



THE RIGHT TO FREEDOM OF ASSEMBLY

A COMPARATIVE STUDY

ORSOLYA SALÁT

Hart Studies in Comparative Public Law

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The Right to Freedom of Assembly

A Comparative Study

Orsolya Salát



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Introduction

Was das freie Versammlungs- und Vereinigungsrecht zu bedeuten hat und wie wichtig es für die Freiheit ist, weiß ja jedes Kind und ist nicht nötig, viel davon zu sagen.¹ (Theodor Mommsen)

I. THE CHALLENGE OF FREEDOM OF ASSEMBLY

IN LEGAL DECISIONS and commentary, freedom of assembly is widely cherished as a precious human right, indispensable for the individual person, for groups within society, and for the whole society, including for the preservation of democratic governance. However, even at a superficial glance it becomes apparent that constitutional law and human rights law allow so many and such serious limits on freedom of assembly that is more constrained than perhaps any other right, especially free speech. Prior restraints such as permits, bans and conditions, and restrictions on the time, place and manner of the assemblies abound in every jurisdiction, *de facto in addition* to general restrictions allowed on speech or expression, as courts reconfigure the activities at assemblies within the framework of freedom of speech or opinion.

Other disciplines, namely, psychology and sociology, which engage with assemblies on a more empirical basis, echo a similar ambivalence. Mass psychology finds ‘masses’ dangerous, emotionalised and prone to evil manipulation,² where group membership contributes to hostility, reduces rationality, and so on.³ Social movement studies—in apparent contradiction—claim to

¹ [What the right to free assembly and association has to mean, and how important it is for freedom, every child knows, and there is no need to say much about that.] Theodor Mommsen, *Die Grundrechte des deutschen Volkes. Mit Belehrungen und Erläuterungen* (Frankfurt, Klostermann, 1969) 52.

² Gustave Le Bon, *The Crowd. A Study of the Popular Mind* (New York, MacMillan, 1896); William McDougall, *The Group Mind* (Cambridge, Cambridge University Press, 1920); Sigmund Freud, *Massenpsychologie und Ich-Analyse* (Leipzig, Wien, Zürich, Internationaler Psychoanalytischer Verlag, 1921).

³ Eg Henri Tajfel, ‘Experiments in Intergroup Discrimination’ in Michael A Hogg and Dominic Abrams (eds), *Intergroup Relations. Essential Readings* (Philadelphia, Psychology Press, 2001) 178; Marylinn B Brewer, ‘Ingroup Bias in the Minimal Intergroup Situation. A Cognitive-Motivational Analysis’ (1979) 98 *Psychological Bulletin* 307; Marylinn B Brewer and Roderick M Kramer, ‘The Psychology of Intergroup Attitudes and Behaviour’ (1985) 36 *Annual Review of Psychology* 219; Leon Festinger, A Pepitone, T Newcomb, ‘Some Consequences of De-individuation in a Group’ (1952) 47 *Journal of Abnormal and Social Psychology* 382.

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document a rational and rationalisable panoply of motivations,⁴ grievances, structures,⁵ organisations⁶ and events of contestation;⁷ pointing out incentives for moderation,⁸ and describing the creation and transfer of meaning which is incommunicable by other means and ways.

More philosophical approaches either ignore freedom of assembly⁹ or oscillate between Schmittian acclamation and fear of subversion,¹⁰ even going as far as questioning whether there is any basis for freedom of assembly in a democracy which guarantees freedom of speech.¹¹

Gatherings of people in public clearly have a potential to transcend or transgress normalcy, be it the psychological, moral, or religious status quo, the political mainstream, the ordinary rules of the game of democracy (or any other form of government), or even social peace. Revolutions and pogroms start with assemblies, and end—or so we hope—with the establishment of other assemblies, allegedly deliberative and representative ones. What remains in between is freedom of assembly. The object protected by freedom of assembly is fundamentally in-between, mirroring and realigning the line between our fears and hopes, between past and future, reason and emotion, people and government, minority and majority. The object protected by freedom of assembly is also in-between in another regard,

⁴ Eg Ted Robert Gurr, *Why Men Rebel* (Princeton, Princeton University Press, 1970); Thomas Crawford and Murray Naditch, 'Relative Deprivation, Powerlessness, and Militancy: The Psychology of Social Protest' (1970) 33 *Psychiatry* 208; Clark McPhail, 'Civil Disorder Participation. A Critical Examination of Recent Research' (1971) 36 *American Sociological Review* 1058.

⁵ Eg David S Meyer and Debra C Minkoff, 'Conceptualizing Political Opportunity' (2004) 82 *Social Forces* 1457.

⁶ Eg Elisabeth S Clemens, 'Organizational Repertoires' in Jeff Goodwin and James M Jasper (eds), *The Social Movement Reader. Cases and Concepts* (Chichester, Blackwell, 2003) 187; John D McCarthy and Mayer N Zald, *The Trend of Social Movements in America: Professionalization and Resource Mobilization* (Morristown, NJ, General Learning Press, 1973); John D McCarthy and Mayer N Zald, 'Resource Mobilization and Social Movements. A Partial Theory' (1977) 82 *American Journal of Sociology* 1212; Mayer N Zald and John D McCarthy (eds), *Social Movements in an Organizational Society* (New Brunswick, Transaction Books, 1987).

⁷ Eg Charles Tilly, *Contentious Performances* (Cambridge, Cambridge University Press, 2008).

⁸ Eg Marisa Chappell, Jenny Hutchinson and Brian Ward, "'Dress modestly, neatly ... as if you were going to church": Respectability, Class and Gender in the Montgomery Bus Boycott and the Early Civil Rights Movement' in Peter Ling and Sharon Monteith (eds), *Gender in the Civil Rights Movement* (New York, Routledge, 2013) 69.

⁹ It is telling how Mill does not have a single word about freedom of assembly in his chapter on freedom of speech in *Liberty*. John Stuart Mill, *On Liberty* (1859, David Spitz ed, 1975) ch II, 17–53. Note also that Benjamin Constant did not include freedom of assembly in his constitutional draft.

¹⁰ John D Inazu elaborated in detail how Rawlsian liberalism does not provide a sufficient basis for the freedom inherent in assemblies either. John D Inazu, *Liberty's Refuge. The Forgotten Freedom of Assembly* (New Haven, Yale University Press, 2012) especially ch 4.

¹¹ Tamás Györfi, 'The Importance of Freedom of Assembly: Three Models of Justification' in András Sajó (ed), *Free to Protest: Constituent Power and Street Demonstration*, Issues in Constitutional Law, vol 5 (Utrecht, Eleven International Publishing, 2008) 1.

between the solitude of the writer or the vulnerability of the speaker and the discipline and strength of the police and army. For some, it might seem to be something between the individual and the people. It is also something in-between the argumentation of the press and the decision-making of the voting booth, referenda or legislation. It speaks as much as it acts. It asserts, shouts and wills, but it has no power to impose. It is a performance, a creation—but only of meaning. It is theatre, but not art. It threatens, but does not kill. It is disobedience, protest or conspiracy but not revolution.

It is a challenge to all of us, and certainly a challenge to the well-educated, literate judges and scholars whose natural form of communication is the argumentative essay. Assemblies are sometimes too messy and disorderly for a learned mind, sometimes too organised and disciplined for a free one. Still, sometimes even judges take to the streets. How do they draw the limits on this activity when pursued by others—often by radical others?

Before answering this question, the object of the enquiry needs to be defined more precisely.

II. A CONCEPT OF ASSEMBLY

There is no universally accepted definition of assembly in either jurisprudence or scholarship. The—often implicit—notions of assembly are framed by historical experience, the political and legal-doctrinal context. These will be discussed in chapter one.

However, as every investigation necessarily proceeds from some preliminary assumption about the object to be examined, it is useful to make that assumption explicit. In comparative law, the awareness of this preliminary assumption is particularly important, because a biased assumption about the object of enquiry simply derails the whole investigation from the outset. There is less space for error if this preliminary notion is too broad rather than too narrow.

In this widest possible sense, one could define assembly as the common presence of at least two persons in a common space at the same time.

In order to be meaningful, however, a concept, broad as it is, needs to be distinguished from other concepts. In human rights law, this means delineation from activities not protected by human rights, and a delineation from activities protected by human rights other than the subject of enquiry, in our case, freedom of assembly.

Some instances of people being together at the same time in the same place evidently fall outside of legal protection. This includes group violence, just as individual violence is not protected by human rights. Legal documents specifically require that the activity of assembly be *peaceful* (or peaceable), testifying to a general aversion of law to assemblies, not present with regard to other, typically individually exercised rights. More intriguing is the question of whether any peaceful types of group

4 Introduction

behaviour, such as, for instance, standing in a queue, ought also not to be protected by freedom of assembly. *Common* presence has to imply that the persons have some *link* with each other beyond the mere coincidence of being at the same place at the same time. Thus, the link might be some *shared* activity, emotion, opinion or the like. An important question is how law defines that link, or, more precisely, how it selects what sort of link it accepts and what sort it does not. As will be seen below, different courts do not define this link in the same way, and this question is hotly contested in some countries. As to the above example, in my view, standing in a queue as such is not an assembly, but it can easily turn into one, for instance, if people outraged by the waiting time start discussing how to handle it or start protesting against it.

In contrast, it appears less problematic—and has not given rise to significant controversy in practice either—to distinguish the scope of assembly from that of the private and family life or privacy. It is assumed that some sense of privateness or intimacy brings a grouping of people within the scope of privacy rights, and freedom of assembly is reserved for more social (including political) gatherings. A family dinner or excursion, in general, falls within the right to private life, and not within freedom of assembly. Therefore, I will not deal with these instances of ‘assembly’ in this book any further. This does not mean, however, that limitation of the scope of assembly by some courts to political gatherings will not be discussed and criticised as overly restrictive.

As to the spatial element of the concept, physical assemblies differ in significant respects from ‘virtual assemblies’. Though it is conceivable that the ‘digital commons’ shares enough characteristics with the physical commons to make them a sufficiently unified object of discussion, this book only deals with offline, real-life, or physical assemblies that take up a segment of real space. In fact, this book adheres to the view that an important characteristic of assembly, from a legal point of view, is its *taking place and taking a stance*, also in the strict senses of the words.

The temporal element in the above preliminary definition is relevant because it distinguishes—at least for my purposes—assembly from association. Exercising the right to association does not cease if the assembly of the association has ended. Restrictions related to the membership in a group affect the right to association, while restrictions related to the meeting of the group affect the right to assembly. Furthermore, not only associations (or members of associations) can hold assemblies—anyone can. Thus a temporary bond between participants already establishes a claim to freedom of assembly, but not to freedom of association. This might be commonsense for a European audience, but it is not in the United States. For instance, John D Inazu has written a book about freedom of assembly according to its title, but often discusses issues pertaining to freedom of

association in the European and international understanding.¹² Inazu is justified in applying ‘assembly’ in this broader sense because that offers the most effective way for criticising the ‘expressive association’ doctrine of the Supreme Court, and because association is not mentioned in the First Amendment. However, as both assembly and association do appear in most European and international human rights documents, this (comparative) book will follow this more widespread use of the concepts, although without claiming that the two rights are not closely related, or that their relationship is fully clarified.

While for most audiences, the distinction between association and assembly is fairly clear, it is much more difficult to differentiate assembly from *expression*. Later on, this confusion will play a central role in my argument. Here it suffices to explore only how the collective, spatial, and temporary nature of assembly contributes to the *specificities of expression* on such occasions. For that, it is useful to differentiate between types of assemblies, although the categories are not exact and most assemblies are a mix of these types.

First, collective expression at *demonstrations* is generally of the sort which is proclamative rather than argumentative, and aims first of all at exerting *pressure* by the sheer significance of the *number* of people present. Assembly is essentially about quantity, and particularly so in a democracy. Furthermore, demonstration-type assemblies not incidentally make use of material objects and symbols of all kinds: material and symbolic aspects are an essential component of generating and conveying expression via the specific form of assembly. Symbols at an assembly are not only *rhetorical* (which is regularly the case with most types of expression), but importantly are also *material* (such as flags, placards, uniforms, effigies, fire, etc) and *bodily, including visual and aural* (such as marching in formation, specific hand gestures, chaining yourself to a fence, dancing, shouting and chanting loud slogans and songs, etc). Assemblies also often make use of the symbolic potential of specific places or dates: the spatiality¹³ and temporality of an assembly might be expressive.

The message at demonstrations largely falls within a few recognisable categories: protest, dissent, outrage, grievance, joy, threat, hate, empathy, commemoration and other *emotionally laden and moral* content. Most demonstrations have a central purpose of addressing the rest of society and government, because participants feel their cause is *particularly important*

¹² John D Inazu, *Liberty's Refuge. The Forgotten Freedom of Assembly* (New Haven, Yale University Press, 2012), for instance, discusses state interference within the membership of a group, especially ch 4.

¹³ Timothy Zick, *Speech Out of Doors, Preserving First Amendment Liberties in Public Places* (Cambridge, Cambridge University Press, 2009).

and worthy of public attention.¹⁴ Such expression is naturally *committed, animated, agitated, often disruptive*, and so on, perhaps best contrasted with the scholarly expression of a mathematician or the disengaged scientist in the positivist fashion.

It is these characteristics that have led many commentators, as mentioned, especially in the tradition of crowd psychology, to see protesting ‘masses’ as *by nature* irrational, dangerous, and prone to violence, as a place where the individual loses his capacity to reason.¹⁵ It remains certainly—and relevantly—true that more people can generally cause more destruction than a single individual, and in that sense, assemblies are potentially more dangerous than individuals. Still, most of these early assumptions were later shaken by research in social psychology. The ‘deindividuation’ hypothesis¹⁶ collapsed when tested empirically:¹⁷ there is no mass mind, neither is there any automatic irrationality or anti-normativity in ‘crowds’. Mainstream social psychology—in particular, social identity theory—shows that persons in a ‘mass’ (in fact, a group) follow group norms which make group identity salient in the particular situation. Participating in a group enables a switch from norms related to personal identity to situational norms related to group or social identity.¹⁸ Thus, crowd behaviour—though different from individual behaviour—is still rational in that it follows a norm (although of course the norm might be murderous, destructive, invidious or simply mistaken).

The second type of assembly with regard to expression is a ‘meeting’. Meetings, as opposed to demonstrations, are occasions for collective expression in the sense of *deliberation and discussion*. These assemblies have—compared with demonstrations—an inward tendency: the participants are engaging first of all each other, not the outside world. Meeting-type or deliberative assemblies might make less use of symbols, be less emotionalised (though not necessarily), and are thus often seen as less

¹⁴ Charles Tilly describes social movements by characteristics of ‘WUNC’ symbols, ie showing worth, unity, number, and commitment. Charles Tilly, *Social Movements, 1768–2004* (Boulder, Paradigm Publishers, 2004).

¹⁵ With different overtones, see the works of Le Bon, McDougall or Freud, above n 2.

¹⁶ Eg Leon Festinger, A Pepitone and T Newcomb, ‘Some Consequences of De-individuation in a Group’ (1952) 47 *Journal of Abnormal and Social Psychology* 382; PG Zimbardo, ‘The Human Choice: Individuation, Reason, and Order vs Deindividuation, Impulse and Chaos’ in WJ Arnold and D Levine (eds), *Nebraska Symposium on Motivation*, vol 17 (Lincoln, NE, University of Nebraska Press, 1969) 237; E Diener, ‘Deindividuation: The Absence of Self-Awareness and Self-Regulation in Group Members’ in Paul B Paulus (ed), *Psychology of Group Influence* (Hillsdale, Erlbaum, 1980); S Prentice-Dunn and RW Rogers, ‘Effects of Public and Private Self-awareness on Deindividuation and Aggression’ (1982) 43 *Journal of Personality and Social Psychology* 503.

¹⁷ Tom Postmes and Russell Spears, ‘Deindividuation and Antinormative Behavior: A Meta-Analysis’ (1998) 123 *Psychological Bulletin* 238.

¹⁸ Steven Reicher, Russell Spears and Tom Postmes, ‘A Social Identity Model of Deindividuation Phenomena’ in Wolfgang Stroebe and Miles Hewstone (eds), *European Review of Social Psychology*, vol 6 (Chichester, Wiley, 1995) 161.

dangerous by law (this is, eg the case in France and Germany). Note however that conspiracy needs exactly this kind of assemblies, and that social psychology shows that intra-group discussion enhances hostility towards other groups.¹⁹

Often, meetings do not primarily *aim* at expression, but have a different focus (most importantly, religion, but also other activities such as artistic, sport, recreational, or any other activity). However, when the state intervenes into their business, it will generally be related in one way or another to expression: if nothing else, then state intervention will relate at least to *potential expression of group identity through shared activity*.²⁰

A final type of collective expression in an assembly, in my view, is the interaction between a lone demonstrator or performer and her audience. Here the observable expression *stricto sensu* is not necessarily collective (though the audience might react to the performer); still, the event as such is fundamentally collective and expressive at the same time.

These three types of collective expression—demonstration, meeting and performance—are easily mixed with each other in many ways. Meetings and demonstrations might come about at the initiation of a speaker or performer. Meetings (of the organisers or the core) might precede or follow demonstrations (of the larger public). An assembly might have deliberative (introverted) and demonstrating (extroverted) parts as well (such as an open-air film screening and discussion within the context of a Pride Parade). Or it might even not be possible to distinguish these aspects from each other (such as the Occupy movement's many assemblies, in fact demonstrating deliberation). That is one of the reasons why the different jurisdictions examined below apply diverging categorisations of assemblies.

In sum, I consider the contemporaneous common presence of at least two persons in a common space to be an assembly. From among these assemblies, the book—in line with jurisprudence—will not deal with those which are so intimate that they are better protected by the right to private and family life.

Furthermore, this book takes the stance that the so-conceived ('public') assembly is always at least potentially expressive, either in the sense of creating or in the sense of conveying a socially comprehensible meaning, something all of us easily understand and potentially internalise. Sometimes, for that creation or conveyance to come about, an assembly looks essentially like a theatre, a symbolic re-enactment, carefully set in place and time.²¹ In

¹⁹ Laura GE Smith and Tom Postmes, 'Intra-Group Interaction and the Development of Norms which Promote Inter-Group Hostility' (2009) 39 *European Journal of Social Psychology* 130.

²⁰ This is very aptly shown by Inazu, *Liberty's Refuge*, above n 12.

²¹ Eg Matthias Reiss (ed), *The Street as Stage: Protest Marches and Public Rallies Since the Nineteenth Century* (Oxford, Oxford University Press, 2007); Baz Kershaw, 'Fighting in the Streets: Dramaturgies of Popular Protest, 1968–89' (1997) 13 *New Theatre Quarterly* 255.

this regard, an assembly is certainly strategic,²² but not more than a theatrical play, an opera, Hundertwasser or Dalí. Or, for that matter, the rhetoric of a politician, the most sacred object of freedom of speech. Some prefer to read Shakespeare, but most prefer to see it—partly because that is also re-enactment. As the circle of creation and conveyance is complete, there is no way to claim that what has acquired a meaning in social interaction somehow does not convey it. Still, as I will try to show below, courts often exactly claim that.

That means that this book contends that freedom of expression doctrines are framed in a way that leaves out an important bulk of actual expression, and denies it the protection of rights without justification. This is especially true about the United States, which comparative lawyers traditionally cherish as the world champion of freedom of expression. But it is also true, to a large extent and for different reasons, of Germany, France and the United Kingdom. The European Court of Human Rights—after an initial period of almost complete disregard for the value of freedom of assembly—has recently strengthened protection of assemblies as much as perhaps an international court can.

III. STRUCTURE

In order to reveal general problems in the nature of freedom of assembly, a sufficiently wide pool of comparative material is necessary. It still has to remain reasonably narrow in order to be manageable, and to avoid falsely attributing problems to assembly which arise from systematic deficiencies elsewhere in a legal order. Therefore, this book deals with generally well-functioning, human rights respecting democracies, and maps even among them only the representatives of influential constitutional traditions. It will analyse in detail the assembly-related jurisprudence of constitutional and supreme courts and quasi-judicial bodies of the United Kingdom, France, the United States and Germany. The jurisprudence of the European Court of Human Rights adds an international dimension. Especially in cases where the European Court proves either especially cautious, or especially rights-protective, it is reasonable to suspect a general problem or pattern less visible from within the legal order of the nation state.

In discussing the particular issues in each of the jurisdictions, hard choices had to be made as to the order of discussion, that is which court to consider first and which next. Mostly, I sought to start with the court where the particular issue has been especially controversial or where the court

²² Maybe even in the—negative—sense associated with strategic as opposed to communicative action by Habermas. Jürgen Habermas, *The Theory of Communicative Action* (Thomas A McCarthy tr, vol 1 1984, vol 2 1987, Boston, Beacon Press).

had created a model or determined the conceptual frame in an influential way. Often, but by far not always, I begin with the US Supreme Court, and rarely if ever with the French Constitutional Council or the Conseil d'État. The German Federal Constitutional Court and courts in the United Kingdom are mostly in the middle, and sometimes are the starters, while the European Court of Human Rights is always the last for reasons of its internationality. I also do not insist on finding, or inventing, answers to each question, to each issue examined in every jurisdiction; rather, I have sought to find the answers only where they exist. This method is justified in a project aspiring to form a general view of the nature of freedom of assembly by examining arguments that judges actually employ and weigh in their reasoning.

A caveat: the many important questions of practical policing of—especially unpeaceful—assemblies are largely left out of the scope of this study, not least because these are traditionally seen as issues pertaining not to the right of assembly, but to right to life, bodily integrity, right to liberty, and so on. This omission is not meant to imply that some of these aspects could not be conceptualised as interferences with freedom of assembly as well, or that they could not rightly be the object of another enquiry.

Chapter one discusses origins, forms and values of assembly in order to provide a general framework for discussion. The remaining chapters deal with the limits of the right to freedom of assembly, which often coincide with the limits of freedom of expression. Chapter two discusses prior restraints on assemblies and shows that, tellingly, this is an area where assembly is not reconfigured as speech by courts. Chapters three to five analyse 'substantive limits', that is those values which are considered so important that they prevail over assembly. Substantive limits include the prevention of violence, disorder or crime (chapter three); prevention of coercion, direct action and disruption (chapter four); and the protection of dignity (chapter five). There is no separate chapter examining the protection of property as a limit on freedom of assembly because issues pertaining to it are either covered in chapters three and four or are conceptualised as restrictions on the place of an assembly. The remaining chapters discuss restrictions related to the time (chapter six), manner (chapter seven) and place (chapter eight) of assembly, and claim that those issues (sometimes seen as secondary, as 'modality', 'speech plus', or 'conduct') belong equally to the core of freedom of assembly as the 'substantive' issues. The Conclusion provides an assessment of the comparative findings, an evaluation and critique, and suggests a path forward for jurisprudence in this unduly neglected area of law.