

Transparency International Anti-Corruption Helpdesk Answer

Limiting the right to protest: Comparing restrictions in the G7, Russia and China

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The UK's Police, Crime, Sentencing and Courts Bill (2021) has raised concerns that it will have a chilling effect on the right to protest (Amnesty International UK 2021; Siddique 2021). In particular, the Bill proposes to introduce limitations to protests based on loosely defined criteria around noise levels, as well as to establish harsher sentences for "public nuisance", a vaguely defined offence including causing "serious distress, serious annoyance, serious inconvenience or serious loss of amenity." The Bill also criminalises damage to memorials.

Research conducted for this Helpdesk Answer has uncovered very few examples of legislation in other G7 countries, Russia or China that includes noise as a potential condition for limiting public demonstrations. In recent years, several states in the United States have sought to establish legislation that rules that "annoyance", "distress", or "inconvenience" can be a ground to limit protests. However, a number of these proposals have already been defeated prior to enactment, and observers expect constitutional challenges for others. Finally, several states in the United States, as well as Russia and Canada, have legislation that criminalises damage to memorials.



Query

Earlier this year, the UK Government introduced the Police, Crime, Sentencing and Courts Bill. How do the following provisions compare to other G7 countries, Russia, and China: a) conditions for limiting protests, b) definition of and sentencing for “public nuisance”, c) criminalising damage to memorials?

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Introduction

The right to freedom of peaceful assembly and of association is enshrined in a number of international treaties and conventions. These include Article 11 of the European Convention on Human Rights (1950), Articles 21 and 22 of the International Covenant on Civil and Political Rights (1966) and Article 12 of the Charter of Fundamental Rights of the European Union (2000). In line with international standards, states have a 'positive duty' to enable the enjoyment of the right to freedom of peaceful assembly as well as a 'negative duty' to avoid unjustifiable interference in the exercise of this right (ECNL 2021: 6).

International conventions, however, do recognise certain conditions for justifiably limiting the right of freedom of assembly. For example, the International Covenant on Civil and Political Rights contains prohibitions on the "propaganda of war" and the advocacy of "national, racial or religious hatred." It also allows the restriction of the freedom of assembly if it is necessary "in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others" (1966: Articles 20 and 21).

Main points

- There are very few examples of legislation that lists "noise" as a potential condition for limiting protests. The only cases identified while researching this Helpdesk answer are all at the state level in the United States: Utah, Tennessee, Georgia, Connecticut, and Indiana. At present, only those in Utah and Tennessee have been enacted.
- Recently, two other bills in Maryland and Arkansas that sought to establish "unreasonable noise", "public inconvenience", "alarm" or "annoyance" as grounds to limit protest were defeated, while another one in Maryland was withdrawn by the sponsor.
- Russia, Canada, China, and several states in the United States have legislation that criminalises damage to memorials.
- Many other restrictive criteria have been introduced in a recent wave of "anti-protest" legislation, including provisions related to "blocking traffic", "critical infrastructure", "camping on state property", "causing identification of a police officer", and others.

The recent wave of “anti-protest” legislation in the United States and elsewhere in response to protests such as Black Lives Matter (BLM) and the “yellow vests” (French: *gilets jaunes*) movement has, however, introduced additional limitations to the right of the freedom of assembly. These limitations are in line with the general trend of shrinking civic space across the world (CIVICUS 2020). Human rights experts warn that these laws may further discourage citizens from engaging in peaceful protests (Amnesty International 2020; ICNL 2017). The general criticism of the recently proposed or enacted legislation focuses on expansive wording and vague terminology that may, according to some human rights experts, lend excessive discretion to police to criminalise legitimate protests (UN News 2021).

The UK’s recent bill – the Police, Crime, Sentencing and Courts Bill (*hereinafter*: UK Police Bill), is one of the “anti-protest” legislations that have raised concerns among observers about new limits to the right of peaceful assembly (ECNL 2021). According to the bill, the police would be able to impose conditions on public processions, including start and finish times, as well as maximum noise levels (Casciani 2021).

The bill has sparked protests by citizens in the UK, as well as criticism from relevant monitoring organisations. The most problematic parts include the proposed prerogative of the police to:

- impose conditions on public processions if the ‘noise’ by participants taking part in a public procession may cause persons in the vicinity of the procession to suffer “serious unease, alarm or distress” (Part 3, Section 54: 45-46). This provision has been criticised by the European Center for Not-for-Profit Law (ECNL), which pointed out that provisions with respect to noise generated by assemblies are particularly problematic, as they are vague and overly broad (ECNL 2021). With respect to the term ‘serious unease’, the ECNL stresses that the essence of the effective right to protest is to be capable of causing discomfort, as the protesters aim to challenge the *status quo*, which inevitably creates unease (ECNL 2021: 10).

- hand down a potential prison sentence of up to 10 years for intentionally or recklessly causing ‘public nuisance’, a vaguely defined offence which includes causing “serious distress, serious annoyance, serious inconvenience or serious loss of amenity” or even just the risk of this occurring (Part 3 Section 59: 52).
- In addition, the bill also criminalises damage to memorials (Part 2 Chapter 4 Section 46: 37).

This Helpdesk Answer compares these provisions in the UK Police Bill with similar provisions in other G7 countries, as well as Russia and China.

The next section focuses on limitations on the right to protest in these other countries. The first subsection addresses provisions that specifically include “noise” as a ground for imposing restrictions on protests. The second subsection considers other restrictions recently enacted in selected countries, including limitations on protests around “critical infrastructure”, “disrupting traffic”, limits with regards to location, and others.

The following section then addresses the existence of a provision on “public nuisance” or related concepts in selected countries’ legislation.

The third section surveys legislation that criminalises damage to memorials, while the final section provides a summary of the findings.

Imposing limitations on protests

- a) Subjective causes (i.e. “noise”) or subjective conditions (i.e. “alarm”, “distress”, “annoyance”, “inconvenience”)

Introducing the ability to limit protests based on vague or subjective criteria, such as “noise levels”, risks introducing arbitrariness or political considerations into the decision on whether, when and how to restrict the right to freedom of peaceful assembly.

The use of vague terminology of causing “unease”, “alarm” or “distress” as a ground for limiting protests is present in some recently enacted legislation in the United States. However, apart from recent legislation enacted in Utah in March 2020 (SB173) and in Tennessee in August 2020 (HB8005/SB 8005), there are no other (enacted) bills in which “noise” specifically is listed as a potential cause of “unease, alarm or distress” of persons in the vicinity of the protest and, as such, providing the basis for imposing conditions on the protest.

Under the Utah legislation (SB173), new criminal penalties are introduced for individuals protesting legislative sessions or meetings of government officials (ICNL no date). The law expands the scope of “disorderly conduct”, to include a person that “recklessly causes public inconvenience, annoyance,¹ or alarm by making unreasonable noise at an official meeting or in a private place that can be heard at an official meeting” (ICNL no date). This legislation faced criticism from civil society even before its enactment. For example, the American Civil Liberties Union opposed the bill due to its vague and broad terminology, as it feared that it could lead to abuse (Kessler 2020).

The latest changes to the legislation in Tennessee (HB8005/SB8005) increased penalties for obstructing or interfering with a legislative session or with a meeting of government officials, including “by staging a loud protest” (ICNL no date). The penalties may include a prison sentence of up to 1 year (ICNL no date).

The bill (HB6455) in Connecticut² penalises obstruction of the General Assembly or of any committee meeting, including by “making unreasonable noise” and “performing any other act which disturbs, disrupts or interferes with any such session, meeting or proceeding” (HB6455: 1-2). The bill also increases penalties for obstructing the legislative process to a class D felony, which means a prison sentence of up to 5 years, a fine of up to US\$5,000, or both (HB6455 2021: 13).

A bill introduced in Georgia in February 2021 (HB289) expands the definition of “unlawful assembly” to include two or more people who harass or intimidate another person in a public space (HB289 2021: Section 3 b3 21). Considering that harassment and intimidation are not defined, this would mean that a loud protest in a public park can potentially constitute an “unlawful assembly” (ICNL no date). Likewise, a bill introduced in Indiana in January 2021 (HB1205) increases the penalties for “disorderly conduct”, which includes making “unreasonable noise” committed “by a person while in an area where a lawful or unlawful demonstration, protest or assembly was taking place” (HB1205 2021: Section 3 (a) 18). This offence would be classified as a class A misdemeanour, punishable by up to 1 year of imprisonment (ICNL no date).

Important to mention, in the context of the UK Police Bill’s provision related to “noise”, is the bill introduced in Maryland in January 2021 (HB645), which was defeated. The bill would have criminalised disturbing the peace by “making an unreasonably loud noise”, including during a demonstration or a march on a public street or right-of-way. The penalty would have been up to 2 months in prison and a \$500 fine (HB645 2021: 3).

Another bill introduced in Maryland in November 2020 and withdrawn by the sponsor in March 2021 (HB198), also contained vague terminology and it would have prohibited “intentionally causing or recklessly creating a risk of public inconvenience, annoyance or alarm”, by conduct including making unreasonable noise and disturbing lawful meeting or gathering without lawful authority (HB198 2020; ICNL no date).

As pointed out by Nick Robinson, of the International Center for Not-for-Profit Law (ICNL), many recent “anti-protest” bills in the United States are being challenged in court, and it is likely that there will be more constitutional challenges in the future (Kelly 2021). One ground for challenging these bills is discrimination, as some bills seem to be targeting particular protest tactics, such as street protests of BLM, which is reportedly

¹ “Annoyance” is also included in the UK’s Police, Crime, Sentencing and Courts Bill under “public nuisance.” (Part 3, Section 59: 52).

² To become effective on October 1, 2021.

unconstitutional (Kelly 2021). Additionally, vague, and overly broad provisions in some recent “anti-riot” bills can also be a ground for court challenges (Kelly 2021). Adams (2021) points out that the vague provisions could discourage people from raising their voice out of fear of excessive government reaction.

b) Other provisions for limiting the right to protest

There are other conditions imposing limitations on protest that have recently been enacted in the United States and elsewhere. As alluded to in the previous section, “anti-protest” legislation drastically increased mostly in the Republican-controlled states, reportedly in response to BLM protests across the United States after the murder of George Floyd on May 25, 2020. The US Protest Law Tracker³ has documented that 34 “anti-protest” laws have been enacted in the United States since November 2016. Moreover, there has been twice as many proposals in the past years compared with any previous year (Epstein and Mazzei 2021). This new raft of legislation introduces a range of new restrictions on protests, such as the conditions on “unreasonable noise” mentioned above, as well as other provisions including wearing masks (Adams 2021).

Many recent bills at the state level in the United States increased penalties for obstructing traffic and pavements or for blocking roads. Returning to Utah’s legislation (SB173), “disorderly conduct” incorporates “obstructing pedestrian traffic at an official meeting or refusing to leave an official meeting when asked by law enforcement” (ICNL no date). The penalties for “disorderly conduct” have also increased, ranging from fines to a prison sentence. In Utah, the penalty is now a \$750 fine for a first offence, prison sentence of up to 3 months if an individual has been warned to stop the prohibited conduct, prison sentence of up to 6 months for a second offence, and up to 1 year for a third offence (ICNL no date).

A Tennessee bill (SB902) signed into law in April 2017, introduced new fines for anyone who “intentionally, knowingly, or recklessly obstructs a

public highway or street including in the course of protest” and in that way blocks emergency vehicles access to or through a street or highway (ICNL no date). The new penalty increases the fine to \$200 (ICNL no date; Ebert 2017).

Amendments to the Russian Criminal Code, enacted in January 2021 introduce liability for blocking transport infrastructure or the movements of vehicles and pedestrians, “if these acts created threat to life, health and safety of citizens, or threat of destruction or damage to property of individuals and (or) legal entities” (Shedov 2021). These amendments have been criticised by legal experts as they criminalise obstacles to traffic even when there are no negative consequences, but rather only a ‘risk’. Further, the concept of ‘threat’ has been criticised for its vagueness (OVD – Info 2020).

A number of states in the United States introduced limitations for protests near “critical infrastructure” (Shea 2020). For example, the law enacted in Arkansas in January 2021 (HB1321) introduces new penalties for protests around oil and gas pipelines. Under the law, purposely entering or remaining on critical infrastructure is a class D felony, which is punishable by up to 6 years imprisonment and a \$10,000 fine (ICNL no date; HB1321 2021). Similar laws that limit protests around critical infrastructure, targeting protesters who seek to disrupt oil pipelines, were adopted in Oklahoma, Texas, Virginia, North Dakota, among others (Shea 2020). Climate activists argue that they came as a response to environmental protests and are an attempt to silence them (Buchele 2019).

Bill 1 – the Critical Infrastructure Defence Act was (*hereinafter: Bill 1*) passed into law in June 2020 in Alberta, Canada. It introduces tougher penalties for protesters around “essential infrastructure”, which include pipelines, highways, utilities, and gas and oil production facilities (Black 2020). It prohibits unlawful entry to any “essential infrastructure” as well as obstruction of construction, maintenance and damaging critical infrastructure without lawful right (Bill 1 2020: Section 2; MacVicar 2020). The penalties for a first offence for individuals include a fine from

³ See: <https://www.icnl.org/usprotestlawtracker/>.

Can\$1,000 to Can\$10,000, a prison sentence of up to 6 months, or both. For the second or subsequent offence related to the same premises, the penalties include a fine from Can\$1,000 to Can\$25,000, a prison sentence of up to 6 months, or both (Bill 1 2020: Section 3). Bill 1 was introduced in response to the railway and pipeline protests during 2020 in Canada. The bill has been criticised for its overly broad definition of “essential” infrastructure, and a group of law professors argued that Bill 1 violates five different fundamental rights and freedoms, including freedom of peaceful assembly (MacVicar 2020).

A bill introduced in Indiana in January 2021 (HB1205) would ban 24-hour protests outside the state capitol. Camping in places around the capitol after being notified about the ban either in person or by signage, would constitute a class A misdemeanour. Camping in this bill is a conduct between 10PM and 7AM, and it includes setting up tents and using furniture as well as laying down on a blanket (HB1205 2021: Section 14 (a) 15).

A law enacted in South Dakota in March 2017 (SB176) expands the authority of the governor to impose limits on protest in certain circumstances. The governor and the sheriff can ban gatherings of any group larger than 20 people on public land if the gathering has the potential to damage the land or interfere with renters’ right to use the land (SB176; ICNL no date).

France has also introduced several “anti-protest” provisions in its legislation in the aftermath of the “yellow vest” movement. This movement started in 2018 with the protest in opposition to the rising fuel prices but subsequently expanded to protesting other economic and social policies including pension reform, racism, and police impunity (Amnesty International 2020: 4). The response of the French criminal justice system and overly broad laws, which opened the space for arbitrary implementation of legislation, were widely criticised by the Amnesty International (2020).

In February 2020, the French parliament passed an “anti-protest” law that would have enabled

administrative, rather than judicial authorities, to pre-emptively ban individuals, considered to be a threat to public order, from attending protests. The penalties would have included a prison sentence of up to 6 months, and a fine of up to €7,500 (Henry 2019). However, the French Constitutional Court struck down this article, stating that the measure has been too vaguely drafted (EURACTIV 2019). French legislation also introduced a ban on covering the face during protest (BBC 2019). Masks, as well as uniforms, (with some exceptions) are also not allowed on protests in Germany (Jones 2021).

Further, the French parliament passed a controversial global security law in April 2021 (Holroyd 2021). Article 24 states that: “causing, with the manifest aim of harming their physical or psychological integrity, the identification of an officer of the national police, a member of the national gendarmerie or an officer of the municipal police when they are taking part in a police operation (...) is punishable by five years in prison and a fine of €75,000” (RSF 2021; Public security law 2021). RSF has particularly criticised vague formulation “causing the identification”, which is not defined in the law, so it remains unclear whether it includes disseminating photos or videos,⁴ as well as the vague concept of “harm to psychological integrity” (RSF 2021).

A recent law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, enacted in June 2020, sparked mass protests in Hong Kong, due to provisions that may limit the right to protest (ICNL 2020). Numerous people were arrested on the first day after the law was enacted, while police was instructed to target those waving an independence flag or chanting for independence (ICNL 2020; Yu, Davidson and Kuo 2020). The focus on having flags and chanting pro-independence slogans is likely related to activities of inciting “subversion” and “secession”, which the law criminalises (ICNL 2020). However, due to the vague terminology, the law was criticised for potentially being a tool against free speech and the right to protest. A

⁴ Although this new wording replaced the previous ban of disseminating photos and videos of police officers and gendarmes with an intent to harm, it still remains vague

and unclear on whether posting photos would be criminalised (RSF 2021).

case in point is that even holding blank pieces of paper has been a cause for arrest (Grundy 2020).

Several countries have limitations with regards to the location of protests. For example, protests in China cannot be held within a certain distance from selected state institutions (ICNL 2021). In addition, citizens can only participate in protests in their place of residence (ICNL 2021). In Germany, unless the Interior Ministry or president grants approval, public assemblies may not take place within certain distances from legislative organs, and the Constitutional Court (Jones 2021).

Russian law prohibits protests near the residence of the president, courts, prisons, and critical infrastructure facilities (The Moscow Times 2019; Federal Law Article 8 2004). In January 2021, additional bans on protest locations were introduced in Russia, including bans on protests near buildings occupied by “emergency operational services”, which include the police and the Federal Security Service (Shedov 2021). Protests without previous approval from the authorities have been a criminal offence in Russia since 2014 (The Moscow Times 2019).

Definition of and sentences for public nuisance

The specific offence related to “public nuisance” does not exist in many jurisdictions, but vague formulations such as “causing distress, annoyance, inconvenience” are present in several states in the United States, as discussed in previous sections (see especially Utah (SB173) and Tennessee (HB8005/SB8005) bills).

In the bill introduced in Arizona in January 2021 (HB2309), “public nuisance” includes conduct “injurious to health, indecent, offensive to the senses or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighbourhood or by a considerable number of persons” (HB 2309 2021: Section 5). Public nuisance is classified as a class 2 misdemeanour (punishable by a fine of up to \$750 and imprisonment of up to 4 months) unless it is committed in a course of violent or disorderly

assembly in which case it is classified as a class 6 felony (HB2309 2021: Section 5).

Although it does not use the specific term “public nuisance”, worth mentioning at this point is an Arkansas bill, introduced in March 2019 (HB1898), which was defeated and died on House Calendar at *sine die adjournment* (ICNL no date). This bill introduced a vague terminology similar to the one in the UK’s Police bill (Part 3 Section 59: 52). The bill introduced “aggravated disorderly conduct” to include causing public inconvenience, annoyance, or alarm, or even recklessly creating a risk of these, including by obstructing the free use of public roads, streets, highways, airports and by disrupting of lawful assembly or a meeting (ICNL no date; HB1898 2019: 1:2). The punishment for this offence (class A misdemeanour) would have been imprisonment of up to 1 year and a fine of up to \$2,500 (ICNL no date).

Legislative provisions on damage to memorials

At the federal level in the United States, former president Donald Trump issued the “Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence” in June 2020 (*hereinafter: Executive Order*). The Executive Order came after a number of statues were toppled after the murder of George Floyd, including a statue of President Ulysses S. Grant (BBC News 2020). The Executive Order instructed federal law enforcement to prosecute individuals who vandalise federal monuments and to withhold federal funding to local governments that did not prevent these actions (Pettypiece 2021). However, this Executive Order was revoked by the new United States president, Joseph Biden, on May 14, 2021 (The White House 2021).

At the state level, the law in Florida, enacted in April 2021 (HB1/SB484), introduces penalties for anyone who “wilfully and maliciously defaces, injures, or otherwise damages by any means a memorial” if the value of the damage is more than \$200 (HB1/SB484). The act is a third-degree felony punishable by up to 5 years in prison (ICNL no date).

Legislation enacted in Arkansas in April 2021 (HB1508) expands the definition of “an act of terrorism” to include any act that causes “substantial damage to” or destruction of a public monument.

A bill introduced in New Jersey in December 2020 (S3261) would increase penalties for damaging memorials if they happen during a riot. The penalty would include a prison sentence of up to 1.5 years and a \$10,000 fine. Currently, the damage to memorials is punishable by up to 6 months in jail (ICNL no date).

A bill introduced in Arizona in January 2021 (HB2309) would introduce heightened penalties for damage to memorials if it occurs during a violent or disorderly assembly, which would constitute a class 6 felony. Otherwise, it would be a class 2 misdemeanour (HB2309 2021).

Russia also criminalised damage to memorials. The Federal Law on Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation introduces criminal liability for destroying or damaging

“the historical and cultural significance of sites and objects, including: military burial sites located on the Russian territory or beyond, as well as monuments, stelae, obelisks and other memorial structures or objects commemorating those who perished while defending the Fatherland or its interests, or are dedicated to the days of military glory of Russia (including memorial museums or memorial signs on battlefields), as well as monuments, other memorial structures or objects dedicated to persons who defended the Fatherland or its interest” (Kremlin no date).

The penalties include financial ones (up to 5 million roubles), compulsory labour or imprisonment of up to 5 years (RAPSI 2020).

In 2014, Canada introduced amendments to its Criminal Code to criminalise “mischief relating to war memorials” in relation to:

- “building, structure or part thereof that primarily serves as a monument to honour persons who were killed or died as a consequence of a war,
- including a war memorial or a cenotaph,
- or an object associated with honouring or remembering those persons that is located in or on the grounds of such a building or structure, or a cemetery” (Criminal Code Chapter 9 Section 430).

The penalties include a fine of up to Can\$1,000 for a first offence, a prison sentence of up to 14 days for a second offence and for each subsequent offence a prison sentence of up to 30 days. In case the offence is prosecuted by indictment the punishment is a prison sentence of up to 10 years and if the offence is punishable on summary convictions, then the penalty is a prison sentence of up to 1.5 years (Criminal Code Chapter 9 Section 430).

Conclusion

The UK Police Bill introduced several legal provisions that could limit the right to protest, which include: a) expansive wording to impose conditions on public processions (i.e. “noise”, “alarm”, “distress”, “annoyance”), b) the vague concept of “public nuisance” and c) criminalisation of damage to memorials. This Helpdesk Answer provided an overview of similar legal provisions in other G7 countries, Russia and China.

First, very few countries include “noise” as a potential ground to limit public processions. These include Utah, Tennessee, Connecticut, Georgia, Indiana, but only Utah and Tennessee have enacted their bills so far. Furthermore, in three cases that used expansive and vague wording of “unreasonable noise” causing “distress”, “annoyance”, “inconvenience”, the bills were defeated. These include two bills in Maryland and one in Arkansas.

Second, the concept of “public nuisance” is present in legislation of Arizona. However, several other states in the United States do use expansive wording which is a part of the definition of “public nuisance” in the UK Police Bill: “annoyance”, “distress”, “inconvenience.” Important to emphasise here is that one piece of legislation that

used this expansive wording in the United States has already been defeated, and that is the bill in Arkansas (HB1898).

Third, several countries criminalise damage to memorials. These include several states in the United States (i.e. Florida, Arkansas), Russia and Canada.

The wave of “anti-protest” legislations in the United States and in Europe in recent years has been widely criticised by human rights monitoring organisations. Expansive wording and vague terminology were especially criticised by RSF (2021), Amnesty International (2020) and ICNL (2017). These experts pointed out that vague terminology can be a ground for a rising number of constitutional challenges to the “anti-protest” legislation at the state level in the United States.

ICNL (2017) emphasised that heightened penalties in recent “anti-protest” legislation can discourage people from participating in protests. This especially relates to higher penalties for disrupting traffic, considering that this frequently occurs in the course of a protest (ICNL 2017: 6).

Finally, the ECL report (2021: 16) points out that the UK Police Bill, which increases the scope of “nuisance” offences as well as the related penalties, is in opposition to the General Comment number 37 of the UN Human Rights Committee (2020), which states that limitations should not discourage participation in public processions.

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