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The crackdown on the right to protest: reclaiming its fundamental democratic value

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Abstract

As the right to protest erodes across European States, this paper argues for a broader understanding of the democratic value of protests. To do so, the paper will first examine international human rights law's understanding of protest and its limitations. Secondly, the paper will draw from democratic theory to understand the transformative potential of protest.

Key words: Right to protest, democracy, human rights, democratic theory.

1. Introduction

In recent years, European states have witnessed a concerning erosion of the right to protest, parallel to a trend around the world. Increasingly, State authorities have responded to peaceful protest by impeding, suppressing, punishing and detaining protesters [1]. Moreover, States are passing repressive laws that restrict this right in the name of maintaining "public order"[2].

International human rights instruments have protected protest through the rights to assembly, expression, and association. While considered a fundamental value of democracy, they see protest mainly as a communication tool within the existing institutional framework. As we see an erosion of the rule of law around Europe, such an understanding understates the democratic significance of protest.

Drawing on democratic theory, this paper will argue for a broader understanding of the democratic value of protest as a transformative practice that expands the democratic horizon and ensures the democracy of the system itself. For this, the paper will first pay attention to the international human rights law understanding of protest and its limitations. Secondly, the paper will draw from democratic theory to understand the transformative potential of protest.

2. International protection of the right to protest

Protest can be defined, in the framework of international human rights, as a form of individual or collective action that aims to express ideas, views, or values of dissent, opposition, denunciation, or vindication[3].

[1] Amnesty International, "Europe: Under Protected and over Restricted: The State of the Right to Protest in 21 European Countries" (Amnesty International Ltd 2024) EUR 01/8199/2024 <https://www.amnesty.org/en/documents/eur01/8199/2024/en/> accessed October 5, 2026 12.

[2] For example, France's 2021 Global Security Law and the UK's Police, Crime, Sentencing and Courts Act of 2022

[3] Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, "Protest and Human Rights: Standards on the Rights Involved in Social Protest and the Obligations to Guide the Response of the State" (OAS Documentos oficiales 2019) OEA/SER.L/V/II CIDH/RELE/INF.22/19 [1]

The right to protest is not contained in a single enumerated right. It is a composite legal category whose legal protection emerges from the interplay of different rights. It falls under the scope of the freedom of assembly[4], as assemblies play a vital role in mobilising. Its organised nature relies on freedom of association[5]. Lastly, understood as an expression of collective opinion, it is protected through the right to freedom of expression[6].

Within this framework, peaceful protest is protected, subject to narrowly justified restrictions, as an essential democratic freedom. Different international actors have recognised the fundamental value of these rights. The United Nations Human Rights Committee describes peaceful assembly as foundational to participatory governance[7], while the European Court of Human Rights (ECtHR) and Venice Commission connect these freedoms to democratic society and political struggle[8].

The dominant view of democracy in the international human rights framework is one of liberal representative democracy. In this system, democracy is associated with the separation of powers, the interplay of group interests, public debate, faith in the media and the freedoms of expression, association, assembly and security[9]. This democratic order is characterised by pluralism, tolerance, and broadmindedness[10]. In such an order, freedom of expression is essential to achieve these objectives[11].

Protests are understood as crucial for democracy because of their communicative potential that broadens pluralism. As stated by the UN Human Rights Committee, the principal purpose of protest is an expressive one[12]. The ECtHR has considered freedom of assembly as a *lex specialis* of freedom of expression[13]. Protest appears as a particular form of communicative power. It allows large groups of people to come together peacefully to express their views, make demands or vindications, and express dissent. This message is more powerful because the power of large numbers of people amplifies the message and gives it more visibility[14].

Protest is also important in other senses. It is a way to take part in public life as it allows participants to advance ideas and aspirational goals in the public domain and to establish the support needed for those goals[15]. A democratic society must allow individuals to organise and

[4] Enshrined in art. 20 UDHR, art. 21 ICCPR and article 11 ECHR.
[5] Enshrined in art. 22 UDHR, art. 22 ICCPR and art. 11 ECHR.
[6] Enshrined in art. 19 UDHR, art. 19 ICCPR and art. 10 ECHR.
[7] UN HRC *General Comment No. 37 on the right of peaceful assembly* (article 21) (2020) UN Doc CCPR/C/GC/37 [1].
[8] Venice Commission *Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression and Media* (2020) CoE Doc CDL-PI(2020)008; *ECHR Guide on Article 11 of the Convention: Freedom of assembly and association* (28 February 2026).
[9] S. Marks, The European Convention on Human Rights and its "Democratic Society" (1995) in The British Year Book of International Law, 66, 209.
[10] Handyside v. the United Kingdom (Decision) ECtHR App Nos 5493/72 (7 December 1976) [49].
[11] *Handyside* (nº9).
[12] UN HRC (nº6) [4]
[13] *Ezelin v. France* (Judgement) ECtHR App Nos 11800/85 (29 April 1991) [35] [37]; *Frumkin v. Russia* (Judgement) ECtHR App Nos 74568/12 (5 January 2016) [107].
[14] I. R. Wall, The Right to Protest'(2024) in The International Journal of Human Rights, 28(8–9) 1380.
[15] UN HRC (nº6)

express their demands in different ways[16]. Apart from more institutional and structured forms, this also includes strategies such as condemnation or direct pressure[17]. This is especially relevant because of the structural inequalities of many regions. The traditional channels of participation for public demands are often curtailed for the most impoverished sectors[18]. Protest can be a way of amplifying the voices of people who are marginalised or who present an alternative narrative to the dominant discourses[19].

However, this framework shows some limitations to the understanding of protest. First of all, protest does not have a stand-alone protection in these instruments. It needs to be fashioned from three different rights with quite an intense effort of stitching them together[20].

Moreover, it does not address some of the inherent tensions present in the understanding of protest itself. Protests can appear as threats to democratically elected representative institutions. In representative liberal democracies, citizens enact their democratic rights by electing their representatives to whom they transfer their powers to govern. Oliver Marchart refers to this view of democracy as "the sleeping sovereign"[21]. Citizens fulfil their functions as sovereign by electing their representatives; then, they withdraw until the next election[22]. Sovereignty remains with the citizens even when they no longer use it[23]. It is not the reality of sovereignty that counts, but the mere possibility that the sovereign might be resurrected[24].

From these democracies, protests appear as a guarantee within the system. As we have seen, they have an important communicative potential, but the actual change comes from within the system. Protests that go further than the expression of dissent can conflict with their view of democracy.

On one hand, protests that challenge decisions made by elected representatives or even topple democratically elected governments can be seen as expressions of raw numeric power that allows minorities to override the will of the majority[25]. However, representative governments can err by straying from people's needs and interests and can be unaware of the marginalised citizens' needs[26]. Human rights bodies do understand the value of protests as a means of direct pressure, especially for marginalised groups.

On the other hand, the material elements of protest are treated as threats to be neutralised rather than a crucial part of the importance of protest[27]. From limiting the traffic flow of a city to encampments, protests generate material changes in the spaces where it occurs. This disruption reverberate around the city, the state,

[16] Special Rapporteur Freedom of Expression ICHR (nº2) [5].
[17] Special Rapporteur Freedom of Expression ICHR (nº2) [5].
[18] Special Rapporteur Freedom of Expression ICHR (nº2) [16].
[19] Special Rapporteur Freedom of Expression ICHR (nº2) [16].
[20] I. R. Wall (nº13) 1379.
[21] O. Marchart, The Sovereign Awakened: A Radical Democratic View on Protest (2022) in Democratic Theory, 9(2)39.
[22] O. Marchart (nº20).
[23] O. Marchart (nº20).
[24] O. Marchart (nº20).
[25] S. Strokes, Are Protests good or bad for democracy? in M. Schwartzberg (ed), *Protest and dissent* NYUP 278.
[26] S. Strokes (nº25) 278.
[27] I. R. Wall (nº13) 1381.

and beyond, being the precursors of change[28]. While a certain level of disruption is allowed by human rights frameworks[29], this is only because of the fundamental value of its communicative nature. The additional material elements are still seen as risks[30] and can fall under the vaguely defined notions of "public order" or "security risk" which justify the protest's restriction. There have been critics that pointed out that human rights courts tend to accept most government allegations on public disorder without properly assessing the proportionality of such a restriction[31].

In opposition to this view, we can find Marchart's reflection on protests as a popular "self-awakening"[32]. Protest, for him, appears as an expression of popular sovereignty, in which the sovereign, instead of waiting to be consulted, directly makes demands[33]. Democracy, from this perspective, is understood as a continuing process in which citizens can contest the representative decisions. Any constituted order that is truly democratic needs to guarantee, accept, and even support the popular sovereign upholding and fighting for the extension of the democratic horizon. Protests in this sense appear as an intrinsic element of democracy.

The tension that arises from these two perspectives is not simply whether protests are democratic, but how democracy should be understood.

3. The right to protest as a fundamental democratic value

The international human rights framework, therefore, encounters limits when conceptualising the fundamental democratic value of protests. In this regard, the perspective of democratic theory, as the discipline in charge of democracy as a concept and as a specific political form, can be useful to better understand its value.

For democratic theory, democracy can be understood as a twofold concept. On one hand, it consists in the constitutionally enshrined ensemble of democratic institutions; on the other hand, it is an imaginative political horizon, an ideal to strive for[34].

Democracy and protest have a complex relationship. Democracy appears both as the institutional counterpart of the protest, and the idea they are fighting for. This contradiction dissolves, however, if we take into consideration that there is not one single idea or interpretation of democracy[35]. Representative constitutional democracy is merely the institutionalised one. But most protest movements operate with some idea of democracy that shapes their organisational form and their acts[36].

This distinction helps explain why protest can appear both to challenge democratic institutions and a democratic practice. From this perspective, protests can have a strong democratic value even when they do go further than communicating

[28] I. R. Wall (nº13) 1383.
[29] UN HRC (nº6) [7].
[30] I. R. Wall (nº13) 1385.
[31] O. Salát *The Right to Freedom of Assembly: A Comparative Study*, Hart Publishing 2015, 132.
[32] O. Marchart (nº20) 50.
[33] O. Marchart (nº20) 47.
[34] D. Gobbi, L. Gorriahn, D. Staemmler and C. Volk. Protest and the Democratic Order: A Research Perspective, in Democratic Theory 9, 2.
[35] D. Gobbi, L. Gorriahn, D. Staemmler and C. Volk (nº33).
[36] D. Gobbi, L. Gorriahn, D. Staemmler and C. Volk (nº33).

demands to political authorities and challenge the democratically elected institutions. However, not all of these protests are necessarily democratic. We must analyse where their truly transformative democratic potential lies.

First of all, protest can create spaces where people practise alternative forms of participation and collective decision-making. They can serve as an instrument to challenge the logic and imaginary of institutionalised democratic orders and serve as hubs for democratic innovation from below. Flesher Fominaya and Feenstra's study of Spain's 15-M movement offers an example of this: occupied camps in public squares were sites of democratic experimentation, where multiple democratic imaginaries coexisted[37]. The squares encompassed deliberative and participatory forms of democracy, with collective self-empowerment in areas such as organising food, childcare and upkeep of the physical space[38]. This illustrates the potential of protest less as an act of vindication and more as a democratic practice that continuously contests and reshapes the democratic order.

Radical democratic theory provides a further explanation for protest's potential. Radical approaches to democratic theory emphasise that democracy can and should be perpetually reconfigured and reconstituted [39]. Radical democratic thinkers consider that the social and political life of modern societies is ineradicably characterised by antagonisms [40]. Due to the pluralistic nature of the social world, conflict will always exist with no rational solution. From this current of thought, every political order is based on the exclusion and suppression of political alternatives, rather than on a consensus[41]. Protests appear as a rare political moment in which the established order gets disrupted, and its antagonistic character gets uncovered[42].

It is interesting to borrow from this perspective the potential of protest as a space to question the normal state of things by reopening the issues that the institutions treat as settled. Our current political systems are based on certain premises of how democracy must look. These ideas are not ahistorical truths, but expressions of a particular historical moment and context. Protests have the transformative potential to break their settled illusion and reignite the debate of what a true democracy looks like.

Lastly, protests can help defend democracy when institutions undermine certain democratic rights or undergo an authoritarian transformation. Protests have been understood both as a way to fight for new rights and as a way to ensure the preservation of the acquired ones. In this sense, it's interesting to look at the central value the 1793 French Declaration of the Rights of Man and of the Citizen gives to resistance to oppression. Normally overshadowed by the 1789 Declaration, the 1973 Declaration places insurgency at the forefront. In Article 33, it states that resistance to oppression is the consequence of the other rights of man. Protest appears not only as a right for the state to guarantee, but as a

[37] C. Flesher Fominaya and R. A. Feenstra, Reconsidering Social Movement Impact on Democracy: The Case of Spain's 15-M Movement, in Social Movement Studies, 22(3), 279.
[38] C. Flesher Fominaya and R. A. Feenstra (nº36).
[39] D. Gobbi, L. Gorriahn, D. Staemmler and C. Volk (nº33) 5.
[40] C. Volk, On a Radical Democratic Theory of Political Protest: Potentials and Shortcomings, in Critical Review of International Social and Political Philosophy, 24(4),448.
[41] C. Volk (nº39).
[42] C. Volk (nº39) 441.

popular duty when the government violates the rights of the people.

This dimension of protest becomes especially crucial in the view of the current crackdown on protesters. A framework limited to dissent within existing institutions may offer inadequate guidance when those institutions themselves become exclusionary or authoritarian.

4. Conclusion

Protest is fundamental to democracy. From the human rights perspective, the right to protest appears as a protection of the fundamental values on which Western representative liberal democracies are founded. However, this understanding can understate its democratic significance. From democratic theory, protest appears to become a true transformative practice which can serve as a hub for democratic innovation, a moment to question the settled status quo and a guarantee in the face of oppression, authoritarianism and democratic erosion.

In view of the current widespread repression of protests, it is important to reclaim its fundamental value in ensuring democracy and combat the discourse that frames protestors as radicals and extremists who threaten public order. A truly democratic order will always be open to protests that look to expand the democratic horizon.