

COVID-19 and the Right to Protest

The death of George Floyd has sparked a wave of protests from Minneapolis to Manchester, Los Angeles to London. Never before has the international community been subject to such restrictions as those now felt during the COVID-19 pandemic.

This note is intended to give a practical overview of the right to protest whilst under 'lockdown'. What rights do individual citizens have to protest, whilst subject to lockdown restrictions in England?

Overview

The right to protest is a human right. It cannot be abrogated except in accordance with law. But a global pandemic of a life-threatening virus creates some unprecedented problems for both protesters and law enforcers.

Indeed, several fundamental lawful rights have been limited by our legislative responses to COVID-19. For example, several rights contained within the European Convention on Human Rights ('ECHR'):

- The right to liberty has been qualified by the need to detain persons for the prevention of the spreading of infectious diseases (as anticipated by Article 5(1)(e)).
- The right to a fair trial (Article 6) has been qualified by remote video hearings taking place, at least at the start of the lockdown, for all practical purposes in private, and by changes to the way in which witnesses can "attend" and give evidence.
- The right to manifest religion or belief (Article 9), and the right to marry (Article 12), have both been limited while people have been prevented from attending places of worship.
- Article 15 (derogation in time of emergency) has been invoked by several countries during COVID-19. To date, the United Kingdom has not done so.

Articles 10 and 11 of the ECHR are, it would seem, unintended victims of COVID-19. This note concludes that the freedom of assembly and association is limited in significant ways during these very unusual times. However, the limitations are slowly being relaxed, and seem to mirror the fluctuating severity of infection rates in England.

Law

Freedoms in the ECHR

The ECHR provides what is often called a 'right to protest', in Article 10 "Freedom of expression" and Article 11 "Freedom of assembly and association".

Despite the 'European' element, Brexit does not stop us from being able to exercise these freedoms.

Neither Article 10 or 11 are 'absolute' rights.

Article 10(2) sets out the limits to the freedom of expression: *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"*.

Article 11(2) sets out the limits of peaceful assembly: *"No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State"*.

Police powers in England

These powers were in place before COVID-19 and continue to be in force.

The Police and Criminal Evidence Act 1986 (PACE) created a legislative framework to protect both the police and the public in the exercise of police powers.

Stop and search powers. Section 1 of PACE (stop and search powers) can be exercised during a protest. Police can stop and search any individual, generally if they have reasonable grounds to suspect that the individual is carrying drugs, weapons, stolen property or something that could be used to commit a crime. Police must also provide to the person being searched various details such as name and station, and the reason for the stop and search. These rules apply to protest and non-protest situations alike.

Ability to request details. The police can also stop an individual and ask for their details, but there is no positive obligation in law to comply. The individual can move away from the police officer; this does not give the police the power to arrest and/or search that individual. However, providing false details can be a criminal offence (obstructing a police officer, s.89 Police Act 1996, with a maximum penalty of a fine and/or one month's imprisonment).

Power to require details. The police can specifically ask for an individual's personal details under s.50 of the Police Reform Act 2002. Failure to give details, or the giving of false details, is

a criminal offence (for which the maximum penalty is a fine). The police can only lawfully exercise the s.50 power if they hold a genuine and reasonable belief that the individual has been engaged in anti-social behaviour (defined as behaviour that causes or is likely to cause harassment, alarm or distress to one or more persons not of the same household).

Arrest powers. Section 24 of PACE provides a general power to arrest without warrant anyone who is, or who the officer has reasonable grounds for suspecting to be, about to commit an offence or anyone who is, or who the officer has reasonable grounds for suspecting to be, in the act of committing an offence.

Wider powers relating to assemblies. The Criminal Justice and Public Order Act 1994 broadens the powers of the police and is often used when large-scale events, such as protests, are organised. It is intended to prevent serious violence. If a sufficiently senior officer gives authorisation under s.60, the police can stop and search any person or vehicles within a specified area and time frame, without any requirement for suspicion or reasonable grounds. Any failure to stop is a criminal offence (maximum penalty is a fine and/or one month's imprisonment).

Removal of items concealing identity. A s.60AA order gives police the power to require an individual to remove and surrender any item "*which the constable reasonably believes that person is wearing wholly or mainly for the purpose of concealing his identity*". In the COVID-19 world, wearing a face mask while at a protest may have a very different, and legitimate, purpose. However, this law has not been amended to take account of this. Failure to remove such an item is a criminal offence (maximum penalty is a fine and/or one month imprisonment). If a s.60 authorisation is in place, a section 60AA order automatically follows. If no section 60 authorisation is in place, a stand-alone section 60AA notice can be authorised.

Conditions on processions and assemblies. The police can impose conditions on protests through s.12 (public processions) and s.14 (public assemblies) of the Public Order Act 1984. These conditions can limit the number of people involved, the location and its duration. Under the Anti-Social Behaviour, Crime and Policing Act 2014, the police can obtain powers of dispersal, forcing people to leave and not return to a certain place within a specified time frame. Again, further criminal offences attracting imprisonment flow from any failure to comply.

It remains to be seen whether any such case-specific authorisations or conditions will be made for upcoming protests.

Lockdown laws

It is worth noting that the 'lockdown' laws vary throughout the UK. This article focuses on the law as applicable in England.

Until 31st May, the relevant aspects of the 'lockdown laws' in England were:

- Regulation 7 of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 (as amended), which criminalised gatherings of 3 or more people in a public place. Under the Regulations, Police have the power, if considered necessary and proportionate, to direct a gathering to disperse, to direct people in a gathering to return home, and to use reasonable force to remove a person to their home;
- Regulation 6 also criminalised being outside of one's home without 'reasonable excuse'. Specific examples of reasonable excuse are included, such as to exercise, but the defence is not exhaustive.

On 1st June, the Regulations were further amended and relaxed as follows:

- Regulation 7 now prohibits outdoor gatherings of more than 6 people.
- Regulation 6 prohibits anyone from staying overnight, without reasonable excuse, any place other than the place where they are living.

Schedule 21 of the Coronavirus Act 2020 is important to note. This law is unlikely to come into play in these circumstances as there is a requirement for an officer to have reasonable grounds to suspect one is a 'potentially infectious person'. Nevertheless, we should all heed Government advice and 'stay alert', as there have been multiple instances of the police and CPS wrongly charging offences under this Act.

What does this mean for protests?

The effect of the lockdown laws is that, as of 1st June 2020, a gathering of 7 or more people outdoors is unlawful. It does not seem to matter that the purpose of that gathering is the exercise of a lawful right, nor does it matter if all pre-COVID-19 laws are being followed in respect of the specific protest.

It is important to note that the "2 metre" concept and other 'social distancing' measures are just guidance. They are not legal requirements. So, P1 protesting 2m apart from P2 could still mean that both are breaking COVID-19 laws.

According to regulation 7(3), there is a gathering when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other.

A protest would fall within "any other activity". So even if you go out to protest "by yourself", if you are there as a result of an organised activity and others are also present doing the same activity, this would be a "gathering". To adopt any looser interpretation would be to defeat the

purpose of the regulations. For example, it would allow unlimited numbers of people to “individually” attend a movie being screened in a park, each “by themselves”. The purpose of the regulation is to confine group meetings to small numbers of people; if one of them is infected, this slows the exponential progression of the virus.

Thus, a protest with more than 6 people, who are physically near each other for prolonged periods of time, even if many are trying to maintain a 2m distance from each other, would likely be a breach of regulation 7.

Is this a permissible limitation on the right to freedom of assembly and association?

In order to argue otherwise, one would need to be able to show that, far from the limitation on gatherings being an unavoidable side-effect, the COVID-19 regulations are being used, or misused, as a means of silencing free expression.

The decisive factor here is the “public safety” and “protection of health” exception in Article 11(2). This is highly likely to be sufficient to justify the infringement of Article 11(1) created by regulations 6 and 7. Moreover, the restriction is only on geographically-specific physical assembly and association. Article 10 freedoms are largely unaffected except insofar as they can only be exercised by physical gatherings. The regulations are not a restriction on expression of views in other ways, e.g. via news websites and papers, social media, advertising, videos, telephone, or letter.

Bearing in mind that there is a 28-day review on the infringement, and that the regulations are clearly being amended to relax the restrictions over time, it is unlikely that the “right to protest” would triumph over these temporary restrictions.

Disclaimer: This article is intended as an overview of the law. It is not legal advice and should not be relied upon as such.

Law accurate for England at the time of publication. Coronavirus-related laws change regularly.

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