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## Comparative Freedom of Assembly and the Fragmentation of International Human Rights Law

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Assuming that the issue of fragmentation of international human rights law can also be usefully examined in the case-law on particular rights using a comparative method, this article examines the divergence and convergence of freedom of assembly guarantees and jurisprudence in international fora. It finds that some identified divergences in fact point to underlying common concerns and assumptions about assemblies. On this basis, the article argues that the fragmentation discourse is prone to structurally analogous, though “reverse”, fallacies as the methodology of comparative law. In particular, the functionalist method is much criticised for being apologetic or trapped within one’s own conceptual and institutional system, a concern which might be present in the fragmentation debate as well. The article concludes on this basis by formulating some suggestions which might be applied to examining fragmentation in international human rights law and potentially beyond.

**Keywords:** Assembly; Fragmentation; Expression; ICCPR; ECHR; Comparative Law; Functionalism

### I. Introduction

This article examines freedom of assembly clauses and case-law of international forums in order to identify possible divergences and convergences in the level of international human rights protection, and thereby strives to add a complementary dimension to the debate of fragmentation in international law without engaging with the fragmentation literature *per se*. It is thus assumed that comparative law might contribute to this debate on international law. By comparing the specific human rights jurisprudence of different international conventions and their quasi-judicial bodies, notably the ICCPR, the ECHR, the ACHPR and the ACHR, the following is an inquiry into institutional fragmentation. It examines whether different institutions interpreting different texts produce a different level of human rights protection in analogous factual situations. Fragmentation is therefore understood to arise already from the sole fact of different institutions pronouncing differently on similar cases, i.e. not only when different institutions or regimes might clash, conflict or interact. This understanding of the concept of fragmentation is justified in the realm of human rights law, as different human rights treaties share a commitment to the Universal Declaration of Human Rights.

Freedom of assembly was chosen as it is a right proclaimed in the Universal Declaration and guaranteed in all major human rights treaties, thus it is suitable in principle for testing the phenomenon of fragmentation. It is also a right exercised, abused, and suppressed intensely all around the world. These two factors on their own merit much more scholarly attention than freedom of assembly usually receives.

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Furthermore, a specificity of freedom of assembly is that it does not have such extensive case-law as its cognate right, freedom of expression. This is because courts often reconfigure assembly issues into expression issues. Consequently, freedom of assembly also attracts relatively little attention from comparative law scholars. Freedom of assembly lacks any grand doctrine or systematic theory even in domestic courts (except maybe the German Federal Constitutional Court<sup>1</sup>) and in domestic scholarship. It might thus be useful to compare this study's perspective with the results of Ajevski's freedom of expression paper elsewhere in this issue. The certainly incomplete, or comparatively thin, jurisprudential corpus of freedom of assembly on its own might contribute in different ways to the fragmentation discourse from, for instance, case-law on freedom of expression, religion, equal treatment or fair trial rights. Notably, in the case of an undersystematised, undertheorised, in short, understudied right there is much less opportunity for the migration or transplanting of legal doctrines, standards, interpretive ideas, etc. than there might be in the case of a more widely researched right and its case-law. In contrast, the commonalities revealed in the case of freedom of assembly might be more profound than the apparent similarities between other rights might suggest.

After a short overview of the guarantee provisions in the text of the European, American and African regional conventions and the ICCPR (section 1), this article examines a few assembly characteristic issues of interpretation which have arisen in some decisions of both the ECtHR and the Human Rights Committee (HRC) (section 2). The ECtHR has for the last two decades increasingly elaborated a significant jurisprudence on freedom of assembly, while the HRC has only a few related communications. The Inter-American Court of Human Rights has not handed down any decision on freedom of assembly. The African Court of Human and People's Rights has lately issued its very first decision<sup>2</sup> on the merits but the case was not about freedom of assembly.

The approach taken in this article is to examine only those questions which have arisen both in the HRC and at the ECtHR, while it is also telling that the Inter-American system, certainly on a continent with very lively protest movements, has not yet ruled on freedom of assembly. The assumption is therefore that the level of fragmentation ought to be examined only in areas which are actually problematised in these jurisdictions. These common areas are likely to expand in the future as the jurisprudential corpus grows. However, for now, the freedom of assembly issues which emerge as commonly significant in both of these jurisdictions can be reduced to three questions: (i) the peacefulness requirement as a determinant of the scope of the right to assembly (section 2.1); (ii) the question of advance notice or permit (section 2.2); and (iii) the relationship between freedom of assembly and freedom of expression, the most confounding conceptual issue in the area of expressive rights (section 2.3).

The concluding section assesses the particular divergences and convergences found, and also provides a broader assessment in light of the fragmentation claim. It concludes, at least in relation to freedom of assembly – and contrary to the suggestion of the introductory study – that it is not necessarily the divergence of doctrines, tests, and justifications,<sup>3</sup> let alone texts, but outcomes and underlying assumptions that matter for the purposes of fragmentation scrutiny. Furthermore, the fact that it is – though substantively an article on international human rights law – methodologically a comparative law exercise, shows up potentially fruitful further questions for research in the field of the fragmentation of international law. I conclude with a general suggestion that scholarship about this fragmentation could benefit from methodological debates in comparative law, and it might be especially warranted to use the critique of functionalism in comparative law as “an inverted mirror” in which the

potential fallacies and overreach of the fragmentation approach might be more easily identified.

## II. Texts

The provisions of the conventions on freedom of assembly are reproduced in [Table 1](#).

## III. Similarities: Structure, Aims, Derogation

The texts of three assembly guarantees (ECHR, ICCPR, ACHR) are similar in that the scope of freedom of assembly covers only peaceful assemblies, which means that non-peaceful assemblies are not protected. Exactly what that means will be clarified below. The Banjul Charter does not mention peacefulness in the guarantee of freedom of assembly.

Common limits are also to be found in the texts, for example, that the treaties only allow restrictions which are “necessary in a democratic society” (in the African instrument, only “necessary”) in the interests of certain legitimate aims. The structure of international human rights norms is thus clearly converging. Among the listed aims common to all four documents are national security, public safety, the protection of health or morals, and protection of rights and freedoms of others.

Finally, none of the examined conventions considers freedom of assembly a non-derogable right, it is included neither in ECHR, article 15, ACHR, article 27(2) nor ICCPR, article 4.

## IV. Differences

### *Formulations of the guarantee*

Concerning the guarantee of the right to assembly, the ECHR, similar to the UDHR, proclaims that “everyone has the right to freedom of peaceful assembly”, the Banjul Charter, article 11 states that every individual has the right to “assemble freely with others”, while in the ICCPR and the ACHR “the right of peaceful assembly shall be recognized.” This latter formulation implies a weaker obligation<sup>4</sup> than the others. Apart from this difference, the ACHR adds “without arms” to “peaceful”, which is similar to the formulation of, for example the German Basic Law, article 8.

### *Limits of the right (lawfulness and legitimate aim of the interference)*

As to the form of the restriction, the ECHR and the Banjul Charter require that it be prescribed/provided for by law, while the other conventions only state that the restriction conforms with the law, apparently meaning that administrative decisions having some basis in formal law would also suffice. In practice, however, it is clear that the ECtHR has relaxed this requirement. No formal legislative act is required, but the norm in question has to conform to certain substantive criteria of predictability and foreseeability.<sup>5</sup>

Apart from those mentioned above, legitimate uses of the restriction include the prevention of disorder or crime under the ECHR and public order under the ACHR and the ICCPR. At first sight, the European text appears narrower, but in interpretation the ECtHR relaxes this requirement to the extent that the different textual versions are indistinguishable in practice. There is basically no imminence or immediacy requirement,<sup>6</sup> and the concept of disorder is also widely understood in Strasbourg.<sup>7</sup>

Table 1.

ICCPR: Article 21	ACHR: Article 15	ACHPR: Article 11	ECHR: Article 11
The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order ( <i>ordre public</i> ), the protection of public health or morals or the protection of the rights and freedoms of others.	The right of peaceful assembly, without arms, is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.	Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.	Everyone has the right to freedom of peaceful assembly (and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

*Authorisation for restrictions as to the personal scope of freedom of assembly*

The ICCPR allows for the imposition of lawful restrictions on members of the armed forces and the police in their exercise of freedom of association (article 22), but not on freedom of assembly (article 21). It does not contain any such authorisation for limiting the political rights of aliens either. ICCPR, article 25 contains some rights for citizens only, however, freedom of assembly is not one of them, so any restriction has to be justified under article 21(2).

The ECHR, article 11 specifically allows “the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.” Article 16 states that article 11 does not hinder a state in restricting the political activity of aliens. The ACHR does not contain a specific authorisation to restrict the political rights of aliens, police, or armed forces. The Banjul Charter does not explicitly authorise person-specific restrictions, but arguably the various duties in Chapter II – in future interpretation – might place a heavier burden on groups mentioned in other texts.

## V. Fragmentation of Texts – Consumed by Interpretation?

The studied conventions share similarities but differ strikingly in other respects. There is fragmentation even within the substantial differences: for example, in the question of the political rights of aliens, police, and armed forces, applicable standards clearly diverge. Though the ILC report on fragmentation<sup>8</sup> might be taken to be concerned with textual differences, human rights scholars do not appear to be worried about them. This silence signifies a shared understanding that human rights norms are largely immune to a strict textual interpretation, and can be molded according to higher interpretive techniques, such as purposive, teleological and dynamic interpretation or the understanding of the convention as a living instrument. In some cases, general (not assembly-specific) interpretation clearly reduces these differences, such as the requirement of “prescribed by law”. In other cases – such as specific authorisation to limit the rights of the police, armed forces or foreigners, or with the exclusion of armed assemblies – the rationales behind the specific limits might be easily taken into account in interpretation (in proportionality analysis) even if the text does not explicitly state them. The next section examines to what extent this assumption holds true with regard to selected leading cases.

## VI. Interpretation

Fear of particularism, including fragmentation, arises solely from the fact of parallel institutions, regardless of the text. Parallel institutions run the risk of diverging interpretation even where the underlying texts match exactly, and can produce converging interpretation even where the texts are different (perhaps within the bounds of avoiding, at least on the surface, a *contra legem* interpretation).

The IACtHR and the ACtHPR have not ruled on the freedom of assembly so there is no jurisprudence to compare. The ECtHR has an increasing corpus of article 11 case-law, though it also started quite late, and it was actually not until 1991 that it found a violation. The HRC has only a handful of cases under article 21. The jurisdictions, thus, though to a differing extent, share a certain moderation when it comes to freedom of assembly. Freedom of assembly is not at the centre of litigation, despite the fact that assemblies are ongoing all over the world, and it would be absurd to claim, for example, that the European continent clearly experiences more (controversial) assembly activity than its American counterpart.

It is most likely that there are cases on assemblies decided under different rights provisions – prime candidates are right to life, liberty and freedom of expression – in each of the jurisdictions. (Note that none of the freedom of expression cases at the IACtHR involved assemblies.) Here, analogous issues arising under the parallel articles in each convention are compared in order to reach some conclusions as to the fragmentation claim. I shall start the analysis with the ECtHR as it has the most elaborate jurisprudence. This does not imply any preference or priority in terms of substance or quality, but is simply done for reasons of quantity and thickness of jurisprudential layers.

## VII. Peaceable and Peaceful as Delimitation of the Scope of the Right

### *The ECtHR's stance on peacefulness*

Article 11, similar to most other national and international instruments, protects only the freedom of peaceful assembly. The ECHR offers substantive review in this regard; the *Stankov*<sup>9</sup> decision at least testifies to such an approach. In this case, the Bulgarian Government argued that the ban on demonstrations organised by the United Macedonian Organisation Ilinden was not an interference since the planned demonstrations would not have been of a peaceful nature. The ECtHR reiterated that article 11 only protects peaceful assemblies, but that a peaceful character is only foregone if the organisers and participants have violent intentions. On the facts of the case, the Government could not reasonably conclude that the planned demonstrations would be non-peaceful. The *Stankov* decision is one example of substantive review which appears to stand in contradiction to several earlier inadmissibility decisions handed down by the Commission. *Chappell*<sup>10</sup> and *Pendragon*,<sup>11</sup> for example, both included complete blanket bans around Stonehenge for the period around the summer solstice. The Commission did not find it problematic that the cause of the danger of disturbance concededly lay outside the sphere of action of the applicants. Therefore, their right to freedom of assembly (and religion) was interfered with without any fault on their part. Remarkably, the Commission did not adhere to the relevant *dicta* of *Plattform "Ärzte für das Leben"*,<sup>12</sup> according to which states are required to take reasonable measures to prevent the violent behavior of others threatening an of itself peaceful assembly. The Chappell–Pendragon line of inadmissibility seems also to conflict with earlier decisions of the Commission itself: in a 1980 case, *CARAF*,<sup>13</sup> it stated that,

The possibility of violent counter-demonstrations or the possibility of extremists with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organizing it, such procession for this reason alone does not fall out of the scope of Article 11 (1) of the Convention.

In this case, a planned antifascist procession was caught up by the general ban on processions in a certain area of London. The Commission accepted the ban as justified because earlier protests by the National Front had resulted in serious damage to persons and property which even large contingents of police could not prevent. In this case, therefore, the peaceful antifascists were restricted in their assembly rights because of previously non-peaceful others. Unlike in *Chappell* and *Pendragon*, the application was not found to be outside the scope of article 11.

That such an application would be manifestly ill-founded today is confirmed by the *Ezelin*<sup>14</sup> jurisprudence: there the court required that a person be punished only if he himself



committed some reprehensible act, which has since been reaffirmed, *e.g.* in *Galstyan v Armenia*.<sup>15</sup> *Ziliberg v Moldova* is also a case involving a demonstration which gradually turned violent, but where there was no indication that the applicant participated in the violence; he was still fined for participating. The court emphasised that<sup>16</sup>

an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.

How sporadic is “Sporadic” is of course open to interpretation, and one should not rush to conclude that such demonstrations can be only dispersed where each and every participant is violent.

On the other hand, under *Plattform “Ärzte für das Leben”*<sup>17</sup> the possibility of violent counter-demonstrations is not a reason to ban a demonstration: “[T]he authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens.”<sup>18</sup> It is also settled case-law that an unlawful situation does not justify an infringement of freedom of assembly,<sup>19</sup> certainly there is no possibility to interpret non-peacefulness as simple unlawfulness. Furthermore – and unlike in cases of freedom of expression, where *e.g.* Holocaust denial<sup>20</sup> falls under article 17 – abuse of rights does not figure in the jurisprudence. The ECtHR has not ruled that certain viewpoints may in themselves amount to an abuse of the right *to assembly*, or are inherently unpeaceful.<sup>21</sup> This is a question which arose with regard to the ICCPR which is discussed next.

#### *The Human Rights Committee on peacefulness*

During the drafting of the ICCPR, there was discussion about the definition of “peaceful”, and whether it should be changed to “peaceable” (*pacifique* or *paisible* in French, compare also “the right of the people peaceably to assemble” in the First Amendment to the US constitution).

This relates to the question of whether peacefulness is a substantive or a modal question. As mentioned above, the ECtHR clearly understands it as a question of modality: the (intention of) violence has to be overwhelming for the assembly to lose its peaceful character, independent of the theme or the political stance of the participants.

During the drafting process of the ICCPR, the Soviet Union wanted to exclude assemblies (or any activities) of fascist or antidemocratic movements from the protection.<sup>22</sup> This approach was rejected, however, and no specific substantive stance lies outside the protection of article 21.

In accordance with the modal approach, the HRC urged the Russian Federation (in 2003) to revise its law on “extremist activities” for being too vague to comply with article 21.<sup>23</sup> Similarly, with regard to Hong Kong, the Committee criticised the definition of treason and sedition for being too vague with reference to article 21.<sup>24</sup>

The positive obligation of the state to protect the peaceful character of an assembly – especially against violent counter-demonstrators or the provocation of others, including the police – is also recognised by the HRC.<sup>25</sup>

Again, similar to the ECtHR (see *Ezelin v France*, above), the HRC imposes the principle of individual responsibility in a different formulation: with regard to Canada, it stated<sup>26</sup> that

the State party should ensure that the right of persons to peacefully participate in social protests is respected, and ensure that only those committing criminal offences during demonstrations are arrested.

This formulation shows that it is individual participation that can be peaceful or non-peaceful, the assembly as such is not a homogeneous unit of reference.

#### *Fragmented in peace*

In sum, there is consensus under both the ECHR and the ICCPR that assemblies which lose their peaceful character do not fall under the scope of protection of the right to assembly, and thus can be limited without fulfilling the justification requirements in article 11(2) and article 21(2).

There is also a tendency in both jurisdictions to narrow those cases which render an assembly non-peaceful, thus depriving it of human rights protection. Both jurisdictions recognise the positive obligation of the state to protect the peaceful character of an assembly. In different terms, in effect both the HRC and the ECHR uphold the principle of individual responsibility with regard to assemblies considered non-peaceful and those upon which sanctions can be imposed.

#### VIII. Prior Notice or Permit: Restriction, Determinance of Scope, and Exceptions

The ECtHR appears not to consider that the requirement of prior notice or a permit might be a restriction on the right to freedom of assembly.<sup>27</sup> Notice or the application for a permit is seen as a tool to realise the state's positive obligation to secure freedom of assembly or enabling an assembly to occur, or even "not to use powers that [the police] may validly have (for instance, of regulating traffic) to obstruct the event."<sup>28</sup>

However, this does not prevent the court from gradually carving out some reasonable exemptions from the notice requirement. It requires states not to disperse assemblies for the sole reason of their being unnotified,<sup>29</sup> and acknowledges the right to spontaneous or "urgent" demonstrations, at least as an immediate response to a political event.<sup>30</sup>

The HRC, on the other hand, appears to consider prior notice or a permit to be a restriction for the purposes of article 21 inquiry, but it accepts that it may be justified. In the leading case on article 21, *Kivenmaa v Finland*, the Committee explicitly contemplates that "a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant."<sup>31</sup> Thus advance notice is clearly considered an interference with the right.

In a case against Russia, the Committee found that serial denials of permission to hold a picket at different suggested locations were in violation of article 21.<sup>32</sup> In a case against Belarus, a former opposition leader successfully argued that the non-issuance of a lawyer's licence because of participation at an unauthorised, but peaceful, rally violated both his right to freedom of expression and to freedom of assembly.<sup>33</sup> Though the Committee did not examine the authorisation requirement, it concluded that the sanctions imposed on the applicant were not justified or necessary for either freedom of expression or freedom of assembly.

Thus, despite the fact that the Committee does not operate a spontaneous demonstration clause, it might arrive at the same conclusion as the ECtHR, especially when the notice

system is misused by government. In effect, in these cases the violation lies in abusively denying a permit or disproportionately sanctioning the holding of an assembly without prior notice or permit.<sup>34</sup> These are exactly the concerns animating the decisions in *Oya Ataman & Bukta* at the ECtHR.

Another way of avoiding the burdens flowing from assembly laws in both jurisdictions is the pronouncement of the applicability of freedom of expression instead of freedom of assembly, as will be discussed next.

#### IX. Conceptual Issues: The Relation to Freedom of Expression

Conceptualities and, more specifically, the relation between freedom of expression and freedom of assembly are neuralgic questions in every jurisdiction aware enough to take these rights seriously. The following comparison should thus be seen as providing a snapshot at the crossroads of institutional fragmentation and the overlap of the scope of rights (“Grundrechtskonkurrenz”).

#### X. The ECtHR on the Relation between Assembly and Expression

The ECtHR only lately contended explicitly that the freedom of assembly, just as its twin-right of association in article 11,<sup>35</sup> has an autonomous meaning under the Convention.<sup>36</sup> The Commission has already noted, and the court has since embraced as a constant reference that “freedom of assembly covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions;”<sup>37</sup> it can be exercised both by individuals and those organising the assembly.<sup>38</sup> Most probably, however, it does not cover *ad hoc* or accidental gatherings of people without a purpose, or for purely social purposes.<sup>39</sup>

Protests and direct action where only one or a few participants appear are covered by the freedom of expression right of article 10.<sup>40</sup> Article 11 is in general considered *lex specialis* to article 10, thus article 10 doctrine can always apply to assemblies, while the connection is not valid the other way around.

Contrary to some national jurisdictions (notably the United States<sup>41</sup> and Germany<sup>42</sup>), the ECtHR does not apply any modality doctrine which would allow for greater restriction on the “form” of expression (including forms of assembly, such as marching or other conduct) than on their “content” or “substance”. In relation to the press, the court declared in 1991 that “not only the substance of the ideas and information expressed, but also the form in which they are conveyed” is protected by Article 10.<sup>43</sup> In 2009, the court expressly applied this doctrine to an assembly advocating reproductive rights on a boat off the Portuguese shore which was prevented from entering territorial waters by a war vessel. A demonstration held on a boat in the territorial waters of a state was considered by the court to be a “mode of diffusion of information and ideas”, restrictions on which, in certain situations, “can affect in an essential manner, the substance of the information and ideas in question.”<sup>44</sup>

In these cases, the ECtHR is thus unequivocally clear about the meaning generating function of the modalities (be they of assemblies or of other expressive activities). Nevertheless, the court recently contended that “even otherwise protected expression is not equally permissible in all places and all times.”<sup>45</sup> “Interference ... might be legitimate when the particular place and time of the otherwise protected expression unequivocally changes the meaning of a certain display.”<sup>46</sup> Thus, context and circumstances matter. The case of *Fáber v Hungary* concerned the removal, detention and administrative fine resulting from the display

of an Arpad-striped flag (an old Hungarian flag used by the arrow cross movement in World War 2) at a site where Jews were murdered in great numbers by the Danube in Budapest during World War 2. The court found article 11 (including notice requirement) inapplicable, but found a violation of article 10. Notably, the removal of the flag could not be justified under any provisions of para 2, as it was a lawfully displayed flag with multiple meanings and, in the present case, was not used to identify with a totalitarian regime.

Another recent decision against Hungary implies a clear distinction between expression and assembly for the purposes of fundamental rights restriction. The case involved a two-person performance beside the Hungarian Parliament consisting of hanging out several items of cloths on a fence, symbolising the Nation's "dirty laundry", in protest against the political crisis ongoing since 2006. The performance lasted only a few minutes, was followed by a dialogue with journalists, and then ended. The performers were later fined for "abuse of freedom of assembly" as they had not notified their "demonstration". The court dismissed the government's argument that the performance was to qualify as an assembly, which falls under the assembly law, and can be subjected to a requirement of prior notice. On the contrary, the ECtHR doubted that such a short two-person "event could have generated the gathering of a significant crowd warranting specific measure on the side of the authorities."<sup>47</sup> Had the specific measure been warranted, freedom of assembly (instead or alongside freedom of expression) would have been applicable, which would have allowed for the imposition of a notification requirement.<sup>48</sup> By requiring advance notice for the 13-minute, 2-person performance, however, "[t]he national authorities' approach to the concept of assembly does not correspond to the rationale of the notification rule."<sup>49</sup> The rationale of the notification rule is the effective coordination and facilitation of assembly, the prevention of public disorder or the protection of the rights of others. The lack of these specific concerns rendered the short, 2-person performance under article 10 instead of article 11. This confirms the fall-back nature of article 10 (or the *lex specialis* status of article 11) as developed in earlier case-law, and implies that for the assembly law to "kick in" some additional, specific concerns are required. In this regard, freedom of assembly is considered a freedom of expression discounted by the mentioned police powers, a kind of "freedom of expression minus".

This view is strengthened by another already mentioned, otherwise very much rights protective decision from 2009.<sup>50</sup> In this case, a vessel providing information about abortion and family planning ("*Women on Waves*") was denied entry to the territorial waters of Portugal. The ECtHR found the issue best and sufficiently examined under Article 10, because the principal grievance consisted of the denial of "their right to inform the public about their stance on abortion and women's rights in general." (§ 28) The court explicitly stated that article 10 "protects equally the mode of diffusion of ideas and opinions" (§30).

In sum, it appears that the ECHR (i) is willing to recognise the expressive potential of the "modalities" of an assembly, but that (ii) it still might allow heavier or different restrictions on assemblies than on speech, if those restrictions correspond to the additional externalities of assemblies.

#### XI. Relation of Assembly and Expression under the HRC Jurisprudence

The HRC appears also somewhat confused over the issue of the relation of articles 19 and 21, freedom of expression and freedom of assembly. The Committee sometimes rejected the assembly claim, but declared the claim admissible under freedom of expression.

*Coleman v Australia* involved a condemnation for taking part in a public address (a one-person political speech in a mall of about 15–20 minutes' duration) without prior written permit from the town council.<sup>51</sup> The complainant argued that the conviction violated article 21 and article 19. The HRC declared the article 21 part of the complaint was inadmissible for lack of substantiation, but found a violation of article 19, for unnecessary restriction.

In one of its few cases on article 21, *Kivenmaa v Finland*, the HRC faced the question of a “protest in a cheering crowd”, i.e. a situation where a minority in an audience engaged in a protest performance while the others were merely onlookers of an event against which the complainants protested. Ms. Kivenmaa, together with 25 other members of the Social Democratic Youth Association, went into a crowd gathering next to the Presidential Palace on the occasion of a visit of a foreign head of state. They distributed leaflets and raised a banner critical of the human rights record of the visiting head of state. She was charged with holding a public meeting without prior notice. Domestic courts found that Ms. Kivenmaa's group was distinguishable from the crowd, and thus she could be considered to have organised a public meeting. She claimed, among others, that articles 19 and 21 ICCPR have been violated. The Committee, though not denying that the requirement of notice for a demonstration may be justified, found “*evident* from the information provided by the parties that the gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State party authorities, cannot be regarded as a demonstration” (emphasis added).

The claim of the state, that displaying a banner turned the presence of Ms. Kivenmaa's group into a demonstration, was rejected by the Committee with the argument “that any restrictions upon the right to assemble must fall within the limitation provisions of article 21. A requirement to pre-notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Consequently, the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant” (§9.2).

This reasoning is, at the very least, unclear, if not manifestly incomprehensible and illogical.<sup>52</sup> At the very least, the Committee should have accepted that it was a demonstration and that, as such, it might be subject to six hours' notice, but in this case the notice requirement was not necessary, or that – as the ECtHR sometimes rules – the lack of notice did not authorise the dispersal of the demonstration, or the prevention of Ms. Kivenmaa continuing her protest, including raising the banner. Bidault speculates that considerations of non-discrimination might have animated the Committee not to accept that the protesters were a demonstration.<sup>53</sup> I would further translate these as concerns over content neutrality which disprove additional burdens flowing from the categorisation of being an assembly, while the others, of an opposing mindset, are only categorised as spectators, spared from any administrative burden.

#### *Different doctrine, similar assumption*

Before forming more determinate conclusions on the background considerations which might have animated the curious (and sparse) reasoning in *Kivenmaa*, a parallel case at the ECtHR is worth examining. *Chorherr v Austria* is factually analogous, though it did not turn on conceptual issues in relation to speech, and was considered solely under the free expression guarantee – what often and tellingly happens to assemblies. The case involved a military parade where applicants went in with placards and leaflets to protest against Austria's

acquisition of interceptor fighter planes. Pacifists slightly interfered with the view of a few parade-watchers, causing some commotion among the spectators (though if they moved away, they could see fully). Applicants were removed from the scene, and later convicted for administrative offences against public decency and breach of the peace. They claimed violation of article 10 at Strasbourg, and did not invoke freedom of assembly at all. The ECtHR found that the restriction fell within the margin of appreciation, and was considered non-excessive to the potential disturbance Mr. Chorherr “must have realised”, and also because the measures were imposed in order “to prevent breaches of the peace and not [in order] to frustrate the expression of an opinion.”<sup>54</sup>

In my view, it could be credibly argued that this is exactly what happened in the case of Ms. Kivenmaa: she was clearly singled out for expression of a specific opinion. Of course, *Chorherr* would have been likely to have turned out differently following the Arpad flag decision at the ECtHR. Nonetheless, if the pacifists were genuinely removed not for their views, but for the commotion they caused, then maybe that which looks so different from so many viewpoints underlies a very similar consideration. If you are harassed for your opinion, then it is a violation of your free expression rights, and that violation should not be covered up and argued away in the disguise of freedom of assembly, with its potentially more extensive permissible limits (such as the requirement of prior notice). However, if you are held responsible for the consequences of your behavior, your expression rights are not violated.

On the other hand, the *Coleman* case of the HRC, involving a one-person public address, is analogous to the ECtHR decision discussed above (the Nation’s “dirty laundry performance”). The assembly claim of Mr. Coleman was dismissed, while the Hungarian government’s argument relying on freedom of assembly was also rejected in the “dirty laundry performance” case. Whether or not the HRC did something different in the *Coleman* case than the ECHR did in the “dirty laundry performance” case depends on our perspective, or, more precisely, how distanced we are when we look at the decisions. The diverging approach to the assembly claims can be either considered (i) a difference arising out of institutional fragmentation; or (ii) a wholly innocent contingency of the complaints – in one case explicitly referring to freedom of assembly next to freedom of expression, and not in the other; or (iii) a wholly innocent contingency of divergent regulation: the Queensland town requires a permit even for a one-person public addresses, while in the Hungarian case, quite to the contrary, notice could only be required if something could be qualified as an “assembly.” All these differences and contingencies however do not account for – but rather disguise – the similarity of concerns motivating the overlapping outcome, i.e. violation of freedom of expression.

## XII. Elusivity of the Debate or Elusivity of the Subject: The Comparative Lawyer’s Interpreting “Fragmentation”

From this short and in fact fragmented inquiry, four particular technical conclusions arise as to divergence and convergence.

First, with regard to the text of the guarantees in the different jurisdictions, there are partial overlaps but also some significant differences. None of them appears really to give reason to worry, in the same way as differences in constitutional texts.<sup>55</sup> Secondly, regarding the criterion of peacefulness, the jurisdictions basically display an identical interpretation, though of course the individual assessment might differ from one case to another just as it might in the opinion of a majority and dissenting judge.

In contrast, there are very clear doctrinal differences with regard to prior notice. The ECtHR does not consider it to be a restriction, while the HRC does. The ECtHR carves out exemptions from notice even while staying within article 11, while the HRC does not. Finally, as to the relation between freedom of assembly and freedom of expression, the two bodies again appear to argue very differently.

These four observations are anything but revealing for a trained eye in human rights law. The banal differences and similarities either affect the legal situation of persons or they do not. Nothing, or almost nothing, follows from them regarding the level of rights protection granted in a particular jurisdiction. The human rights scholar could, on this basis, tell not much more to the international law scholar than that the question of fragmentation is a gradual one in human rights law. Certainly there are some divergences, but they do not seem to be so overwhelming as to question the integrity of the human rights system. Alternatively, there certainly are convergences, but they do not seem to be so overwhelming as to demonstrate the unity of the human rights system. Such a conclusion, true as it is, does not provide much added value to the fragmentation discourse.

Instead, the reasons for this state of affairs need to be explained and reflected upon. As a result, the following more general considerations can be drawn from this short inquiry on the freedom of assembly.

To some extent, the divergences are technical, which might not greatly affect the actual enjoyment of the right in question. Such is the case with whether prior notice is a restriction or not, or whether the wearing of arms at an assembly qualifies that single armed participant immediately as non-peaceful, or not until the court has examined the justification, etc. The sort of fragmentation which raises concern would be a divergence in the level of rights protection in the final outcome of a case, i.e. where one could establish that a claimant would be better off had she turned to the other organ (as it was to be feared in the Norwegian religious education cases<sup>56</sup>). On the basis of the present inquiry, no such threat lingers over the freedom of assembly, though of course that could change any moment.

More interestingly, paradoxically, such divergences might bring to light hidden or unconscious but shared assumptions which are formulated in different ways in different jurisdictions.

In my view, this happens with freedom of expression. In fact, the stances the ECtHR and the HRC take on this issue do not have much in common on the surface of their arguments. Nonetheless, in both jurisdictions, these different arguments highlight the same problem, although invisible from within the jurisdiction: whether freedom of assembly is a “freedom of expression-minus” or a self-standing, independent right. This is a slightly more visible issue (but still not explicit) in the context of the First Amendment, where scholars talk about a neglected or forgotten right to freedom of assembly.<sup>57</sup> Consider the “speech plus” doctrine,<sup>58</sup> where the additional element to speech (the “plus”) merits a “minus” in the strength of protection.<sup>59</sup> From a theoretical angle, some authors argue to the contrary that freedom of assembly does not merit protection alongside freedom of expression,<sup>60</sup> in accordance with the fears of much early crowd psychology from Le Bon to Freud.<sup>61</sup> Therefore, looking at human rights jurisprudence through the lens of fragmentation might actually enhance our knowledge and reflection on the problematic nature of a specific human right.

On the other hand, this exercise about the right to freedom of assembly might be symptomatic of the limits of theorising on the fragmentation of human rights law in general: the fact that there are no cases at the IACtHR, very few at the HRC, and many, but only recently, at the ECtHR might be taken as cautionary signs that the fragmentation discourse is not to be forgetful about the methodological dangers of unreflected comparison. Maybe



international law could learn from the intense debates around the methodology of comparative law. International law, especially international human rights law, in fact, aspires to something similar to what the first methodologically conscious comparatist, Saleilles attributed to comparative law: a “droit idéal relative”, which, if properly elaborated, reveals a “droit commun de l’humanité civilisée”.<sup>62</sup> A further step in the history of comparative law aims to explicitly dispense with the sole focus on texts and formal legal rules and look for the functions that law fulfills.<sup>63</sup> Fully-fledged functionalism is, however, criticised for being apologetic of or being trapped within one’s own system or culture, or simply for misconstruing an ideal function.<sup>64</sup> Applied to fragmentation in international law, it can be hypothesised that those working within one regime or institution will transpose their own texts, concepts and rules to other regimes or institutions, which contributes to the appearance of fragmentation. It does not follow of course that there exists no real fragmentation, just as it is surely possible to formulate and research adequately some of the functions that law fulfills in every society. In some cases, however, what looks like legal fragmentation might on closer inspection turn out to be the result of factual differences, of erratic assumptions about common social problems or their weight, sheer (though inspiring) doctrinal differences having no bearing on the actual level of human rights protection, though surely they can be as they appear: true legal divergences. Certainly this plethora of results is the lesson from this inquiry regarding freedom of assembly. This might suggest that the fallacies of fragmentation discourse might be the opposite of the concerns with comparative law: comparative lawyers tend (or at least used to, classically, e.g. Zweigert and Kötz<sup>65</sup>) to see similarity and construct unity everywhere, while fragmentationists overemphasise differences and tensions. However, logically, the reverse might be true, too, but of course on a different level: ostentatious similarities, tests, doctrines, and arguments copied might in fact be only covers for divergences, legitimising the particular decision a given organ wishes to take (see, e.g., again from comparative law, Kahn-Freund or Vörös<sup>66</sup>). Alternatively, one regime might for some reason resist the smooth integration of a doctrine, test or justification seemingly identically present in another regime, and start to distort it in order to fit into its own logic (*mutatis mutandis*, Somek<sup>67</sup>). These are questions and possibilities which might potentially bear fruit when (trans)posed and examined with regard to particular issues in the fragmentation discourse of international law.

In sum, I hope to have shown through the example of freedom of assembly in this article that fragmentation discourse, if it is to be expanded into international human rights law, certainly ought take into account a wide range of intermingling contextual elements (e.g. at least in the sense of a “reverse” or inverted neofunctionalism<sup>68</sup>). These include not only the human rights texts (at the least), applied doctrines, standards, justifications, particular facts of the cases, and outcomes of decisions, but also – as we have seen – domestic regulations, and procedural strategies of the applicant and government alike.

However, this might drive the debate into another impasse well-known from (and unresolved in) comparative law. Just as comparative law is not really self-confident about where its subject starts and ends (both vertically and horizontally), studying international law from the perspective of fragmentation also makes the boundaries of international law – at least international human rights law – look uncertain. An inverted comparative law methodological awareness spills into the problem of vanishing boundaries of the subject, international law itself, as what is traditionally understood as domestic law and legal culture might need to be taken into account as well. That might be the price to be paid for the avoidance of some errors due to increased self-reflection.



## Notes

1. *BVerfGE* 69, 315 (“Brokdorf”), 1985.
2. African Court of Human & Peoples’ Rights, *Tanganyika Law Society et al. v United Republic of Tanzania*, Application Nos 09/2011 and 11/2011. Judgment of 14 June 2013.
3. See Adjevski, this issue.
4. M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, NP Engel, 2005), at 392.
5. See, e.g., *Djavit An v Turkey*, Application No 20652/92. Judgment of 20 February 2003, §65 (finding a violation for non-foreseeability).
6. D Mead, *The New Law of Peaceful Protest. Rights and Regulations in the Human Rights Act Era* (Hart Publishing, Oxford, 2010), at 361.
7. For instance, the legitimate aim of preventing disorder qualified the unhindered flow of traffic in a pedestrian area or avoiding excessive noise in Commission decisions (*GS v Austria*, Application No 14923/89. Decision on admissibility of 30 November 1992, *S v Austria*, Application No 13812/88. Decision on admissibility of 3 December 1990). The court, in a similar vein, accepted the enforced evacuation of a church occupied by protestors with the consent of religious authorities (*Cisse v France*, Application No 51346/99. Judgment of 9 April 2002), similar to a retrospective disciplinary sanction, imposed after the assembly was long over (*Ezelin v France*, Application No 11800/85. Judgment of 26 April 1991, Series A No 202) as measures pursuing the prevention of disorder.
8. M Koskenniemi, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (International Law Commission, UN Doc. A/CN.4/L.682, 2006).
9. *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, Application Nos 29221/95, 29225/95. Judgment of 2 October 2001.
10. *Chappell v United Kingdom*, Application No 12587/86. Admissibility decision of 14 July 1987.
11. *Pendragon v United Kingdom*, Application No 31416/96. Admissibility decision of 19 October 1998.
12. *Plattform “Ärzte für das Leben” v Austria*, Application No 10126/82. Judgment of 21 June 1988.
13. *Christians against Racism & Fascism (CARAF) v United Kingdom*, Application No 8440/78. Admissibility decision of 16 July 1980.
14. *Ezelin v France*, Application No 11800/85. Judgment of 26 April 1991.
15. *Galstyan v Armenia*, Application No 26986/03. Judgment of 15 November 2007.
16. *Ziliberberg v Moldova*, Application No 61821/00. Admissibility decision of 4 May 2004.
17. *Plattform “Ärzte für das Leben” v Austria*, *supra* note 12.
18. *Oya Ataman v Turkey*, Application No 74552/01. Judgment of 5 December 2006 at §35.
19. *Oya Ataman v Turkey*, §39, referring to *Cisse v France*, Application No 51346/99. Judgment of 9 April 2002, §50.
20. E.g. §53, *Lehideux & Isorni v France*, Application No 55/1997/839/1045. Judgment of 23 September 1998.
21. A close case is though the French “Gallic soup” demonstration, *Association Solidarité des Français v France*, No 26787/07. Admissibility decision of 16 June 2011. Even there, however, the court found that the discriminatory message of the demonstrators would cause disturbances to public order, and this latter fact mandated the finding of inadmissibility (manifestly ill-founded). Thus, the message was not qualified as unpeaceful, thus falling outside article 11, nor abusive of the right to assembly, falling under article 17.
22. M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, NP Engel, 2005), at 372; M Bidault, *Article 21 in Le pacte international relatif aux droits civils et politiques; commentaire article par article* (E. Decaux, Paris, Economica, 2010), at 476.
23. M Bidault, *Article 21 in Le pacte international relatif aux droits civils et politiques; commentaire article par article* (E. Decaux, Paris, Economica, 2010), at 477. Obs. fin., Fédération de Russie, CCPR/CO79/RUS, 4 November 2003, at para 20.
24. M Bidault, *Article 21 in Le pacte international relatif aux droits civils et politiques; commentaire article par article* (E. Decaux, Paris, Economica, 2010), at 477. Obs. fin., Région administrative spéciale de Hong Kong, CCPR/C/HKG/CO/2, 30 March 2006, at para 20.
25. M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, NP Engel, 2005), at 387; M Bidault, *Article 21 in Le pacte international relatif aux droits civils et politiques;*

- commentaire article par article* (E. Decaux, Paris, Economica, 2010), at 477–78. *E.g.* Obs. fin. Argentine, CCPR/CO/70/ARG, 1 November 2000, at para 13.
26. Concl. obs., Canada, CCPR/C/CAN/CO/5, at para 20, 28 October 2005. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.CAN.CO.5.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.CAN.CO.5.En)
  27. *Rassemblement jurassien & Unité jurassienne v Switzerland*, Application No 8191/78. Admissibility decision, 10 October 1979, DR 17, 108, 119.
  28. *Oya Ataman v Turkey*, Application No 74552/01. Judgment of 5 December 2006, §16 of the judgment, quoting §29 of the Opinion of the European Commission for Democracy through Law (the Venice Commission) interpreting the OSCE/ODHIR guidelines on drafting laws on freedom of assembly with regard to the regulation of public meetings, adopted at its 64th plenary session (21–22 October 2005).
  29. *Oya Ataman v Turkey*, Application No 74552/01. Judgment of 5 December 2006.
  30. *Bukta v Hungary*, Application No 25691/04. Judgment of 17 July 2007.
  31. See, e.g. *Kivenmaa v Finland*, Comm No 412/1990, 31 March 1994, §9.1.
  32. *Chebotareva v Russia*, Comm No 1866/2009, 26 March 2012.
  33. *Gryb v Belarus*, Comm No 1316/2004, 26 October 2011.
  34. A rather easy HRC case involved the conviction of two persons distributing leaflets organising an “unauthorized mass event” in Belarus does not need to be discussed in detail. See *Zaleskaya v Belarus*, 1604/2007, 28 March 2011. In *Belyazeka v Belarus*, Comm No 1772/2008, 23 March 2012, where a 30-person, peaceful commemoration of Stalinist crimes in a forest was dispersed and the organiser fined for organising an unauthorised mass event, the HRC similarly found a violation of both article 19 and 21.
  35. *Chassagnou v France*, Applications Nos 25088/94, 28331/95 and 28443/95. Judgment of 29 April 1999, 1999 ECHR 22, §100.
  36. *Tatár & Fáber v Hungary*, Application Nos 26005/08 and 26160/08. Judgment of 12 June 2012.
  37. *Rassemblement jurassien & Unité jurassienne v Switzerland*, Application No 8191/78. Admissibility decision of 10 October 1979, DR 17, 108, at 118 *et seq.*, and *Christians Against Racism & Fascism (CARAF) v United Kingdom*, Application No 8440/78. Admissibility decision of 16 July 1980, DR 21, 138, at 148, *Barankevich v Russia*, Application No 10519/03. Judgment of 26 July 2007, §25.
  38. *Rassemblement jurassien & Unité jurassienne v Switzerland*, Application No 8191/78. Admissibility decision of 10 October 1979, DR 17, 108, 118 *et seq.*, and *Christians against Racism & Fascism (CARAF) v United Kingdom*, Application No 8440/78. Admissibility decision of 16 July 1980, DR 21, 138, at 148.
  39. The Commission noted that “[t]here is ... no indication in the ... case-law that freedom of assembly is intended to guarantee a right to pass and re-pass in public places, or to assemble for purely social purposes anywhere one wishes. Freedom of association, too, has been described as a right for individuals to associate ‘in order to attain various ends.’” *Anderson v United Kingdom*, Application No 33689/96. Admissibility decision of 27 October 1997, 25 EHRR CD 172.
  40. *E.g. Hashman & Harrup v United Kingdom*, Application No 25594/94. Judgment of 25 November 1999.
  41. *E.g. Cox v Louisiana*, 379 U.S. 536 (1965).
  42. Explicitly in BVerfG, Beschluß vom 23. 6. 2004 – 1 BvQ 19/04. NJW 2004, 2814. (“Stoppt den Synagogenbau!”).
  43. *Oberschlick v Austria (No 1)*, Application No 11662/85. Judgment of 23 May 1991, §57.
  44. *Women on Waves v Portugal*, Application No 31276/05. Judgment of 3 February 2009, §38–39.
  45. *Fáber v Hungary*, Application No 40721/08. Judgment of 24 July 2012, §58.
  46. *Fáber v Hungary*, emphasis added.
  47. *Tatár & Fáber*, §29.
  48. In this case, the fine was imposed with regard to a prior restraint unacceptably on a core political speech, thus the right to freedom of expression, as guaranteed by article 10, was found to have been violated.
  49. *Tatár and Fáber*, §40.
  50. *Women on Waves v Portugal*, Application No 31276/05. Decision of 3 February 2009.
  51. *Coleman v Australia*, Comm No 1157/2003, 17 July 2006.
  52. See the strong dissent of Kurt Herndl. M Bidault, *Article 21 in Le pacte international relatif aux droits civils et politiques; commentaire article par article* (E. Decaux, Paris, Economica, 2010), at 480.

53. M Bidault, *Article 21 in Le pacte international relatif aux droits civils et politiques; commentaire article par article* (E. Decaux, Paris, Economica, 2010), at 480.
54. *Chorherr v Austria*, Application No 13308/87. Judgment of 25 August 1993, §31–32.
55. M Rosenfeld, “Constitutional Migration and the Bounds of Comparative Analysis” (2001–2003) 58 NYU Annual Survey of American Law 67–83; or SG Calabresi and KH Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary” (1992) 105 Harvard L Rev 1153–1216, at 1199–200.
56. HRC: *Unn & Ben Leirvag v Norway*, Comm No 1155/2003, 23 November 2004; ECtHR: *Folgero v Norway*, Application No 15472/02. Judgment of 29 June 2007.
57. TA El-Haj, “The Neglected Right of Assembly” (2009) 56 UCLA L Rev 543–; JD Inazu, “The Forgotten Freedom of Assembly” (2010) 84 Tulane Law Review 565–612.
58. See, e.g., *Cox v Louisiana*, 379 U.S. 536 (1965), at 555, “emphatically” rejecting that “the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.”
59. NN, “Reflections on Justice Black and Freedom of Speech” (1972) 6 Val U L Rev 316–331.
60. T Györfi, “The Importance of Freedom of Assembly: Three Models of Justification”, in A Sajó (ed), *Free to Protest: Constituent Power and Street Demonstrations* (Eleven, Utrecht, 2009), 1–17; similarly, D Smilov, “The Power of Assembled People: The Right to Assembly and Political Representation”, in A Sajó (ed), *Free to Protest: Constituent Power and Street Demonstrations* (Eleven, Utrecht, 2009), 98–105.
61. G Le Bon, *The Crowd. A Study of the Popular Mind* (MacMillan, New York, 1896); S Freud, *Massenpsychologie und Ich-Analyse* (Internationaler Psychoanalytischer Verlag GmbH, Leipzig, Wien, Zürich, 1921).
62. MR Saleilles, “Conception et objet de la science du droit comparé”, in *Congrès international de droit comparé. Procès-verbaux des séances et documents. Tome premier*. (LGDJ, Paris, 1905) 167–189.
63. E Rabel, *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung* (2 Bände, Tübingen/Berlin, 1936 and 1957).
64. G Frankenberg, “Critical Comparisons: Re-thinking Comparative Law” (1985) 26 Harvard Int L J 411–456; R Teitel, “Comparative Constitutional Law in a Global Age” (2004) 117 Harvard L Rev 2570–.
65. K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (Tübingen, JCB Mohr, 1996).
66. O Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37 Modern Law Review 1–27; I Vörös, “Contextuality and Universality: Constitutional Borrowings on the Global Stage – the Hungarian View” (1998–1999) 1 U of Pennsylvania J of Const L 651–660.
67. A Somek, “The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review” (1998–1999) 1 U of Pennsylvania J of Const L 284–324.
68. R Teitel, “Comparative Constitutional Law in a Global Age” (2004) 117 Harvard L Rev 2570–2697.