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FREEDOM OF ASSEMBLY IN JAPAN IN PAST, PRESENT, AND FUTURE: THE RISE OF A DISTINCTIVE FUNDAMENTAL RIGHT?

Abstract

This article examines the past and present of the constitutional protection and regulation of freedom of assembly in Japan and argues for the necessity of a more liberal framework of protection. Compared to the pre-war period, freedom of assembly in Japan appears to have acquired the status of a constitutional civil liberty under the post-war Constitution. Nevertheless, assemblies continue to be subject to extensive legal regulation, and the freedom of assembly is often subordinated to competing public interests through judicial balancing. In light of this situation, this article argues for the need to develop a more liberal approach that properly recognizes the distinct nature and constitutional significance of assemblies themselves.

Keywords

Freedom of Assembly, Japanese Constitution, Comparative Law, Constitutional Protection of "Place" of Assembly, Demonstrations

Introduction

In Japan, comparative constitutional research has long played a central role, not only in the protection of freedom of assembly, but also across

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a broad range of constitutional questions. From this comparative perspective, particular attention has traditionally been directed towards the constitutional jurisprudence and legal scholarship of the United States of America, especially in the field of civil and political liberties such as freedom of assembly and freedom of expression. Among the concepts imported through this comparative engagement, one of the most influential has been the so-called "double standard" theory. According to this theory, constitutional adjudication should distinguish between regulations affecting economic freedoms and those affecting civil or personal liberties, with stricter judicial scrutiny being required in the latter context.[1]

Various theoretical justifications have been advanced in support of this framework. Some scholars emphasize substantive constitutional values, arguing that civil liberties deserve heightened protection because they are indispensable to individual self-realization and democratic self-government. Others rely on institutional arguments, including theories concerning the limits of judicial competence in economic policymaking and the need to preserve the democratic political process. Although these justifications have been subject to sustained criticism — particularly from those who question whether civil liberties can genuinely be regarded as normatively superior to economic freedoms[2] — the double standard theory has nevertheless remained highly influential and has come to constitute a widely shared premise within Japanese constitutional discourse.

At the same time, however, the constitutional protection of freedom of assembly and freedom of expression in Japan reveals a striking tension between constitutional doctrine and judicial practice.[3] While legal scholarship has generally endorsed robust protection for these freedoms, judicial decisions have often adopted a more cautious and deferential approach toward governmental regulation, particularly in cases involving public order, administrative discretion, or the use of

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[1] Y. Watanabe, G. Shishido, K. Matsumoto, T. Kudo, *Constitutional Law*, Vol. 1, 2nd ed., 2023, p. 80; T. Mori, Y. Koizumi, H. Asano, T. Matsumoto, *Constitutional Law*, Vol. 2, 3rd ed., pp. 13–14.

[2] Mori, Koizumi, Asano, Matsumoto, *Constitutional Law*, p. 203.

[3] K. Ueda, *Between balancing test and standard test*, Horitsu Jiho, Nihon Hyoronsha, 2019, p. 1137.

public space. As a result, the field of expressive freedom has frequently been characterized as one in which a considerable gap persists between constitutional theory and judicial reality. This divergence raises important questions regarding the actual function of comparative constitutional ideas within Japanese constitutional adjudication and how imported constitutional theories are transformed within the domestic legal context.

This article examines the constitutional protection and regulation of freedom of assembly in Japan from historical and comparative constitutional perspectives. It first traces the development of assembly regulation from the pre-war period to the current constitutional order, and then analyses the broad scope of protection afforded to assemblies under Article 21 of the Constitution alongside the major judicial precedents concerning street demonstrations and the use of public facilities. The article further explores how Japanese courts have justified restrictions on assemblies through a balancing approach influenced by concerns for public order, traffic control, and the perceived dangers of collective action, despite the scholarly reference to the "double standard" theory. Finally, it argues that Japanese constitutional jurisprudence has insufficiently examined the democratic significance and vulnerability of assemblies, and therefore calls for reimagining a more liberal and assembly-protective legal framework through comparative constitutional insights.

I. History of the Regulation and Current Constitutional Status

1. The Constitutional Status of Freedom of Assembly in the Pre-War Period

In Japan, the first constitution based on modern constitutionalism was the Constitution of the Empire of Japan, or the Meiji Constitution, promulgated on February 11, 1889, and enforced on November 29, 1890. It was the first constitution in Asia and was modelled after the Constitution of the German Empire. The Japanese government enacted it after a tour

of Europe in order to gain global status as a modern state. Article 29 of the Meiji Constitution stipulates that "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings, and associations". However, under this Constitution, the fundamental rights of the people were limited, with the legal reservation of restrictions (*Gesetzesvorbehalt*), as they were guaranteed only "within the limits of law". This contrasts to Article 11 of the current Constitution, which I describe later in this article, which guarantees fundamental rights as "eternal and inviolate rights".

A natural consequence of this constitutional regime was the enactment of a number of assembly control laws. In 1880, before the enforcement of this Constitution, the Public Assembly Regulation (集会条例), which was enacted alongside the amendment of Press Regulation (新聞紙条例) and the Publication Regulation（出版条例） had put pressure on the liberal civil rights movement. In 1890, under the new Meiji Constitution, the Public Assembly Regulations was repealed and the Assembly and Political Association Law（集会及び政社法）was enacted as a law restricting assembly and other activities. In particular, this legislation prohibited women, along with minors, from not only initiating, but also participating in political activities and associations. Its content was later succeeded by the Peace Police Act (治安警察法) in the 1900s. In response to this act, a petition campaign was launched by women, which led to the amendment of Article 5.2, which stipulates that women could also participate in assemblies, but membership in political associations and the right to vote remained proscribed. In addition, during wartime, the "Law on the Temporary Prohibition of Speech, Publications, Assemblies, Associations"（言論、出版、集会、結社等臨時取締法）was enacted, establishing a permit system for assemblies. This law and the Security Police Law were both repealed in 1945. Today, while no nationwide law regulating assembly is observed, as will be discussed later, individual legislation includes provisions which could regulate assemblies in each specific area. For instance, demonstrations on streets are regulated by the Road Traffic Act,[4] the Penal Code;[5] after 1948, the Public Security Ordinances of all municipalities regulate assemblies.

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[4] Keihō [Pen. C.] 1960 (Japan).

[5] Keihō [Pen. C.] 1960 (Japan).

2. Current Constitutional Protection of Assemblies

It was generally believed that the constitutional guarantees of fundamental rights were significantly expanded after the war compared to the prewar period. The Constitution of Japan was enacted as a revision of the Meiji Constitution based on the three pillars of sovereignty of the people, respect for fundamental human rights, and pacifism. Article 21 of the Constitution stipulates as follows: "Freedom of assembly and association as well as of speech, the press, and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." As no article of the Japanese constitution and other legislatures provides a definition of assembly, court decisions and academic discussions might be very helpful to understand what constitutes the exercise of freedom of assembly. To state the conclusion in advance, the scope of protection of freedom of assembly has a relatively broad scope. The term "assembly" is often discussed in connection with "association," both of which are defined as a group of people with a "common purpose". However, associations are distinguished from assemblies in the sense that they are "temporary" associations, while associations are continuous gatherings of people.[6] The core of these rights lies in sharing a "common purpose," therefore it is a common ground that a "mob" lacking such a purpose does not qualify as an assembly or association.

The question arises, however, as to what is included in this "common purpose". Behind this debate lies a different attitude toward the question of how to understand the status of the freedom of assembly in the constitutional system in relation to other fundamental rights, especially the freedom of expression, which is also guaranteed by Article 21 of the Constitution. If the basic significance of freedom of assembly could be deduced as a right to a form of freedom of expression,[7] the purpose of participating in the political opinions would be required for constitutional protection of the assemblies at issue. However, the case law and legal scholarship are based on the premises that the purpose of assembly is not limited to the formation of political opinions. If the freedom

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[6] N. Ahibe, *Kenpo*, Iwanami Shoten, 8th ed., 2023, p. 240.

[7] *Ibid*., p. 232.

of assembly is to protect the gathering of people itself, then some jurists do not limit the purpose of the assembly to any particular purpose.[8] For example, in the *Ageo City Welfare Centre Case*,[9] where the use of the main building of the Ageo City Welfare Centre was denied for a joint funeral service, it is implicitly assumed that a funeral is also an assembly. Also, as discussed later, even the gatherings of motorcycle gangs in Japan have been recognized as being within the scope of protection of freedom of assembly in the Supreme Court case, *the Hiroshima City Ordinance on Elimination of Motorcycle Gangs Case*.[10] Such broad scope of protection is well suited to fostering a wide range of free and voluntary assemblies, thereby encouraging communication with other citizens.

3. The Preferred Position of Freedom of Assembly

3.1. Explicit Judicial Recognition in Case Law

As mentioned above, Japanese legal scholarship has surely sought to accord civil liberties a preferred position by referring to the 'double standard' theory in the United States. Accordingly, a limited number of judgments have recognized the significance of assemblies as a physical exercise of freedom of expression and seems to recognize it as "preferred position". One example is part of the judgment in *the New Tokyo International Airport Case*.[11] In this case, the Supreme Court of Japan ruled, "[i]n a modern democratic society, assemblies are necessary because they provide opportunities for people to access various opinions and information, etc. and thereby develop their thoughts and character and also mutually present and exchange opinions, information, etc. Moreover, assemblies are an effective means to express opinions to other people. Therefore, the freedom of assembly guaranteed in Article 21,

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[8] M. Shiyake, *Kenpo: Kihonken*, Seibundo, 3rd ed., 2010, p. 301.

[9] SaikōSaibansho [Sup.Ct.] March.15.1996, 1993 (O) 1285,50 Saikō Saibansho minji hanreishū [Minshū] 549 (Japan).

[10] SaikōSaibansho [Sup.Ct.] September.18.2007, 2005(A)1819, 61 Saikō Saibansho keiji hanreishū [Keishū] 601 (Japan).

[11] SaikōSaibansho[Sup.Ct.]July.1,1992, 1986 (Gyo-Tsu) 11,46 Saikō Saibansho minji hanreishū [Minshū] 437(Japan).

paragraph (1) of the Constitution should especially be respected as *one of the important basic human rights in a democratic society* [emphasis added]."[12] Another case, *Izumisano City Community Hall Case*,[13] in which the denial of using a community centre for the purpose of having an indoor assembly was at issue, it was held that "[c]onsidering that to restrict freedom of assembly is to restrict mental freedom, which falls within the scope of fundamental human rights, said comparison should be made in accordance with criteria that are stricter than those applicable when restricting economic freedom."[14] This is regarded as one of the court decisions that most closely aligns with the double standards.

3.2. Place for Assemblies: the Public Forum Doctrine as a Basis for Enhanced Protection

The approach based on the preferred position of freedom of assembly is particularly reflected in the protection of the "place" for assemblies, especially indoor assemblies. In Japan, we observe no regulations on prohibited areas for assembly such as in Germany (*Bannmeile*)[15] or regulations against assembly at monuments for Jewish victims (e.g., Article 15, paragraph 2 of the German Assembly Law as well as individual Landt Assembly Laws). The Act on Maintenance of Tranquility of Areas around the National Diet Building, etc. and Foreign Diplomatic Establishments, etc. Act No. 90 of 1988 prohibits certain types of assemblies, but it is not a general rule for organizing assemblies itself. As to the question of whether or not an assembly can be held in that specific place, it is therefore necessary to consider the administrative rules applicable to the place at issue.

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[12] The English translation of the Supreme Court judgment, although unofficial, is based on the following source with modifications where appropriate. https://www.courts.go.jp/english/Judgments/search/1464/index.html. The same applies to all subsequent quotations from Supreme Court judgments.

[13] SaikōSaibansho [Sup.Ct.] March.07.1995, 1989(O)762,49 Saikō Saibansho minji hanreishū [Minshū] 687 (Japan).

[14] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/202/index.html

[15] Gesetz über befriedete Bezirke für Verfassungsorgane des Bundes vom 8. Dezember 2008 (BGBl. I S. 2366).

The key concept needed to answer this question will be "the public forum doctrine". Although Japanese courts have not explicitly referred to the public forum doctrine, its underlying rationale has played an important role in the case law concerning access to and use of public spaces for assemblies. In this respect, the constitutional question is not whether certain places are categorically excluded from assemblies, but rather under what conditions assemblies may be permitted or restricted in particular public spaces. The public forum doctrine, which has been developen in the United States, is influential in this respect, and the standard is whether the place is a *traditional public forum* (a place that has been historically and traditionally open to expressive activities, such as a street or park) or a *designated public forum* (public property opened to the public by the state as a place for expressive activities). Following examples, *The Niigata Prefecture Public Security Ordinance Case*[16] decision and *the Izumisano City Community Hall Case* can be concluded to correspond to a traditional public forum and a designated public forum, respectively.

For instance, *the Niigata Prefecture Public Security Ordinance Case* regarding street demonstrations states that "[n]aturally the people are free to conduct mass parades or mass demonstration movements as long as they do not resort to unreasonable means or for illegal purposes against the public welfare."[17] Also, in *the Izumisano City Community Hall Case*, where the denial of using a public assembly at a community centre for the purpose of having an indoor assembly was at issue, it was held that the civic centre in question fell under the category of "public facility" as defined in Article 244 of the Local Autonomy Act as "a facility for the purpose of promoting the welfare of residents", and that it is prohibited to deny residents access to the facility without just cause, and to treat residents in an unfair and discriminatory manner when they use the facility, and held that any unfair and discriminatory treatment of residents is prohibited. Based on this premise, the Court have suggested the impact on the exercise on freedom on assembly by the denial of use as follows:

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[16] SaikōSaibansho [Sup.Ct.] November.24.1954, 1951(A)3188, 8 Saikō Saibansho keiji hanreishū [Keishū] 1866 (Japan).

[17] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/1996/index.html

> *Where a facility to be used for the purpose of assembly, e.g. a Hall, is established as a public facility of an ordinary local public entity prescribed in Article 244 of the Local Autonomy Act, its inhabitants shall basically be allowed to use the facility unless the use is inconsistent with the purpose of the establishment of the facility, which means, if the manager were to refuse the use of the facility without justifiable grounds, there would be the risk that such refusal would lead to undue restriction on the constitutionally guaranteed freedom of assembly.* [emphasis added][18]

As described above, in determining "whether the state's refusal (including local governments' refusal) to allow public facilities to be used for assembly infringes the freedom of assembly and violates Article 21, paragraph 1 of the Constitution", it is important to establish whether the public facility in question is "a place where assembly should be permitted" or "a place designated for the purpose of assembly". An assembly requires a place where people can assemble themselves. Even though the conventional understanding presupposes that freedom of assembly is "freedom from the state" and not the right to demand the state to provide a place for assembly, it can be constituted as a violation of freedom of assembly when assembly is denied in a place where it should be freely allowed.

*The Izumisano City Community Hall Cas*e mentioned above is one of the most important precedents, and also from another perspective, provides justification for denial of use. In particular, in the light of the impact on the freedom of assembly of the denial of use of indoor facilities used by the public as public facilities, the concurring opinion by Justice Itsuo Sonobe, states, "in cases where a decision not to permit the use of the Hall through the application of the requirement would, in effect, result in prohibiting an assembly at the Hall, there is the possibility that such decision would substantially bring about the same effect as prohibiting an assembly by reason of the necessity to maintain public order (that is to say, an order for the purpose of preventing the occurrence of harm to the public[])."[19] In particular, the decision, influenced by the "double-standard" of the United States, held that "to restrict freedom of

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[18] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/202/index.html.

[19] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/202/index.html

assembly is to restrict mental freedom, which falls within the scope of fundamental human rights, said comparison should be made in accordance with criteria that are stricter than those applicable when restricting economic freedom" and that restrictions are permissible only when "imminent danger" to public safety is specifically foreseeable.[20]

Even in other cases where holding assemblies is considered a secondary purpose or a use of the facility at issue, the Court has made judgments with careful consideration of the interests of freedom of assembly rather than categorically denying the use of facilities. For example, in *the Kure City Board of Education Case*,[21] a group of employees working at public elementary and junior high schools in Hiroshima City was denied permission to use school facilities for their research meeting. The case is based on the premise that "unlike other public facilities that are primarily intended for joint use by the public, such as roads and community halls, school facilities are primarily established for the purpose of school education and basically restricted from being used for other purposes"[22] and thus the use depends on, in principle, the manager's discretion. The Court concluded that the denial was unreasonable, considering many factors including the previous operation of the permission, oral consent for the permission to the group, existence of no specific likelihood of the occurrence of an obstruction incident by right-wing organizations ("hostile audience"), a significant need for the group to use school facilities, and the motive for such a different and unequal treatment.

II. How to Legally Hold Assemblies: the Current Regulatory Framework

While freedom of assembly in Japan has a broad scope, this does not necessarily mean that the level of protection is strong. On the contrary,

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[20] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/202/index.html

[21] SaikōSaibansho[Sup.Ct.]February.7,2006, 2003(Ju)2001,60 Saikō Saibansho minji hanreishū [Minshū] 401(Japan).

[22] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/814/index.html

freedom of assembly has long been regarded as a "second-class liberty". The doctrine of double standards is not consistently applied in the case law on freedom of assembly; it is subject to numerous legal restrictions and is readily restricted following a balancing of competing interests. Although the freedom of expression and assembly is the main battleground where academic theories have proposed a "double standard" for standards for constitutional review, case law rarely explicitly applies it and appears to avoid the concept of the legal standards.

1. Current Regulations on Assemblies

As already indicated, after repealing the pre-war regulations, some legislation includes regulations on exercise of assemblies. The main legal sources are, the Road Traffic Act, so-called Public Security Ordinances, and the Penal Code.

First, Article 77, Paragraph 1 (iv) of the Road Traffic Act, one of the main grounds for regulation, stipulates that "a person(…) seeking to undertake an activity such as holding a festival or filming on location on a road which would involve persons using the road by passing down it in a configuration or manner that would have a serious effect on public traffic, or seeking to undertake an activity that would cause people to gather and thereby have a serious effect on public traffic, if the public safety commission prescribes that activity as one for which a person must obtain permission, having found that this is necessary, based on area road or traffic conditions, in order to prevent road hazards or to otherwise ensure the safety and fluidity of traffic", that person must obtain permission from one of the competent police station chiefs.

Second, in addition to this, the Public Security Ordinances of each municipality are another major basis for regulating assemblies. They include notification systems for assemblies, conditions for gatherings, authority for police officers to take necessary measures, and penal provisions. Here, I would like to mention two main issues with regard to this regulation. The first issue is the content and the nature of the Notification System. For example, the Tokyo Metropolitan Ordinance on Public Safety "Ordinance Concerning Rallies, Group Marches, and Group Demonstrations" (Ordinance No. 44 of July 3, 1950) requires organizers

to give notification 72 hours in advance of a group demonstration, with the exception of (i) students, pupils, and others on field trips, school trips, athletic events, and competitions, and (ii) customary events such as ordinary ceremonial occasions. The following are required to be reported by the organizer at least 72 hours prior to the group demonstration: the name and address of the organizer, the date and time of the rally, mass march or mass demonstration, the number of expected participants, and so on.

Third, the Penal Code has some articles, which could in specific cases take effect as regulations on assemblies. If a person, for the purpose of protesting, for example, enters property controlled by another person, he or she may be subject to arrest under general criminal law provisions such as trespassing. In this regard, -- in the context of freedom of expression, not assembly, *the Kichijoji Station leaflet distribution Case*,[23] the citizens who made speeches on the railway premises were charged with Article 130 of the Penal Code (Breaking into a Residence) as well as Article 35 of the Railway Operation Act, which prohibits soliciting, performance, speech, or other conduct without permission on railway premises.

2. Balancing Test Undermining the Freedom of Assembly?

The Japanese Supreme Court's approach to freedom of assembly can generally be characterized as one that avoids rigid constitutional standards and instead adopts a flexible balancing methodology on a case-by-case basis and, as a result, the courts prioritize competing interests, not the freedom of assembly. This position is well illustrated by the Commentary by the Judicial Research Official on *the Hiroshima City Ordinance on the Elimination of Motorcycle Gangs Case*. In that case, the constitutionality of an ordinance regulating gatherings of motorcycle gangs in Hiroshima City and similar activities was at issue; according to the court, "[i]n reviewing the constitutionality of provisions that restrict fundamental human rights, … the approach is based on the theory of the 'dou-

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[23] SaikōSaibansho [Sup.Ct.] December.18.1984, 1984 (A) 206, 38 Saikō Saibansho keiji hanreishū [Keishū] 3026 (Japan).

ble standard'; however, as for the specific method or standard of constitutional review — regardless of whether this is explicitly stated — we adopt the theory of balancing interests, which involves a concrete comparison and weighing of the extent to which restrictions are necessary to achieve a specific objective, the content and nature of the freedom being restricted, and the specific forms and degrees of the restrictions imposed."[24] In this way, "Supreme Court precedents deal with matters flexibly, without establishing fixed standards and binding themselves to them."[25]

From this perspective, let us analyse how each of the legal regulations mentioned earlier is reflected in the balancing of interests. First, the notification system in the public security ordinances: although these requirements are distinguished as a "Notification System" rather than a "Permit System", following the German model, it is not necessarily clear whether this theoretical distinction is taken into account in practice. While case law distinguishes this from a general permit system, it is generally held that requiring prior permit or notification in certain cases to maintain public order is not prohibited under the Constitution. The Supreme Court in its decision on *the Niigata Public Security Ordinance Case* stated the following regarding the constitutionality of adopting such a notification system.

> "*Processions, marches or public mass demonstrations (hereinafter simply referred to as such actions) are inherently a matter of freedom of the people, provided that they are not carried out for unjustified purposes or in a manner contrary to the public welfare. Therefore, it is reasonable to conclude that it is not permissible to establish, not a mere notification system for such activities in the ordinances, but rather to establish a general permit system to restrain such activities in advance, in violation of the purpose of the Constitution. However, in order to maintain public order or prevent serious injury to the public welfare, even if an ordinance provides for a specific place or method, under reasonable and clear standards, so as to obtain permission in advance or to submit a notification, and to prohibit such activities in such cases, this cannot be interpreted as an unreasonable restriction on the freedom of the people guaranteed by the Constitution. This is because the provisions of the ordinance do not in any way restrict these activities in general, but merely acknowl-*

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[24] 61 Saikō Saibansho keiji hanreishū [Keishū] 601 (Japan).

[25] *Ibid.*

edge that there are cases in which specific places or methods may be restricted from the aforementioned perspective. Furthermore, it should be understood that the provision that such activities may be prohibited or not permitted if they are foreseen to pose a clear and imminent danger to public safety does not immediately constitute an unreasonable restriction on the freedom of the people as guaranteed by the Constitution."[26]

Japanese academics are also informed in the literature of comparative constitutional texts of so-called "spontaneous" assemblies in the context of the discussion of the constitutionality of the notification system under the influence of Germany, whose Federal Constitutional Court supported proportionality by exempting spontaneous assembly from notification.[27] Based on the aforementioned discussion in Japan, however, if a spontaneous assembly is not notified in Japan, there are possibilities of being charged with a violation of the Public Security Ordinances or the Road Traffic Act.

The second point I must address is the relationship between the Road Traffic Act (a national law) and the Public Security Ordinances (an ordinance), or the scope of these concurring regulations. With regard to this issue, *the Tokushima City Public Security Ordinance Case* stated,[28] "the Road Traffic Law aims to maintain road traffic order, but on the other hand, the Ordinance aims to maintain not only road traffic order, but also the peace and order of local public entities, that is, the object of the Ordinance is much broader and more comprehensive, and therefore the regulations don't have the same purpose." Consequently, the Court states that "so long as there are no contradictions between them, and the overlapping regulations by the Ordinance have a specific meaning and effect, the regulations by the Road Traffic Law do not deny or exclude the regulations by the Ordinance, and it is reasonable to interpret that it can be applied to the scope beyond the regulations by the Ordinance". In this way, the web of overlapping regulations has been upheld by the

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[26] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/1996/index.html

[27] BVerfGE 69, 315.

[28] SaikōSaibansho [Sup.Ct.] September.10.1975, 1973 (A) 910,29 Saikō Saibansho keiji hanreishū [Keishū] 489 (Japan).

Supreme Court, restricting the freedom of assembly in order to serve different purposes.

3. The Overemphasis on the Physical Dangers of Assemblies

As noted above, freedom of assembly must always be weighed against other interests, such as traffic and public safety, undermined in many cases. In *the Tokyo Metropolitan Public Security Ordinance Case*[29] — which examined the constitutionality of an ordinance requiring prior notice for demonstrations — the court put forward the notorious "theory of mobbing" as follows.

> "*[E]xpression of thoughts differs materially from mere expression of ideas by speech or publication in that it is characterized by a collective might of many people, that is, it is supported by a sort of physical force hidden under the surface. This type of latent force can, by its very nature, be easily set in motion sometimes according to previously arranged plans and sometimes by stimulation or instigation which may suddenly strike from within or without. In such a case, even a peaceful and orderly assembly can be engulfed in a maelstrom of excitement and agitation, and in an extreme situation, it may, in an instant, turn into a riotous mob and by the force of circumstances, trample down law and order by force, and not even the leader of the mass movement or the police force would be able to control it. Such has been the painful truth according to the law of mob psychology and actual experiences of the past* [emphasis added]."[30]

The Tokushima City Public Security Ordinance Case,[31] not as radically as the Tokyo Metropolitan case, similarly holds the danger or the difference with mere speech.

> "*The aforementioned acts in a group include expression of thought and argument concerning politics, economic, labour issues and views of the world that typically*

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[29] SaikōSaibansho [Sup.Ct.] July.20.1960, 1960(A)112, 14 Saikō Saibansho keiji hanreishū [Keishū] 1243 (Japan).

[30] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/15/index.html

[31] SaikōSaibansho [Sup.Ct.] September.10.1975, 1973 (A) 910,29 Saikō Saibansho keiji hanreishū [Keishū] 489 (Japan).

appeal to the public and the authorities. Those acts should be respected by the Constitution in a sense, however, different from expressions made by mere speech or publication, because they are carried out by the physical activity of many people. They have been characterized by being supported by a collective force of many people, that is, a certain kind of potential physical force. From these characteristics, in a case where those acts are not carried out in an orderly and smooth manner, participants are in fact left to do as they please; it may not only cause harm to the interests of residents and sojourners in that area, but also disturb the calm."[32]

This understanding is also supported in the Commentary by the Judicial Research Official on *the Hiroshima City Ordinance on Elimination of Motorcycle Gangs Case*, which states, "Unlike freedom of speech and the press, freedom of assembly involves collective action," particularly emphasizing the fact that it differs from pure freedom of expression.

III. Search for the Significance of Freedom of Assembly

In Japan, as described above, the issue has centred on a balancing approach", which has always undermined the freedom of assembly and interests of demonstrators, emphasizing the risks and dangers which they cause. However, the Supreme Court's approach — which lacks consideration or analysis of *the significance or substance of the assembly,* merely engaging in bare balancing — is meaningless.[33] A recent case increased the urgent need for a modified, more liberal approach to assembly laws. As suggested earlier, while indoor assemblies tend to enjoy a strong guarantee, in contrast, various grounds for regulating outdoor assemblies are recognized in judicial precedents.[34]

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[32] For the English translation, see the source cited below, https://www.courts.go.jp/english/Judgments/search/44/index.html

[33] H. Sasaki, *Present State of Doctrines Guaranteeing Access to Places for Public Expression: On the Recent "Freedom of Assembly" Supreme Court Decision, The Reference*, National Diet Library, 2025, pp. 21–22.

[34] T. Mori (ed), *Jinken II*, Sinzansha, 2022, p. 265.

The relatively recent Supreme Court case, *the Kanazawa City Hall Case*,[35] supported the conclusion that the use of the plaza for a demonstration was prohibited on the basis of the administrative rules prohibiting political demonstrations on the premises of the city hall including this plaza. The assembly, demonstrating their support for defending Article 9 of the Constitution from the amendment was expected to be held in the plaza in front of the Kanazawa City Hall, where many events and assemblies were permitted in the past. But such a permit was denied in this case. The main grounds were that the premises did not fall under the category of "public facilities" as defined in the *Izumisano City Community Hall Case*, and that if a rally was held there, it would give the appearance that the city supported the rally, thereby prejudicing "the apparent political neutrality" and the residents' trust in the administration, and thereby undermining the smooth performance of public services. This decision was based on the premise that the regulation is neutral in terms of the content of expression, and that it easily denies the right to assembly, not because it restricts the expression of opinions, but because it tries to prevent the adverse effects that such an expression may cause. The negative impact of this case is that it created a new, and even hypothetical justification — namely, "the apparent political neutrality" — as a basis for regulating outdoor assemblies, thereby allowing for arbitrary decisions in denying the use of facilities.[36]

In order to change this alarming situation in Japan, contributions are indispensable from the academic and even comparative constitutional perspective. Japanese constitutional jurisprudence has long understood assemblies primarily through the lens of public order and physical danger. What remains underdeveloped, however, is a constitutional understanding of assemblies as vulnerable democratic practices that require heightened protection precisely because the participants physically expose themselves in public space. Reconstructing freedom of assembly from this perspective is an urgent task for contemporary Japanese constitutional law.

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[35] SaikōSaibansho[Sup.Ct.]February.21,2023, 2021(O)1617,77 Saikō Saibansho minji hanreishū [Minshū] 273(Japan).

[36] For details, see the following source. https://www.courts.go.jp/english/Judgments/search/1930/index.html

Conclusions

This article has examined the development of freedom of assembly jurisprudence in Japan through its historical evolution, legal regulations, and landmark judicial precedents. Until today, freedom of assembly has received less scholarly and judicial attention than freedom of expression, but the article demonstrates that Japanese judicial precedents and theories have attempted to establish their own specific theory of guarantees, with influence from other countries. The distinctiveness of the Japanese approach, however, lies not merely in weighing the right to assembly against other competing interests without considering the unique nature of assemblies or the significance of safeguarding that right, but rather in subjecting assemblies to extremely broad and cumulative restrictions by emphasizing the physical dangers they pose. Through comparative constitutional insights, a more liberal legal framework should be constructed in Japan. In particular, freedom of assembly should no longer be understood primarily through the lens of disturbance of public order, traffic control, or the physical dangers of collective action. Rather, constitutional jurisprudence must recognize assemblies as vulnerable democratic practices in which participants physically appear in public space in order to express dissenting opinions and confront political power.