MY TEA PARTY, YOUR MOB, OUR SOCIAL CONTRACT: FREEDOM OF ASSEMBLY AND THE CONSTITUTIONAL RIGHT TO REBELLION IN *GARVIS V SATAWU (MINISTER FOR SAFETY & SECURITY, THIRD PARTY)* 2010 (6) SA 280 (WCC)

**Stu Woolman**

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

*The United States of America Declaration of Independence, 4 July 1776*

’Tis easy for an aging academic who has lived the better part of his adult life in a foreign land to forget these stirring words, and easier still to overlook the precision with which this political, and proto-constitutional, document was drafted. Enlightenment philosophers to a man, the authors of the Declaration of Independence begin by crisply stating a Lockean theory of the social contract then dominant, and still in play:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed …

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1 United States of America Declaration of Independence (1776).
The critical words here are the last. Governments derive their powers ‘from
the consent of the governed’. When a government that owes its legitimacy to
the consent of the governed subsequently fails to vouchsafe these ‘unalienable
Rights’ or ‘becomes destructive of these ends’, ‘it is the Right of the People to
alter or to abolish it, and to institute new Government, laying its foundation on
such principles and organizing its powers in such form, as to them shall seem
most likely to effect their Safety and Happiness’.²

Imagine that. Treating the notional social contract as a genuine contract.
Indeed, whether the contract had been abrogated was debated on both sides
of the Atlantic, and by some of the finest English and American statesmen/
philosophers of the time.³ Ultimately, neither the half-crazed British monarch
George III nor the somewhat more rationale English parliament could find
their way to recognising the alleged breach – and rectifying the rift that this
contravention of a particular social contract had caused. The rest of that part
of the story is now history.

For the purposes of this note, however, what lives on is an essential element
of the social contract that the Americans made explicit in the Declaration of
Independence. This element can actually be found within the four corners of
the United States (US) Constitution: The First Amendment (1791)⁴ protects
the right to freedom of assembly. On its face, this guarantee appears rather
innocuous compared to the US Constitution’s Second Amendment⁵ require-
ment that this new Leviathan forswear its monopoly on armed force so that
individual state militias – from Massachusetts to Virginia – might continue
to bear arms.

I want to suggest that the opposite is true, rightly and intentionally so.
That is, the First Amendment protection of the right to freedom of assembly
is not, and was not, intended to be a form of ‘compensatory legitimation’⁶. By
enshrining the freedom to assemble, the drafters of the US Constitution,
and subsequently the framers of the South African Constitution committed
themselves to a use of force in the public realm potentially more dangerous
and destabilising than state militias. As many of the South African Journal on
Human Rights (SAJHR)’s readers will have experienced for themselves, partic-
ipation in a sizeable demonstration in the years leading up to South Africa’s
liberation (or in current social movement protests regarding the half-measures
delivered by that liberation until now) is to find oneself part of a truly dynamic
and powerful beast. Such a political crowd draws its power, as Elias Canetti
notes, from its erasure of borders between individuals, the gravitational pull
that an expanding, living, moving umbhikisho has on those around it, and the

² Ibid.
³ See E Burke On American Taxation (1774); E Burke Conciliation with America (1775); T Paine
Common Sense (1776).
⁴ The First Amendment (Amendment I) US Constitution (15 December 1791).
⁵ The Second Amendment (Amendment II) US Constitution (15 December 1791).
⁶ See H Weiler ‘Legalization, Expertise and Participation: Strategies of Compensatory Legitimation
incipient threat of violence that causes all around to sit up and take notice. Canetti writes:

[E]ruption … the sudden transition from a closed into an open crowd … is a frequent occurrence … A crowd quite often seems to overflow from some well-guarded space into the squares and streets of a town where it can move about freely, exposed to everything and attracting everyone. But more important than this external event is the corresponding inner movement: the dissatisfaction with the limitation of the number of participants, the sudden will to attract, the passionate determination to reach all men.

Canetti’s observations about crowds suggest why, in South Africa, assemblies remain an ever present and potent tool. Pickets, marches, demonstrations and processions are fires that cannot be so easily put out – or turned off. Crowd action – loud, noisy, disruptive, and sometimes dangerous – ought to be viewed, at a minimum, as a direct expression of popular sovereignty, and if so, as a direct challenge to the status quo. Larry Kramer’s view is that such ecstatic expressions of the will of the people transforms constitutional interpretation into an enterprise shared by government with the people themselves. That, in any event, is one of the better arguments for giving s 17 of the Constitution a broad construction.

But in contemporary South Africa, an additional, and even more compelling, reading is on offer. By creating space for crowd action, s 17 vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them – or, more importantly, by the basic law and the state. Section 17 creates a unique space in which citizens can stand outside the Constitution. Section 17, read with a collective failure to make good on the founding provisions of s 1, is designed to put the state and civil society on notice, if not high alert. In Modderklip, s 1 of the Constitution (read with s 34) required that the state take ‘reasonable steps … to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law’. The Modderklip Court’s reading of s 1 is concerned with those steps the state must take to turn back the forces of anarchy, entropy and rebellion. By transforming those forces into something more benign, we – as represented by the Constitutional Court – forestall the potential abrogation of the social contract reflected in our Constitution. Although the Modderklip Court describes the circumstances of the eviction case before it as extraordinary, they most certainly are not. They are, in so many ways, the circumstances in which many South Africans find themselves now (whether they are par-

7 E Canetti Crowds and Power (1962).
8 Ibid 22.
9 See In Re Munhuumeso 1995 (1) SA 551 (ZS) 557, where the Court stated: ‘an assembly … stimulates … discussion of the opinion expressed [and] … [the] public is brought into direct contact with those expressing the opinion’.
11 See, for example, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC).
12 Ibid para 43 (my emphasis).
ticularly concerned with access to housing, health, water, food, education, electricity, social security grants, or a brace of other basic goods necessary for living a life worth valuing). It is, I hazard to assert, the defining characteristic of this political moment.

I’d like to suggest that it is this defining characteristic of this political moment that exorcises Judge Hlophe so in *Garvis v SATAWU*. For when one marries s 1 to s 17 of the Constitution, the right to freedom of assembly potentially threatens the very constitutional order of which it is a part and which the judge has sworn to uphold. It makes him nervous. Well, it makes me nervous too. And that again is s 17’s purpose: to rattle the cage of those who govern or who benefit from the current regime. But so unnerved is the good judge by the threat of an incipient revolution, that he offers several questionable readings of s 17 and the Regulation of Gatherings Act 205 of 1993 (RGA) along the way.

Hlophe J describes the facts of *Garvis v SATAWU* as follows:

In this particular case the march was organised within a volatile milieu. The protracted industrial action had been acrimonious and had given rise to the deaths of nearly 50 people pursuant to strike-related violence. Furthermore, there had been previous instances of damage to the Cape Town Municipal Council and private property. The plaintiffs are a disparate group of persons. They are brought together by the mutual misfortune of having been victims of the violence (the riot damage) perpetrated during the march.

Of particular note here is that the judge’s description of events collapses harms that preceded and followed the actual march with the deleterious consequences of the march that seizes the court. Such a rhetorical move may be necessary given some of the actual facts of the immediate case before him: namely the rather minimal quantum of damages sought by the plaintiffs in this matter. (Counsel for the defendants, Eduard Fagan SC, acknowledges that R1.5-million in damages had allegedly occurred during the strike action in toto – and *that* sword of Damocles is what actually lay above the defendants’ heads.)

As counsel for the defence notes, the convenors of the demonstration had done everything required of them in terms of the RGA. They had given notice to the appropriate authorities as required by s 3(5) of the RGA. And they had received approval to conduct the demonstration. No small thing. Municipal authorities and the police regularly rebuff – without justification – those who wish to exercise the right to gather, demonstrate and assemble. SATAWU cleared these bureaucratic hurdles. It did so by agreeing with the local authority (and its responsible officers) that SATAWU would take an array of steps

14 *Garvis v South African Transport and Allied Workers Union* 2010 (6) SA 280 (WCC).
16 E-mail correspondence with E Fagan, 10 March 2011.
that would, to the fullest extent possible, prevent damage to property and person. The gathering’s convenors: (a) communicated that the gathering would be peaceful, no traditional weapons would be carried, and no alcohol consumed (as the RGA requires); (b) arranged for 500 marshals from SATAWU to self-policing the gathering (as the RGA requires); (c) warned participants that no damage to property would be tolerated nor would intimidation of non-striking security workers take place (as the RGA requires); (d) received approval from the local authority regarding the time, place and manner of the march (as the RGA requires); and (e) received the necessary assistance from police and local authorities to clear the roads of all vehicles, for barricades to be put up along the route of the march in order to minimise the risk of damage that might be caused to these vehicles and to make controlling the participants in the gathering easier (as the RGA requires.) Because RGA s 11(1) holds jointly and severally liable for damage the actual persons responsible for any damage, the convenors of the demonstration, the organisations behind the demonstration and fellow travellers that participated in the demonstration, RGA s 11(2) provides a defence for the convenors, fellow travellers and the responsible organisations:

(a) that he or it did not permit or connive at the act or omission which caused the damage in question; and

(b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

(c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question.18

Given the pre-gathering commitments of both the convenors, the local authority and the police to ensure a safe and peaceful demonstration, it is hard to understand why the convenors and SATAWU ought to be held liable for events that they, the local authorities and the police could not control. Too much is made by both counsel and the High Court of the words RGA s 11(2)(b) ‘was not reasonably foreseeable’. As I have argued at length elsewhere, the RGA is riddled with potentially unconstitutional provisions.19 (The unfortunate nature of its interaction with the Uniform Rules of Court and the longstanding pattern and practice of police and municipal authorities to block demonstrations whenever and wherever possible give rise to a fatally flawed Act.) Given that the convenors, local authorities and police met their obligation to take all reasonable steps to control this demonstration, it defies common sense to deny that some damage might well occur. As Judge Hlophe himself sets up the scene, the damage was certainly foreseeable. The honourable judge would have done well to acknowledge that RGA s 11(2)(a) and RGA s 11(2)(c) bracket RGA s 11(2)(b). No one suggests that the convenors connived in the acts that caused the damage or that they failed to take all reasonable steps to prevent such acts. Everyone, at least on the papers and in the judgment, agrees that

18 RGA s 11(2).
19 Woolman (note 17 above) 43-6 – 43-17.
they did. Read together, these three provisions provide a defence against the claim for damages that seems more than plausible.

But while the law as a practice certainly concerns itself with the extension and the application of the words in the applicable and apposite texts, it often does so under the pressure of time. Its interpreters, in court, are often forced to move with a particular urgency to divine denotations of words most amenable to their positions, even when those constructions can appear most strained. The defendants are driven to contest the constitutionality of RGA s 11(2)(b) in terms of s 17 of the Constitution. The High Court is likewise obliged to opine on the validity of RGA s 11(2)(b) against the backdrop of s 17. Given the setting of the demonstration – and the agreement to gathering conditions arrived at by the convenors, the local authorities and the police – it would seem that the defendants would have the better part of the argument. (Of course, the more plausible reading is that which I offer above. For a truly unduly strained example of statutory construction, see Mankayi v Anglogold Ashanti Limited.) Whatever was ‘reasonably foreseeable’ was expressly taken into account by the convenors and the local authorities – including property damage. (Why else would the local authorities and police allow the demonstration to go forward?) Badly drafted as it is, the only other way to make sense of RGA s 11(2)(b) is that convenors are allowed to go ahead with a demonstration for which they have taken all reasonably foreseeable precautions – and yet must prepare themselves to be held liable for damages that flow from some unexpected event. According to Judge Hlophe, this reading of RGA s 11(2)(b) is to be preferred to the defendants’ construction and to construction that I have offered above. Tortured prose indeed. A restatement of the facts makes plain just how awful this rendition of the statutory provisions is.

Judge Hlophe ignores the fact that the convenors had secured the permission of local authorities to demonstrate (against the background of previous property damage and physical violence), as required by the RGA, and had reached agreement with local authorities as to how the union and the police could best control the demonstration. Given that damage occurred and that it was reasonably foreseeable (or totally unexpected), the convenors are – on Judge Hlophe’s construction – not entitled to the protection of RGA s 11(2). All that is left to decide is whether s 17 of the Constitution has anything to say about the construction or the validity of RGA s 11(2). Given that s 17 only affords protection to assemblies, demonstrations and marches that are ‘peaceful’, the judge summarily dispatches with defence counsel’s contention that RGA s 11(2)(b) effectively makes truly meaningful and powerful assemblies, demonstrations and marches impossible to conduct. As I have previously noted ‘[a] generous interpretation of the “peaceful” proviso is … necessary (a) to prevent the state from exploiting this requirement in order to suppress unpopular positions … (b) to ensure that if some members of an assembly resort to violence, while the majority of the participants remain peaceful, the

20 See K van Marle ‘Law’s Time, Particularity or Slowness’ (2003) 19 SAJHR 239.
21 2011 (3) SA 237 (CC).
assembly remains protected … and (c) [to] prevent a peaceful assembly from being hijacked by violent … opponents or agents provocateurs’. 22 Hlophe J writes in an entirely different spirit:

It was further contended on behalf of the plaintiffs that the cancellation of a few prospective gatherings is a small price to pay for the protection of the constitutional rights which would be infringed by a riot such as that which occurred in Cape Town on 16 May 2006. I am inclined to agree with Mr Katz [plaintiff's counsel] in this regard. 23

Is the cancellation of truly meaningful assemblies, demonstrations and marches such ‘a small price to pay’? If one’s conception of the freedom to assemble is so meagre and cramped that only nice, middle-class protests against, say, the construction of new nuclear power plants are protected, then yes, the price for exacting liability from the convenors of marches designed to put the working conditions of poorly paid labourers on the table is indeed small. If so, one might as well flatly state that the constitutional order said to protect the security, safety and pursuit of happiness of poorly paid labourers does nothing of the sort. (For a robust defence of the Constitution (as social contract) that demands protection, promotion, respect and fulfilment of the rights of all, see Glenister v President of the Republic of South Africa. 24)

And that takes us back to the beginning, and the genius of the drafters of the US Declaration of Independence, the First Amendment of the US Constitution, our own Constitution s 17 and the (somewhat irregular) RGA. The right to assemble places a sometimes exacting toll on the state and other members of society. But it is a price worth paying. For if we, as a society, refuse to pay that price, then we run the risk that many of our fellow citizens will withdraw their consent to the social contract (as manifest in the Constitution) said to bind us. The result may well be rebellion, and for those of us who benefit most from the protection of the current order, the loss of much of that which we hold dear. However, it is not just our own lives and property with which we, on the other side of the barricade are concerned, but the larger promise of a Constitution that states quite unequivocally that we have committed ourselves (in writing) to the redress of the wrongs of the past and the creation of a society based upon the dignity, the equality and the freedom of all. The constitutional enshrinement of the freedom of assembly was intended – 220 years ago in the United States and 17 years ago in South Africa – to remind us of the terms of the social contract into which we have entered.

22 Woolman (note 17 above) 43-3.
23 Para 45, my emphasis.
24 2011 (3) SA 347 (CC).
The constitutional hazard to which I allude is not hypothetical. Protests, more violent, more dangerous, now occur with greater frequency in South Africa.  

Let me not be misunderstood. Not all convenors should be immunised from liability for demonstrations gone awry. Not all demonstrations that challenge the status quo ought to be protected. And the freedom to assemble is not a blank cheque to wreck havoc. As Thomas Jefferson and his brethren noted 235 years ago, ‘[p]rudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed’. Prudence requires a commensurate degree of self and group control. However, I think it fair to say that the growing number of regular, sometimes violent, demonstrations in South Africa suggest that many of our fellow citizens believe that the basic provisions of our social contract have not been kept and that our one party democracy runs the risk of turning liberation into domination.  

About such an untoward change in the nature of the polity, Jefferson wrote: ‘when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the people] under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security’. Our democracy is young and the jury is still very much out as to whether we can make good on the promises of our basic law. However, current, regular, violent uprisings should give us pause and need no further explanation (in these pages). We ignore their meaning, and their potentially revolutionary possibility, as the Garvis Court has, at our own peril.

25 On the extra-constitutional character of protests from Matatiele to Merafong, see T Madlingozi ‘The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, “Interpretive Charity” and the Citizenry as Sangomas’ (2008) 1 Constitutional Court Review 63; M Bishop ‘Vampire or Prince? The Listening Constitution and Merafong Demarcation Forum v President of the Republic of South Africa (2009) 2 Constitutional Court Review 313; D McKinley ‘Democracy and Social Movements in South Africa’ (2004) 28 SA Labour Bulletin 39, 40 (a leader of the Anti-Privatization Movement, McKinley noted some seven years ago that the increasing violence employed by community movements reflects their exclusion from ‘more inclusive and meaningful forms of direct and participatory democracy, that have little to do with the institutional forms of representation within bourgeois democratic society’).

26 Declaration of Independence (note 1 above).


28 Preamble (note 1 above).