64</sup> He argues that more is needed than a legally constituted subject to have human rights, because the subjectification of the social body is imperilled not only by economic constraints but also by regimes of signs, machines and collective assemblages of enunciation, such as, law, language, public opinion etc.<sup>65</sup> Deleuze further rejects any appeal to an abstract, fixed, predefined subject of human rights based on eternal values in a constitutional state, because for him such thinking blocks movement not only in law but also political thought and practice, and monopolises the possibilities presented by the acknowledgment of rights.<sup>66</sup>

In the absence of transcendent values or any kind of transcendence the question arises how to engage with Deleuze and Guattari’s philosophy to reach the necessary distance to enable us to assess the present.<sup>67</sup> In *A Thousand Plateaus: Capitalism and Schizophrenia* Deleuze and Guattari “contrast the plane of organisation or actuality, on which we encounter real things, real people and various kinds of becoming” with “the

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<sup>63</sup> This constitutional right is not unlimited but is curtailed by the Regulation of Gatherings Act 205 of 1993. The Act, adopted prior to the 1994 constitutional dispensation by the then Apartheid parliament, requires negotiations between the local authorities and the organisers of a social protest, which requirement entails the exercise of skills and resources to organize a public protest. Handmaker J & Berkhout R “Introduction to mobilising social justice: Critical discussions on the potential for civic action and structural change” in Handmaker J & Berkhout R (eds) *Mobilising social justice in South Africa: Perspectives from researchers and practitioners* (2010) 1 at 7; De Vos “A problematic limitation on the right to freedom of assembly” (6 October 2011) *Constitutionally Speaking*. Available at <http://constitutionallyspeaking.co.za/a-problematic-limitation-on-the-right-to-freedom-of-assembly/> (accessed 22 June 2013).

<sup>64</sup> Deleuze (1995) at 152.

<sup>65</sup> Lazzarato M “The concepts of life and the living in the societies of control” in Fuglsang M & Sørensen BM (eds) *Deleuze and the Social* (2010) 171 at 172-173; Roffe J “The revolutionary dividual” in Hickey-Moody & Malins (2007) 40 at 41.

<sup>66</sup> See Deleuze (1995) at 122; Patton (2010) at 23 & 152; Patton P “Immanence, transcendence, and the creation of rights” in De Sutter & McGee (2012) at 17; Lefebvre (2012) at 49-51.

<sup>67</sup> Patton (2012) at 15-16.

plane of immanence or virtuality, on which we encounter abstract machines, pure events and becoming-imperceptible”.<sup>68</sup> Patton explains that Deleuzian criticism of the present is directed at identifying social or other movements in which becoming is expressed.<sup>69</sup> These becomings are processes of relative deterritorialisation which open the possibility for change. This kind of criticism “is always situational or site-specific. There is no master plan and no general recipe for effecting change in a particular direction”. In a political sense, societies are outlined by their deterritorialisation.<sup>70</sup> Patton explains that Deleuze and Guattari “mean that fundamental social change happens all the time, even as the society reproduces itself on other levels”.<sup>71</sup> Change may happen in degrees or it may happen “through the eruption of events which break with the past and inaugurate a new field of social, political or legal possibilities”.<sup>72</sup> Deterritorialisation occurs when a process escapes or leaves a given territory, while reterritorialisation occurs when the deterritorialised elements recombine and enter into new relations which can either result in the composition of a new assemblage or the modification of old assemblages.<sup>73</sup> Deterritorialisation may be negative or positive. Patton explains:

[I]t is negative when the deterritorialized element is subjected to reterritorialization that obstructs or limits its line of flight. It is positive when the line of flight prevails over the forms of reterritorialization and manages to connect with other deterritorialized elements in a manner that extends its trajectory or even leads to reterritorialization in an entirely new assemblage. In this sense, they say, the effective transformation of a given field of reality requires the connection of deterritorialized elements in mutually supportive and productive ways rather than their conjugation within a new system of capture.<sup>74</sup>

Furthermore, Deleuze and Guattari also distinguish between relative and absolute deterritorialisation. Relative deterritorialisation has to do with the historical relationship between things and the territories into which they are organised, including the manner in which these territories break down and change into new forms.<sup>75</sup> Absolute deterritorialisation occurs only in the virtual realm, while relative deterritorialisation occurs in the actual. This distinction between the virtual and the actual is fundamental to their ontology of assemblages because absolute deterritorialisation expresses their normative ideal, which forms the core of their ethics.<sup>76</sup> The ethical principle of absolute deterritorialisation is a concept “of an abstract, nonorganic and creative life which is expressed in the positive or negative

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<sup>68</sup> Patton (2012) at 16.

<sup>69</sup> Patton (2012) at 16.

<sup>70</sup> Patton (2012) at 16.

<sup>71</sup> Patton (2010) at 73.

<sup>72</sup> Patton (2010) at 73.

<sup>73</sup> Patton P *Political normativity and poststructuralism: The case of Gilles Deleuze* (15 November 2007). Available at [http://www.uu.nl/sitecollectiondocuments/gw/gw\\_centre\\_humanities/political-normativity-deleuze.pdf](http://www.uu.nl/sitecollectiondocuments/gw/gw_centre_humanities/political-normativity-deleuze.pdf) at 5; Deleuze G & Guattari F *A thousand plateaus* (tr Massumi B) (2005) at 509.

<sup>74</sup> Patton (15 November 2007) at 5; Deleuze & Guattari (2005) at 220.

<sup>75</sup> Patton P “Becoming democratic” in Buchanan & Thoburn (2008) 178 at 179.

<sup>76</sup> Patton (15 November 2007) at 6.

deterritorialisation of existing assemblages and their reconfiguration into new assemblages".<sup>77</sup>

Patton explains that Deleuzian criticism of the present is directed at identifying social or other movements in which becoming is expressed. These becomings are processes of relative deterritorialisation which open the possibility for change. Patton emphasises that this kind of criticism "is always situational or site-specific. There is no master plan and no general recipe for effecting change in a particular direction".<sup>78</sup>

### 3.2 Assemblages produce the subject

Deleuze is interested in subjectification because he asserts that:

[I]t definitely makes sense to look at the various ways individuals and groups constitute themselves as subjects through processes of subjectification: what counts in such processes is the extent to which, as they take shape, they elude both established forms of knowledge and the dominant forms of power.<sup>79</sup>

He further remarks

[T]he way individuals and communities are constituted as subjects on the margins of established forms of knowledge and instituted powers, even if they thereby open the way for new kinds of knowledge and power. Subjectification thus appears as a middle term between knowledge and power, a perpetual "dislocation," a sort of fold, a folding or enfolding.<sup>80</sup>

Deleuze and Guattari do not assume that the subject is somehow prior to society. They argue that machinic assemblages produce the subject.<sup>81</sup> For them, the concept "assemblages" describes the joining of forces into relatively steady arrangements with particular capacities to affect and to be affected. They assert that any social formation limits or arranges movements or flows.<sup>82</sup>

Assemblages, as conceived by Deleuze and Guattari, are complex constellations of objects, bodies, expressions, qualities, and territories that come together for varying periods of time, ideally to create new ways of functioning.<sup>83</sup> They claim that human existence is affected by two kinds of assemblages: collective assemblages of enunciation,<sup>84</sup> and machinic assemblages of desire.<sup>85</sup> Collective assemblages of enunciation are acts and statements that encompass the signifying and interpreting activities and entail enacted rules and linguistic practices governing a subset of speech

<sup>77</sup> Patton (15 November 2007) at 6.

<sup>78</sup> Patton (2012) at 16.

<sup>79</sup> Deleuze (1995) at 176.

<sup>80</sup> Deleuze (1995) at 150.

<sup>81</sup> Deleuze & Guattari (2005) at 171.

<sup>82</sup> Roffe (2007) at 40.

<sup>83</sup> Livesey G "Assemblage" in Parr A (ed) *The Deleuze dictionary* (2010) at 18.

<sup>84</sup> Roughly analogous to Foucault's notion of discursive practices. Lorraine T *Deleuze and Guattari's immanent ethics* (2011) at 13.

<sup>85</sup> Roughly analogous to Foucault's notion of non-discursive practices. Lorraine (2011) at 13.

acts of the social field.<sup>86</sup> Machinic systems of desire are bodies, actions and passions that include specific subsets of the habitual practices and routines bodies undergo.<sup>87</sup> Lorraine explains:

What counts as meaningful speech is dictated not by an individual subject, but by the systems of “signifiante” that determine what makes sense in a given situation. What counts as a recognisable subject (to oneself as well as others) is dictated by systems of subjectification that determine a subject’s position vis-à-vis others.<sup>88</sup>

Collective systems of enunciation include discursive practices, such as, the acts and statements involved in constitutional rights interpretation, adjudication, activism, translation and concretisation in policy, legislation and other measures taken by the judiciary, the State and formalised NGOs when dealing with these rights. These assemblages are complex because the State and other processes of power give expression to civil, political and socio-economic rights.<sup>89</sup> Through its complex legal and political organisation the State creates striated space. This enables the State to control energy by creating inequalities and building a hierarchical system of relations into the legal and political system which places the occupants (such as, the youth, the elderly, the poor, the unemployed) of each stratum at odds with those of other strata, and acts as a system of capture.<sup>90</sup>

Machinic systems of desire include bodies, actions and passions. They include various non-verbal expressions by collective bodies, such as, the dwellers in shack settlements, or groups who may occupy public spaces in the form of social protests. They include the structural and spatial conditions in which these bodies move, and incorporate their reactions and behaviour. In the context of inequality in South Africa and the displacement of so many impoverished collective bodies in South Africa, space is not only a geographical or physical location but is also a political apparatus of control, a part of the forces of production and/or reproduction of property relationships, a symbolic structure and a means of re-appropriation through resistance and other forms of expression.<sup>91</sup>

### 3.3 Spatial boundaries and violence

The structural and everyday violence imposed on impoverished individuals and collective bodies is also a product of spatial and structural living conditions that form part of the machinic systems of desire.<sup>92</sup> It is evident from socio-economic rights case

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<sup>86</sup> Lorraine (2011) at 13; Livesey (2010) at 18.

<sup>87</sup> Lorraine (2011) at 13; Livesey (2010) at 18.

<sup>88</sup> Lorraine T “Majoritarian” in Parr (2010) at 153.

<sup>89</sup> See the discussion in section 2.2 above.

<sup>90</sup> Watson (2008) at 198.

<sup>91</sup> Lefebvre H *The production of space* (1991) at 249 & 394.

<sup>92</sup> Hickey-Moody & Malins (2007) at 11.

law that impoverished individuals and groups originate from outside the borders of urban societies,<sup>93</sup> neglected<sup>94</sup> and dilapidated inner city dwellings<sup>95</sup> and transit camps.<sup>96</sup>

The shack settlement situated around and in townships (former Black settlements) presents a particular space of contestation. These townships and shack settlements on the margins of South African cities originated with colonialism but were perpetuated with the apartheid legislation and policies.<sup>97</sup> During apartheid the township was scientifically planned for purposes of control, and the plans included severe subjugation in conditions of poverty on a racial and class basis. Mbembe remarks that “space was therefore the raw material of sovereignty and the violence it carried with it”.<sup>98</sup> He further argues that at present neo-liberalism and globalisation contribute to the violence of a specific component of the population because they force the redistribution of resources, which leads to displacement.<sup>99</sup>

Pithouse describes the shack settlement as the space “where the refusal to accept that the human should be rendered as ‘waste’ has come to its most intense and sustained conflict with the state”.<sup>100</sup> One of the reasons for this is because of the gravity of issues arising from this space. Apart from resisting their material conditions, impoverished collective bodies also continue to battle to represent themselves, to avoid political party structures or their representation by NGOs.<sup>101</sup> Pithouse further argues that other reasons for resistance include State policy directed at the socio-political eradication of such bodies rather than at their support. He stresses

[T]he fact that to step into the shack settlement is to step into the void. This is not because of any ontological difference amongst the people living there, or because life there is entirely other at the level of day-to-day sociality. It is because it is a site that is not fully inscribed within the laws and rules through which the state governs society. *Because its meaning is not entirely fixed it is an unstable element of the situation.* The unfixed way in which the shack settlement is indexed to the

<sup>93</sup> For example, *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Pheko & others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd & others* 2012 (2) SA 337 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd & others* 2012 (4) BCLR 382 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others* 2009 (9) BCLR 847 (CC); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes & others* 2011 (7) BCLR 723 (CC).

<sup>94</sup> For example, *Schubart Park Residents' Association & others v City of Tshwane Metropolitan Municipality & another* 2013 (1) BCLR 68 (CC).

<sup>95</sup> For example *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* (CC) 2012 (2) SA 104 (CC); *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality & another* 2012 (9) BCLR 951 (CC); *Occupiers of 51 Olivia Road, Berea Township, & others v City of Johannesburg & others* 2008 (5) BCLR 475 (CC).

<sup>96</sup> For example, *Mchunu & others v Executive Mayor, Ethekwini Municipality & others* 2013 (1) SA 555 (KZD).

<sup>97</sup> Mbembe A “Necropolitics” (2003) 15 *Public Culture* 11 at 24-25.

<sup>98</sup> Mbembe (2003) at 24-25.

<sup>99</sup> Mbembe (2003) at 24-25.

<sup>100</sup> Pithouse RM “Thought amidst waste: Conjectural notes on the democratic project in South Africa. Paper presented at the Wits Interdisciplinary Seminar in the Humanities (WiSER): University of the Witwatersrand (2012) at 12.

<sup>101</sup> Pithouse (2012) at 12.

situation opens opportunity for a variety of challenges - from above and from below, democratic and authoritarian, in the name of the political, of tradition, of nationalism and of private interest, and from the left and the right - to the official order of things.<sup>102</sup>

To live in these structural conditions has been described by John Comaroff as “unthinkable”. He goes on to describe “the alienation of increasing numbers of humans from the very condition of their humanity – [and] all this while the production of wealth and inequality proceeds apace”.<sup>103</sup> In terms of spatial organisation, Henri Lefebvre<sup>104</sup> argues that the State as the active provider of infrastructure and the manager of resources is responsible for the creation of abstract space. It imposes spatial prohibitions and sanctions through the legal system. Abstract space is therefore characterised by normative and discursive non-aggression contracts and the coercive exercise of institutional power to preserve an apparently “non-violent” social order. In the latter context, space therefore also forms part of a complex legal organisation and a collective assemblage of enunciation.

### 3.4 Minorities, the majority and the State

Impoverished collectives, including the women of Marikana, have two things in common. Firstly, they struggle to broaden the base of those who count and enjoy the entire range of basic legal and political rights as citizens in a democratic constitutional State.<sup>105</sup> As explained above, these individuals and groups need to approach the judiciary, civil society organisations and often inaccessible political channels to express their voices. Secondly, they constitute forces that question the legitimacy of decisions made by the government.<sup>106</sup> This is visible both when they mobilise legally and in their other, unorthodox methods of taking action, such as occupying public space. The important question, however, is whether these assemblages manage to deterritorialise or even only relatively deterritorialise their suffering.

Deleuze and Guattari’s machinic ontology is “normative in a specific, formal sense”. It systematically prioritises different kinds of assemblages that deviate from the majoritarian standard.<sup>107</sup> Deleuze and Guattari’s concepts of “minority” and “majority” therefore provide valuable pragmatic tools to focus on problems such as oppression under exploitative capitalist hierarchies, and they correspond well with the socio-political struggles of “the poor, women, the young, the homeless, refugees, migrants”.<sup>108</sup> It is also important to keep in mind that these terms do not refer to any actual existing or corresponding minorities, majorities or States.

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<sup>102</sup> Pithouse (2012) at 12, my emphasis.

<sup>103</sup> Bangstad, Eriksen, Comaroff & Comaroff (2012) at 133.

<sup>104</sup> Lefebvre (1991) at 56-57.

<sup>105</sup> See Patton (2010) at 157; Conley (2010) at 166-168.

<sup>106</sup> Patton (2010) at 151-152; Patton (2012) at 15.

<sup>107</sup> Patton (15 November 2007) at 4.

<sup>108</sup> Watson (2008) at 198.

In *A Thousand Plateaus: Capitalism and Schizophrenia*, Deleuze and Guattari proclaim “ours is becoming the age of minorities”.<sup>109</sup> For them minorities as a concept are “‘fuzzy,’ nondenumerable, nonaxiomizable sets, in short, ‘masses,’ multiplicities of escape and flux” that are not defined by the “smallness of their numbers but rather by becoming or a line of fluctuation”. Although minorities may also be “objectively definable states, states of language, ethnicity, or sex with their own ghetto territorialities”, they advise us to think about minorities as “seeds, crystals of becoming whose value is to trigger uncontrollable movements and deterritorialisations of the mean or majority”.<sup>110</sup> In other words, Deleuze and Guattari will advise us to think about the women of Marikana not only in terms of objectively definable states such as ethnicity, race and economic inequality but also in terms of social stratification.

Their idea of a majority in contrast with the idea of a minority is always linked to a state of power and domination. Deleuze and Guattari describe the concept “majority” in constitutional democracies as an abstract figure, “the average adult-white-heterosexual-European-male speaking a standard language”.<sup>111</sup> The latter forms the majority not in a quantitative sense, but as the historical standard whereby the rights and duties of citizens are measured by the axioms of a capitalist society.<sup>112</sup> Therefore, the concept of “minority” in opposition to “majority” is not based on quantity. Indeed, the elements that make up social minorities may be greater in quantity than those in the apparent majority, and the minority as well as the majority encompass the relationship of a group to the larger collectivity of which they are parts.<sup>113</sup> The majority, like the minority, can take various and simultaneous forms or have many elements.<sup>114</sup> Patton argues that the majority is defined as the group which most closely approximates the “majority” standard, while the minority is defined by the gap which separates its members from that standard.<sup>115</sup> “Minority” as a concept therefore refers to the “set of strategies and logics antithetical to the state axiomatic”.<sup>116</sup> Deleuze remarks:

What defines the majority is a *model* you have to conform to: the average European adult male city-dweller, for example ... A minority, on the other hand, has no model, it’s a becoming, a *process*. One might say the majority is nobody. Everybody’s caught, one way or another, in a minority becoming that would lead them into unknown paths if they opted to follow it through. When a minority creates models for itself, it’s because it wants to become a majority, and probably has to, to survive or prosper (to have a state, be recognized, establish its rights, for example).<sup>117</sup>

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<sup>109</sup> Deleuze & Guattari (2005) at 470.

<sup>110</sup> Deleuze & Guattari (2005) at 106.

<sup>111</sup> Deleuze & Guattari (2005) at 105-106.

<sup>112</sup> Patton (2010) at 157.

<sup>113</sup> Patton P “Difference + politics” in Parr (2010) at 76.

<sup>114</sup> Conley V “Minoritarian” in Parr (2010) at 167; Patton “Difference + politics” (2010) at 77; Watson (2008) at 203.

<sup>115</sup> Patton “Difference + politics” (2010) at 77.

<sup>116</sup> Watson (2008) at 199.

<sup>117</sup> Deleuze (1995) at 173, my emphasis.

For Deleuze and Guattari the “State” as a concept is “an apparatus of organisation, capture and exclusion, which stratifies, polices, striates, codes/decodes, territorialises/deterritorialises, interiorises, counts, occupies, controls and regulates; it produces laws, feelings, identities, tools, workers and theorems”.<sup>118</sup> Deleuze and Guattari argue that one of the fundamental tasks of the State apparatus is the striating of smoothed space.<sup>119</sup> The State apparatus functions through the capture of movement and the partitioning of space. In other words, one of the functions of the State is to create complex legal organisation and to create hierarchical processes where people are placed at odds with each other. The State acts as a system of capture.<sup>120</sup> Deleuze and Guattari<sup>121</sup> further insist that the “axioms” of capitalist society constitute majorities. For them, “human rights have come to function as axioms within the immanent axiomatic of global capital”. Patton gives the example where

[T]he basic civil and political rights regarded as human rights coexist alongside other axioms, such as those designed to ensure the security of property. The result is that when economic conditions demand the tightening of credit or the withdrawal of employment, the rights of the poor to basic social goods are effectively suspended.<sup>122</sup>

Minorities are processes that operate according to different sets of strategies and logics antithetical to the state axiomatic. Because minorities operate on non-denumerable, non-axiomizable processes, their potential for transformation or deterritorialisation lies in their “own special power” to become or to create lines of flight.<sup>123</sup> Minoritarian-becomings, therefore, provide a way of broadening the base of the majority by affecting “the nature of the rights and duties attributed to the new majority”.<sup>124</sup>

### 3.5 A minor conclusion

As explained above, the social body is produced by collective systems of enunciation as well as machinic assemblages, and is also imperilled by economic constraints. I have referred to the escalating number of social protests in South Africa and the concerns of government to address the fact that masses of people are expressing their discontent. These aggregates of people not only continually struggle through different processes (social protest as well as legal and political processes) to broaden the base of the majority model, but they also continually and actively oppose the legitimacy of the decisions made by the State.<sup>125</sup> It can be argued that these forms of resistance constitute a variety of processes (lines of flight, positive deterritorialisation or stratification) with the potential of changing the majority model.

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<sup>118</sup> Watson (2008) at 199.

<sup>119</sup> Deleuze & Guattari (2005) at 385.

<sup>120</sup> Watson (2008) at 198. See section 2.2 above.

<sup>121</sup> Deleuze & Guattari (2005) at 469.

<sup>122</sup> Patton (2012) at 17.

<sup>123</sup> Watson (2008) at 200.

<sup>124</sup> Conley (2010) at 166-168; Patton (2010) at 157.

<sup>125</sup> Purcell M *The down-deep delight of democracy* (2013).

While some of these “protesting” collectivities are based on underlying social networks, other social protests are spontaneous. Madlingozi argues that organised social movements are based on underlying social networks and have some degree of organisation, a collective identity and the capacity to maintain sustained challenges against the State and others.<sup>126</sup> What is important, however, in terms of social stratification or positive deterritorialisation, is not a collective identity but the continued active involvement of the collective bodies occupying public space<sup>127</sup> While organised social movements are based on underlying social networks and are focussed on broadening the base of the majority, spontaneous social protests, in Deleuzian terms, present infinite and multiple processes in which lines of flight may be established to continually challenge the very concept of majority and the privileges experienced by “the average adult-white-heterosexual-European-male speaking a standard language”.

Butler, for example, argues that sometimes it is necessary to act before laying a claim. In other words, she suggests that impoverished collective bodies should occupy spaces in order to be recognised.<sup>128</sup> Her argument corresponds to Henri Lefebvre’s argument that “groups, classes or fractions of classes cannot constitute themselves, or recognise one another as ‘subjects’ unless they generate (or produce) a space”.<sup>129</sup> Translated in the context of the neo-colonial South African nation state, this is exactly what collective bodies do when protesting against the State. They are attempting to “derealise” their suffering. Judith Butler (relying on the work of Gayatri Spivak) argues that in the context of post-colonialism, the Global South presents a situation where the only way to lay a claim to rights is through assimilation of the same Western juridical structures which were not only built on the exploitation of indigenous people but also continue to require that same “effacement and exploitation”.<sup>130</sup> In other words, the only resort available to impoverished collective bodies is the very system that caused their oppression and exploitation, and which “othered” them as sub-human/non-human. In the context of constitutional socio-economic rights, this means that the only instrument available to impoverished social bodies is the discursive and non-discursive practices presented by their constitutional rights. Costas Douzinas identifies this paradox and remarks that the greatest achievement of universal human rights is that it has “imposed the ideology of the rich on the poor”.<sup>131</sup> Douzinas further argues that every time an oppressed or poor person uses the language/discourse of rights to protest, resist, and fight she draws from and connects with the transcendent metaphysics, morality and politics of the Western World.<sup>132</sup>

Once the body is recognised and made “real” as a subject, the critical question remains whether or not the current constitutional rights processes, in so far as they are

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<sup>126</sup> Madlingozi (2013).

<sup>127</sup> Purcell (2013).

<sup>128</sup> Butler (2009) at xiii.

<sup>129</sup> Lefebvre (1991) at 416-417.

<sup>130</sup> Butler (2009) at x.

<sup>131</sup> Douzinas *C Human rights and the empire: The political philosophy of cosmopolitanism* (2007) at 33.

<sup>132</sup> Douzinas (2007) at 33.

based on a fixed concept of the human and appeal to transcendent values, concepts of history or human nature, are able to address the needs of a minority. In other words, once the women of Marikana have been allowed to protest and voice their grief, concerns and anger, are the current law and political system able to address the everyday violence experienced by them?

In his critique of human rights discourse, Deleuze suggests we should reject universal human rights in so far as they are based on a fixed concept of the human and appeal to transcendent values, concepts of history or human nature.<sup>133</sup> As already explained, Deleuze refuses to accept any representation of a fixed concept of the subject in law and political thought. Together with Guattari,<sup>134</sup> Deleuze argues that universal human rights presuppose an abstract subject of rights that cannot be reduced to any singular, existent figures. These rights belong to everyone but to no one in particular.<sup>135</sup> Therefore, these rights “say nothing about the immanent modes of existence of people provided with rights”.<sup>136</sup> Human rights discourse is based on the idea of the majority or the model you have to conform to, “the average adult-white-heterosexual-European-male speaking a standard language”, and that is why these abstract constitutional rights are unresponsive to the everyday violence and needs of minorities, such as the women of Marikana. In other words, although these collective bodies sometimes manage to deterritorialise social, political or legal possibilities these processes are often subjected to reterritorialisation that obstructs or limits their line of flight because of the abstract construction of the subject as a predefined and fixed concept.

#### 4 CONCLUSION

This article has questioned the disjunction between the lived realities of impoverished social bodies and the language, politics and practices of human or constitutional rights that represent them. I argued that when bodies have limited or no access to water, sanitation, shelter, adequate food and healthcare this is not merely an infringement of their rights but it is also a form of systematic and structural violence shaping their everyday existence. I have further argued that the very problem with rights discourse is that it exists in the frame of representational thought and the notion of a predefined and fixed concept of the subject and transcendent values and morality. Deleuze views this as a limitation on “possibility and experimentation”, but in the context of the African body, representational thought based on a fixed concept of the subject and transcendent values also allows for the continued differentiation and exploitation of those who do not conform to the majority model. Constitutional rights discourse and practices, in so far as they are based on a fixed notion of a subject and transcendent values, present hierarchical methods of State capture that serve the broader capitalist market. This modernist legal construction of the subject is possibly one of the main reasons for the

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<sup>133</sup> Lefebvre (2012) at 48.

<sup>134</sup> Deleuze & Guattari (1994) at 107.

<sup>135</sup> Patton (2012) at 17.

<sup>136</sup> Deleuze & Guattari (1994) at 107.

multitude of heterogeneous processes by which impoverished collective bodies in the neo-colonial, post-apartheid nation state actively continue to struggle to deterritorialise their suffering. The question nevertheless remains how these multitudes may present lines of flight to broaden the base of the current majority standard or alternatively manage to make the future that of an age of becoming minorities.