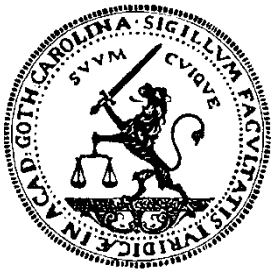

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Evils of Law, Ethics of Violence: A Look on the Derogatory Nature of the Right to Freedom of Assembly

Master thesis
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Contents

“We feel free because we lack the very language to articulate our un-freedom”

Slavoj Žižek, Welcome to the Desert of the Real

Dedicated
To the memory of the mixture of sweat and blood that we have left on the streets of our *City*

Acknowledgments

The first pages of a piece are usually the last pages to be written, for that reason they contain but a smidge of the totality of a work, to be short, the totality of this research wouldn't have been formed if it wasn't for the contribution of many individuals to whom I'm grateful.

It is required to acknowledge the spatial and temporal boundary that I was raised in -Iran- not merely for the purpose and theme of this research but for *it* being an infinite source of hope and worries.

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Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples Rights
BID	Business Improvement Districts
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights

1 Introduction

The main question of this research is rooted in a passage in Walter Benjamin's *Critique of Violence*, where he highlights that in certain circumstances even conduct involving the exercise of a right can be described as violent by holders of political power. More specifically, such conduct, when active, could be called violent if the right is exercised in order to overthrow the legal system that has conferred it. Benjamin explicitly offers the example of the right to strike and its outlawed status when it is deployed to topple the centralized power.[1]

Consequently Benjamin points out a paradox; that on one hand certain actions are considered to be a human right and on the other hand the same action is deemed to be violent, outlawed and legitimate to be confronted with the monopolized violence of the sovereign.

On the back of this paradox the subject of this research is to investigate the value of the right to assembly as a means of political action and examines what is left of it in light of legal and other limitations. In order to do this I am required to study the "form" of assembly regardless of its possible content or aim. Therefore the main question of this research -in legal terms- is articulated as: what are the limits of the right to freedom of assembly, given the right of the sovereign to preserve public order?

While it is not hard to imagine a sovereign outlawing its own overthrowing, this thesis tries to examine whether such a paradox, regardless of the ultimate aim or the content of an assembly, actually exists in law, either as written law or in jurisprudence.

Freedom of assembly as one of the basic requirements of a democratic and vibrant society is enshrined in various international human rights instruments. This right has been largely known as a fortifier of democracy and in itself has a direct link with the realization of other human rights such as freedom of expression, non-discrimination etc.

The wide margin of appreciation reserved for states to preserve 'public order' as a way to excuse their legal obligations, in other words the articulation of this right in international instruments, allows states to render the "public space" as its own playground and enables them to legally justify the use of violence against those who practice their basic human rights, on the basis that they are violent or radical and not peaceful.

This thesis tries to challenge the idea that the human right to assembly protects the assemblers from state interference, to show the paradox, so normalized within the everyday practice of law, which makes possible state interference in any given case of public assembly. This thesis tries to explain how international human rights law in practice allows any form of resistance e.g. student protests in London against the new tuition fee law or French protests over the new retirement law, to be labeled as violent. Finally I will conclude that international human rights law, instead of granting

[1] W. Benjamin, 'Critique of Violence', *Selected Writings*, (Harvard University Press, Cambridge, 1996, Volume 1) p. 240.

political power to individuals to protect themselves from state's interferences, takes away the potentiality of a basic political action. To do so I will launch a critique of the right to freedom of assembly to show a structural flaw both in the articulation of the right and in the jurisprudence on it.

"Assembly and Social Movements" is the first chapter after the introduction. On the first level, this chapter aims to provide a clarification/delimitation for the rest of the research. In this chapter it will be explained that assembly in the public space as a method of action for social movements is the issue in focus. Furthermore, through the lens of the study of social movements, 'the form' of assembly will be highlighted, in contrast to its 'content', the highlighting of which plays a vital role for the main argument of this research. Regardless of the isolation of the right to freedom of assembly in legal scholarship, most of what is written about this right is focused on the content of the assembly and not its form.
This thesis, by taking the task of looking at the form of assembly, tries to distance itself from traditional methods of researching this right and consequently provides a fresh perspective in understanding the unique nature and structure of right to assemble.

As a result, this research will have an inter-disciplinary approach to human rights; this chapter, as will be obvious, is indebted to the discipline of sociology.

The third chapter is the chapter focusing on positive law, in which the scope of protection of the right will be assessed in a detailed manner through a special focus on the limitation clauses. Drawing on the Vienna Convention on the Law of Treaties and rules of interpretation, the meanings and implications of critical terms like 'assembly', 'peaceful', 'national security' and most importantly 'public order' will be extracted. These findings will be examined and contrasted with case-law.

In the second half of this chapter, special attention is given to 'public order' as the most commonly used limitation, in which I will point out a structural paradox generated from what I call the 'false unification of rights', meaning the attribution of identical limitations, scope and interpretation for two different rights; freedom of assembly and freedom of expression - in the articulation, interpretation and practice of 'preserving the public order', a paradox so normalized that is ignored by most legal commentators, a paradox that -I argue- creates an open ended space for state interferences in one of the most crucial rights for a democratic society, practically undermines its realization and theoretically creates an impossibility of action.

As the realization of rights is not only dependent on proper legal protection, with various cultural, economical and political factors playing a role in such an endeavor, the fourth chapter is focused on the management of spaces and their relation to the practice of the right to assemble. By using theoretical arguments and materials from anthropologists and human geographers, this chapter sheds light on other limitations on the practice of this right; limitations that are not necessarily legal or articulated in hard law but nevertheless have a chilling or neutralizing effect on political activities as such.

Public space and its order, the critical situation of public space, the proliferation of gated communities, shopping malls and the eradication of traditional city centers as the space of communication and political deliberation, the expansion of protected property rights in public spaces and the political implications of management of spaces are the main issues that are examined in this chapter.

To begin with it is necessary to elaborate on the relationship of assembly as a human right with democracy. This segment will draw attention to the role of assembly as a political event concerned with the democratization of a society; an argument for the role of this human right as being more than a safety valve for democracy or an action to fill the gap between every election.[2]

1.1 Democracy and Freedom of Assembly

To see how freedom of assembly is linked to democracy it is required to have an understanding of democracy. Sheldon Wolin proposes a definition for democracy different from a form of government or as a type of politics distinguished by elections. He refers to democracy as an episodic project concerning the *political*;[3] he defines democracy as the potentiality of ordinary citizens to become political beings through self-discovery of common concerns and modes of action for realizing these concerns.[4]

His reading of democracy is highly tied to the notion of time, in fact for him democracy is not where the *political* is located but how it is experienced. This conception of democracy underlines the relation between democracy and assembly. In this way assembly is a democratic project rather than acts outside the realm of democracy that only enhance it; it is a way to experience the *political* and consequently democracy.

Furthermore the similarities between his reading of democracy as an episodic project and assembly as a common *political* event become more apparent when we understand that both democracy and assembly are moments and events (respectively) highly bound by the boundaries of constitutions. Boundaries that enforce inclusion and exclusion; while both projects are about pushing these limits that are set forth, away.

He notices that "democracy was born in transgressive acts". These transgressive acts are inherited forms and what he calls 'revolutions', Actions that "activate the demos and destroy boundaries that bar access to political experiences" through "shattering the class, status, and value systems by which it was excluded."

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[2] Such a role, as a safety valve, is described for assembly by David Mead in *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era (*Hart, Oxford, 2010).

[3] Wolin describes the *political* as an expression of the idea that a free society composed of diversities can nonetheless enjoy moments of commonality when, through public deliberations, collective power is used to promote or protect the wellbeing of the collectivity. In S. Wolin, 'Fugitive Democracy', 1:1 *Constellation*, (1994) p.1.

[4] S. Wolin, 'Fugitive Democracy', 1:1 *Constellation*, (1994) pp.11-25.

Although the main topic of this research is not the legality of revolutions in their historical form, as I will show later through a Benjaminian reading of assembly; assemblies can be considered as a revolutionary act in the sense that, as a progressive action, assemblies object and aim to destroy the catastrophic *states quo* by pushing away the pre-described [one can read instead constitutional] boundaries of time and space.[5]

I find coupling Wolin's conception of democracy as a fugitive moment and assembly, through focusing on its form, as a political event dealing with time and space, an interesting way of connecting these two together; in this way such a reading presents assembly as an indispensible right.

[5] It must be noted that Wolin describes a democracy carried along by revolution as a 'surplus democracy', where after the end of the revolution the project of institutionalization of politics begins, through which politics becomes specialized, regularized and administrative in character and quality, he goes on and says that institutionalization marks the attenuation of democracy. *See ibid*. From this, Wendy Brown points out Wolin's lack of faith in this conventional redemption strategy; furthermore she clarifies Wolin's attempt to advocate the development of democratic practices at spatially local and temporally episodic levels, in, W. Brown, 'Democracy and Bad Dreams', 10:1 *Theory & Event* (2007).

2 Assembly and Social Movements

2.1 Introduction

> "When, at a certain time and place, two bodies affected by the same form-of-life meet, they experience an objective pact, which precedes any decision. They experience *community*."
> *Tiqqun, Introduction to Civil War*

In this chapter I intend to clarify the focus of the thesis; being freedom of assembly. The importance of this part is to illuminate what I exactly mean by assembly and what kind of assembly is under focus here. In this way a clear delimitation for the coming chapters will be provided. While being aware of the possible distance that might be produced away from the main topic, here I will also engage in providing a basic understanding of social movements and their function. The focus of this research is on the demonstrations or assemblies that are critical to state power holders, in other word those assemblies which have a political character – political not in a narrow sense of party struggle but rather the general contestation on having control over decision making process. To study these kinds of assemblies is usually a method for studying social movements. Therefore a short description of social movements will clarify the purpose, function and logic of the specific form of assembly that this research deals with.

The terms assembly, demonstration and marches, are used interchangeably, and due to the fact that most demonstrations and marches that people witness have an element of protest in them, the term protest also been used to refer to demonstrations or other forms of assembly. But, to be clear, assembly as a right that is reflected in various international documents has a broad meaning. It can encompass events like a funeral to a conference indoors or a demonstration in the public space, basically any gathering of people. Here, as is clear from the title of this chapter, assemblies that can be considered as a method for social movement is the focus of this work, with all of the above mentioned criteria and functions.

2.2 A Definition

The term 'social movements', as a political phenomenon with an inclusive quality that can gather different interest groups/individuals, was used for the first time by the German sociologist Lorenz von Stein in his book "History of French Social Movement From 1789 to present".[6]

Charles Tilly defines social movements as a continuous form of politics by a collective of ordinary people that make claims against someone else's

[6] C. Tilly, *Social Movements 1768-2004* (Paradigm Publisher, London, 2004) pp.2-5.

interests. In this sense governments are targeted either as the holder or the guardian of that interest.[7] Furthermore he provides three elements for social movements; campaign, repertoire and participant.[8] This research is concerned with the second element – repertoire - and one specific component of that element, being assemblies in a public space. The importance of this definition is that he turns the focus onto the forms that these movements take, rather than mere content.

What is specifically interesting for the purpose of this research is the evolution of social movements from their roots in the eighteenth century; while in general terms the main purpose of these movements hasn't changed dramatically – increasing people's participation in the decision making process- changes have been significant in the form. Widespread technological advances, reduction of illiteracy and new forms of communication and transportation have made the spread of information, the forming a common cause or the establishment of networks and the mobilization of individuals towards a shared common purpose, easier.[9] This interactivity of new movements, as will be explained later, has a significant role in forming new identities in societies, identities that are different but form a whole.

A more sophisticated definition of social movements is one that Mario Diani proposes; in his terms a distinct social process which engages collectives to act through different mechanisms is a social movement. He also points out three elements for his description, namely: involvement of collectives in a conflictual relation with an identified opponent, dense informal networks and sharing a distinct collective identity.[10]

The source of social conflict as it will be described later can vary. Political, cultural or economical conflicts can be a reason for a movement. What is important to be reminded of is that these conflicts amount to a demand for change. These demands, if realized, will damage the interest of the opponent[11] and that's how the conflict emerges.

Another important matter for this research is the importance of identifying the target. A movement which has just a moral, ethical or a general demand without a clear target cannot be considered a movement in this sense, because it fails to create the conflict in a sense to demand a change from a specific interest group that may resist the change because of its own interest. For example the annual pride parade is not a social movement because it is merely an expression of some morality or a celebration of solidarity. But, if the same parade put forward an agenda and made demands from whatever individual or institution/s that could address those demands, then it would fall within the described ambit of social movements.

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[7] *ibid*., p.3.
[8] Tilly, *supra* note 6, p.4.
[9] J. Markoff, *Waves of Democracy: Social movements and Political Change* (Pine Forge Press, California, 1996) p.45.
[10] D. Della Porta & M. Diani, *Social Movements: An Introduction (*Blackwell, Malden, MA, 2006) p. 20.
[11] *ibid*., p. 21.

2.2.1 Purpose of Movements

Any discussion about social movements and collective action is undoubtedly cast under the shadow of the labour movement and the Marxist theory of class struggle and class consciousness. But the "new social movement" approach offers a new understanding of the content of social movements and argues that a homogenous cause of action is losing its relevancy in the contemporary context.[12] By notification of these changes in the content of social movements, holders of this approach suggest that the causes of conflict are now beyond material gains of classes.

A critical ideology in relation to; modernism and progress; decentralized and participatory organizational structures; defense of interpersonal solidarity against the great bureaucracies; and the reclamation of autonomous spaces, are principles that Della Porta names as innovative of new social movement approach.[13]

According to Melucci the new social movements "address cultural issues and tend to differentiate themselves from the model of political action".[14] While clarifying that naming the current society that we live in is not as easy as it seems, he points out that changes in the forms of politics in society has an effect on the content of the movements.[15] He refers to the complex system of contemporary politics that has shifted its focus on individualizing centers of actions and to the capacity of biopower to intervene in the symbolic order, therefore controlling even the motives of action.[16] Here one can argue that he refers to a structural intrusion that goes beyond the everyday and normal authority of power; by having control over the motives of individual action and with diminishing possibilities to be identified collectively, modern power has a chilling/ neutralizing effect on social movements even before they start to shape their agenda. "Today the achievements of modernity, such as mass culture, the rising educational levels, and the generalization of citizenship rights, have turned the

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[12] Della Porta, *supra* note 10, p. 8. Meanwhile she makes an example of others like Alain Touraine who believe that although changes happen in societies from agrarian to programming, the struggle of different classes [interest groups] is not changing and new social classes replace capitalists and workers and provide sources for social conflicts. *See* A.Touraine, F. Dubet, M. Wieviorka, and J. Strzelecki, *Solidarity: The Analysis of a Social Movement: Poland 1980–1981* (Cambridge University Press, Cambridge, 1983).

[13] Della Porta, *ibid*, p. 9.

[14] A. Melucci, *Challenging codes: collective action in the information age* (Cambridge University Press, Cambridge, 1996) p. 78.

[15] *ibid., pp.* 97-106.

[16] As to the extraordinary capacity of what one may call biopower and intrusion of the market into everyday social life, one can make an easy and common example of the so-called "apple generation" or "apple person" as a way of identifying individuals with a group and forming an identity; every one of us sees handfuls of people everyday walking in streets, sitting on the bus or in any other everyday situation having the white apple earphones. It has become almost a joke how people try to fill every single free moment of everyday life, small-silent moments where, if there is nothing pushed in to your ears, you could engage in some thinking, small conversations or even daydreaming, another example with a little stretch is this new obsession with Facebook and its exaggerated role in relation to current uprisings in the Middle East and North Africa, without considering its significant role in neutralizing the masses, by reducing activism to just a click on a post or joining a virtual march of freedom.

individual into a subject of action; but no less into the terminal point of the processes of regulation".[17] Therefore "In his view, new social movements try to oppose the intrusion of the state and the market into social life, reclaiming individuals' right to define their identities and to determine their private and affective lives against the omnipresent and comprehensive manipulation of the system".[18]

According to the definitions that we so far discussed, the mobilization of a collective on matters of political, economical and cultural importance, while targeting a specific identified opponent with the cause of seeking control over the decision-making process of the issues under concern, are the characteristics of a social movement.

2.3 Assembly as a Method of Social Movement

The repertoire of social movements is quite dependant on the everyday changes of technology and styles of living, as well as on the purpose of the movement. Marches, processions, demonstrations, strikes, wildcat strikes, petitioning, campaigning and so on are different methods of action. Of course, the internet and other technological and socio-economic developments have an effect on these methods; online petitioning or Netstrike and e-mail jamming[19] are common examples of the role that the internet has played in shaping the repertoire of social movements.

A crucial point often noticed by scholars of social movements[20] is that since every method has its own benefits and costs, a wise selection of a method is a vital decision that should be made in the light of various considerations such as; what would be the effect of this method on popular opinion about our cause? How and in what way can the chosen method correspond to building a stronger sense of solidarity? And finally, and most importantly, in case officials react to the movement what are the costs of that for the movement?

While marches and demonstrations are widespread forms of practicing freedom of assembly; they are also a common way of signifying the strength of a movement. One reason why these methods are mostly favored by activists would be the amazing and awe-inspiring spectacle that the image of hundreds of thousands of marchers creates or, as Jasper puts it in a more dramatic way, "virtually all the pleasures that humans derive from social life are found in protest movements: a sense of community and identity; ongoing companionship and bonds with others; the variety and challenge of

[17] Melucci, *supra* note 14, p. 91.
[18] Della Porta, *supra* note 10, p. 9.
[19] Netstrike is the method used by online activists: by opening the same targeted webpage at the same time by numerous users, the webpage will jam and become inaccessible. Email jamming or email bombing is a similar method; sending various emails to a targeted email address by large numbers of users. These methods are relatively common; the WTO's website was targeted during the Seattle protest, and anti abortion movements are active in sending pictures of dead fetuses to employees of abortion clinics email addresses. In a more contemporary context, Netstrike was used against some official websites of the Iranian government by the opposition.
[20] While Della Porta herself notices this matter in her book; she quotes other like Hirschman, Rochon and Pizzorno as well. In Della Porta, *supra* note 10, p. 179.

conversation, cooperation and competition. Some of the pleasures are not available in the routines of life."[21] Anyone who has at least once joined a protesting demonstration can approve of what he said.

One crucial concern for a social movement's repertoire, and in our context assemblies or demonstrations, is the logic of numbers: "there always seems to be power in numbers."[22] The bigger the crowd, the greater the pressure will be; it will attract more media attention and the possibility of reaching the goal will increase for supporters of the cause. Considering that any assembly (demonstration) in a public space will disrupt the everyday order of life, De Nardo notices that the larger the number is, the harder it is for the authorities to control the crowd, and "demonstrations by their size also give the regime an indication of how much support the dissidents enjoy."[23] Following this logic, Della Porta concludes that to some extent the logic of numbers corresponds or follows the same logic of representative democracy; 'majority rules', however of course she notices that marchers or demonstrators are not always the true majority.[24] In this way, it appears there is a relationship between the logic of assembly and democracy. Furthermore, the logic of numbers plays a pivotal role in the success of an assembly; the larger the crowd is, the more they will be heard. The problem that arises here is that; while the larger the crowd, the greater the impact; also the harder the control, management and keeping order is and consequently the possibility of state interference will increase.

So reading assemblies in the light of social movements therefore leads to some propositions;

1- Assemblies in this sense become a "*political*" event in Wolinian terms.
2- They are a live and continuous "political" event.
3- They have a critical attitude toward their targeted group; being the state or a multinational corporation for example.
4- It uses the achievements of its time like the internet in order to communicate, form networks and recruit.
5- It has an inclusive character; while it gathers diverse individuals it gives them a common identity.
6- Not only does the mere existence of this action depend on having a place to assemble, but more importantly the efficiency of it is dependent on its occurrence in front of the eyes of the public and here the logic of numbers acts as a double-edged sword; on one hand the magnitude of the image is dependent on the number of participants, while on the other hand the greater a crowd is the deeper the disruption of the normal order of the place will be, with the possibility of violence and disorder also increasing. Therefore the same logic that is connected to the success of an assembly,

[21] J. Jasper, *The Art of Moral Protest: Culture, Biography, and Creativity in Social Movements* (University of Chicago Press, Chicago, 1997) p. 220. In Della Porta, *supra* note 10, p.14.
[22] J. DeNardo, *Power in Numbers: The Political Strategy of Protest and Rebellion*, (Princeton University Press, Princeton, NJ, 1985) p. 35. In Della Porta, *supra* note 10, p. 171.
[23] *ibid.*, p. 36. In Della Porta, *supra* note 10, p. 171.
[24] Della Porta, *ibid*, pp.171-173.

> provides the possibility of prohibition or interference from the state. As a result, public space and the disruption of the everyday normal order of it, is a necessary or corollary result of a successful assembly.[25] For example; online virtual marches in support of the people of Egypt, fashionable during February this year, cannot in any way replace those in Tahrir square. If the people of Egypt had considered online events as a substitute for physical activism, they might never have succeeded in overthrowing Mubarak. Therefore assembly as a historic form of action is that which cannot be represented in the distance; there is no spectacle to replace it, but its own breathtaking image of solidarity.[26]

2.3.1 Relation of Freedom of Assembly and Freedom of Expression

To begin with, one should be reminded of the two dimensions of freedom of assembly: content and form. Separating these two will help us in illustrating the relationship between freedom of expression and freedom of assembly.

On the one hand assembly is a form of expression. Instead of written, verbal or artistic expression it is demonstration – in its literal meaning: exhibition- of a thought, idea or dissent. Drawing from this point, freedom of expression provides legal protection and justification for the content of any assembly. On the other hand, as explained above, any social movement requires a conflictual relation. The very result of freedom of expression or speech is creating a spectrum of opposing ideas and speeches, or as Justice Holmes said, it creates a "market place of ideas."[27] So while in themselves assemblies are another form of expression and benefit from its legal protection in regard to the content, freedom of expression prepares the background for the creation of movements and assembly. Differences in ideas, thoughts and rhetoric lead to access of one side of this market to power and make others exercise their right in order to criticize the power holder and that's when the conflict needed for a movement emerges.

One should bear in mind that not always does a conflict start by access to free expression; in an authoritarian regime where the marketplace of ideas is emptied of any products of minds different from the governmental one, the conflict may not spark from exercise of the right to free expression but from the expression of a lack of that diversity in the market place of ideas, which again is almost the same relation.

This characteristic of free expression in creating conflictual relations is explained neatly by Douglas J in *Terminiello* in the American Supreme Court:

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[25] Putting propositions 2 and 4 together, one can conclude that assemblies are political events which deal with time and space inherently.

[26] Reference to Guy Debord in his opening line of *'The society of spectacle'*: Everything that was directly lived is now merely represented in the distance. G. Debord, *Society of the spectacle* (Rebel Press, London, 1987)

[27] *Abrams* v. *U.S.* 616 (1919).

"[The] Function of free speech is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger".[28]

The intersectionality of freedom of expression and assembly is also mentioned by the European Court of Human Rights in various cases. As it seems; the common understanding of freedom of assembly is to read it in the light of freedom of expression.[29] In his extensive overview of European case law related to freedom of expression and assembly, David Mead reports that "there is no case in which the court has considered both Article 10 and 11[30] separately and no application has been rejected, or a violation not been found under one where it would have been under the other."[31] Furthermore in the case of *Ezelin* v. *France*, the ECtHR points out the *lex specialis* nature of freedom of assembly in relation to freedom of expression.[32]

Arguably the major contribution of the relationship between these two rights is that by the strong protection that exists for freedom of speech and expression and from the conjunction of freedom of assembly and expression, one can enlist the right to protest in his/her rights.[33]

A last thing to add in relation to the offspring of these rights is: "protest is a political resource of the powerless."[34] Therefore assemblies or demonstrations become the media for those who don't have access to conventional channels of expression. In this sense, streets transform to become a form of mass media, it is a media because it communicates people, it is media because it is nothing without the human element and it is a mass media since almost everybody has access to it; in a sense one can say it's a cheap media, in that the same subjects that use it as media give the very credit to it, define it and create it, the street or, in a more general term, the public space becomes a void if one takes away the human element.

2.4 Conclusion

Social movements are sites of articulation of dissent for those who have limited access to the conventional channels of communication or decision making. Meanwhile as a social-political phenomenon it transforms by the changes of time, both in method and content. What it does not change is the

[28] *Terminiello* v. *City of Chicago* 337 US 1,4 (1949) mentioned in D. Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era (*Hart, Oxford, 2010) p. 7.

[29] *See Öllinger* v. *Austria*, 29 June 2006, ECtHR, no. 76900/01, Judgment, para. 38. *Christian Democratic People's Party* v. *Moldova*, 14 February 2006, ECtHR, no. 28793/02, Judgment, para. 62. *Djavit An* v. *Turkey*, 20 February 2003, ECtHR, no. 20652/92, Judgment, para. 39.

[30] Article 10 of ECHR declares Freedom of Expression and Article 11 Freedom of Assembly.

[31] D. Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era (*Hart, Oxford, 2010) p. 64.

[32] *Ezelin* v. *France*, 26 April 1991, ECtHR, no. 11800/85, Judgment, para. 35.

[33] Mentioned in Mead *supra* note 31, p. 58.

[34] M. Lipsky, *Protest and City Politics* (Rand McNally & Co, Chicago, 1965). In Della Porta *supra* note 10, p. 166.

critical attitude toward the power holder and this very feature makes assemblies a fortifying element of a vibrant society.

Assembly/ demonstration in public spaces is one of the oldest forms that social movements use and arguably the most commonly used one throughout history. The value of this method, from my point of view among others, is its capacity to challenge the prescribed conditions of time and space and it is this relation of assembly with time and space which constitutes the “form” of assembly. Consequently access to public space at the desired time has a vital role in the success of any movement or assembly.

As mentioned by Tilly, in his definition of social movements, they are continuous political processes; continuity as a vital matter is categorized by him under the element of ‘campaign’, this continuity is a process that doesn’t stop in a specific moment, therefore it is inclusive for those deprived from a wide range of time, e.g. a worker who has to spend most of his time in a workshop with a machine.

Furthermore demonstrations, by using the largest and naturally the most accessible space available to masses and using it as the medium for transmitting dissent or exerting pressure on the government, breaks through the imposed boundaries of politics, so a woman whose space of action is limited to the household and whose time is bound by same boundaries of private space, can use and include herself within them.

As the last point for this part, I have to admit that even though I have a glorifying conception of assemblies and demonstrations, I am aware that even these methods of action in some certain cases fall short. One good example is that of undocumented migrants, who are bound by much stronger boundaries and for whom, by breaking through those boundaries by resorting to this form of action, pay a high price. One could say that methods are deployed in relation to those costs and benefits inherent in the social action; anyhow here is not the place to answer that question.

3 Assembly as a Protected Human Right

3.1 Introduction

> "That Things are *"status quo*" is the catastrophe."
> *Walter Benjamin, The Arcades Project*

This chapter is aimed to show the legal shortcomings in the interpretation of the right to freedom of assembly by focusing on 'preserving public order/prevention of disorder' as the most common used limitation clause by courts. To do so I will provide the reader with a short content-study of the right to freedom of assembly, with the intention of illustrating the scope of its protection. Extracting the meaning of terms like 'assembly', 'peaceful assembly' and other limitation clauses will be done in accordance with the rules of interpretation stipulated in the Vienna Convention on the Law of Treaties.[35]

Initially the ordinary meaning of terms will be examined and in cases where such an attempt doesn't clarify the investigated ambiguities, subsequent agreements, practices in application of the right and finally the preparatory work of the treaty will be deployed in order make the scope of the right more concrete. It must be noticed that the intention here is not to provide an interpretation of the right to freedom of assembly, in as much as it is to extract an existing understanding/interpretation.

Later the chapter will continue with a more detailed analysis of the term 'public order'. By examining its legal implications, I will argue that 'public order' as a limitation clause is in fact what I call 'the paradox' of the right to freedom of assembly. I will argue that public order as a legal term constitutes boundaries of time and space that assembly -merely by its form and regardless of its content- as a human right tries to break down.

Before starting this chapter it must be noted that in regard to the focus of this research, a lack of material at the international level has compelled me to have a euro-centric approach. This enforced perspective can bring about rightly suited criticism; therefore firstly I will take the responsibility of answering this specific challenge through a comparison of both the articulation and '*travaux preparatoires*' of this right in different instruments.

3.1.1 Focus

One specific challenge of this chapter is the choice of material and focus; the initial intention was reliance on the International Covenant on Civil and Political Rights (ICCPR), for the obvious reason of its broader jurisdiction.

[35] Vienna convention on law of treaties 1969, Article 31-33.

During the preparation period however, the scarcity of material at the international level showed itself more and more. The validity of this research is to an extent tied to examining actual, real life examples and case law, however the ICCPR and its monitoring body (the Human Rights Committee) in their lifetimes have generated only one case on freedom of assembly and no General Comments. Interpreting this record as an indication of the full realization of this right, it is, without any exaggeration, illusory. While how this record should be interpreted is a matter for other research, what is gained from this record is an indication of the isolation of this right in international institutions and discourse. On the other hand what is lost from it, is the certainty of having a universal perspective.

In contrast to the UN database, regional systems and specifically the European Court of Human Rights (ECtHR) have a handful of jurisprudence to offer such a discussion. Of course, while on the first glimpse region-specific materials compromise the intended universal applicability of the outcomes of this research, an investigation of the effect of the usage of regional-specific cases on the totality of this research via a short comparison of different human rights instruments e.g. ICCPR, ECHR, ACHR and ACHPR, will show the similarities of articulation of this right in various systems. In this way the noted similarities can be seen as a way to escape the challenge of possible euro-centricity allegations toward this research.

ICCPR	ECHR	ACHR	ACHPR
National Security	National Security	National Security	National Security
Public Safety	Public Safety	Public Safety	Safety of Others
Public Order (ordre public)	Prevention of disorder or crime	Public Order	
Protection of public health or morals	Protection of health or morals	Protect public health or morals	Protection of health and ethics of others
Protection of the rights and freedoms of others	Protection of the rights and freedoms of others	Protection of the rights and freedoms of others	Protection of rights and freedoms of others

Table 1
Limitation clauses of the right to freedom of assembly in the four major international instruments

As shown in Table 1, there is almost an absolute similarity in regard to the limitation clauses of the right to freedom of assembly in the four major regional and international instruments (ICCPR, ECHR, ACHR, ACHPR); while national security, public safety, protection of public health and morals and protections of rights and freedoms of others are identical legitimate aims in all the above mentioned instruments, the articulation of preserving 'Public Order' as a legitimate aim of interference brings about differences.

There is no explicit referral to this aim in the African Charter on Human and People's Rights (ACHPR),[36] however the Inter-American Convention on Human Rights (ACHR) adopted the same wording as the ICCPR, while the ECHR refers to this limitation clause as 'prevention of disorder or crime'. During the drafting of the ICCPR the replacement of 'public order' by 'prevention of disorder or crime' gave rise to considerable discussions, which will be looked at thoroughly later.

Another noticeable difference in relation to the articulation of the right to freedom of assembly is the 'recognition' of the right under the ICCPR and ACHR, which is in contrast to the language of the ECHR and ACHPR where they talk about 'granting' the right, by saying: 'everyone has the right/everyone shall have the right'. This matter was raised in the US proposal during the sixth session of the Commission on Human Rights (1950), offering to change the first sentence to: 'everyone shall have the right to be free from governmental interference to assemble peaceably…' This proposal was not voted upon; while another proposal suggested that the law must 'guarantee' the right, which was rejected on the basis of already existing guarantees in draft Article 2 of the Convention.[37] Finally the French and Egyptian motion to 'recognize' the right as a fundamental human right that doesn't need to be granted by the covenant was accepted.[38] Considering the failure of the Egyptian and French delegates to explain why this applied to freedom of assembly in particular and not to other rights; the above natural law oriented proposition can be seen as not having any specific legal significance in the sense of a weaker obligation.[39]

Consequently the major differences in articulation of the right either don't entail a significant difference in regard to the domain of protection or, as it will be shown in the coming sections, certain differences are made to increase the functionality of subsequent monitoring mechanisms and not to elevate the protection scope.

Despite the fact that the similarity in wording can be regarded as an indication of a similar and universal understanding of the right; it is not a conclusive justification for having a euro-centric focus. Alternatively what can be raised as an additional justification for the focus of this research and attribution of its results to other jurisdictions is the dominance that the ECtHR has over the human rights discourse. This can be inferred from excessive use of ECtHR decisions, analogies and reasoning in both domestic and regional courts of non-European countries. For example the South African Supreme court cited the ECtHR in its decision on pronouncing capital punishment unconstitutional, with the same citation having also been

[36] African Charter on Human and Peoples' Rights 1981, Article 11: 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.

[37] Proposal E/CN.4/365, M.J. Bossuyt, *Guide to the "travaux preparatoires" of the International Covenant on Civil and Political Rights* (M. Nijhoff, Dordrecht, 1987) p.414.

[38] M.J. Bossuyt, *Guide to the "travaux preparatoires" of the International Covenant on Civil and Political Rights* (M. Nijhoff, Dordrecht, 1987) pp. 415-416.

[39] M. Nowak, *U.N covenant on civil and political rights: CCPR commentary* (Engle, Kehl, 2005) p. 484.

done by the Supreme Court of Zimbabwe.[40] Other commentators have also listed various examples of such influence of the ECtHR over the Inter-American Court of Human Rights and other domestic courts.[41] In a way the increasing referencing to the ECtHR by domestic courts outside Europe has transformed it to a 'sort of world court of human rights'.[42] This influence that the ECtHR has over the legal development of human rights and international law can be pointed out as another reason for reflecting the findings of this research on a more expanded level than Europe.

3.2 Scope of Protection

3.2.1 Assembly

In the absence of any conventional definition for the term 'assembly'; one is compelled to take its customary and generally accepted meaning in national legal systems, keeping in mind the object and purpose of the treaty.[43] The Oxford English Dictionary defines 'assembly' as: "a meeting together of a group of people for a particular purpose."[44] This definition clearly regenerates the same level of broadness and ambiguity that the lack of a definition creates for a legal research. Consequently there is a need to look into other sources to clarify the legal implication of this term.

The urge to specify the limits of assembly was proposed by the Soviet Union's delegate in the Commission on Human Rights; their suggestion to add "meeting, street processions and demonstrations" was rejected after the French delegate pointed out that freedom of assembly might not necessarily include the right to conduct historical pageants or processions.[45]

Since assembly has a broad domain which encompasses any gathering of individuals and given the purpose of assembly as a human right, Manfred Nowak proposes that not every assembly of individuals requires special protection.[46] In an attempt to clarify the domain of assembly he states that certain forms of gathering are protected by other Articles of the ICCPR e.g. religious processions or church services are protected by Article 18 on

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[40] Case of *State* v. *Makwanyane*, 1995 SACLR LEXIS 218, at 1 (CC June 6,1995), and *Ncube* v. *state*, 1998(2) SA 702 and *Juvenile* v. *State*, Judgment No. 64/89, Crim. App.No. 156/88 (Zimb.1989). *See* A. M. Slaughter, 'Judicial globalization', 40 *Virginia Journal of International Law*, (2000) pp.1103-1124. For influence of ECtHR on the constitutional interpretations by the US Supreme Court, *See* G. L. Neuman, 'The use of international law in constitutional interpretation', 98:1 *The American Journal of International Law* (2004) pp.82-90.

[41] *See* J. G. Merrills, *The development of international law by the European Court of Human Rights*, (Manchester University Press, Manchester, 1988).

[42] J.B. Attanasio, 'Rapporteur's overview and conclusions: of sovereignty, globalization and courts', in T. M Franck and G. H Fox (eds), *International law decisions in national courts* (Transnational Publishers, New York, 1996) pp. 373-383, in A. M. Slaughter, 'Judicial globalization', 40 *Virginia Journal of International Law*, (2000) pp.1103-1124.

[43] Vienna Convention on the Law of Treaties 1969, Article 31.

[44] A. S. Hornby, *Oxford Advanced Dictionary.* (Oxford University Press, Oxford , 2000) p. 61.

[45] Nowak, *supra* note 39, p. 484. *also see* Bossuyt, *supra* note 38, p. 414. E/CN.4/SR.325.

[46] Nowak, *ibid*.

freedom of religion, private meetings for purely social purposes by Article 17 and so on.[47]

A comprehensive definition that can be extracted from the works of different commentators is: assembly as an institutional form of expression is a platform for discussions, communication and proclamation of ideas; while these ideas are not necessarily political in the narrow sense they must go beyond mere private or institutional (party related matters) concerns and therefore be directed at the public, assemblies in this sense are politically participative gatherings of individuals.[48]

3.2.1.1 Temporal Limit of Assembly

Another issue arising in relation to the definition of assembly is the temporal limit. Does assembly, as it is defined above, entail any time limits? Or must assembly, as a periodic event, have a defined and set start and finish time? In answering this, the case of *Cisse* v. *France* can be of importance.[49] Here a group of undocumented migrants occupied a church with the consent of the priest for several months in objection to their uncertain status and French migration regulations. The French government argued that such a protest for such duration cannot constitute 'assembly'. As a consequence of the finding of a violation by the ECtHR, one can argue that there is no temporal limit once an assembly occurs.[50]

3.2.1.2 Numeral limit of assembly

As explained in the previous chapter, the logic of numbers plays a pivotal role in the success of a movement and, in our case, an assembly, the bigger the crowd is the greater the influence would be. But how many people is enough people to constitute an assembly? Can one protesting soul claim protection under freedom of assembly?

There seems to be no case in which one individual has claimed to conduct an assembly by him/herself. However in the case of *MacBirde* v. *UK* [51] an individual raised both a violation of her freedom of expression and assembly by the UK authorities when she was banned from joining an assembly. The case was declared inadmissible on the basis of necessity and proportionality of action taken by the police and the court didn't investigate the legitimacy of raising article 11 (freedom of assembly). David Mead in his book (2010) cites this case alongside another,[52] either as possible signs of the expansion of the domain of freedom of assembly or as an open case for the interpretation of such expansion.[53]

But, considering that states have a positive obligation to facilitate the smooth flow of an assembly and must refrain from any actions that have a chilling effect on the practice of rights and refrain from making them

[47] *ibid*., p.485.
[48] *Cf.* Nowak, *supra* note 39, p. 485 and Mead, *supra* note 31, p. 58.
[49] *Cisse* v. *France*, 9 April 2002, ECtHR, no. 51346/99, Judgment.
[50] Mead, *supra* note 31, p. 65.
[51] *MacBirde* v. *UK*, 5 July 2001, ECtHR, no. 27786/95, Inadmissibility decision.
[52] *Galstyan* v. *Armenia*, 15 November 2007, ECtHR, no. 26986/03, Judgment.
[53] Mead, *supra* note 31, p.66.

illusory and an ineffective,[54] it is clear that a person who is stopped by officials from joining an assembly can raise Article 11 on the grounds that freedom to join or walk towards an assembly is a corollary result of freedom of assembly, or as it is said in the rules of Islamic jurisprudence, 'permission to the object is permission to the means of achieving the object'.[55] Therefore the reason that the ECtHR allows individuals to raise a violation of Article 11 cannot be seen as a sign of stretching the definition of 'assembly' to one sole protester. On the other hand neither the customary meaning of assembly nor the sociological purpose and function of assembly as a social movement suggest such an expansion.

Just because one is expressing dissent in the public space doesn't mean it amounts to an assembly. I see this confusion as rooted in the false equation of 'protest' with 'demonstration' or 'assembly', plus ignorance towards the specific characteristics of assembly.

It has been established since there is no right to 'protest' *per se*, the conjunction of freedom of expression and assembly provides such a right.[56] This equation is only correct if we deal with it from one side; it is true that a demonstration can become a protest since expression of dissent is free -as long as the expression stays within the ambit of the right- but not always do protests occur in the form of a demonstration or assembly. This equation (expression + assembly = protest) proposes that one only has the right to protest in public spaces if he/she gathers with numbers of people. As I see it, the right to protest is a clear subcategory of freedom of expression; you can express your dissent in any form and manner, alone or with others, and this sort of equation limits the right to protest only to occasions of demonstration and historical pageants.

Equating protest with assembly or reading the right to protest as combination of freedom of expression and assembly and in the end concluding the legitimacy of a one-person assembly is reading the right to freedom of assembly not under the light of its form, rather by what it expresses. The difference is in what makes assembly so special that it is required to have specific provisions dealing with it is not that it can be interpreted as a right to protest or that it can take a protesting course, it is mostly because it is a critical behavior. A large crowd in a critical space -like public space- no matter what they are chanting or not chanting; no matter if they are protesting or not, can be threatening for the state exactly for the same reason that a massive traffic jam can be problematic, but with two big differences; in an assembly there is an intention of jamming the space -it is an intentional behavior created by a conflictual relation- and it is comprised of the bodies of constituents of the state, rather than objects within the state.

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[54] *Airey* v. *Ireland*, 9 October 1979, ECtHR, no. 6289/73, Judgment.

[55] Translated by author, *See* M.M. Damad, *The rules of Islamic Jurisprudence, civil section* (Islamic Science Publishing House, Theran, 2007) p. 235. *Cf.* Shik Tosi, *AL- Mabsouth*, p. 167.

[56] R. White, C. Ovey and F.G. Jacobs, *Jacobs, White and Ovey the European convention on human rights* (Oxford University Press, Oxford, 2010) p. 451.

3.2.1.3 Peaceful Assembly

It is 'peaceful' assemblies that are protected by law. This requirement is in every instrument except Article 11 of ACHPR;[57] while the Inter-American Convention clarifies the meaning of peaceful by adding the phrase 'without arms' right after the term 'peaceful'. The peacefulness of an assembly relates to the manner that it takes and not the content of it - this was decided early in the drafting history of the Covenant,[58] meaning that the assembly must happen without resort to violence, vandalism or uproar, therefore the participants must refrain from such acts in their behavior, while in contrast the content of what they are shouting or demanding during the course of an assembly can be provocative, insulting and annoying; the righteousness of the content will be examined under the limits of the freedom of expression. Such a division between content and manner of an assembly can also be spotted in the jurisprudence of the European Court; where it has been held that an assembly cannot be stripped down from peacefulness because its content might or does annoy or offend others.[59]

It can be interpreted from the approach of the court and the "customary meaning of 'peaceful'" that the absence of violence is what constitutes the peacefulness of an assembly.[60] In the end, a line must be drawn between violent behavior and being proactive during the course of an assembly.[61] While destroying private and public property and physical violence against individuals are clear examples of violent behavior, shouting, being enthusiastic and encouraging others to be so are merely being proactive in the course of an assembly and shouldn't be considered violent.

It is worth mentioning that since every idea has some opponents, consequently every assembly has its own opposition, thus the risk of provocation of a violent response from an opposing group can't be justified as a legitimate ground of interference, as the European Commission on Human Rights stated in the *Christian against Fascism and Racism* v. *UK*, the "possibility of violent counter demonstrations or the possibility of extremists with violent intentions… joining the demonstration cannot as such take away [the] right [to assemble], even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organizing it."[62]

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[57] The 'must' of peacefulness of an assembly in the African Charter can easily be interpreted by reading the right together with its limitation clauses - maybe the drafter intended to avoid repetition.

[58] K. J. Partsch, 'Freedom of Conscience and Expression and Political Freedoms' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) p. 231. Furthermore he believes that since this qualification is only applicable to the manner of the assembly, the limitation clauses in the second paragraph are only related to the content and not the manner.

[59] *Stankov and Ilinden* v. *Bulgaria*, 2 October 2001, ECtHR, nos. 29221/95 and 29225/95, Judgments, para. 86. *Ärzte für das Leben* v. *Austria*, 21 June 1988, ECtHR, no. 10126/82, Judgment, para. 32.

[60] *See* Nowak, *Supra* note39, p. 487.

[61] *See Galstyan* v. *Armenia*, *Supra* note 52, para. 117.

[62] *Christians against fascism and racism (CARAF)* v. *UK*, 16 July 1980, EComHR, no. 8440/78, Admissibility decision, at 4, p. 148. *Also see Ziliberburg* v. *Moldova*, 4 May 2004, ECtHR, no. 61821/00, Inadmissibility decision.

Also the ECtHR has already decided that if an assembly turns violent, not everybody in the assembly loses protection. Since it is the people who turn violent and not the assembly, therefore sporadic violence doesn't render the whole assembly illegitimate. As in the case of *Ezelin* v. *France* where a barrister who took part in an authorized assembly was disciplined by his professional body for not disassociating himself from the violence, offences and insults that happened during the course of demonstration, the court ruled that: "the freedom to take part in a peaceful assembly - in this instance a demonstration … is of such importance that it cannot be restricted in any way so long as the person concerned does not himself commit any reprehensible act on such an occasion."[63]

3.2.2 Positive Obligation

Since the US proposal during the drafting of the ICCPR on limiting state's obligations to a merely negative one by rephrasing the first sentence to "every one shall have the right to be free from governmental interference to assemble peaceably…"[64] was rejected, it has been pointed as an strong indication of existence of a positive obligation on the state to protect assemblies from interference by third parties.[65]

In the European context, a group of anti-abortion doctors complained to the ECtHR of a violation of their right to assemble on the grounds that two of their demonstrations were disrupted by opposing groups; eggs and grass had been thrown at them, and they complained that they weren't given sufficient protection by the police. This case led to the recognition of positive obligations of the state, where the court says: "Genuine, effective freedom of peaceful assembly cannot ... be reduced to a mere duty on the part of the State not to interfere, a purely negative conception would not be compatible with the object and purpose of Article 11 ... sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be." [66]

As a result, states are also obligated to take necessary positive action to facilitate fulfillment of this right, action like providing police forces for the protection of participants, making available public thoroughfares or other areas, re-routing traffic and not discriminating or acting arbitrarily in denying access to public buildings.[67]

3.2.3 Limitations

Like most rights, freedom of assembly is limited by a subsequent second paragraph, describing the extent of a state's lawful interference. Any lawful interference must pass the three fold test of necessity in a democratic society, prescription by law and seeking a legitimate aim, which is reflected

[63] *Ezelin* v. *France*, *Supra* note 32, para. 53.
[64] Commission on Human rights, 6th session (1950) E/CN.4/365, in Bossuyt, *Supra* note 38, p. 414-415.
[65] Nowak, *supra* note 39, p. *488*.
[66] *Ärzte für das Leben* v. *Austria*, 21 June 1988, ECtHR, no. 10126/82, Judgment, para. 32.
[67] Nowak, *Supra* note 39, p. 488.

in all the above mentioned instruments (ICCPR, ECHR, ACHR, and ACHPR). While Nowak complains on two occasions about the narrow scope of protection of freedom of assembly in comparison to other provisions like Article 19 on freedom of expression, he refers to the limitations of this right as being so "broad that a range of possibilities are available to suppress assemblies critical to the regime."[68] Here I try to look at these limitations and highlight those that play a major role in obstructing the critical practice of this right by being broad, not fully defined and being ignorant to the purpose and nature of assembly.

3.2.3.1 Necessity in a Democratic Society

The inclusion of the phrase 'in a democratic society' was proposed by French delegates to the Commission on Human Rights and finally was accepted with a weak majority of 9:8.[69] It was argued that: "freedom of assembly could not be effectively protected if the state parties didn't apply the limitation clauses according to principles recognized in a democratic society."[70] On the contrary, other countries were objecting on the basis that term 'democracy' might be interpreted differently in various countries,[71] but this objection was answered by the French delegate as: "a democratic society might be distinguished by its respect for the principles of the Charter of the United Nation, the Universal Declaration of Human Rights and the Covenant/s on human rights."[72]

The main connotation of this phrase is that a balance must be made between the individual's right to assemble and the larger interest of the public. Basically the measures taken by authorities must be proportionate to the intended pressing social need.

Furthermore it has been inferred from studying the preparatory work of the ECHR and its application by the monitoring bodies, that the convention was to prevent a 'rebirth of totalitarianism' and 'defend people from dictatorships'.[73] Consequently democracy as a way of life can justify limitations on individual rights and freedoms for the common good or to protect more compelling rights of others.[74]

In her reading, Susan Marks states that the boundaries of rights become the same as the boundaries of democracy,[75] therefore restrictions must not just be for one of the legitimate aims or interests but it must be 'necessary,

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[68] *ibid*., pp. 482 and 488.

[69] *ibid*,. p. 490. He also notes that this proposition was consistent with the language of ECHR.

[70] Bossuyt, *supra* note 38, p. 418.

[71] E/CN.4/SR.169 proposal by Lebanon, Great Britain, Australia, Uruguay and the US. In *Ibid.*, p. 418.

[72] E/CN.4/SR.169. In Bossuyt, *Supra* note 38, p. 418.

[73] Council of Europe, *Collected edition of the "Travaux preparatoires" of the European convention on human rights*, (Nijhoff, Hauge, 1985) vol 1, p. 192 and vol 5, p. 332, in S. Marks, 'The European Convention on Human Rights and It's 'Democratic Society'', 66 *The British Year Book of International Law* (1995) p. 210.

[74] S. Marks, 'The European Convention on Human Rights and It's 'Democratic Society'', 66 *The British Year Book of International Law* (1995) pp. 209-210.

[75] *ibid*,. p. 211. After examining various cases from the ECtHR she concludes that what she calls a 'thin' conception of liberal democracy is what is meant by the convention.

for them 'in a democratic society'.[76] She divides the term 'necessary in a democratic society' and explains that 'necessary' relates to a 'pressing social need' and 'democratic society' refers to proportionality of the restriction in relation to the interest pursued.

Proportionality of action taken has a direct link with the discrete parts in a democratic society as a whole. The relation of the court with the questions like the interaction of the rights of the majority in contrast to minorities or the democratic process of each country, are the decisive elements for striking a balance. It seems -in her reading- that democracy, no matter how thin the conception of the convention is from it or how wide the margin of appreciation of states is, is to be protected and plays a role as another aim of interference.

3.2.3.2 Prescribed by Law

There is a division in regard to this qualification within the four mentioned instruments; the ECHR and the ACHPR state that the inference must be prescribed by law, while the ICCPR and ACHR only require the action taken be 'in conformity with the law', the later proposes that there is no need for the existence of law *per se* as the basis for inference, but an administrative rule based on general statutory authorization might be enough legal grounds for interference. This variation within the texts can be traced back to the French proposal in the 6th session of the Commission to change the draft article from "… prescribed by law…" to "… imposed in pursuance by law…"[77] which finally was substituted with the current text by 13:1 votes.

As a consequence of the adopted language in the ICCPR, the police -on their own- can break up a demonstration that is deemed to endanger public safety on the basis of a general authorization.[78] Here is one of the problematic turns that the drafters took; while other tests and limitations of the right to freedom of assembly are similar to other rights, it seems that the specific form of action that assembly possesses brought the idea of opening officials' hands for more interference. This reduction of the objectivity of reason to a subjective call of a police officer in the field reduces the predictability and clarity elements that law must have.

3.2.4 Legitimate Aims of Interference

In general a close study of the 'travaux preparatoires' of the ICCPR on the subject of limitation clauses in various articles, reveals two major schools of thoughts; those who proposed a brief statement of general limitations like the International League for the Rights of Man[79] and others who proposed that it should be a full list of specific limitations. Bossuyt reports, as the consequence of this division, more than thirty specific limitations were suggested only in regard to article 19 on freedom of expression.[80]

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[76] *ibid*, p. 215.
[77] E/CN.4/365, Bossuyt, *Supra* note 38, p. 416-417.
[78] Nowak, *Supra* note 39, p. 490.
[79] E/CN.4/SR.321, Bossuyt, *Supra* note 38, p. 387.
[80] *Ibid.*

In light of the impossibility of forming an exhaustive list of limitations that can cover all situations and be applicable in diverse legal and political systems, this idea was rejected and decision was made to use a workable and common formula for drafting limitation clauses.[81]

3.2.4.1 National Security

This limitation clause was reflected in the original draft as 'necessary to ensure security', but after various amendments, the oral proposal of the Chilean delegate to add the word 'national' before 'security' was accepted by 7: 4 votes with 4 abstentions.[82] Later the word 'ensure' was changed to 'in the interest of' after Great Britain's proposal in the 8th session of the Commission.[83] Concerns were also raised as to the nature of limitation clauses like 'national security' and 'public order', for being vague and open for abuse unless those concepts were properly qualified.[84]

It appears that restrictions on the basis of 'national security' are accepted only in relation to serious threats to the life a nation and the existence of the state as a whole. The Johannesburg Principals on national security, freedom of expression and access to information, which has the status of soft law,[85] defines a genuine cause of interference based on national security as "to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to *violent* overthrow of the government."[86] Moreover it stresses that mere advocacy for a change of government policy or the government itself can't be consider as genuine case of national security.[87]

3.2.4.2 Public Safety

Public safety as a ground for interference seems to have considerable overlaps with other limitation clauses like public order.[88] Protection of public safety is primarily the duty of police forces not the protestors or organizers; by comparison with other limitation clauses it seems that the purpose of this provision is mainly to protect the life and physical integrity of individuals and to protect them from violence in its physical form. Nowak notes that an assembly can be broken up, restricted or prohibited if

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[81] E/CN.4/SR.160 (US) and E/CN.4/SR.162 (US), Bossuyt, *Supra* note 38, p. 388.
[82] E/CN.4SR.121, Bossuyt, *Supra* note 38, p. 418.
[83] E/CN.4/L.145, Bossuyt, *Supra* note 38, p. 419.
[84] Bossuyt, *Supra* note 38, pp. 417-418.
[85] The Johannesburg Principals on national security, freedom of expression and access to information, as a scholarly source of international law, have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998,1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in their annual resolutions on freedom of expression every year since 1996.
[86] Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, available at: <www.unhcr.org/refworld/docid/4653fa1f2.html> [accessed 23 June 2011], Principle2.
[87] *ibid.*, Principle 7.
[88] This overlap might be the reason that ACHPR didn't mention 'public order' as a separate limitation clause.

the police can't guarantee the physical safety of people, he also expands this protection to business as well;[89] therefore vandalizing private and public property is grounds for interference under this provision.

3.2.4.3 Protection of Public Health and Morals

Since moral values are relative and subjected to the passage of time; this condition reserves a certain level of discretion for states. Some - by reliance on certain cases like the *Handyside* case[90] - refer to the protection of morality as 'sexual morality',[91] while others make the example of the possible prohibition of certain assemblies in holy places.[92] What is clear is that the ambiguity of the right and the accepted margin of appreciation for states in regard to this clause should not amount to an undermining of the purpose of the right and be used as a basis for abuses. As to public health, certain overlaps with the prior limitation are likely. Considering the manner, type and methods of an assembly there can be legitimate prohibitions on assembly in protected environments, national parks etc.

3.2.4.4 Protection of the Rights and Freedoms of Others

The main tasks of courts in cases of alleged violations of rights can be summarized as striking a fair balance between conflicting interests. This provision underlines this same notion. As one of the more frequently used aims of interference, this provision also overlaps with others like public safety and public health. The reason for the frequent use of this limitation clause can be that the terms 'rights' and 'freedoms' not only proposes a wide range of legitimate reasons but also there is no indication on whether these rights and freedoms must be fundamental or even statutory.

Concerns can be raised from confusion found in a case law review of various jurisdictions. For example, the answer to the question of whether demonstrating on highways is permitted has brought an ambivalent position in the practice of English courts. In the case of *Hirst* v. *Chief Constable for West Yorkshire*[93] it was stated that the lawful usage of highways is to pass and re-pass and therefore protesting on highways was deemed incompatible with the order that law has decided for these certain areas. This position was revoked later by the House of Lords in a majority of three to two in the case of *DPP* v. *Jones*,[94] but not long after in *Birch* v. *DPP*[95] the Divisional Court decided that the use of the highway by a protester was not reasonable and established a doubt on whether the political right of an Englishman to protest is compatible with right to drive freely on highways.

An identical right -the orderly circulation of traffic/driving freely on highways- has been found by the ECtHR in the case of *Molnar* v. *Hungary*, where the courts decided that the: "restriction on freedom of peaceful

[89] Nowak, *supra* note 39, p. 492.
[90] *Handyside* v. *UK*, 7 December 1976, ECtHR, no. 5493/72, Judgment.
[91] White, *supra* note 56, p. 321.
[92] Nowak, *Supra* note 39, p. 493.
[93] *Hirst* v. *Chief Constable for West Yorkshire* (1987) 85 Cr App R143.in Mead *Supra* note 31.
[94] *DPP* v *Jones* (1999) 2 AC 240.in Mead *Supra* note 31.
[95] *Birch* v *DPP* (2000) Crim LR 301. in Mead *Supra* note 31.

assembly in public places may serve the protection of the rights of others with a view to preventing disorder and maintaining the orderly circulation of traffic."[96]

This limitation has been seen as an open-ended condition which even covers rights that are not rights *per se*.[97] As an example, the case of *Nicol and Selvanayagam* v. *UK* is remarkable, where two anti-fishing protestors were convicted to 21 days of imprisonment for frightening fish away from hooks, by throwing sticks and twigs on the surface of the water during a fishing contest. The ECtHR declared the case inadmissible on the basis that the interference made by the state was in pursuance of legitimate aim of protection of rights of others.[98] In his review of this case, Mead states that what courts are doing is no longer a matter of balancing between clashing rights; rather in cases like this it has become a prevalence of liberties -freedoms- over the right to protest (assembly).[99]

3.2.5 Pubic Order

In this segment I will engage in discussing the 'public order' limitation in a more detailed manner. The reason for highlighting this limitation is that, not only is prevention of disorder/protection of public order the most common limitation used,[100] but also, due to its vagueness and lack of proper definition, it can cover all the other limitations by itself. For example, as mentioned earlier, the term public safety refers to the physical integrity of others and protection of private property, vandalization of private property or the resorting to violence against individuals, which also easily fall into the ambit of disorder. The same is found with regards to public health. Furthermore there is a variety of examples for overlap of rights and freedoms of others with public order. In the *Molnar* case and *GS* v. *Austria*,[101] while the orderly flow of traffic was considered as the rights and freedoms of others, obstruction of traffic has been considered as an act against the rights of others and consequently as public disorder.[102]

Furthermore I have singled out this limitation and decided to analyze it with the political implications of the order of public space -which comes in the next chapter- for the reason that the terms 'public order' and 'assembly' both have a spatial component, therefore reading this limitation without the socio-political entailments of space is repeating the same common mistake of other commentators in ignoring the spatial characteristic of the right to freedom of assembly and would result in a one sided observation of this

[96] *Molnár* v. *Hungary*, 7 October 2008, ECtHR, no. 10346/05, Judgment, para. 34.
[97] *See* white, *Supra* note 56, p. 323 and Mead, *Supra* note31, p. 89.
[98] *Nicol and Selvanayagam* v. *UK*, 11 January 2001, ECtHR, no. 32213/96, Admissibility decision, p. 11.
[99] Mead, *Supra* note 31, pp. 89-90 and p. 333.
[100] White, *Supra* note 56, p. 206 and Mead, *Supra* note 31, p. 90.
[101] *GS* v. *Austria*, 30 November 1992, ECommHR, no. 14923/89, inadmissibility decision.
[102] Another example can be the case of *S* v. *Austria*, 3 December 1990, ECommHR, no. 13812/88, Inadmissibility decision, where use of musical instruments in the course of an assembly was considered being against public order and the rights of others due to the excessive noise that it generates.

limitation clauses that at the same time is applicable to all the other rights while it is not specified to any of them.

In order to do so this segment starts with clarification of the different ways of articulation of this limitation in different instruments, to examine whether or not different meanings or scope were intended in using such diverse terms.[103] After that will come an analysis of the paradox that the current definition of 'public order' creates in regard to the practice of the right to freedom of assembly.

3.2.5.1 Public Order or Prevention of Disorder; Does the Different Wordings Entail Different Scope?

To start with an overview of the drafting history of the ECHR and ICCPR; as mentioned in the beginning of this chapter, the articulation of the legitimate aim of preservation of public order varies. The ICCPR refers to it as 'public order' and the ECHR refers to it as 'prevention of disorder or crime'. Such a review will clarify whether or not a substantial difference in the meaning was intended.

The difference in the two texts can be traced back to the proposal of the British delegates in the second meeting of the Committee of Experts during the drafting of the ECHR,[104] where in two different proposals they offered the replacement of 'public order' with 'prevention of disorder or crime' alongside with combining freedom of assembly and association into one article.

This suggestion resulted in long discussions without any decision being made and, in the end; the Committee of Experts agreed that it was not competent to decide this matter alongside other raised issues since such a choice "depended on considerations of a political character".[105] Finally, the matter was assessed in a conference composed of senior experts who had proper and full guidance from their governments in regard to the political entailments of this term.[106]

In this conference the British delegate suggested that for the full realization of rights and having a functioning monitory system it is needed to have precise and clear wording. Mr. Hoare (United Kingdom) noted that the intention is to have a proper instrument which makes obligations for states and binds them, so they must know the proper extent of their

[103] This will be done based on rules of interpretation articulated in the Vienna Convention on the Law of Treaties; the ordinary meaning of the terms in light of the object and purpose of the conventions, related international agreements and practices and preparatory works will be deployed respectively in accordance to the needs of the research.

[104] (Doc. *CM/WP* 1 (50) 2, p.5) (Strasbourg, 6th to 10th March, 1950), in 'Preparatory work on Article 11 of the European convention on human Rights', Library of European Court of Human Rights, <www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART11-DH(56)16-EN1693924.PDF>, visited on 21June 2010.

[105] 'Preparatory work on Article 11 of the European convention on human Rights', p.9, Library of European Court of Human Rights <www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART11-DH(56)16-EN1693924.PDF>, visited on 21June 2010.

[106] *Ibid.*, (Doc. AS (2) 8, para. 59, p. 57).

undertakings. He added that a precise and clear obligation would be accepted more easily and it would be harder to violate.[107]

The same proposal was also given by the British delegate to the drafting committee of the ICCPR to change 'public order' to 'prevention of disorder' on the basis that the English term 'public order' is different from the French word '*l'ordre public'* and such a usage of words would bring about uncertainty and the possibility of far-reaching derogations.[108]

The British clarified the case by stating that public order in common law countries simply means absence of disorder and is different from the French term, which is used to refer to the basis for negating or restricting private meetings, the exercise of police power or application of foreign law, but this time their motion was not successful.[109]

As a result, the study of preparatory works of these instruments shows the difference was a matter of clarification for having a functioning monitoring system, rather than intending different meanings. None of the instruments or their preparatory works suggested any definition for 'public order', the only attempt led to defining the term in negative manner – public order is the absence of disorder- which hasn't solved any ambiguity and perhaps the reason for rejection of British proposal was for its inability to point out the main connotation of the negation that they made.

3.2.5.2 How is Public Order Understood?

It is not a matter of dispute that the term 'public order' entails a certain level of ambiguity, both in its literal and legal meaning.

The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights defined public order as: "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order." [110] In this regard one can also point out that since, according to the ECtHR, democracy is the only form of governance compatible with human rights,[111] therefore democracy and democratic values are part of public order too.

Furthermore the Federal Constitutional Court of Germany in the Brokdorf decision defines pubic order as: "the totality of unwritten rules,

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[107] Council of Europe, *Collected edition of the "Travaux preparatoires" of the European convention on human rights*, vol. IV (Nijhoff, Hauge, 1985) p. 106.

[108] E/CN.4/SR.319 (GB), Bossuyt, *Supra* note 38, pp. 365-366.

[109] The same proposal was made by British delegates alongside a handful of other countries' delegates in regard to Article 19 on freedom of expression, which was rejected by 9:5 votes with 4 abstentions. The word 'order' was adopted by 7:5 votes and 6 abstentions and the word 'Pubic' was adopted by 6:1 with 10 abstentions. *See* Bossuyt, *Supra* note 38, pp. 380-381.

[110] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984) Para. 22-24. Almost the same definition for 'public order' is proposed in Article 4(e) Strasbourg Declaration on Right to Leave and Return: "the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based."

[111] *United Communist Party of Turkey* v. *Turkey*, 30 January 1998, ECHR, no. 133/1996/752/951, judgment, para. 45. *See also Refah Partisi* v. *Turkey*, 13 February 2003, EctHR, nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment, para. 86.

obedience to which is regarded as an indispensable prerequisite for an orderly communal human existence within a defined area according to social and ethical opinions prevailing at the time."[112]

Putting these two definitions together not only shows the broad ambit of public order but also brings about a certain level of oversimplification. A red light as a sign to stop is as much a part of public order as the absence of physical violence and deterrence from destruction of private property or the prohibition of torture are and -at a logical level - both can be raised equally as a reason for interference.

3.2.5.3 Broad Ambit and Undermining of the Right

The broad and oversimplified definition of public order has amounted to an undermining of the right to freedom of assembly and such an impact on the efficiency of the right can be seen in case law. Besides the already explained *Molnar* case and the three cases of the UK court on the question of balancing the right to freedom of assembly with the alleged right to drive freely, which are good examples of such an ambiguous, broad and form-ignorant application of public order, there are other cases that can be cited.

In two different cases, European monitoring bodies have provided two different decisions on whether generating loud noises during a demonstration can be a legitimate case of interference on the basis of prevention of disorder. The Commission, in the case of *S* v. *Austria,* decided that using megaphones and musical instruments – although the demonstrators declared that they will not make noise after 22:00- amounts to public disorder and is a matter that domestic officials are better suited to decide on. However, in the case of *Galstyan* v. *Armenia,* the court accepted that the nature of assembly requires the generation of a certain amount of noise and therefore one cannot lose his/her protection for just being proactive in an event.[113]

The deciding bodies in neither of the cases provided any formula or method on how they made their minds up, and on what grounds they decided that honking your horn during a demonstration is within domain of public order but using musical instruments and megaphones are too loud for the order. Furthermore the court in the *Galstyan* case did not accept that generating loud noise is tied to the form and nature of assembly but only accepted a certain level of noise; an unknown level which it did not make clear how it should be measured.

In the advent of such interpretations, the term disorder is more and more used to refer to inconvenience, annoyance or disruption rather than the absence of order, turmoil, civil disturbance or chaos.[114] This reduction of threshold stems directly from the above mentioned broad and oversimplified definition of public order, which in itself is the consequence of the

[112] Brokdorf decision of the Federal Constitutional Court of Germany (1985) BVerfGE 69, 315 1 BvR 233, 341/81, in 'Guidelines on Freedom of Peaceful Assembly', (The OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw, 2007), p. 39. <www.osce.org/odihr/24523>,visited on 24 June 2011.
[113] *Galstyan* v. *Armenia* , *Supra* note 52, paras. 116-117.
[114] Mead, *supra* note 31, p. 90-91.

unification of the conditions of rights and the ignorance of specificity towards each and every single right.

3.2.5.4 Paradox of the Law

The above cases and other existing case law[115] prove the proposition that; the oversimplification of a legitimate aim to a discretionary level, provides reasons for interference in any given case, in other words, as the bar on public order decreases, the right to freedom of assembly in itself becomes a threat to public order; in a way, the mere practice of the right brings a reason for interference.

An assembly is not an ordinary every day event and due to its characteristics -numerous individuals occupying a space normally used for shopping or commuting- causes inevitable disturbance and disorder, so lowering the bar on public order makes a permitted assembly an exceptional courtesy of the sovereign that has disregarded the inevitable disturbance -which is already outlawed. This means that assembly as a recognized human rights exist only as an exceptional *point avance,* one where the state determines whether it is given or not.

To show how public order -as it is defined today- has had such an effect on the practice of this right we need to read the definition again. Public order is defined as something like this; the totality of domestic and international legal frameworks in addition to all the unwritten rules and disciplines that prevail at the time and which a functioning society is built upon, with respect to human rights and democratic values.

This in itself is a broad definition that can encompass both legal and normative frameworks and unwritten codes of conduct. What these definitions suggest is that; rules, regulations and every day disciplines preserve the public order, thus compliance with them guarantees the order and defends the normal ordinary routine of a society.

The reason that I refer to public order as 'normal ordinary routine' is that the assumption of law here is that we have a society which is based on order. Consequently 'disorder' is the exception and the rule is 'public order'. So this ordinary routine -which is based on and protected by the rules and codes of conduct- exist throughout a certain period of time, until something substantially changes.[116] To drive between the lines or to dress before going out into the streets are orderly and normal routines, protected either by law or codes of conduct and therefore part of public order.

Acts against these rules are considered to be disorder because they destroy/disturb the routines and ordinary rituals. For that reason, in a society where rules, regulations and codes of conduct are generally complied with, the *status quo* becomes the orderly status and the disorder becomes the exception, thus what these definitions propose is that preserving the *status quo* becomes preserving the order.

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[115] *See G and E* v. *Norway*, 3 October 1983, ECommHR, no. 9278/81 and 9415/81, Inadmissibility decision.

[116] Time plays a substantial role in defining public order. For example homosexuality was considered to be an abnormal and disorderly behavior not long ago in all the countries that now accept it as normal.

In other words preserving public order is understood as preserving the *status quo*, which encompasses not only domestic legal frameworks, human rights standards and values of democracy but also goes further, in as much as it covers regulations or even disciplines, while it's bound by both time (*norms and rules that are prevailing at the time*) and space (*in a functioning society*), in other words public order defines boundaries of time and space, meaning that at this time and at this exact place you are compelled to act/ behave in a certain pre-described manner, if you do the opposite you are acting against the peace of the time and place and threatening the balance and order.

Public order in its contemporary interpretation is the exact opposite of the function of assembly as a method of social movement. As explained above, an understanding of assembly is tied to an understanding of what it does in regard to the expansion of time and space. Assembly as a *political* event - *the political* being: momentums of commonality among diverse interests and individuals that express or protects a common (collective) good through collective power and public deliberation-[117] breaks through boundaries that proclaim exclusion. Through gathering diverse interest groups to pursue a common goal, assembly repels boundaries of identity; by occurrence in a common space like the public space, it rejects spatial barriers such as household and workshop, and finally assembly as a live event that occurs in a certain place in a certain period of time stops, in the literal sense of the word, the ordinary flow of time for one who participates in it -you must stop your routine to make time for participation and on the other hand it slows down the routine of others by obstructing the communal space. For these reasons the progressive nature of assembly is tied to its rejection of boundaries.

To put it in Walter Benjamin's words: assembly can be seen as a progressive act that rejects what it deems to be catastrophic. "The concept of progress must be grounded in the idea of catastrophe. That things are "status quo" *is* the catastrophe."[118]

The threat to preserve the "*status quo"* [here the obligation to preserve the public order] for him is the critical moment and progress is "the first revolutionary measure taken".[119] Assembly with its functionality that I explained above is a revolutionary act, not in the sense that it aims necessarily to conduct a revolution in its historical sense but in the sense that it revolts against the prescribed boundaries of time and space.

It is in this exact understanding of assembly that preservation of public order -*status quo*- becomes the paradox of the right. Law threatens through punishment in order to preserve public order but at the same time assembly - inevitably- challenges the temporal and spatial boundaries of public order. It is for this reason that I argue that the right to freedom of assembly is undermined by the current understanding of public order. The paradox lies at the heart of 'public order' and 'assembly'; the former tends to preserve boundaries while the later aims at breaking the same boundaries. In a way, the law takes away with one hand what it gives with another.

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[117] Wolin, *supra* note 4, p. 11.
[118] W. Benjamin, *The arcades project* (Belknap Press, Cambridge, 1999) p. 273.
[119] *ibid.*, p. 474.

3.3 Permission and Authorization as Methods of Control

Before concluding this chapter it is necessary to open another discussion. Interferences made with the practice of this right are not always in the form of a ban in advance, dispersing of a crowd or subsequent penalization. Refusing to issue authorization for an assembly is interference and should comply with the above mentioned tests,[120] since it has a chilling effect on the right and might bring hesitation among individuals to participate.

It is an accepted practice for states to require authorization for or notification of demonstrations beforehand. "Prior-authorization procedure [does] not normally encroach upon the essence of the right to peaceful assembly."[121] The given reason for such a requirement is; to enable officials to take reasonable measures to guarantee the smooth running of demonstrations according to the nature of each event.[122]

It is clear that this administrative rule should be applied in conformity with the nature and purpose of the right; but objections can be raised in the way that such a rule gives the upper hand to the state in regards to control, management and even manipulation of demonstrations by indirectly limiting the chances of spontaneous uprisings and therefore is in contrast to the democratic function of freedom of assembly as a political event.

On this matter, while the ECtHR has accepted the right of states to penalize those who participate in a demonstration which has failed to obtain an authorization;[123] it has recognized the right to spontaneous demonstration in certain circumstances without notification or authorization as well. Such circumstances appear to be when anything but an immediate response in the form of a demonstration would be irrelevant and de-contextualize the whole action.[124] By comparing these two different positions of the court, a scholar like Mead considers his hands tied and leaves the question to be answered by subsequent developments of the courts jurisprudence.

It is not clear who is in charge of deciding on whether the immediate response is necessary or that the passage of time doesn't have an effect on the graveness of the cause; clearly the protestors are not in charge since the state can interfere on the basis of lack of authorization. The legitimacy of such an action will be decided after the practice of the right has been hindered. Here is exactly where one other characteristic of the assembly – as already touched upon on previous chapter- should come into play.

Assembly is a right that in its practice is tied to the temporal context that it happens in, it is a live event that can't be duplicated, repeated or represented again in the future or distance; the right is respected when there are no interferences made while it is occurring. For example, if a group of

[120] *Baczkowski* v. *Poland*, 3 May 2007, ECtHR, no. 1543/06, Judgment, para. 67.
[121] *Hyde park and others* v. *Moldova*, 14 September 2010, ECtHR, nos. 6991/08 and 15084/08, Judgment, para. 46.
[122] White, *supra* note 56, p. 454.
[123] *Ziliberburg* v. *Moldova*, 4 May 2004, ECtHR, no. 61821/00, Inadmissibility decision, p.12
[124] *Molnár* v. *Hungary* , *supra* note 96, paras. 37-38.

women's rights activists plan to conduct an assembly while anti-abortion legislation is discussed in the parliament, with the aim of pressuring their elected representatives to vote against the proposal, their assembly can only be effective if it happens before the decision is made; no matter how problematic their assembly would be for the public order or rights and freedoms of others, any other time except before or while the plan is under discussion is inappropriate. How to reconcile this temporal graveness of assembly with time-consuming regulations like obtaining authorization is a dilemma that works perfectly in favor of states.

From another perspective, the requirement to obtain an authorization from officials -no matter how administrative this regulation is or the fact that states are compelled to be open-minded and flexible even in cases where authorization hasn't been obtained- is the legal manifestation of what sociologists like Melucci have referred to as methods and regulation to control motives of action which have a chilling and neutralizing effect on actions as such, even before they shape their agenda.

Interestingly, this requirement is accepted as legitimate, while objection to this exact complex system of contemporary politics –to be clear, a critical approach towards the massive intrusion of bio-power[125]- is the core purpose of the new social movements, the very thing which will examine the legality of any movements [assembly] even before they communicate their dissent.

Finally if the right is granted or recognized and if its main target is usually the power holders,[126] why should the practice of it be suspended by authorization from the government? This rule becomes more problematic when one reads it alongside the possibility of officials interfering only on the basis of a general authorization and not the law *per se*. Furthermore this regulation can have an effect on de-contextualization of the assembly.

3.4 Conclusion

Investigating the scope of the right to freedom of assembly more than anything re-emphasizes the repeated paradox of this right; 'assembly can be a democratic means of fortifying and maintaining democracy, if it staged against interest of state power holder, on the other hand effective exercise of critically oriented freedom of assembly is dependent on the state's protection.'[127]

Although freedom of assembly is mostly regarded as a form of expression and its limitation clauses are read under the light of free expression, it is generally accepted that freedom of assembly enjoys a

[125] Bio-power can be defined as a complex matrix of strategies used to create docile bodies. The term, as it was coined by Michael Foucault, refers to a complex network of methods and strategies aimed to subjugate and control bodies of populations, peaked by the developments of science, technology and most importantly biology in mapping the human body. For more information *See* M. Foucault, *The history of sexuality Vol.1: The will to knowledge* (Penguin,London 1990).

[126] To clarify; from my perspective the usual target of assemblies is the power holder; The media and general public are the audience of the assembly, those who the message must be transferred to either to gain more support or to magnify the message.

[127] Nowak, *supra* note 39, p. 482.

narrower protection compared to other civil and political rights. But how is this possible?

While expression can be critical through its content, assembly is so because of its form. Seeing assembly only through the lens of its content widens the scope of interferences. As it has been shown above, disturbance, annoyance and disruption are detachable parts from the form of assembly but this is only addressed by reference to the limits of freedom of expression and in regard to the content. There is no controversy around the legal protection of insulting slogans or banners. In addition to the content; the form of behavior that assembly has can also result in annoyance and disturbance.

To open it up more; forms of expression -protected under the right to freedom of expression- are not inherently disturbing or disrupting. Talking, writing or performing regardless of the message, are normal behavior while occupation of a communal space by large numbers of people is disrupting. The lack of effort to distinguish and take into account the form of assembly amounts to what I call a 'false unification of rights' and attribution of the same normative protection to two different rights. As a result, while the content of assembly is highly protected, protection of its form is left in a void.[128] Judicial inconsistency of courts[129] and open ended room for interferences with the right to freedom of assembly on the grounds of the inevitable consequences of its form, are the result of this void.

Furthermore, and most importantly, form-ignorant interpretation of legal terms like 'public order' have deepened the above mentioned void by creating another legal paradox. Public order – in relation to the right to freedom of assembly- converts it from a 'limitation' to an absolute 'suppression'. Public order aims to set spatial and temporal boundaries and assembly demolishes those boundaries unavoidably.

In other words, the right is 'limited' by its exact counter-part, a relation based on a negation/rejection allowing for no balance to be made, meaning that the right –considering its functionality and nature of its form- itself becomes an outlawed behavior, due to the following sentence on prevention of disorder.

Here is where I settle my main argument for claiming the impossibility of holding an assembly without giving a possible legal cause of interference; I argue that if such an interference doesn't happen, it doesn't mean that a reason for interfering wasn't available. Due to the current definition of public order and the existing paradox in the text of all the major conventions

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[128] The ignorance towards the specificity of each right is not news; during the drafting process of the ICCPR it was pointed out that limitation clauses should be drawn-up in a uniform manner to avoid any serious interpretation mistakes. Consequently although Articles 18 -21 of ICCPR were drafted and revised at different times, arguments surrounding major limitation clauses like public order and national security of these articles are identical. *See* Bossuyt, *Supra* note 38, p. 365, E/CN.4/SR.116; W/CN.4/SR.319 Commission on Human Rights, 5th session.

[129] The judicial inconsistency of the courts can easily be spotted by comparing for example the case of *Galstyan* v. *Armenia* (*supra* note 52) and the *S* v. *Austria*, 3 December 1990, ECommHR, no. 13812/88, Inadmissibility decision, Also the contradictory decisions of European monitoring bodies on the issue of spontaneous assemblies and the obligation to obtain authorization are other immediate examples that come to mind.

of human rights; legally speaking from the moment that an assembly launches its course of action, disorderly behavior is created.

The problem of ignorance of the characteristics of assembly becomes evident when in practice courts seek to balance this right with the rights and freedoms of others. It is practically impossible to hold a public assembly and not get into the domain of rights and freedoms of others; this is the corollary of the form that assembly possesses. The occupation of pubic space by masses of people can hinder using common services like roads and highways, it can obstruct businesses from profiting, it can make normal and routine life a bit complicated when roads are closed, but is it rational to ban or put limitations on an assembly because some may miss their flight due to traffic caused by a demonstration? Doesn't it undermine the right when courts override freedom of assembly with the right to fish or the right to drive?

Finally, the specificity of assembly's form is not unknown to policy makers and legislators. The reduction of the traditional test of 'prescribed by law' to 'in conformity with law' is a direct response to the fact that assemblies are live events that continue over a course of time and, as any other event of such a nature, they are unpredictable and can change both in content and manner and therefore authorities need to have the possibility to interfere with the right while it is in progress, via police orders for example. Yet, despite knowing that assemblies have these characteristics, when it comes to protecting this right, these specificities are ignored and left to the good will of the state.

4 Politics of Spaces or External Limits of the Right to Freedom of Assembly

4.1 Introduction

"Good fences make good neighbors!"
Robert Frost, Mending Wall

Fulfillment of a right besides proper legal protection depends on other factors as well. Law as a social construct, regardless of its abstract nature, applies to real life situations, situations so intertwined with social, economical and political considerations that detaching it from those elements pushes it into the realm of the abstract. Therefore a piece of legislation ignorant toward these real life climates of a society never obtains the possibility of application or full realization.

Fulfillment of the right to freedom of assembly is no exception to this rule; for example the existence of a culture of protest in a society is a requirement for the realization of the right. Where the disturbing or annoying aspect of assembly/demonstration is more ingrained in people's understanding, in comparison to its political functionality, fulfillment of the right is problematic.

Another factor, deserved to be examined in regard to the realization of this right is the interplay of economy and politics in public space.[130] This chapter aims to show how the right to freedom of assembly is limited/ affected due to the practice of power in the public space.

Furthermore I have singled out this specific matter since studying this right and its limitations without the socio-political entailments of spaces is repeating the same common mistake of ignoring the spatial characteristic of the right to freedom of assembly and would result in a one sided observation of draw back clauses that at the same time is applicable to all the other rights while it is not specific to any of them.

All together, this chapter aims to launch a theoretical and analytical quest to clarify the political limits of this right. This will be done by a study of the politics of public space, legal practices like the privatization of communal spaces and the proliferation of shopping centers, as illuminative factors in an understanding of the tension between assembly as a human right and public space and - in a sense - its order.

[130] I tend to refer to these requirements as non-legal ones, meaning those requirements that are not strictly and directly noted in the body of international human rights law.

4.2 Public Space and its Order

There is no need to explain that an assembly needs a place to be held in. A comprehensive evaluation of the efficiency of this right requires not only pointing out the deficiencies in its legal articulation or understanding, but also consideration of other social-economical and political factors that play a role in the preparation of public space for such practices. In this section I try to reason on the importance of public space as a critical domain of action and the role that political desire plays in transformation of this space. The disappearance of public space or, in other words, the privatization of public space will be the next section in which the growth of private commercial centers, the increase in gated communities and the expansion of property rights will be singled out as main practices that limit the right to freedom of assembly.

4.2.1 Public space, critical space

Commentators from different disciplines refer to increasing processes of privatization of once-used-to-be public spaces as the 'disappearance of public space'.[131] This process can happen by transference of ownership from local or national governments to private entities or it can happen through expansion of property rights. In any case it is clear that such spatial transformations have a negative effect on exercise of right to freedom of assembly.

In addition the process of urbanization brings about certain arguments that can't be completely irrelevant to the practice of rights. The politics of spaces-the function or the purposes that certain spaces are shaped /reshaped according to- can't be ignored.

Today what one refers to as 'public space' – in a tangible and physical sense- can be condensed with a certain level of imprecision to the term 'city'. The town square, parks, streets or simply all those spaces in between home and workplace, home and shopping center, home and another home, are what constitute the 'public space'.

There are other functions and definitions besides commuting and a place for leisure set forth for public spaces. Public space is widely acknowledged as the space for communicating ideas, experiencing collective life and forming networks. A place for strangers to meet, dispute, discuss and spend their free time while enjoying a community life. To put it in Harvey's words; Public space as a platform for the 'proper bringing together' of multiple interests into some framework expressive of the general interest, creates an opportunity of collective urban experience that brings about a sense of obligation or moral influence over different classes.[132]

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[131] *See* M. Kohen, *Brave new neighborhoods* (Routledge, New York, 2004) and D. Mitchell, 'The liberalization of free speech: Or, how protest is silenced in public space' *Stanford Agora On-line Journal of the Stanford Law School* (2003).

[132] *Cf.* D. Harvey, *Spaces of hope* (Edinburgh University Press, Edinburgh, 2000) p. 81 and D. Harvey, 'The Political Economy of Public Space', in S. Low and N. Smith (eds.), *The politics of public space* (Routledge, New York, 2005) pp. 17-34.

As a consequence of such experiences, entirely unrelated causes to, for example my own, (let's say a preoccupation of a worker over his/her minimum wage) will become my concern as well, and it is through these moments that *the political* occurs -a new experience of the political different from typical gatherings of groups of people with the same concerns which directly relate to them all.

Through this lens the importance of accessibility/the politics of public space for the realization of the right to freedom of assembly becomes more unambiguous. In a way, public space is not only important as the proper locus for assembly but also it has an effect on the political distribution of anxieties and discontent, thus it can increase/decrease the possibility of people coming together.

Expanding Henri Lefebvre's 'Right to the City', David Harvey speaks of it as a collective right to shape/ reshape, define/ redefine ourselves through doing the same to our cities.[133] He bases his argument on Robert Park's definition of city as: "man's most consistent and, on the whole, his most successful attempt to remake the world he lives in more after his heart's desire. But, if the city is the world which man created, it is the world in which he is henceforth condemned to live. Thus, indirectly, and without any clear sense of the nature of his task, in making the city man has remade himself."[134]

He concludes that the right to the city is the right to change ourselves by changing our cities in the most desirable way, and since such change requires collective power over the process of urbanization this right is more a collective right rather than an individual one.

The relation of the study of the process of urbanization and the right to freedom of assembly lies within the notion of 'change'. If cities as embodiments of public spaces are shaped or changed according to the desires and wishes of those who currently have the power over the process of urbanization, it is required to see to what extent ideologies (desires) behind such transformations match the requirements of the fulfillment of the right to freedom of assembly. In simple words, if cities are changing according to the desires of those who hold power and such changes affect who we are as collectives inhabiting those spaces, are we -or in other words- are our cities changing in a way to make more space for the practice of this right? To what extent do today's gated communities, segregated suburbs or tightly surveilled public spaces – as Harvey puts it[135]- allow such public deliberation, communication or political activities, such as assemblies or demonstrations?

[133] D. Harvey, 'The Right to the City', 53*New Left Review*(2008) pp. 23-40.

[134] R. Park, *On Social Control and Collective Behavior,* (Chicago University Press, Chicago, 1967) p. 3. In D. Harvey, 'The Right to the City', 53*New Left Review*(2008) pp. 23-40.

[135] D. Harvey, 'The Political Economy of Public Space', in S. Low and N. Smith (eds.), *The politics of public space* (Routledge, New York, 2005) pp. 17-34.

4.2.2 Privatization of Public Space

Private ownership and property rights are legitimate and legal privileges, which can be problematic for practice of other rights like freedom of assembly.
The expression 'my house, my castle' is not a baseless everyday idiom. In fact you can do in your private what might be seen in public as immoral, against order or even an infringement of rights. You are fully allowed to be biased or discriminate in your private space of action; you can act in your private space in a way that limits the rights of others–for example freedom of expression. This basically comes from the clear relation of ownership and power, property brings power with itself that gives the owner the authority over its subjects, in contrast in the public space the authority is not rooted in ownership of state over the faith of its subjects but rather from a more complex social and political relation.

On the other hand, while private space can't be categorized as space of deliberation and communication, one would think that public space for the very fact that it is not owned by any specific person and is open to everyone is the site of activism. As much as this proposition can be true, the history of the establishment of such a function for public space is not drained of struggle.

One commonly cited example is the struggle of Industrial Workers of the World (IWW), commonly known as the Wobblies, and the story of their soap box speeches in the United States. Workers –members of IWW- started to publicize their discontent and dissatisfaction through holding speeches on street corners while standing on a soap box. By doing so not only did they communicate their dissent to a larger audience- consisting of other workers, their targeted business owners and of course the general public- but also through their struggle for keeping public space as a platform for communicating dissent, they established that access to public space can be seen as a matter of class differentiation, in a sense that the soap box and the street corner were the only affordable means for them to practice their freedom of expression.[136]

Their struggle to make the tradition of soap box speeches wasn't an easy ride. They were arrested and confronted by police and the legal system repeatedly on the basis of disorderly acts, vagrancy and of course on the basis of the right and freedom of the business owners of the streets. Their strategy was to not leave the soap box empty; whenever one of them was arrested another replaced him/her immediately,[137] the first day that this tactic was employed in Spokane, eighty-three men were imprisoned.[138]

If the Wobblies were fighting to establish this specific functionality of public space, today the struggle is for a far more drastic cause, to keep the public space, 'public'. The expansion of so called buffer zones around private enterprises, which allows the owners to stretch their property rights into public spaces, commercialization and, as a result of privatization of town centers, by the proliferation of shopping districts and shopping malls

[136] *Cf.* M. Kohen, *Brave new neighborhoods* (Routledge, New York, 2004) pp.18-35
[137] *ibid* p. 23.
[138] *ibid.*

and excessive controlling measures are today's obstacles for holding an assembly. If in the advent of the twentieth century the question was whether one can practice his/her rights in the public space, today, by affirmation of such a possibility, the question is: where exactly is left as public space.

A question of such a nature was brought to the ECtHR where the applicants were banned from setting up banners and collecting signatures in the entrance of a shopping mall in the new town center (the Galleries). The Galleries, which was owned by a private company, had all the classic componants of a traditional town square, e.g. public service offices like a police station and post office, a shopping center, a library and a health center and in fact it was marked on the city map as the town center, but still the applicants were not allowed to practise their rights there.[139]

The court while examining different cases of the US Supreme Court where, in some cases, such rights were acknowledge in quasi-public places,[140] rejected the applicants claim on the basis that different states have a different perception of public and private.

What must be noted in this regard is that today private shopping centers are growing to be more than just a center for mere private commercial purposes and are a place of gathering where multiple activities-besides consuming- like entrainment, education, health care, charity etc. goes on, in a sense the new shopping malls are the city-or the city center- in miniature. When such a phenomenon replaces the traditional center of communication, it must inherit the same regulations and functions, otherwise critical public spaces like town centers transform to private spaces that one is still welcome to enter, but only for shopping, consuming and enjoying the spectacle.

4.2.3 Gated Communities

Another example of privatization of public space in its literal sense- transference of ownership- is the growth of gated communities. Gated communities are defined as "residential developments surrounded by walls, fences or earth banks covered with bushes and shrubs, with a secured entrance."[141]

An interesting example of such cases that Kohen brings in her book is in Utah, Salt Lake City, where a block of downtown was sold to a church, which subsequently banned non sanctioned political and religious activity in the public- private plaza.[142] These communities are usually secured by private security and consist of groups of people with certain similarities or interest, either Hollywood celebrities or a group of middle class bourgeoisies.

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[139] *Appleby* v. *UK*, 6 May 2003, ECtHR, no. 44306/98, Judgment.

[140] Shopping malls can be one example of quasi-public places. These are places that are open for public use, anyone can enter them without an explicit invitation, these places usually contain the traditional components of the old town centers, the difference is that these places are owned by private entities and that is the criteria that makes them different from public places.

[141] S. Low, 'How Private Interests Take Over Public Space', in S. Low and N. Smith (eds.), *The politics of public space* (Routledge, New York, 2005) p. 84.

[142] Kohen, *Supra* note136, p. 2.

What is the burning issue here is that the segregation of different groups is a direct result of the creation of such physical boundaries. What these boundaries proclaim is in a sense encapsulated in Robert Frost's poem 'Mending wall'[143]. The poem is story of two neighbors who meet up every spring to repair a wall that segregate their lands, while the poet with a bitter joke objects to this annual ritual of segregation: 'My apple trees will never get across, And eat the cones under his [your] pines', his neighbor repeatedly says : 'Good fences make good neighbors.' The sad tune of Frost is in fact the melody of today's urban life; gated communities are proliferating rapidly- especially in the US.[144] In fact we have a name for the bitter answer of Frost neighbor, 'tolerance'; the other is tolerated in as much as he/she-or his/her ideas- doesn't get close to 'us'. The poor, the homeless or the worker should stay in the designated areas.

The city- the public space- through these practices is divided between different classes. To realize these divisions there is not always a need for walls or fences, the design and aesthetics of spaces are capable of sending the same message of "keep out" or "keep in". It is in such an atmosphere that the relationship between public space and political activities like demonstrations and assembly becomes more and more complicated. In an environment of spatial segregation the probability of bringing people together reduces more and freedom of assembly is the first right to be affected negatively.

4.2.4 Expansion of Property Rights

Expansion of property rights in public spaces is also another growing concern for the realization of freedom of assembly. Private business owners not only enjoy legal protection within their property but they claim such rights -and enjoy from such rights in certain cases- within the surrounding area or the pedestrian walkways of their property as well.

Under the UK Harassment act of 1997 those businesses or private entities who are usually targeted by protestors-e.g. armaments factories, major corporations or multinational companies and abortion clinics- can claim a buffer zone or protest free zones around their establishments.[145] This means that a zone of certain miles, even though it penetrates the public space, becomes a grey zone that is not per se private or public. Protestors in these cases are compelled to conduct their action somewhere else, which leads to de-contextualization of their protest; what would be the good of holding an assembly or a protest against Nike, contesting its production standards, aiming to raise awareness among customers, when you are forced to hold it, not in front of the company's premises, but a couple of miles away?

It should be considered that this specific advantage for private enterprises is different from securing their right and freedoms to practice their

[143] The author came across to the poem for the first time in Kohen, *supra* note 136.
[144] Kohen notes that from 1995 -1998 the number of people living in gated communities in the US increased from 4 million to 16 million. Furthermore a survey done in 2001 states that 7,058,427 (5.9%) of households live in communities surrounded by walls and 4,013,665 households live where the access is controlled. *ibid*, p. 86.
[145] Mead, *supra* note 31, p. 22.

endeavors, e.g. their right to run a business and earn a profit or the freedom of customers to enjoy legal services; this sort of regulation is more similar to controlling measures and of the same nature of the prohibition of protest in the vicinity of Parliament Square in London[146] and the prohibition of holding assemblies with the cause of Northern Ireland in Trafalgar Square.[147]

4.2.5 Political Implication of Spaces

David Harvey has largely analyzed the political implications of the transformation of Paris during the Second Empire by Haussmann. [148] His analysis of the transformation of Paris can be useful to show how the political implication of the transformation of cities can affect the practice of rights; more specifically the right to freedom of assembly.

Paris was transformed into a new city with massive boulevards made splendid by spectacular illumination and occupied with café and boutiques, where public and private constructs match and validate each other on the basis of aesthetics.

The consequence, he argues, was the reduction of the intermixing of classes.[149] Paris was divided to a respectable west and a less fortunate and largely ignored east; industrial activities and their associated working class were moved from the center and replaced with a matching design of public and private constructions. He sees the class segregation of cities as a new form of repression. The concentration of capital in certain spaces created homogenized public and private spaces where the poor and the homeless were not welcome equally in the Boulevards (the public space) and the café's (an exclusive commercial space).

Through such intrusion of market values, the political aspect and functionality of public space was replaced by a mere spectacle. In the end the result was that -to put in Harvey's words- the sociality of city [public space] was as much controlled by the commercial activities around it as by police power. And the loss of course was the idea of the city as a form of sociality, as a potential site for the construction of utopian dreams of a nurturing social order.[150]

The above mentioned segregation by the proliferation of gated communities and the control of activities in public spaces through the protection of private activities of businesses are further evidence of the existence of the political implications of public space which eventually hinders the realization of freedom of assembly in two stages. Firstly by making 'bringing people together' harder and harder due to a reduction of the sociality of cities, a reduction of the intermix of-urban experiences and physical segregation of people. Secondly by bringing extra control of public

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[146] *ibid.* , p. 146. The same prohibition is in place in Turkey in regard to Taksim square.
[147] *ibid.*, p. 87.
[148] *See* D. Harvey, 'The Right to the City', 53*New Left Review*(2008) pp. 23-40.and D. Harvey, 'The Political Economy of Public Space', in S. Low and N. Smith (eds.), *The politics of public space* (Routledge, New York, 2005) pp. 17-34.
[149] Harvey, *supra* note 133, p. 5.
[150] *ibid.*, p. 6.

space by the expansion of private property rights into public space and ‘mall-ing the cities’. An example of such economical control of public space can be given from variety of examples; I have picked Iran and the city of Shiraz to elaborate on such external limitations to freedom of assembly. Considering that the government of Iran is not hesitant about cracking down on any sort of assembly, it doesn’t mean that they don’t use these forms of control through ‘soft power’.

Shiraz, Molla- Sadra Street; Grey areas are the educational spaces and Black areas are the commercial spaces.

Shiraz is a city in the southern part of Iran and is among the five biggest cities of the country. The city hosts large numbers of universities and enjoys a young population. As any other big city with a young population and various colleges and faculties, the city has a relatively active and vibrant civil society. In times of demonstration and assemblies -as the tradition in Iran is- everything starts from the main university building or the main dormitory.

Most of the demonstrations in this city either start from ‘Molla-Sadra’ street or end or disperse as they get there.

As it is shown in the map ‘Molla-Sadra’ street with almost 800m length and 30 m (including the pedestrian area) width, hosts two faculties and one university library and it is only 1 Km away from the main dormitory. It is clear and obvious that due to the presence of these sites, this street has taken a political function for itself.[151]

What is interesting in observing the development of this street is the commercialization of this area throughout the last ten years. The street on normal days is highly populated both by cars and walking people, nevertheless four shopping centers have been built in this street. As a consequence of these developments, what once used to be a student site became one of the main shopping streets of the town. Assemblies rarely

[151] *Cf.* D. Harvey, *Spaces of hope* (Edinburgh University Press, Edinburgh, 2000) p. 75. As Harvey says in ‘spaces of hope’: human beings have produced a nested hierarchy of spatial scales within which to organize their activities; such an attribution of specific functionality – in this case platform for political activities- to ‘Molla-Sadra’ street is apparent.

happen on this street – if it happens it is either behind the closed gates of the university, this is while non-students are usually prohibited from entering the university building, or in the dispersing crowds from another site taking haven in this street for its various escape ways- and the historical role of the street is now controlled by traffic regulations or private businesses, and the existence of customers and their families also renders the place less favorable.

These methods of control -controlling political activities by private businesses- are not limited to certain geographical boundaries and are not new either; On March 3, 2003, in the advent of Iraq war, a lawyer named Stephen Downs was arrested for trespassing at the Crossgate Mall in Guilderland, New York, a small town near Albany. He was wearing a T-shirt that he bought from the mall with the slogan "Give Peace a Chance", security guards at the mall ordered him to take off the T-shirt or leave the mall, arguing that the mall is like a ' private house' and his behavior is inappropriate. Subsequent to his refusal he was arrested and handcuffed by the police.[152]

Moreover Don Mitchell makes the example of Horton Plaza Shopping Center in Downtown San Diego to show the suppression of freedom of speech and protest as the social and political cost of proliferation of malls in the US.[153] The mall was built next to a traditional downtown center and Horton Plaza Park, with the intention of creating a new downtown centre, safe and free from homelessness.[154]

When in 1985 the shopping center opened, the project to remove poor and the homeless from the vicinity of the park started and this plan was succeeded in 1991 through new development plans. While the project of homogenization of the aesthetic of the surrounding area and the commercial purpose of the mall was proceeding; the political functionality of the occupied space -the downtown center- brought new challenges.

The owners of the mall permitted limited activities of political natures, like distributing leaflets, collecting signatures and petitioning, on the condition that no more than two persons was allowed to be active in the mall and there must be a permission request 72 hours in advance.

In March 1986 a request for a performance by eight people for ten minutes in objection to the US sponsored bombing of El Salvador was denied by the management of a mall. The activists didn't object to the decision and didn't ask for permission to distribute leaflets but later, on April 4th 1986, the owners of the mall managed to obtain an injunctive relief against the group for trespass, interference with business, and annoyance on

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[152] Kohen, s*upra* note 136, p. 1.

[153] D. Mitchell, 'The liberalization of free speech: Or, how protest is silenced in public space' *Stanford Agora On-line Journal of the Stanford Law School* (2003).

[154] Beside 'Mall-ing' the cities Kohen makes the example of a more complicated but relatively similar practice; 'Business Improvement Districts' (BID), where the practice of commercialization and homogenization of public space happens through not replacing the city with the relaxed feeling of the mall but by keeping the experience and sense of urban life while it is emptied from the actual dangers, disturbance of the city. In a sense restructuring the city as a mall, where the consumer experiences the feel of a city –walking in the sidewalks from one shop to another- and the safe, relax and dazzling touch of the mall. *See* Kohen, s*upra* note 136, pp. 63-65.

the basis of speculation of the possibility of a demonstration on the 5th of April in the Horton Plaza Park.[155]

These examples, alongside many others, show how states manage to control the sociality of spaces and reduce behavior that they deem to be disturbing, annoying or disorderly through the deployment of 'soft power'; while they are indirectly manipulating the affairs in the public space, the direct actors of control are no longer the police or uniformed authorities but the private business owners.

4.3 Conclusion

Accordingly, as the traditional town centers are turning into privately owned shopping malls and business owners expand their property right more and more within public spaces, cities- in a more narrow sense public spaces- transform to sites of intertwined rights – the right of the private owners to regulate their premises as they wish, the right of business owners to exclude protestors and those who bring about disturbance to their customers or damage the glitter and glamour of their shops by holding disturbing images of sweatshops, from the vicinity of their premises, and added to all this, the right of the citizens to use the pedestrian area without disturbance or the right to drive. In this confusing cluster of rights, in that wherever one sets foot there is a right to be infringed, it gets harder and harder to open a space for *the political*.

In the end, when Kohen says "Public sidewalks and streets are practically the only remaining sites for unscripted political activity",[156] one might doubt such possibilities as well; taking into the account the ECtHR and British courts jurisprudence, the right to freedom of assembly doesn't enjoy an easy ride even when it comes to access to streets or pedestrian walkways. After all, those spaces have a primary function that quite often overrides the political right to freedom of assembly.

[155] This form of prior to action- restraint, resembles the French government narrative of 'pre-terrorism' in regard to what is known as 'Tarnac nine affair'. for more information on 'Tarnac nine affair' *see* S. van Rossem, 'From a quiet crowbar to an explosive reaction, the discourse of (pre-) terrorism and the spectacle', T. Witty, 'Towards Radical Praxis, Tiqqun, form-of-life and the ethics of civil war' and D. Soto de Jesús, 'Between Sabotage and Pre-Terrorism, Short Circuits and their Terrorizing Disruptions', available at <www.inter-disciplinary.net/probing-the-boundaries/hostility-and-violence/war-virtual-war-human-security/conference-programme-abstracts-and-papers/session-9a-the-%E2%80%9Cwar-on-terror%E2%80%9D-and-civil-dissent/> visited on 9 July 2011.

[156] Kohen, *supra* note 131, p. 3.

5 Concluding remarks

It is a clear fact that the main actors of international law - or in our case international human rights law - are states. States are creators of rights, rights which are created to protect individuals. It is also a well known fact that international law and again, in our case international human rights law, suffers from a chronic deficiency in regards to enforcement, implementation and realization.

Most of the efforts devoted by scholars of international law are in regard to answering questions like; how can states be made to comply with these norms or where does international law –human rights- stand in comparison to state sovereignty. Answers to those questions perhaps provides vision and understanding for dealing with matters of implementation, but what is generally overlooked is a basic issue; who is the "anyone", the "everyone", who is repeated in human rights conventions. To oversimplify this question- which I intentionally want to - the answer is the people. People are generally neglected in our calculation of international law's deficits and, forgetting people as actors and the main concern of law, we find ourselves trapped in the old paradox of human rights; states are both the protectors and the violators of rights.

Freedom of assembly is one of the human rights – if not the only - that can provide a platform for activism and filling the gap between the adoption and the realization of rights. As mentioned above, protests, assemblies and demonstrations are sites of articulation of dissent for those who have no access or limited access to the conventional channels of communication or decision making; it is a legal measure to pressure power holders to comply with the will of the people. This characteristic that I refer to as 'the active attitude of assembly' is attached to its form.

It is a social collective action that not only psychologically and romantically ties different layers of society together, but also which pursues a solely sublime political objective and which does this solely through its barrier-breaking form. It is exactly due to this formalistic function of assembly that I propose that this is one of the human rights – if not the only- that has the possibility of activating individuals for filling the gaps of international law.

In 'Before the Law' Kafka metaphorically describes the law as a palace - a gated construction- to which a man from the country seeks admittance. Before the law stands a doorkeeper who rejects his entrance *at the moment*.[157] Year after year passes with rejection, ignorance and even with the frightening of the man from the countryside. "How does it happen that for all these many years no one but myself has ever begged for admittance?" says the man laying on his deathbed, "No one else could ever be admitted

[157] Frank Kafka, "Before the Law," in Nahum N. Glatzer (ed.), *The Complete Stories and Parables*3-4 (New York: Quality Paperback Book Club, 1971). Available at http://myweb.wvnet.edu/~jelkins/lawyerslit/exercises/kafka.htm, visited on 4th July 2011.

here, since this gate was made only for you. I am now going to shut it," replies the door keeper, and the man dies without entering the law.

Lawyers, usually with a sense of arrogance, see themselves as the guardians of the law, those who protect, cherish and utilize it in the most efficient manner to reach justice in the end.[158] What is intriguing is the occasional similarity of the attitude of commentators, lawyers and drafters of laws – in our case international law and more specifically in relation to freedom of assembly - with the doorkeeper of Kafka's story. Both are ignorant of the correlation of the law and its subjects. The former is meaningless if it is not accessible or practicable by the later. It has been shown that the right to freedom of assembly has been drafted, interpreted and granted, while the political, economical and spatial dynamics of both the right and the holders of it have been and are ignored. The consequence of this is the recognition of a human right that is impossible to practice without giving a legal cause for inference, interruption and confrontation by the sovereign.

Furthermore I tend to couple Benjamin's description of violence with Kafka's story. The man from the country stands outside the law, therefore any attempt by him to enter either through; bribing, forcing his way through or misleading the doorkeeper, is in violation of the law and he will be taken down by other doorkeepers inside, which corresponds to Benjamin's description of violence, on why violence is outlawed.

> The law's interest in a monopoly of violence vis-a-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law.[159]

There is a stimulating correspondence between these two texts and the legal representation of freedom of assembly. As explained, public order prescribes boundaries of time and space; exclusion from which is an introduction into the realm of illegality and violence. Assembly as a legally permitted action is excluded from the realm of legality due to the nature of its form that rejects such boundaries of time and space. This exclusion from spatial and temporal protection of law reiterates the paradox of Kafka's story and the subsequent legal or physical crackdown of the sovereign can be explained by the logic of violence that Benjamin describes.[160]

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[158] New York Lawyer's Code of Professional Responsibility, <www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf > visited on 8 July 2011, the same rethoric can be found in any other official oath of lawyers across the countries or even in primary education of law students in universities.

[159] Benjamin, *supra* note 1, p. 239.

[160] You are not permitted to assemble at a certain time in a certain place, the same goes with the man from country, he wasn't rejected entrance for good, he was not allowed into the demanded place – inside the law- *at the moment*, maybe later but not right now. an assembly with an Irish cause in Trafalgar Square, protesting in front of an armament factory or using musical instrument in the evening are in violation of the law, in the exact way and for the exact reason.

Lastly, human rights defines itself as a protector of people against the state's power, interferences and violations. However, scrutinization of the reading that international human rights law proposes for one of the most effective tools of mobilizing masses against the state's interest, makes it clear that the promise of law as the upholder of good against evil falls short. International human rights law, by being ignorant to the speciality of the form that assembly holds, and by prescription of the same limitation clauses, such as public order, with the same definitions, to each and every right; instead of protecting the people, enhances the artillery of the government by providing legal reasoning for a crackdown on what is the practice of a human right. Situated from this angle, the law becomes a source of paradox –if not evil- and the alleged violent and disorderedly behavior - by standing on the opposing point of the paradox/evil - becomes ethical.

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