COMPARISON ON THE RIGHTS, LIMITATIONS AND PROCEDURES RELATED TO PUBLIC GATHERINGS AND DEMONSTRATIONS ACROSS EUROPE

prepared for
THE HELSINKI COMMITTEE (APADOR-CH)

DLA PIPER

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN THE EUROPEAN UNION AND THE COUNCIL OF EUROPE

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

On a European level, fundamental rights are laid down in the Charter of Fundamental Rights of the European Union (**the Charter**) and the European Convention on Human Rights (*Convention for the Protection of Human Rights and Fundamental Freedoms*, **ECHR**). The right to freedom of expression is laid down in Art. 10 ECHR and Art. 11 of the Charter. The right to freedom of assembly is guaranteed by Art. 11 ECHR and Art. 12 of the Charter.

The early treaties of the European Communities did not contain any provisions on fundamental or human rights. As a result of the European Convention, the Charter was proclaimed by the European Parliament, the Council of the European Union, and the European Commission in 2000. At this stage, the Charter was not legally binding and only laid down the Member States' common understanding of fundamental rights. With the Treaty of Lisbon of 1 December 2009, however, the Charter became part of EU primary law. According to Art. 51 (1) of the Charter, the provisions of the Charter are addressed to the institutions of the EU, in the first place. They are only addressed to the Member States when they are implementing Union law.

The ECHR was elaborated by the Council of Europe in 1949/1950 and has been ratified by all Member States of the European Council. The rights laid down in the ECHR can be enforced by the European Court of Human Rights (**ECtHR**).

As regards the relation between the ECHR and the Charter, there are hardly any differences in the scope of protection. The Charter is based on the ECHR to a large extent. In order to ensure utmost convergence in the protection of fundamental rights, the meaning and scope of the rights laid down in the Charter which correspond to rights of the ECHR shall be the same as those laid down by the ECHR (Art. 51 (3) of the Charter). EU law may provide more extensive protection, however. Since both codes provide for the freedom of assembly as well as the freedom of expression there are no differences in the content of these freedoms.

As to the possibility of interventions, the ECHR contains specific rules relating to each fundamental freedom, whereas the Charter only contains one general clause on interventions applicable to all fundamental rights in Art. 52 (1). Through Art. 51 (3) of the Charter, restrictions of the freedom of assembly and the freedom of expression must follow the specific rules of the ECHR.

Furthermore, there is a strong interdependence between European fundamental rights and the four fundamental freedoms (freedom of movement of goods, capital, services and people) laid down in the TFEU. Fundamental rights can both restrain the fundamental freedoms (cf. ECJ C-112/00 – *Schmidberger*) but also be restrained by the them (cf. ECJ C-341/05 – *Laval*).

I. Freedom of assembly

Art. 11 ECHR and Art. 12 of the Charter provide for the right to freedom of peaceful assembly.

1. Scope of protection

The notion of a "peaceful assembly" does not cover a demonstration where the organisers and participants have violent intentions (ECtHR, app. no. 13079/87 – *G. vs. Germany*). Nevertheless, a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote (ECtHR, app. no. 10126/82 – *Ärzte für das Leben*).

The right to freedom of assembly does not only protect individuals but also – inter alia – political parties (ECtHR, app. no. 23885/94 – *ÖZDEP*). Although the right to freedom of assembly is granted to everybody, the protection of Art. 11 ECHR is less effective for certain employees in public service. According to Art. 11 (2), S. 2 ECHR, the right to freedom of assembly shall not prevent the imposition of lawful restrictions to the exercise of this right by members of the armed forces, of the police, and of the administration of the State.

One of the objectives of the freedom of assembly is the protection of opinions and the freedom to express these. Hence, the freedom of assembly must always be considered in the light of the freedom of expression (ECtHR, app. no. 23885/94 – *ÖZDEP*). In case C-112/00 (*Schmidberger*), the ECJ granted the right to freedom of peaceful assembly even for the case that the fundamental freedom of movement of goods would be restrained by the exercise of the freedom of assembly.

2. Intervention

Restrictions to the right to freedom of assembly must comply with the provisions of Art. 11 (2) ECHR. Formally, they must be prescribed by law. Taking into account the different legal systems of the Member States to the Convention, especially common-law countries, this does not only cover statutory law but unwritten law, also. The requirement refers to the need of legal certainty. Hence, the law must be adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct (ECtHR, app. no. 6538/74 – *Sunday Times*).

Neither Art. 11 ECHR nor Art. 12 of the Charter make a distinction between indoor or outdoor assemblies.

3. Justification

Art. 11 (2) ECHR provides for justifications of interventions. Any interference must be aiming at a legitimate objective. Hence, the right to freedom of assembly shall only be restricted in the interest 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.

In addition, any measure restricting the right to the freedom of assembly must be *necessary* in a democratic society. This expression implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate goal pursued with reference to the intervention (ECtHR, app. no. 29221/95 – *Stankov*).

II. Freedom of expression

Art. 10 ECHR and Art. 11 of the Charter guarantee the freedom of expression. In the ECtHR's words, "freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man" (ECtHR, app. no. 5493/72 – *Handyside*).

1. Scope of protection

Art. 10 ECHR and Art. 11 of the Charter cover both the private and commercial use of freedom of expression, e.g. in advertising (cf. ECJ, C-380-03, *Tobacco Advertising*). The freedom of expression is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (ECtHR, app. no. 23885/94 – *ÖZDEP*).

However, certain forms of expression are excluded from the protection of Art. 10 ECHR (or Art. 11 of the Charter, respectively), if they can be characterized as "hate speech". Based on Art. 17 ECHR, the comments in question can be excluded from the protection of Art. 10 ECHR if they negate the fundamental values of the Convention. Hate speech which is not apt to destroy these fundamental values, can still be subject to restrictions in case of a legitimate public interest (cf. ECtHR Factsheet "Hate speech").

2. The intervention

According to Art. 10 (2) ECHR, the exercise of the freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law (as to the meaning of "law", see above section A. I. 2.).

3. Justification

Just like the freedom of assembly the freedom of expression may only be restricted for reasons of public interest, especially 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. Again, any restricting measures must be *necessary* in a democratic society (Art. 10 (2) ECHR).

When it comes to assessing the proportionality of restricting measures, Art. 10 (2) ECHR emphasizes that the use the freedom of expression carries with it duties and responsibilities, which must be taken into account. Also, the assessment of proportionality is to a large extent dependent of the different national traditions of the contracting parties. Therefore, the national legislator as well as courts and authorities have a certain margin of appreciation in the assessment of proportionality (ECtHR, app. no. 5493/72 – *Handyside*). In the first place, it is the duty of national authorities, who are in closer touch with local situations, to assess the need for such measures in the light of the situation obtaining locally at a given time (ECtHR, app. no. 13470/87 – *Preminger*). Hence, the international courts restrain themselves in their control on the question whether the national authorities overstep their margin of appreciation.

As regards the judicial review over European institutions, the ECJ stated that "the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10 (2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference" (ECJ, C-380-03, *Tobacco Advertising*).

B/C.) DEADLINES AND AUTHORITIES INVOLVED

There are no specific rules in the EU or international law governing technical or administrative questions of the right to freedom of assembly and expression.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

There are no rules governing the question of prompt and spontaneous protests or processions. If such rules exist in national law, they must comply with the intervention and justification requirements as described above. In particular, such measures must aim at a legitimate objective and have to be necessary in a democratic society.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

The Charter as well as the ECHR do not provide for specific rules regarding forbidden places of demonstration, e.g. the European Parliament or the ECJ. However, national or local laws which are applicable for the locality of European institutions may contain such rules. A Brussels local law provides for restricted demonstration rights in the area of the European Parliament, for example. If such national or local law provides for rules of restriction, they must comply with the intervention and justification requirements as described above. In particular, such measures must aim at a legitimate objective and have to be necessary in a democratic society.

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

I. Legal protection for individuals under EU law

Legal acts and decisions of EU institutions with legal effect are subject to judicial review by the ECJ and the General Court in actions for annulment (Art. 263 (1) TFEU). In the context of the protection of human rights, the courts are competent for actions on grounds of infringements of the Treaties (Art. 263 (2) TFEU). Individuals may only seek legal protection before the ECJ in proceedings against an act if it is addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures (Art. 263 (4) TFEU). Hence, private individuals may only bring proceedings for annulment of an EU law if they are able show that the disputed law affects them directly and individually.

Actions on grounds of infringements of the Charter committed by national authorities cannot be brought to the ECJ by individuals. On a European level, these actions can only be brought to court by the European Commission or other Member States. However, individuals can claim a breach of the Charter before national (administrative) courts, which have to consider and respect the fundamental rights laid down in the Charter. If the national courts have doubts concerning the interpretation of the respective EU provisions, they may refer the case to the ECJ for a preliminary ruling (Art. 267 TFEU).

II. Legal protection for individuals before the ECtHR

Art. 34 ECHR allows for applications from any person (individuals and legal entities), nongovernmental organisations, or groups of individuals claiming to be the victim of a violation by one of the Parties of the rights of the ECHR. Before an application to the ECtHR can be lodged, all domestic legal remedies must have been exhausted (Art. 35 (1) ECHR). The complaint which is meant to be taken to the ECtHR must have been raised before the national courts. Applications must be made within six months after the final decision of the national courts.

ECtHR's decisions cannot annul national laws or overrule national decisions. The Parties to the ECHR "only" have an obligation under public international law to abide the final decision (Art. 46 ECHR).

G.) CRIMINAL RESPONSIBILITY

No criminal responsibility for illegal public gathering or violation against provisions restricting the freedom of expression has been established by either international or EU law.

Please contact thilo.streit@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN AUSTRIA

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

In Austria, the freedom of assembly and the freedom of expression are found in two distinct legal documents, which are both part of the Austrian constitution, the basic state law on the general rights of citizens 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger 1867*, "**StGG**") and the European Convention on Human Rights ("**ECHR**").

The StGG was introduced into the Austrian legal system in the 19th century in a phase of change from absolute to constitutional monarchy. Thus, the original intent of the rights contained therein was primarily focused on the defence of citizens (not necessarily all human beings) against the state. The ECHR was drafted by European states after Europe faced two devastating World Wars and the Nazi-regime terrorised the whole continent.

Especially the freedom of assembly and the freedom of expression are fundamental for a modern democratic state which we desire to have in today's society, as only these rights enable the general public to truly participate in the political process. On the other hand, the exercise of these rights may result in the infringement of rights of other parties. Therefore, a balance between these rights and other constitutional rights has to be found. As a result, the judiciary has developed a rich jurisprudence and on various occasions enhanced or specified the scope of the respective rights in the light of the progressing decades.

I Freedom of assembly

The freedom of assembly is to be found in Art. 12 StGG and Art. 11 ECHR. According to Art. 12, the precise content of the freedom of assembly is to be regulated by a separate statute, the Assembly Act 1953 (*Versammlungsgesetz 1953*). The Assembly Act 1953 is not a constitutional law. It specifies the provisions on assembly and also sets restrictions to the right of freedom of assembly. However, these restrictions are in compliance with the narrow scope of restrictions permitted by Art. 11 ECHR.

1. Scope of protection

According to Art. 12 StGG, a protected assembly is any gathering of people (whether public or private) for a common cause, such as a debate, discussion or demonstration.

However, a mere occasional gathering, or events that solely aim on informing the public such as the joint presentation of banners and posters or an information desk is not within the scope of Art. 12 StGG (although these forms may be protected by other fundamental rights such as the freedom of expression). It is noteworthy that Art. 12 StGG only applies to Austrian citizens. Foreigners must not rely on this provision.

Art. 11 ECHR however has broadened the scope of the right to freedom of expression. Under this provision, every gathering of people for a mutual aim, including for example ceremonial acts, are protected by the freedom of assembly. This article is also applied to all human beings, regardless of nationality.

The right of freedom to assembly prohibits the state from requiring assemblies to apply for an approval (although a notification requirement is permitted). The right also contains the right to organize an assembly and remain assembled.

2. The intervention

Art. 12 StGG provides that assemblies may be conducted in accordance with a separate statute, the Assembly Act 1953. This Act provides for some restrictions on the right to assembly.

Section 2 subsection 1 of the Assembly Act 1953 provides that each and every assembly must be notified to the competent authority within 24 hours at the latest. The notification shall contain the purpose, the location and the time of the assembly. Then the authority may choose to send one or more representatives who are entitled to an appropriate place at the assembly and may demand the information about the organizer of an assembly and the speakers of the assembly.

Pursuant to Section 6 of the Assembly Act 1953, an assembly that contravenes criminal law or otherwise endangers the public safety shall be prohibited by the authorities. Further, the authority shall prevent people from participating in an assembly if they disguise their face or at least bear items which have the purpose to disguise one's face (Section 9 subsection 1 Assembly Act 1953). Furthermore, people who are armed or who bear items which under the circumstances are to be used violently against people or objects are prohibited from participating in an assembly (Section 9a Assembly Act 1953).

3. Justification

Whenever an assembly is conducted contrary to these restrictions, the authority shall dissolve it. Similarly, the authority shall end the assembly when it turns out to aim at an illegal purpose or when it endangers public safety. However, an assembly must not be dissolved for the sole reason that it was not notified to the authority.

All these restrictions on the right to assembly have to be interpreted narrowly and must only be applied if justified under Art. 11 Para 2 ECHR. Therefore, a balancing test has to be performed between the interests of the organizer of the assembly on the one hand and the state interests which are stated in Art. 11 Para 2 ECHR (e.g. public safety, public order, prevention of crimes) on the other hand.

The authority has to take into account all available circumstances in order to estimate whether the commencement or continuance of the assembly will severely infringe the state interests which are explicitly named in Art. 11 Para 2 ECHR. Only in such a case, the right to assembly may be restricted.

In addition, if the authority finds only a resolvable issue with the assembly (e.g. the authority considers the aimed location of the assembly as inappropriate), the authority has to contact the organizer in order to resolve this issue (e.g. the organizers agree to another location).

Furthermore, the state has an obligation to provide for the freedom of assembly in the sense that all lawful assemblies must be protected against disturbances by third parties.

II Freedom of expression

The freedom of communication is of pivotal importance in a democratic society, as only through this right the public can form an informed opinion and hence can responsibly exercise its role in the electoral process. Besides the freedom of information, the freedom of the press and the freedom of broadcasting, the freedom of expression is an important part of the freedom of communication.

The freedom of expression is established in Austria in Art. 10 ECHR and Art. 13 StGG. As the scope of Art. 10 ECHR is far broader than the scope of Art. 13 StGG, the latter has lost any importance in the Austrian legal system. Solely the prohibition of censorship, which is expressed in Art. 13 StGG, is still of theoretical relevance.

1. Scope of protection

Art. 10 ECHR protects the freedom of an individual to express an opinion. The term opinion is to be interpreted broadly. Any expression of thoughts are protected, including thoughts on scientific, cultural, technical or other issues. Apart from an expression of subjective values, also factual statements or other news are protected. Also, each individual is free to choose on which channels he or she desires to express his or her opinion, be it in written from, on television, on pictures or other media. Similarly, it is protected to receive information. Art. 10 ECHR even includes commercial advertising.

2. The intervention

According to Art. 10 Para 2 ECHR, the freedom of expression may be restricted with form requirements, conditions or criminal legislation. The possible restrictions of the freedom of expressions are as plentiful as the possible opinions to be expressed themselves.

Common restrictions of the right to express one's opinion can be found in advertising restrictions of various professional groups (e.g. attorneys or doctors) as well as were third party rights are infringed (mostly voiced through a criminal or civil trial before an ordinary court).

Therefore, several other statutes implicitly or explicitly restrict the freedom of expression.

3. Justification

However, such a restriction of the freedom of expression is only permitted, if an explicitly stated state interest of Art. 10 Para 2 ECHR (e.g. public safety, public order, prevention of crimes) is thereby protected and if the restriction is reasonable and necessary. Therefore, the test is whether a less restrictive measure could have been taken, and, if not, whether the stated interest which shall be protected outweighs the individual interest of freedom of expression in the specific case.

For example, statements regarding a person of public interest are under a stronger protection than similar statements regarding a private person. Also, commercial advertising is less protected than voicing ones political opinion.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

According to Section 2 of the Assembly Act 1953, the authority must be notified of an assembly at the latest 24 hours prior to the assembly (exceptions are made for some religious or cultural processions in Section 5 Assembly Act 1953). The notification must contain the purpose, the location and the time of the assembly. Only upon request, the authority will issue a written confirmation. As already stated, the authority may send one or more representatives to the assembly.

The competent authority is – depending on the place of the assembly – either the state police department or the municipal authority. In order to ensure the safety of a lawful assembly, the police may accompany the assembly.

It is also noteworthy that any other authority is equally entitled to prohibit or dissolve an assembly, if the assembly endangers the public safety and the other authority is charged with maintaining public safety. The freedom of expression is not subject to any authoritative acknowledgement and hence there are no deadlines or authorities involved. The restrictions

on the right to freedom of expression may be enforced by courts or administrative authorities (especially disciplinary authorities), as the case may be.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

Under Austrian law, prompt or spontaneous protests or processions are not explicitly regulated. However, as already stated, failing to notify the authority of an assembly is no valid reason to dissolve the assembly. Hence, prompt and spontaneous protests and processions are permitted in Austria.

However, due to the lack of a formal notice, the participants of such a spontaneous assembly have to accept that the factual circumstances regarding the prohibition of the assembly have to be collected in a more informal manner as the authority is not able to conduct formal proceedings.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

In general, people are allowed to assembly at any public place in Austria. However, whenever one of the chambers of the parliament, the national assembly or a state parliament are in session, an out-door assembly must not be held within 300 meters around the constitutional seat of the respective institution.

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

Participants of an assembly can appeal against any decision of the authority to either the state police department or the ministry of interior affairs. These authorities will rule on the issue as last instance of the ordinary administrative procedure.

However, the participants still have the option to file a formal complaint against these decisions with either the administrative court (*Verwaltungsgerichtshof*) or the constitutional court (*Verfassungsgerichtshof*). These courts, however, only rule on legal issues (including issues of procedural law).

Due to the duality of legal bases of the freedom of assembly, the procedural aspect differs for Austrian nationals and foreigners. Foreigners may file their complaint with the constitutional court only if the authorities have gravely violated their rights under Art. 11 ECHR, while "normal" infringements of the Assembly Act 1953 have to be brought before the administrative court. Austrian nationals, however, can only file a complaint with the constitutional court – be it for grave violations of their fundamental right, or merely a misapplication of the Assembly Act 1953.

If a participant's rights were violated due to the use of excessive force by the authority's organs, the participants may also file a complaint with the independent administrative panel (*Unabhängiger Verwaltungssenat*). This panel serves as a tribunal in accordance with Art. 6 ECHR.

G.) CRIMINAL RESPONSIBILITY

1 Illegal public gathering

According to Section 19 Assembly Act 1953, any infringement of the provisions of the Assembly Act 1953 are to be punished with arrest up to six weeks or a monetary fine up to EUR 720,00 by the competent administrative authority, as long as the violation does not constitute an offence under criminal law. This includes the organizers duty to notify the authority about the assembly.

However, a participant who has disguised his or her face and is armed or bears items which under the circumstances are to be used violently against people or objects is to be punished with prison up to six month or a monetary penalty up to 360 day's rates, in case of a repetitive act to up to one year in prison or 360 day's rates by the competent criminal court.

2 Violation against provisions restricting the freedom of expression

Sections 111 to 115 of the Austrian Criminal Code (*Strafgesetzbuch*) protect the honour of an individual. It is penalized to make wrong statements of facts which are inclined to damage the reputation of another person. Similarly, it is prohibited to insult somebody.

These offences are to be prosecuted by the inflicted individual himself or herself. Only if certain constitutional organs are target of the insult or the wrong statements of facts, the public prosecutor will prosecute the offences, if the organ agrees thereto.

Please contact andreas.daxberger@dlapiper.com or michael.komuczky@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN THE CZECH REPUBLIC

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

The freedom of assembly and the freedom of expression are basic human rights that belong to the category of political rights. In the Czech republic, they are both enshrined in the Charter of Fundamental Rights and Freedoms and in the relevant special acts.

During the Communist era these basic political rights were significantly suppressed by authoritative regime. At that time, the freedom of assembly was primarily adjusted by a decree of the Ministry of the Interior. De facto, organizing of meetings and assemblies was made possible only for legal persons, because individuals were allegedly not in a position to ensure proper organizing services. After the Velvet Revolution in 1989, however, political and social system has completely changed. Very briefly after this historical event a new act on the right of assembly was enacted and, with minor amendments, it still applies.

The freedom of assembly is closely connected with the freedom of expression and other fundamental human rights which as a whole play a crucial role in realizing and upholding democracy and therefore are of a very high constitutional importance.

I Freedom of assembly

The freedom of assembly is a political right, the content of which is the ability to act peacefully in public places and to communicate their views there – demonstrate or manifest.

In the Czech legal system it is principally guaranteed by Article 19 of the Charter of Fundamental Rights and Freedoms. Restrictions are only allowed in accordance with and on the basis of law.

Statutory regulation of the realization (as well as the restriction of this right) is contained in Act No. 84/1990 Coll., on the Right of Assembly.

1. Scope of protection

As mentioned above, the political right to assemble peacefully is constitutionally guaranteed. It may be restricted, but only by law and in case of assemblies that are held in public locations. Furthermore, an assembly may not be made to depend on the grant of permission by a public administrative authority. Thus, in the Czech Republic the principle of notification is applied, not the principle of permitting.

Legal protection is provided to such assemblies whose purpose falls under Section 1, Subsection 2 of the Act on Right of Assembly. This means that exercise of the right of assembly serves to realize the freedom of expression and other constitutional rights and freedoms, to exchange information and views and to participate in a resolution of public issues and other common questions via expression of attitudes and opinions.

Street processions and demonstrations are considered assemblies in the sense of the Act on Right of Assembly regardless of their purpose.

Vice versa, Section 2 of the Act on Right of Assembly stipulates certain kinds of assemblies that do not fall under the legal term assemblies even though their purpose might be in compliance with the Act. These assemblies are (i) assemblies of people associated with the activities of public authorities covered by other legislation (ii) assemblies related to provision of services and (iii) other assemblies not serving the purpose stated under (i) or (ii).

2. The intervention

Pursuant to Article 19 of the Charter of Fundamental Rights and Freedoms, the freedom of assembly may be limited, if such measures are considered necessary in a democratic society for the protection of rights and freedoms of others, public order, health, morals, property, or security of the state (this list is exhaustive).

Therefore, in practice, there are several possibilities to restrict the freedom of assembly. For instance, by means of a previous mandatory notification, by banning an assembly for specified reasons under Section 10 of the Act on Right of Assembly, or dissolving a commenced assembly in cases referred to in Section 12 of the Act on Right of Assembly.

a. Outdoor assemblies

As already mentioned, Article 19 of the Charter of Fundamental Rights and Freedoms provides that the exercise of the freedom of assembly may be limited by law in case of assemblies held in public places, under further circumstances (i.e. if such measures are considered necessary in a democratic society for the protection of

rights and freedoms of others, public order, health, morals, property, or security of the state). An assembly held in public places is the only kind of assembly that may be subject to restrictions. (Thus an assembly held in a dwelling or in enclosed spaces that are not open to the public is not subject to the notification obligation.)

In general, outdoor assemblies are subject to the notification obligation and related competences of public authorities. Under Section 5 of the Act on Right of Assembly, a written notification containing specified information must be submitted to the public authority at least five days in advance. This notification is not an application for approval. An assembly may be restricted by imposing conditions to prevent any harmful external effects or even totally prohibited pursuant to Section 10 or 12 of the Act on Right of Assembly.

b. Indoor assemblies

Under the Act on Right of Assembly, there is no way to restrict an indoor assembly, unless an indoor public place is concerned. Assemblies held in a dwelling or in enclosed spaces that are not open to the public are not subject to the notification obligation. Furthermore, the possible restriction by law mentioned in Article 19 of the Charter of Fundamental Rights and Freedoms is not applicable.

In accordance with the principle that everybody may do what is not prohibited by law and nobody may be forced to do what the law does not command, people are allowed to assemble when they want and where they want as long as this freedom does not collide with any right of a third party protected by law. (For example, responsible authority must intervene if such assembly would disturb night piece, incite racial intolerance etc.)

3. Justification

The above mentioned possibility of restriction is not limitless. Any restriction concerning the freedom to assemble needs to be justified. The scale of justification extends from constitutional to statutory level.

On the constitutional level, the exercise of the freedom of assembly may be limited by law in the case of assemblies held in public places, if it concerns measures that are necessary in a democratic society for the protection of rights and freedoms of others, public order, health, morals, property, or security of the state.

On the statutory level, an assembly might be banned if its purpose would aim towards denying or restricting personal, political or other rights of citizens because of their nationality, gender, race, origin, political or other opinion, religion or social status or to inciting hate and intolerance for such reasons as well as towards committing violence or gross indecency etc. (See Section 10 and 12 of Act on Right of Assembly.)

II Freedom of expression

Freedom of assembly is closely connected with the freedom of expression and other political human rights.

The freedom of expression is guaranteed by Article 17 of the Charter of Fundamental Rights and Freedoms together with the related right to information. (The freedom of information is the flipside of the freedom of speech and ensures that anyone can inform himself without hindrance from generally accessible sources. Article 17 further obliges state bodies and territorial self-governing bodies to provide information with respect to their activities, using an appropriate manner.)

The freedom of expression includes the right to express his views in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the state.

1. Scope of protection

Broad formulation of Article 17 of the Charter of Fundamental Rights and Freedoms covers all imaginable ways of expressing one's opinion. Considering that this list is unclosed (with formulation "or in any other form"), the protection provided by Article 17 is as wide as it gets, as long as limits of restriction admitted by the Charter hereafter are respected.

(Legal framework of the right to information provide Act No. 106/1999 Coll., on Free Access to Information and Act No. 123/1998 Coll., on Access to Information on the Environment.)

2. The intervention

The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures that are necessary in a democratic society for protecting the rights and freedoms of others, the security of the state, public security, public health, or morals.

It is also very common that the freedom of expression clashes with other fundamental human rights, such as the right to privacy or the right to protection of reputation. Only then court decides, which basic human right prevails.

3. Justification

Pursuant to Article 1 of the Charter of Fundamental Rights and Freedoms, fundamental human rights and freedoms are guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethic or social origin, membership in a national or ethnic minority, property, birth, or other status. The duty of public authorities is thus to protect basic human rights which implies an obligation to actively intervene against violations. In accordance with the practice of courts, balance between the freedom of expression and other rights and freedom needs to be sought.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

According to Section 5 of the Act on Right of Assembly, the person who intends to convene an assembly has to notify the intention in writing to the appropriate authority. The notification must be delivered to the authority at least 5 days in advance and may also be submitted in person. In general, the competence in matters of the freedom of assembly is granted to municipal authorities in whose jurisdiction assemblies take action. The bigger the assembly is, the higher authority is competent. Thus, for assemblies taking place across the border of one region the competent authority is the Ministry of Interior (the Czech Republic is divided into 14 regions).

Several pieces of information must be specified in the notification by the person who intends to convene an assembly. For instance, the purpose of the assembly, its date and place, envisaged number of participants or the name, surname and permanent residence of the organizer are required. If the notification is submitted in person, the authority confirms in writing the date and time when the notification requirements were met. In case of imperfections or defects, the organizer is immediately notified. The notification obligation is fulfilled after correction of all the defects within a period specified by the authority.

The Act on Right of Assembly stipulates that in case of a reasonable concern that an assembly may be disturbed the organizer may ask the competent authority or the competent department of the Police of the Czech Republic to provide the assembly with protection. On the other hand, the organizer is obliged to provide the authority upon its request with assistance necessary to ensure proper holding of the assembly and to fulfill the obligations stipulated by special laws.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

We are not aware of any special provisions relating to prompt and spontaneous protests/processions, i.e. protests/processions arising without a previous intention of their organization. However, although these processions are not specifically dealt with in legislation, it does not necessarily means prohibition of theirs. In case of processions and protest that do not fall under the regime of the Act on Right of Assembly, the constitutional principle that everybody may do what is not prohibited by law and nobody may be forced to do what the law does not command emerges. Also, the Charter of Fundamental Rights and Freedoms states that the power of the state may be asserted only in cases and within the limits set by law and in a manner determined by law. Thus the implication stating that if prompt and spontaneous protests/processions are not expressly forbidden by law they are allowed, is in place.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

The Act on Right of Assembly contains only one explicit prohibition regarding forbidden places of demonstrations. In Section 1 it states that banned assemblies are those ones that take place within 100 meters from buildings of legislative bodies or places where these bodies negotiate and act. In general, holding of an assembly may also be prohibited by a decision of the competent authority.

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

With regards to the Act on Right of Assembly the participants are generally required to follow instructions of the assembly organizer in accordance with appropriate legal provisions and refrain from anything that would disturb a proper and peaceful course of an assembly. After the assembly is finished, the participants are obliged to disperse peacefully. It is explicitly stated that the participants may not carry any firearms or explosives. It also banned to carry other items that can be harmful, if it can be on the basis of circumstances or behaviour of the participants suggested that the items be used for violence or threat of violence. Moreover, the participants may not have the face covered in a way that makes more difficult or prevents their identification.

The participants of an assembly enjoy the same rights as every person. i.e. inviolability of the participants and of their privacy is guaranteed, they are entitled to protection of his or her human dignity, personal integrity, good reputation. The participants naturally benefit from the freedom of thought, conscience and religious conviction.

G.) CRIMINAL RESPONSIBILITY

1: Illegal public gathering

The Act on Right of Assembly states that persons convening an assembly without complying with the notification requirements or holding a banned assembly may be fined up to CZK 5.000. The person is liable for an administrative offence.

2. Violation against provisions restricting the freedom of expression

As an example may serve criminal offences related to limitation of the freedom of expression. Pursuant to Section 356 of Act No. 40/2009 Coll., Criminal Code, whoever publicly incites hatred of a nation, race, ethnic group, religion, class or other group of persons or encourages to restriction of rights and freedoms of their members, shall be punished by imprisonment of up to two years. According to Section 184 of the Criminal Code whoever communicates false information about another person that is capable significantly undermine seriousness of the person in the eyes of the fellow citizens, especially harm the person in employment, impair his family relationships or cause any serious injury, shall be punished by imprisonment of up to one year.

Please contact peter.valert@dlapiper.com or eva.ruhswurmova@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN FRANCE

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

Freedom of expression is recognized by Article 11 of the Human and Citizens Rights Declaration, adopted in 1789 following the French Revolution and within the context of the proclamation of democracy and liberties. Such Declaration is part of the "constitutional block" and has therefore a constitutional value.

On the contrary, freedom of assembly is not expressly acknowledged by the Declaration of the Human and Citizen Rights. Due to its political dimension – since assemblies stigmatize and potentially increase the risk of political contestation – freedom of assembly has been alternatively recognized or ignored by the successive Constitutions. It has been finally recognized by the law in 1881, prior to the right of assembly on the public road (demonstration), which has been regulated as from a "*décret-loi*"[1] dated 30 October 1935.

I – Freedom of assembly

French law distinguishes between indoor assemblies ("*public meetings*") and outdoor assemblies ("*demonstrations*"), depending on the use of the public road.

Freedom of indoor and outdoor assemblies have both a legal value, and are not specifically recognized by the Constitution, which represents the supreme and fundamental law in France.

Nevertheless, freedom of demonstration has gained recognition as constitutional value thanks to a decision from the Constitutional Council in 1995, which has formally recognized this freedom as arising from the freedom of expression.

1. Scope of protection

Freedom of assembly is globally governed by a "repressive" system, which ranks the freedom as the principle and restriction as the exception. Therefore the exercise of liberty is supposed to be free and controlled exclusively *a posteriori*, to punish a misuse (as opposed to the "preventive" system, based on controls and restrictions *a priori*). In the line of this principle, any restriction must be highly motivated, in light of the potential threat to public order.

a) Indoor assemblies (public meetings)

The freedom of public meetings is guaranteed by a law dated 30 June 1881, pursuant to which "*public meetings are free*" and not subject to any authorization or prior declaration (Article 1). However, this freedom must be exercised in a legal framework, requiring limited schedules and the existence of a board of peoples in charge for maintaining the order (subject to criminal liability). The law also enables the responsible authority to mandate a public agent to attend the meeting and potentially dissolve it in case of disorders.

b) Outdoor assemblies (demonstrations)

Outdoors assemblies are governed by a *Décret-Loi* dated 23 October 1935, modified by the law n° 95-73 dated 21 January 1995 (both codified in the Internal Security Code "CSI" which has been enacted in March 2012).

According to Article L.211-1 of the CSI, demonstrations are subject to prior declaration, which has to be delivered to the responsible authority before the demonstration. This prior declaration must identify the organizers of the event and indicate the purpose, place and schedule of the demonstration.

By way of exception, prior declaration is not required when a demonstration may be considered as consistent with local practices or traditional events (which are supposed to be already known by local authorities and which are generally peaceful), including principally religious processions, associative demonstrations or "*memorial*" celebrations (11 November, 8 May or 14 July).

2. The intervention

There might be exceptional situations, provided by the Constitution or by the Law, where the exercise of public freedoms may be temporarily postponed.

[1] A *décret-loi* is adopted by the executive and has a value of legislative law. It does not exist anymore since the Constitution dated 1958 has replaced *decret-loi* by ordonnance.

Article 36 of the Constitution provides that the exercise of freedoms may be postponed in the context of state of siege[2], during which civilian power is transferred to the Army (never used since the end of World Wars); Article 16 of the Constitution grants to the President of the Republic the power to postpone the exercise of freedoms in case of very grave and imminent threat to the Nation (lastly used in April 1961, following the putsch in Algeria).

Pursuant to the law dated 3 April 1955, State of emergency may be declared in case of public disaster or imminent peril due to a grave prejudice to public order, during which freedom of assembly may be postponed if it is likely to create or increase disorders (subject to the supervision of the Court). State of emergency has been declared for the last time in 2005, as a result of riots in the French suburbs, in order to impose night curfews. Such procedure has been recognized to be in compliance with Article 11 of European Convention of Human Rights (related to the Freedom of Assembly)[3].

Beside these procedures, limitations of indoor or outdoor assemblies are highly restricted and subject to the supervision of Administrative Courts and State Council ("*Conseil d'Etat*") – the administrative Supreme Court – which will ultimately assess the balance between the respect of freedom and the risk of disorders.

a. Indoor assemblies

Prohibition of an indoor assembly can be decided by the local authority in charge of the police. The prohibition order must be highly justified in regard of the risk of prejudice to the public order, the lack of other measures which would be able to avoid it, and the balance of such prohibition compared to the risks of disorders. This principle of proportionality between the restriction in the exercise of freedom and the threat to public order has been provided by the State Council in a famous decision dated 13 May 1933 "*Benjamin*". For instance, a meeting organized by students has been judged as legally prohibited because it was only motivated to support boycott of exchanges of economic and scientific information with Israel[4].

The Court is able to declare the illegality of an unjustified prohibition and to allocate damages to organisers, should they bring an action in this sense.

b. Outdoor assemblies

The competent local authority in charge of the police is enable to prohibit a demonstration likely to disturb the public order. The prohibition order must be notified to the signatories of the prior declaration. The local authority can also impose some conditions (forbidding the use of microphone and speakers or the use of flags and banners), as well as prevent access to certain places (in February 2013 – during the demonstration against the adoption of the law related to the wedding for homosexuals – the local authority in Paris has prohibited to demonstrators the access to specific places, such as the Avenue of *Champs Elysées*). This power to negotiate the conditions of the demonstration – with the risk of prohibition, should the organizers refuse to comply – is finally quite similar, in the facts, to a system of prior authorization.

3. Justification

Restrictions to the freedom of assembly have to be justified in consideration of (i) the existence of a real and serious threat to the public order and (ii) the lack of any other effective measures to prevent disorders. Interventions must be appropriate to the risk and then comply with the principle of proportionality. The Court considers any case in view of specific circumstances[5].

Freedom of assembly could also be restricted to conciliate with another fundamental freedom, such as the freedom of movement (freedom to come and go), in respect of which citizens who are not part of the demonstration must not be endangered.

II Freedom of expression

1. Scope of protection

Freedom of expression, guaranteed by Article 11 of the Human and Citizens Rights Declaration, includes an individual dimension (the liberty to have and to express one's thoughts and opinions freely) and a social dimension, which covers the freedom to spread information.

The law dated 29 July 1881, known as to be named "Freedom of the Press Act", applies to all speeches made public by any means (press, broadcasting, public speaking…). It does not require any control prior to publications or spreading, but a formal declaration to the Prosecutor, in order to identify the person who will be liable in case of abuse.

[2] The State of siege is implemented by a decision of Council of Ministers, prorogued by the law after a 12-day period

[3] Decision from the State Council dated 9 December 2005, n°287777

[4] Decision from the State Council dated 7 March 2011, n°347171

[5] An assembly organized by a political group belonging to Basque nationalism has legally been forbidden due to recent terrorist attacks at the same place. Other instances relate prohibition of demonstrations due to the proximity with an hospital, which was likely to disturb medical activities

Freedom of press is ensured notably through the protection of journalistic sources, which has been consolidated recently by a law dated 4 January 2010.

2/3. The intervention/Justification

The freedom of expression is able to be restricted in regard to protected rights of other individuals or public institutions, for which protection is guaranteed pursuant to either a system of prior administrative control or a repressive system punishing the abuse. A large number of concerns are considered in front of the freedom of expression, such as:

- Protection of the honor: Article 29 of the law punishes any defamation or insult, with specific condemnation when defamation or insult pointes courts, public's administrations or army, or when it also constitutes a discriminatory statement.
- Protection of privacy, which also includes the right of each person over him/her own image, according to which a special authorization must be obtained prior to any publication.

In case of a serious harm to privacy, interim procedures allow the victim to ask the President of the Civil Courts to order the seizure of offending publications. Freedom of press act also offers to the victim the right to obtain the publication of a response to correct information in relation to him/her, especially in case of infringement to the presumption of innocence.

- Protection of public order, which includes:
  - Protection of public order (Article 23 of the Freedom of the Press Act), punishing persons who have, by any means of communication, directly incited the authors of a crime to commit this act. This protection is increased vis-à-vis young people, and regulates dissemination and selling of sensitive publication.
  - Protection against discrimination (Article 32 al 2 of the law), which specifically punish slander or libel when motivated by the belonging of the victim to a particular ethnic group, race or religion... as well as incitement to discrimination, hatred or violence against these persons.
  - Punishment of negationism (*i.e* the denial of the existence of one or more crimes against humanity), governed by Law no. 90-615 of 13 July 1990 (the "*loi Gayssot*").
  - Protection of public institutions, which prevents, for instance, any pressure or discredit vis-à-vis the authority of justice and court's decision. This also covers the confidentiality of judicial investigations.
  - Protection of the fundamental interests of the Nation and national defense secrets, which are subject to protective orders intended to restrict their dissemination.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

The prior declaration aforementioned (see section A-I.1) have to be notified at least three days (but no sooner than fifteen days) before the planed event.

The declaration is notified to the authority who supervises the exercise of police. Such power is granted to the local *Préfet* who represents the Executive in each of the 101 *Départments* (administrative local areas) in France, and is responsible for maintaining public order and security. In smaller cities, declaration must be notified to the Mayor, who will redirect them to the Prefet. In Paris, declarations have to be notified to the *Préfet de Police*, who supervises the exercise of the police in the capital.

Same authorities have the power to prohibit assemblies, subject to the control of the Courts (in France, Executive authorities are controlled by Administrative Courts – separate from Judicial Courts – which have the power to void their decision and to seek their liabilities).

Local force of police may be required to ensure the security and maintain public order in the context of demonstrations.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

French law distinguishes spontaneous and passive gathering from prompt protests ("*attroupements*"), planned in order to oppose the implementation of the law more than to express an opinion in a peaceful state of mind.

Neither of them are not recognized as a public freedom under French law. Nevertheless, they will be deemed illegal (and subject to criminal liability) only in case of (i) threat to public order and (ii) refusal from participants to disperse themselves following two successive warnings from the police forces. In this context they can be dissolved by the police.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

There are no special provisions under French law about some places which would be forbidden to gather in. However, specific places could be potentially forbidden in case of threat to public order, which is usually assessed on a case-by-case basis, in the light of local circumstances.
For instance, assemblies have been legally forbidden due to their proximity with a medical center[6] or with a cemetery[7].

[6] Decision from the State Council dated 30 December 2003 n° 2003-066267

[7] Decision from the Administrative Court of Marseille dated 6 July 2005 *"Assoc Adimad"*

In February 2013, the local authority in Paris has prevented the access to special places in Paris, such as the Avenue of *Champs Elysées,* the *Concorde* square or the *Invalides* square, due to the proximity with sensitive monuments (Elysées, Matignon and Louvre) and to the risk of disturbance to opened shops and tourists. The restrictive order has been criticized before the Court, on the basis of a specific emergency procedure called "*référé liberté*" (see below section F), but has not been declared invalid.

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

Any intentional infringement of the exercise of freedom of assembly can be punished to fines (up to €45,000) and imprisonment (up to 3 years). Such sentence would be increased in case of violence (Article 431-1 of the Criminal Code).

Courts also ensure the protection of the exercise of the freedom of assembly, by controlling the legality of restrictions. A specific interim procedure has been implemented by the law in 2000[8] in order to avoid and bypass an illegal intervention from the public authority against a fundamental freedom ("*référé-liberté*"). Citizens are thus enabled to challenge the legality of a prohibition order before the occurrence of an assembly, in order to avoid it (based on this procedure, the State of Council has ordered the city of Annecy to receive the annual meeting of the Front National political party in summer 2002, stating that prohibition was not justified with regard to the public order[9]).

Finally, the security of the participants of an assembly has to be ensured by the State, which is in charge for taking all measures that are necessary to prevent any disorders. Article L.211-10 of the CSI provides that the State is civilly liable for any damages or bodily harm resulting from an assembly, without being required to prove any fault from the responsible authority.

G.) CRIMINAL RESPONSIBILITY

1 Illegal public gathering

Organizers of an undeclared or a prohibited assembly are liable to a fine of up to €7,500 and imprisonment of up to 6 months (Art. 431-9 of the Penal Code). Participants are liable only if they have ignored two summons from the Police without dispersing themselves (Article 431-4 of Criminal Code). Sentences are increased if demonstrators are wearing weapons (Articles 431-10 and 431-11 Criminal Code).

Since a recent Decree dated 2009, it is forbidden and subject to fine (except in case of local practices or traditional events) to conceal one's face to or in the immediate proximity of a demonstration on the public road "*for the purpose of not being identified, in circumstances that raise fears of serious breaches of public policy*" (Article R 645-14 of The Penal Code).

2. Violation against provisions restricting the freedom of expression

To ensure an effective protection of third parties, restrictions to Freedom of Press Act are governed by a system of cascading liabilities, thanks to which there is always a possibility to find a liable person (head of the publication, author, printer, seller…).

However, any action pursuant to the Freedom of Press Act must be initiated within a 3-month period starting from the offending statements (except for the repression of negationism and incitement to violence, hatred, discrimination or racism, where the statute of limitations is extended to 1 year).

Punishments are specific to each infringement and governed by specific legal provisions. Most of them are subject to fine and prison sentences.

Please contact frederik.azoulay@dlapiper.com or elsa.demullenheim@dlapiper.com for further information.

[8] Law n°2000-597 dated 30 June 2000

[9] Decision from the State Council dated 19 August 2002, n°249666

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN GERMANY

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

The German freedom of assembly and freedom of expression are significantly influenced by the consequences of the Nazi regime. Today's provisions enacted in 1948/1949 are still interpreted in relation to what happened in Germany during the Nazi terror between 1933 and 1945. In defining the scope of these constitutional rights, the question is always, which scale should have been set up by the legislative at that time.

The dictatorial NS regime suppressed citizens by prohibiting assemblies and processions and the freedom of opinion and speech.

The constitutional law of Germany aims at preventing any kind of relapse into a dictatorial regime. The freedom of assembly and the freedom of expression play a crucial role in preventing this. They are essential rights in realizing and upholding democracy and therefore are of very high constitutional significance. It is through these rights that a nations people can at any time voice its opinion and inform politicians about its views and is not restricted to do so in by way of elections only.

Based on the historical background the freedom of assembly is strongly connected with the freedom of expression. Whereas the freedom of expression is a right each individual person has, the freedom of assembly protects the formation and the expression of opinions within a group of people. These two rights go hand in hand, often being simultaneously applicable.

I Freedom of assembly

The freedom of assembly is codified in Article 8 of the Basic Law for the Federal Republic of Germany ("*Grundgesetz für die Bundesrepublik Deutschland*"). Also, there are provisions in the Law on Assemblies and Processions ("*Versammlungsgesetz*"), which enable specific authorities to enforce restrictions on an assembly. This law is non-constitutional and was enacted by the German legislative in 1953. It is however based on Article 8 Para. 2 of the German Basic Law and thereby fulfills the constitutional demand whereby restrictions are only allowed in accordance with and based on a law enacted by parliament.

1. Scope of protection

Article 8 of the German Basic Law distinguishes between two kinds of assemblies, namely indoor assemblies pursuant to Article 8 Para. 1 of the German Basic Law and outdoor assemblies according to Article 8 Para. 2. The differentiating characteristic between the two is the potential effect on uninvolved third parties. Indoor assemblies by nature have little or no effect on uninvolved third parties. German Law therefore imposes very high requirements on restricting indoor assemblies.

The freedom of assembly gives everybody the right to gather and perform acts typical in an assembly, as long as this is done in a peaceful way without any weapons. Besides the actual participation in an assembly, the organization, preparation and choice of location are also protected.

2. The intervention

As Article 8 Para. 2 of the Basic Law states, outdoor assemblies, may be restricted by or pursuant to a law. Such a law must be passed by the German parliament.

There are numerous possibilities to restrict the freedom of assembly, for instance in advance by making a notification mandatory or dissolving an assembly that has started.

But in all cases the authorities are only allowed to act according to the Law on Assemblies and may specifically not apply German Police Law. Due to the high significance of the freedom of assembly in Germany, the authorities, even the police, aren't allowed to treat participants as if this was an everyday situation. Any form of restriction is only permissible, if the importance of the freedom of assembly has been carefully considered. Even then, depending whether the assembly is held indoors or outdoors there is a big difference in the degree of permitted restrictions.

a. Outdoor assemblies

Pursuant to Section 14 and 15 of the Law on Assemblies, authorities are allowed to restrict outdoor assemblies. Section 14 Para. I stipulates that anyone who plans to organize an outdoor assembly must notify the responsible authority at least 48 hours prior to the announcement of the event and declare the nature of the assembly.

This notification is not an application for approval. Generally, the authority won't give any reply and will only react if they find that legal actions are required.

Besides the immanent intervention pursuant to Section 14, the assembly may be restricted by imposing conditions or even totally prohibiting it pursuant to Section 15 Assembly Law. If it is necessary to prevent any harmful external effects, it may be dissolved before it officially ends. The authorities may also intimidate participants by making a video of the assembly.

b. Indoor assemblies

The requirements on restricting indoor assemblies are far more demanding than those concerning outdoor assemblies. Basically there is no way to restrict an indoor assembly. There is also no duty of registration. Furthermore the restriction by law in accordance to Article 8 para. 2 German Basic Law is not applicable. People are allowed to assemble when they want and where they want, as far as it takes place inside. The boundary of the freedom to assemble indoors is only overstepped, if this freedom collides with a constitutionally protected right of a third party. Only then must the responsible authority intervene. In fact, there is no legal guideline on how to intervene, however, German courts require legal standards to be provided by the legislative. Without any provisions passed by the parliament, the executive and the judiciary would set the standards themselves and that is not compatible with German constitutional law. Therefore such restrictive provisions are included in Section 5 of the Law on Assemblies. These provisions need to be interpreted in favor of the participants, meaning that the authority always has to consider, that basically German law does not allow any restrictions for indoor assemblies and that any restriction may always be conducted in exceptional cases only.

3. Justification

Even then, any restriction concerning the freedom to assemble needs to be justified. The scale of justification depends on the kind of assembly taking place.

In case of an outdoor assembly, the requirements of Section 14 and 15 of the Law on Assembly need to be met in order to intervene in a constitutional manner.

In case of an indoor assembly, a balance between the freedom of assembly and the restricted constitutional right of a third party needs to be found by the responsible authority. Section 5 of the Law on Assembly provides guidelines for doing this, indications may be for instance persons carrying weapons or inciting others to violence.

Furthermore, the responsible authorities have to consider the principle of proportionality. This means that any measure by a public authority that affects a human right must be appropriate in order to achieve the intended aim. Also, it must be necessary to achieve such aim, i.e. there may be no less severe means in achieving the same objective. And finally, the measure must be reasonable, considering the competing interests of the different groups or persons at hand.

The final decision has to include an estimation. Meaning that (i) the authority has to realize that it has some room for estimation, (ii) that it has the duty to investigate all necessary facts in order to judge responsibly and (iii) must do so within the legally defined limits. German courts may review and judge about such a measure, however, the extent of a courts examination scope is restricted to the parameters (i) to (iii) mentioned above.

II Freedom of expression

Besides the codified freedom of assembly, an elementary right in a democracy is the freedom of expression, including the freedom of information, the freedom of press and freedom of reporting by means of broadcasts and films. The freedom of expression includes the freedom to freely express and disseminate one's opinion in speech, writing and pictures. These freedoms are included in Article 5 of the German Basic Law, they also include the protection of individual communication and mass communication.

1. Scope of protection

The term "opinion" is interpreted in a broad sense and covers all kind of statements, views, attitudes and judgments of an individual. The constitution thereby clearly acknowledges that the expression of subjective views is of high value in a democracy. The main reason of expressing oneself is to create an external effect on the environment by conveying one's personal intellectual thoughts. As such, the expressions may be convincing, estimates and judgments are therefore also protected.

In contrast, factual claims are not protected, since it can easily be proven whether they are true or false. However, if facts refer to an opinion or help to shape an opinion in advance they are covered by the protection of Article 5. This will often be the case.

The freedom of information is also mentioned in Article 5 of the German Basic Law. It is the flipside of the freedom of speech and ensures that anyone can inform himself without hindrance from generally accessible sources.

The freedom of the press protects the manufacturing and reproduction method, regardless of the product's content. Publications such as books, newspapers or magazines fall within the same group. The existence of a physical carrier medium is crucial. The freedom of press also covers activities in advance, for instance the decision, which information should be disclosed and in which kind of way, it includes the procurement and the processing of information.

The freedom of reporting includes broadcasts and films and their delivery in the form of electronic broadcast. Apart from that, the broadcasting freedom is similar to the freedom of the press.

2. The intervention

In contrast to the freedom of outdoor assembly, there is no duty of registration regarding disseminating any individual opinions provided by press or report or something else. The lack of registration is guaranteed, e.g. Section 2 of the Hessian Press Law rules, that the press isn't subject to any duty of registration.

The rights, mentioned in Article 5 of the German Basic law, find their boundaries in the provisions of general law, in provisions for the protection of young persons, and in the right to personal honor. As with the freedom of assembly, the authorities also in this case require an enacted law in order to restrict the freedom of expression.

The question is, how is the term "general law" defined? A court had to rule on this definition and found that a general law is given, if it doesn't itself compete against a particular opinion or the freedom of the press or broadcasting. Instead, a general law protects a legal interest beyond the freedom of expression. Thus, the protected interest has to be constitutionally acknowledged and generally protected. The historical background of this provision is, that the legislative wanted to prevent the prohibition of a specific opinion. This is based on the experience with the Nazi regime, where voicing an opinion that was against the Nazi regime was heavily punished.

Furthermore, an intervention may also occur by court conviction or verdict.

3. Justification

In light of the large number and variety of general laws, a wide inclusion must be restricted to respect the high value of the freedom of expression. Due to this the courts proclaim, that a general law restricting the freedom of expression has to indicate and acknowledge the high significance. A balancing between the freedom of expression and the protected right provided by the general law is required.

Every restriction has to be necessary, appropriate and reasonable, in order to achieve the protection aimed at. This goes for both affected rights and usually requires a weighing up of interests. As before, the general law enacted by the parliament serves as a guideline to solve the collision.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

Pursuant to Section 14 Assembly Law, the organizer who intends to arrange an outdoor assembly must notify the authorities within 48 hours prior to the announcement of the event and declare the nature of the event. Furthermore the responsible person has to be named.

The responsible authority is the regulatory agency of the municipality. Pursuant to Articles 83 and 84 of the German Basic Law, each federal state of Germany is allowed to determine the procedure and the establishment of the authority involved in implementing the Assembly Law. This also includes the determination of the responsible authority.

After the notification the organizer must not expect any reply from the authority, since an approval is not required. The authority will exceptionally react, if they think that measures are required to prevent any hazards or dangers as a result of the assembly. This can be done by setting up conditions or even a complete prohibition. Thereby a participant's right of assembly can for the first time be restricted during the procedure of notifying and organising an outdoor assembly.

In addition to the regulatory agency, the police are allowed to provide support, especially when external circumstances require an accompaniment. This often occurs during politically sensitive gatherings, where further particularities are: Pursuant to Section 12 Assembly Law the policemen have to reveal themselves as not being participants. Police Law is not applicable at all. The police must act in accordance with the provisions of the Assembly Law. This in detail specifies the requirements the police have to obey, e.g. Section 12, 12a, 13 Assembly Law. Thereby, the police are allowed to tape a video or dissolve the gathering. They also are allowed to conduct standard measures against typical hazards taking place in an assembly, such as obtaining personal identification information from a participant. Collecting personal data is a typical instrument of Police Law and therefore it is disputed whether Police Law is exceptionally applicable in such case. The Constitutional Court resume is that pursuant to Section 15 para. 1 Assembly Law interventions are allowed not only before an assembly, but also after it has started. Since an assembly can be totally forbidden, a less intrusive action pursuant to the Police Law must be legally allowed on a fortiori basis. Any crime against a police officer results in an immediate resolution of the assembly.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

Sometimes outdoor assemblies evolve spontaneously or at least faster than the previously discussed short- and medium-term planned assemblies (longer than 48 hours). Such assemblies are referred to as prompt or spontaneous protest. Typically, a prompt protest is planned less than 48 hours in advance, whilst a spontaneous protest is not pre-planned at all. The already mentioned significance of the freedom of assembly ensures that the scope of protection, pursuant to article 8 of the German Basic Law, also includes such prompt and spontaneous protests. However, German Law doesn't provide for any special provisions for such protests and therefore the regulations for medium- and long term assemblies are applied and interpreted in a modified way, in line with constitutional standards.

In the case of spontaneous protests, there is no duty of notification, they may be carried out within the spur of the moment. In a vibrant democracy it is important that the public can respond or comment on events without being delayed by administrative procedures. This practically reflects the theoretical importance given to the freedom of assembly.

Similarly this applies to prompt protests. The constitutional Court ruled that the organizer shall only notify as soon as possible, acknowledging that sometimes even the deadline of 48 hours may not be adhered to.

In other words, the freedom of assembly is considered as superior to the authorities' interest in obtaining a timely notification. Nonetheless a spontaneous or prompt protest can create great risks, the restrictions available pursuant to the Assembly Law may not be enough to prevent harm. In such cases Police Law is exceptionally applicable. Generally the measures need to be aimed at the person causing the risk or danger, only if this is not possible or does not reduce the danger, may interventions by aimed at participants in general.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

In principle, people are allowed to assemble at any public place in Germany. But in exceptional cases, the regulatory authority may prohibit an assembly, if the requirements of Section 15 Assembly Law are met. Thereby, the authority can impose a ban on assemblies held in regions next to a memorial place of historical and trans-regional significance for victims of the Nazi violence and despotism. The authority must also consider whether an assembly affects the dignity of the victims in a negative way.

Pursuant to Section 15 Para. 2, 3 Assembly Law, the memorial for the murdered Jews of Europe in Berlin is a specifically forbidden location for assemblies and processions as well as the area around the Federal Parliament (*Bundestag*), the Federal Council (*Bundesrat*) and the Federal Constitutional Court. Further forbidden places can be determined by the federal states.

The federal states of Bavaria and Lower Saxony determined, that the area around their state parliaments may not be used.

The following locations are not permissible in Saxony:

1. Völkerschlachtdenkmal in Leipzig
2. Frauenkirche
3. nördliche Altstadt
4. südliche innere Neustadt in Dresden

In Saxony-Anhalt:

1. Concentration camp Memorial Lichtenburg Prettin,
2. Memorial for the victims of the NS-„Euthanasie" Bernburg,
3. Memorial Langenstein-Zwieberge,
4. Memorial „Roter Ochse" Halle (Saale),
5. Memorial in Dolle for murdered prisonsers of KZ Mittelbau-Dora,
6. Memorial Feldscheune Isenschnibbe Gardelegen,
7. Memorial Veckenstedter Weg Wernigerode,
8. Memorial Moritzplatz Magdeburg,
9. Memorial Deutsche Teilung Marienborn.

The locations are precisely determined in the relevant appendix of the Assembly Laws. Also, assemblies in Saxony are prohibited on certain days:

1. 27 and 30 January
2. 8 May
3. 1 September
4. 9 November

We expect that further locations will follow, once parliaments of the other federal states have enacted their own state Assembly Laws.

F.) LEGAL PROTECTION

The participants of an assembly, who are preemptively charged by the authority, can obtain legal protection pursuant to Section 80 Para. 5 VwGO and Section 32 BVerfGG.

1. Section 80 Para. 5 VwGO

Generally every kind of restriction represents a burdensome intervention for a participant. He or she may lodge an objection against such a restriction, although this will not prevent the authority from conducting the intervention since it will proclaim its immediate enforcement. Preventing an enforcement can only be achieved by involving a court, i.e. by seeking legal protection pursuant to Section 80 Para. 5 VwGO. By doing so, the participant submits an application in order to restore the suspensive effect that an objection would have had, thereby preventing an immediate enforcement.

2. Section 32 BVerfGG

Furthermore, Section 32 BVerfGG offers a possibility to obtain an interim order. As part of the interim legal protection the Constitutional Court examines the restrictive and preventive measures of the authority regarding any restrictions into basic rights of the participants. Typically such measures are issued on short notice, so that the court's resolution pursuant to Section 32 BVerfGG necessarily anticipates the dispute although this is normally done by a judgment. The Constitutional Court has to consider the significance of the freedom of assembly and stop any conflicting measures which are not compatible with the German constitution.

G.) CRIMINAL RESPONSIBILITY

1 Illegal public gathering

A lack of notification of an outdoor assembly is a criminal offence pursuant to Section 26 Assembly Law, and the organizer can be punished with prison arrest of up to one year or a monetary fine (*Geldstrafe*).

An imprisonment of up to 6 months is also to be expected, if the assembly is conducted in another way than was previously notified to the authority.

Pursuant to Section 29 Assembly Law the Court is allowed to impose an administrative fine (*Bußgeld*) for less serious offences.

2. Violation against provisions restricting the freedom of expression

Pursuant to the Section 185 ff of the German penal code (*Strafgesetzbuch*) the Court will sentence the suspect, who made a statement that intervenes in the sphere of a third party in a negative and excessive way. This provisionfalls within the definition of a general law pursuant to article 5 par. 2 of the German Basic Law and allows a restriction of the freedom of expression.

Please contact mathias.hanten@dlapiper.com or andrea.muenchen@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN HUNGARY

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

I FREEDOM OF ASSEMBLY

1. Scope of protection

Any person applying violence or duress to unlawfully prevent another person from exercising his right to assembly is guilty of a criminal act punishable by imprisonment for up to three years (Section 174/C of Act IV of 1978 on the Criminal Code (hereinafter "**Criminal Code**")).

As it is implied by the above provision of the Criminal Code the freedom of assembly is a significant (yet not unrestricted) fundamental right a person may enjoy. As being a fundamental right it is codified in Article 8 of the Basic Law of Hungary (hereinafter "**Basic Law**"), however, the detailed provisions in relation to freedom of assembly are contained in a separate act, namely Act III of 1989 on the Right to Assembly (hereinafter "**Assembly Act**").

According to the Assembly Act, persons may exercise their right to assemble by organizing or participating in peaceful demonstrations, protests or processions, where they may freely express their opinion between each other or disclose it to an audience as wide as possible.

The Assembly Act shall not be applicable to (i) assemblies falling under the scope of the act on election procedures, (ii) religious rituals and processions on the territory of legally acknowledged churches, (iii) cultural and sports events and (iv) family events.

The Assembly Act only deals with gatherings in public areas and it does not differentiate between indoor and outdoor assemblies.

2. The intervention

Any restrictions to the freedom of assembly are only allowed in accordance with and based on a law enacted by parliament. According to Article I of the Basic Law, a fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued. In case of any restrictions, the nature and the essential content of the relevant fundamental right has to be taken into consideration.

Interventions can be divided into two groups, as they may take place either before the event is held or during the event.

A) Intervention before the event

If the event would significantly jeopardize the operation of the parliament, the local governments or the courts, or if transportation could not be re-routed, the police may prohibit the organizer from holding the event at the place and date indicated in the notification within 48 hours from receiving the notification. The decision of the police shall be communicated to the organizer within 24 hours.

B) Intervention during the event

The police shall – following a (loud enough) warning – dissolve the event if:

i) the way the participants exercise their right to assemble constitutes a criminal act or it involves a call to commit a criminal act;

ii) it infringes upon the rights and freedom of others;

iii) the participants appear armed or possess weapons;

iv) the event has been organized despite a prohibiting decision made by the police.

3. Justification

The police shall inform the organizer of the circumstances due to which the event could not be held and shall also inform the organizer how it would be possible to hold the event by changing either the date or the place.

If the event is forbidden, the organizer may submit a request for the judicial review of the decision of the police within three days from receiving such decision. The court shall make its decision in the framework of an out-of-court procedure within three days from receiving the request. If the court agrees with the request, it may repeal the decision of the police, otherwise the court dismisses the request. There is no further remedy against the decision of the court. If the court repeals the decision of the police following the planned date of the event, the organizer shall inform the police of the new date at least 24 hours prior to holding the event.

II. FREEDOM OF EXPRESSION

1. Scope of protection

According to Article IX of the Basic Law, everyone shall have the right to freedom of expression and Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for the freedom to receive and impart information as is necessary in a democratic society.

The freedom of expression is usually regarded as the "mother law" of certain other fundamental rights such as freedom of conscience, freedom of religion, freedom of assembly, the freedom to create works of art or establish scientific principles, etc.

The freedom of expression is of significant importance in a democratic state as it enables a person to express his/her opinion, to freely communicate with others or to impact the opinion of others. The freedom of expression includes all types of communication regardless of its channel, value, ethical considerations or in some cases even its authenticity. Nevertheless, a line has to be drawn between the term "opinion" and "factual claims".

The freedom of expression only provides protection to the expression of any opinion, and such protection is ignorant of whether an opinion is valuable or has no value, is true or false, is based on feelings or reasonable arguments.

Opinions concerning public affairs enjoy a protection even higher, even if they are heightened or exaggerative.

As opposed to opinions, the constitutional protection is not similarly strong in relation to factual claims, as it can be easily proven whether they are true or false. While opinion is a purely subjective phenomenon and is therefor less likely to impact its subject, a factual claim is a straight affirmation that may have an adverse effect on a person's reputation.

2. The intervention

Being the mother law of several fundamental rights, the freedom of expression may only be restricted in order to safeguard the fundamental rights of others. In a democratic society there are usually four values to be protected and these values may prevail over the freedom of expression. These include (i) the values of the state such as constitutional order, national symbols or the security of the state and its leading officials, (ii) the interests and values of different groups of the society either ethnical or religious, i.e. the suppression of hate speech against these groups, (iii) public peace and public morals, and (iv) the human dignity and other important fundamental rights of an individual.

For further information please see the part titled "Violation against provisions restricting the freedom of expression" below.

3. Justification

Restrictions have to be necessary, appropriate, reasonable and proportionate to the intended aim. It has to be observed that the restriction of the freedom of expression causes less harm than failing to make a restriction. The restriction shall never violate any fundamental right more than it is necessary to protect another.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

The organizer of the event shall notify the competent police station in writing of the event at least three days prior to the planned date of the event. The written notification must contain: (i) the planned commencement and end date of the event, the place or route of the event, (ii) the purpose and the agenda of the event, (iii) the expected number of participants and the number of organizers responsible for the uninterrupted conduction of the event, (iv) the name and address of the person entitled to represent the organizing entity or persons.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

In Hungary, there are no special provision on prompt and spontaneous protests. If people react to any event by spontaneously gathering in a public area, the police shall not be notified. As outlined above, it is the organizer who should notify the police, but since in case of a spontaneous protest there is no organizer, nobody can be held liable for not notifying the police. However, in practice a notification is usually made, but no sanctions are imposed for failing to do so.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

No such list exists in Hungary.

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

On the one hand, the police has to protect the participants during the event if requested by the organizer and shall remove any person who intends to intervene with or prevent a lawful public assembly.

However, on the other hand, the police shall ensure that the public assembly does not violate the law. In case of any violation of the law either by the organizer or the participants the police may take measures described in Act XXXIV of 1994 on the Police.

In case of excessive measures by the police, the participants are entitled to file a complaint with several forums. In addition, they may initiate a lawsuit for non-material damages caused by or resulted from the improper or excessive measures taken by the police.

G.) CRIMINAL RESPONSIBILITY

1. Illegal public gathering

According to Section 189 of Act II of 2012, it constitutes an infringement if the organizer:

– organizes a public assembly without notifying the competent police station;

– organizes a public assembly despite a prohibiting decision made by the police;

– organizes the public assembly to a place or route or at a date other than the one approved by the police.

Besides the organizer, the participants of a public assembly shall also comply with several obligations.

For example, it is recognized as "Disorderly Conduct" by the Criminal Code and is punishable by imprisonment for up to two years if someone engages in a violent or intimidating resistance against such actions of the organizer or the security personnel that are taken with a view to maintaining order at a public assembly.

Furthermore, it constitutes an infringement and is punishable either by confinement or monetary fine if someone appears at a public assembly with his/her face covered to an extent that makes it impossible for the authorities to later identify this person.

2. Violation against provisions restricting the freedom of expression

While constitutional law and the Basic Law itself only establish general principles as to restricting the freedom of expression, the Criminal Code enlists a few concrete restrictions in this respect.

The Criminal Code recognizes several types of criminal acts and misdemeanors regardless of whether such are committed against an individual or a larger group of or the entire society. On the one hand, "Defamation" is committed against an individual by engaging in the written or oral publication of anything that is injurious to the good name or reputation of another person, or using an expression directly referring to such a fact. On the other hand, other provisions of the Criminal Code aim at safeguarding the abovementioned cornerstones of a democratic society. For example, the prohibition of "Blasphemy of National Symbol" aims to keep the integrity of the Hungarian state. Moreover, if the freedom of expression is against the rule of law, it qualifies as "Incitement Against a Law or Decree of Authority". Accordingly, any person who – before great publicity – incites to general disobedience against an Act of Parliament or any other statutory provision or decree of an authority so as to disturb public peace is guilty of a criminal act punishable by imprisonment for up to three years.

The provision on "Incitement Against a Community" has a historical background and intends to prevent hate speech against certain groups. By virtue of such provision, any person who incites to hatred before great publicity against: (i) the Hungarian nation or (ii) any national, ethnic, racial group or certain groups of the population is guilty of a misdemeanor punishable by imprisonment for up to three years.

In addition, criminal acts such as "Use of Symbols of Despotism" and "Open Denial of the Crimes of National Socialist and Communist Regimes" are most certainly the results of widely known historical events, namely the Nazi and Communist regimes in Hungary.

Please contact monika.horvath@dlapiper.com or adam.tokar@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN ITALY

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

The right of freedom of assembly and freedom of expression are regulated by the Italian Constitution, dated 1946 and are considered as "inviolable human rights", seeing as these rights are fundamental for the Italian democracy, born after the fascist regime.

The insertion of these rights in the Italian Constitution guarantees solid protection from possible limitations, given that the Constitution is the first source of the Italian law: this means that an ordinary law cannot modify the constitutional provisions.

Apart from the Constitution, there is no unique law regulating the organization and performance of public assembly, consequently limits and procedures have to be reconstructed in the existent laws and on the basis of the interpretation of jurisprudence and authors.

Given the above, the Italian administrative laws in place (that, in many cases, were enforced before the Constitution and therefore during the fascist regime, as the Decree n. 773, of June 18 1931- "Public Safety Law"-) can only regulate the limits that are, in any case, established in principle by the Constitution itself and must be interpreted following the principles of the Constitution.

I Freedom of assembly

1. Scope of protection

The freedom of assembly is regulated by Article 17 of the Italian Constitution. It establishes that Italian citizens have the right to assemble peacefully and without weapons.

Scholar's opinion and recent case law states that the right concerns not only Italian citizens but also "foreign" and "stateless" individuals, on the basis of what established by article 2 of the Italian Constitution which recognizes fundamental human rights (such as the freedom of assembly) as applicable to all the human beings.

The provision is aimed to protect the right of each person to assemble together with other people to satisfy any kind of common interest (religious, social, sport, cultural etc.) therefore "assembly" is considered any kind of demonstration, procession, sit -in, meeting, etc.

This right is protected as an expression of human freedom and is connected with the "freedom of expression" protected by article 21 of the Italian Constitution (see below, par. II).

2. Limits to the freedom and possible intervention by the public authority

The Constitution establishes general limits to the right of assembly, independently from the fact that the assembly takes place indoor or outdoor:

– assembly has to be carried out peacefully

– and without the use of weapons.

The assembly is not considered peaceful if, from the context, it appears that there is the possibility of damage to individuals or objects.

With reference to the weapon prohibition; article 4 of Law no. 110/1975 provides that also people who have a weapon license cannot bring weapons to an assembly. The law specifies that poles of flags, posters, and banners are not considered "weapons", unless they are used as blunt objects during the assembly.

Given these general limits, applicable to all kinds of assembly, article 17 of the Constitution and the Public Safety Law provide for a different regime in relation to the place of assembly, as indicated below.

a. Outdoor assemblies

Following article 17 of the Constitution, for outdoor assembly taking place in "public areas" (i.e. areas freely open to the public, as for examples squares, public parks, streets) a prior notice must be given to public authority by the promoters of the assembly.

The Local Authority for Public Safety can impede the assembly before it takes place or order its termination, in the event of serious danger to public safety.

Following the Public Safety Law, the Local Public Authority can impede the assembly (or impose different modalities or location) also to protect public order, public health, public morality and also in the event of omitted notice (Art. 18 of the Public Safety Law).

Following Scholars' interpretations, omission of notice cannot justify the intervention of the Authority, given that it is not compliant with the right established by the Constitution, for which only the public safety authorizes the limitation of the freedom and considering also that the duty of notice falls only on the promoters and not on the attendees. Unfortunately there are no case law.

The other limitations to the freedom of assembly (public order, public health, public morality) are considered compliant with the Constitution, seeing as they represent the protection of other fundamental rights.

Moreover the Local Public Authority can order the termination:

– of a "seditious" assembly or of protests harmful to the image of authorities in general or if crimes are committed during the assembly (article 20 of the Public Safety Law).

– if there are flags or seditious phrases/slogans, symbols of rebellion or of defamation of the State (art. 21 of the Public Safety Law).

Following law no. 152/1975, as amended by Law no. 533/1977, it is not allowed to participate in assembly wearing helmets or with other means that not allow to recognize the identity of the participants, therefore the Public authority can stop the assembly, but only if the individuals wearing the helmets are not isolable. Therefore in general, the grounds on which a public assembly can be terminated should again be public safety.

Following the Law no. 645/1975 it is not allowed to organize a rally or protest that evokes Fascist or Nazi ideals.

Moreover, on the basis of D.L. no. 122/1993, in public assembly it is not allowed to display racist or xenophobe phrases/slogans.

b. Indoor assemblies

For indoor assembly and assembly that take place in closed location accessible to the public (as an example theatres, cinemas, gyms etc.) no prior notice is necessary.

The Public Authority cannot intervene or stop the assembly, unless weapons are present (general limits provided by article 17 of the Constitution).

3. Justification

The prohibition of an assembly has to be motivated by the Authority. Following the case law (High Court, 13 June 1994) the denial of public assembly has to be motivated on the basis of "logic and coherent grounds", on the concrete possibility that the assembly may represent a danger for the public safety (or public order, public health, public morality).

Also for the termination of an ongoing assembly, the decision should be motivated based on public order or danger to safety, and in any case the Authority should try to isolate or remove the participant/s with weapons and/or "threats" to the public safety, before ordering the termination of the assembly.

II Freedom of expression

As for the freedom of assembly, also freedom of expression is regulated by the Italian Constitution as a fundamental human right (article 21 of the Constitution).

1. Scope of protection

The right to expression involves any form of expression, oral or in writing, through any means of communication. It is considered one of the founding principles of Italian democracy.

Following the interpretation of the Constitutional Court, this freedom concern news, opinions, comments etc.

Strictly connected to this right, is the right to be informed, the freedom of obtaining information. For this reason the Constitution also highlights that the press cannot be censured or subject to preventive authorizations.

2. Limits to the freedom and possible intervention by the Public Authority

Given this broad protection to the freedom of expression, it should be noted that there are some limits to this right mainly aimed to protect other fundamental rights provided for by the Constitution:

– public morality (please note that it is very difficult to define seeing as the notion of public morality changes over time); this limit is not applicable to arts seeing as, following article 33 of the Constitution, art must to be completely free.

– the honor of other people.

In principle, it is not possible for the Public Authority to limit the right of free expression. However, in the event that the limits indicated above (i.e. public morality and honor) are violated in this freedom of expression, and this behavior is considered unlawful or even a criminal offence (see below par. G.2), the "damaged party" can sue the individual responsible of the offence before the civil or criminal Court.

Therefore also the press has to respect the above mentioned limits. For the relevant case law, it is possible to circulate information in detriment of third parties' honor/reputation, if the information is true and the circulation of the information can be considered useful for the collectivity. In Italy of the "right to criticize" and "to satire" are recognized, but the extension (and consequently the limits) of these rights are often decided by the Courts.

As mentioned above, Article 21 of the Constitution also highlights that the press cannot be censured or subject to preventive authorizations. Otherwise, it is provided that the Judicial Authority can seize the press articles (newspapers, magazines, etc.) in cases in which crimes have been committed.

Other limits are established by the Italian criminal code and concern the violation of the criminal investigation secrecy.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

Following article 17 of the Constitution, for outdoor assembly taking place in "public areas" (i.e. areas freely open to the public, as for examples squares, public parks, streets) a prior notice must be given to public authority by the promoters of the assembly. This obligation is also provided for by article 18 of the Public Safety Law, that also specifies that the notice with the information regarding the place, date and time of the assembly has to be given to the Local Authority for the Public Safety (*Questore*) at least 3 days prior. The notification is not a request for authorization, but only a sharing of information.

The notice is not requested for electoral assembly, indoor assembly, assembly that takes place in a closed location, accessible to the public.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

Italian Law does not provide for any special provision for spontaneous protests/marches. In any case, following the interpretation of authors, the freedom of assembly established by article 17 of the Constitution can be extended also to these spontaneous gathering, as for the possibility of stopping these gathering on the same grounds provided for public assembly.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

The Italian law does not provide for specific places where demonstration is forbidden. As indicated above, the Public Authority can, on a case by case basis, considers that a specific assembly in a specific place can be a danger to public safety, public health, public morality or impede the exercise of the other freedoms constitutionally established (e.g. freedom of movement) and on the basis of these grounds can impede that the demonstration can be made in that specific place.

In 2009, the Ministry of Internal Affairs circulated a General Directive to the Territorial Public Authorities concerning public assembly with the aim to withdraw some sensitive locations from the possibility of being used for protests. The Directive does not specify the places, but identifies the criteria that the Territorial Authorities should follow and identifies sensitive locations as those areas *characterized by social, cultural o religious symbols or in which there is an huge inflow of people or in which there are "critical objectives*".

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

There is no specific legal safeguarding for the participants, unless the use of the force by the Authority/Police can be considered a crime or enacted outside the legal limits. In such cases the participant can sue the person responsible before a civil or criminal Court.

G). CRIMINAL RESPONSIBILITY

1. Illegal public gathering

a) The lack of notification of an outdoor assembly is a crime punishable by article 18 of the Public Safety Law, with the arrest up to 6 months and a fine from 103 to 4.136 euros. The criminal offence can only be charged against the "promoters" of the assembly, not to the attendees.

b) Under article 4 of Law no. 110/1975, whomever brings weapons in a public assembly (i.e. outdoor assembly) is punishable with the imprisonment from 1 year up to 3 years and a fine from 3.000 to 20.000 euros, in case he/she holds a weapon license. In case he/she does not hold a weapon license the sanction would be from 3 up to 6 years of imprisonment and a fine from 5.000 to 20.000 euros;

c) Pursuant to article 654 of the Italian Criminal Code ("ICC") whomever in a public assembly carries out seditious acts or cries out seditious words/phrases is punishable with an administrative sanction from 130 to 619 euros. If the assembly itself is considered seditious, whomever participates is punishable with arrest up to one year, under article 655 of the ICC.

d) Whomever in a public assembly manifests sympathy for fascism or the fascist party or of Nazis organizations is punishable with imprisonment up to 3 years and with a pecuniary sanction, under Law no. 645/1952.

e) Finally, whomever in public assemblies shows flags or phrases/slogans or symbols of racism or xenophobia is punishable with imprisonment up to 3 years, and with a fine between 50 to 250 euros, under article 2 of Law no. 122/1993.

2. Violation against provisions restricting the freedom of expression

Crimes from letter c) to e) indicated above can also be considered relevant for the violation of limits to the freedom of expression, therefore the crimes indicated can be considered also under this perspective.

There are also the following crimes:

– injury: under article 594 of the ICC, whomever offends the honor of a person present or through other modalities (fax, letter, phone) is punishable with imprisonment up to 6 months or up to one year and a fine of 1.032 euro (in case the offence consists in the attribution of a specific fact).

– defamation: under article 595 of the ICC, whomever offends the reputation of a person in communicating with other individuals (i.e. the person of which the honor is offended is not present) is punishable with the imprisonment up to one year and with a fine of 1.032 euros. The penalties are higher if the offence is against a politic body or authority. If defamation is made through the press, the penalties are higher (imprisonment from 6 months up to 3 years) and also the director, the vice-director, and the editor of the newspaper in question can be considered criminally liable and sanctioned with the same sanctions.

Please contact stefano.modenesi@dlapiper.com or antonio.carino@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN POLAND

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

The freedoms of assembly and of expression are bound closely together. They are also fundamental to a democratic state and, therefore, are guaranteed by the Constitution of the Republic of Poland.

Authors of legal doctrine in Poland place great emphasis on the fact that the Polish Constitution guarantees *freedoms* of assembly and expression, not *rights* to assembly and expression. According to these authors, this is because they are part of the natural law which the state did not constitute, but only granted protection thereof.

Poland is a party to the European Convention on Human Rights and, therefore, its provisions – in particular Articles 10 and 11 – as well as the jurisprudence of the European Court of Human Rights, have a crucial impact on Polish standards in this area.

The Polish Law on Assemblies has recently been the subject of public controversy. In 1990, soon after the fall of the communist regime, it was an accurate reflection of public opinion and was regarded as being liberal in nature.

However, in recent years it has been criticised, in particular by the presidents of Poland's largest cities, for being too far-reaching. This is due to the occurrence of numerous incidents in which public celebrations were disrupted by extremist groups.

As a result, pressed by local government authorities, the Polish Parliament amended the Law on Assemblies, introducing some restrictions thereto.

I. Freedom of assembly

Freedom of assembly is codified in Article 57 of the Polish Constitution. Furthermore, the applicable rules in this regard are stipulated in the Law on Assemblies. Its provisions deal with required proceedings, competent authorities and criminal acts concerning assemblies.

1. Scope of protection

According to Article 57 of the Polish Constitution, everyone has the freedom to organize peaceful assemblies and to attend them. Any limitations of this freedom must be codified in a statute. According to Article 31 of the Polish Constitution, such limitations are admissible provided that they are necessary in a democratic state of law for the sake of its safety, public order, and the protection of the environment, health, public morality or other persons' freedom and rights. They must not violate the essence of freedoms and rights. Such violations are deemed to be restrictions which result in such rights and freedoms becoming only fictional.

In addition, the Law on Assemblies specifies that limitations of the freedom of assembly may be introduced in order to protect Holocaust sites.

An assembly is defined in the Law on Assemblies as a group of at least 15 persons gathered to deliberate and/or express their opinion. Assemblies organized by the state, local government authorities, or which constitute part of the practices of the Catholic Church or other churches and religious associations legally established in Poland are excluded from the scope of regulation of the Law on Assemblies.

Assemblies may be organized by any natural person who has full capacity to perform acts in law, any legal person, or any other organization or group of persons.

2. The intervention

As mentioned above, the Polish Constitution allows the freedom of assembly to be restricted on the grounds of safety, public order, and the protection of the environment, health, public morality or other persons' freedoms and rights. Such restrictions are only permitted if they are set forth in statutes passed in parliamentary proceedings, which involve the participation of both legal and natural non-governmental persons.

It is of key importance that persons participating in assemblies are not permitted to carry weapons, explosive materials, pyrotechnic products, or any other dangerous materials or equipment.

a. Outdoor assemblies

The restrictions set forth in the Polish Law on Assemblies apply to outdoor assemblies which are available for undetermined group of persons, i.e. so-called public assemblies.

A basic obligation of an organizer of an assembly is to notify the competent local government authority.

The notification consists of: the personal data of the organizer and the full legal name and address of the registered office (if the assembly is organized on behalf and in the name of a legal entity), the personal data of the assembly's moderator if he/she is not the organizer, the purpose, agenda and language of the assembly, the place, date and start time, the estimated number of participants, the route and specific time of a march if the plan foresees it, and the planned means of assuring the peaceful course of the march and the means to be provided by the municipality.

The councils of municipalities have the power to indicate areas in which assemblies may take place without notification. Although discussions have taken place in Warsaw about establishing such a place, as of today no such place exists. Nonetheless such a place has been established in Lodz, Poland's third largest city.

Furthermore, a public assembly must have a moderator, who may be the organizer him/herself or another person, who has to give his/her written consent. The moderator is the person responsible for the opening and closing of the assembly, as well as for leading it in a manner which ensures that no legal provisions are breached and no damage is caused by the assembly's participants.

b. Indoor assemblies

The Polish Law on Assemblies does not set forth any specific restrictions with regard to indoor assemblies, as long as they meet the above definition of an assembly, i.e. a group gathered to deliberate and/or express the participants' opinions. Otherwise, in particular if the assembly is for artistic or sports purposes, it may fall under separate regulations regarding mass events.

3. Justification

The competent local government authority may prohibit the notified assembly if:

- Its purpose or course are contrary to the provisions of the Law on Assemblies or criminal provisions or;
- It may cause a threat to human life or health or to substantially valuable property.

If two or more assemblies are planned to take place at the same time in an area or on a route overlapping, either partially or wholly, the local government authority has the power to assess whether it is possible to divide them so they that will not cause any threat to human life or health or to substantially valuable property. If the authority judges that this is not possible, it will request that the organizer of the assembly which was notified last change the time or location/route of the assembly and provide information regarding the new time and place/route of the assembly.

If the organizer fails to respond to the authority's request, the authority may also prohibit the assembly from taking place.

In addition, the Act on the Protection of former Nazi Holocaust Sites stipulates that assemblies which are planned to take place at Holocaust sites may be prohibited if there is a risk that they would offend the gravity of such places.

The moderator is obliged to request that a person leave a gathering if his/her behaviour violates any provisions of law or prevents or aims to prevent the assembly's course. If such person does not obey the request, the moderator is obliged to ask the police for assistance.

The competent local government authority may delegate its officers to attend the assembly. It is actually obliged to do so if the estimated number of participants exceeds 500 or if there is a threat of any violation of public order.

The assembly may be disbanded both by the moderator and by the delegated officers of the competent local government authority. The moderator is obliged to disband the assembly if its participants do not obey his/her orders given as part of his/her statutory obligations, or if the assembly's course violates the provisions of the Law on Assemblies or criminal provisions. The delegated officers may disband the assembly for reasons justifying the prohibition of the gathering (please see subsection 3 of this section) if the moderator, despite the officers' request, fails to do so.

A decision on prohibiting an assembly and a decision on disbanding an assembly, as with any administrative decision in Poland, must contain legal and factual reasoning.

Administrative courts place great emphasis on the fact that a decision on prohibiting an assembly cannot be based solely on assumptions or suppositions. Furthermore, the authority does not have power to assess the purposes of an assembly and the ideas and content of materials presented there, provided that they are not illegal. The decision must be based on evidence pertaining to specific circumstances.

Restricting the organization of an assembly must be assessed in the light of the rule of proportionality. Weighing up the conflicting rights or freedoms in the light of this rule must not lead to the exclusion of any of them and, furthermore, must reflect their hierarchy arising from the general principles of the Polish Constitution.

II. Freedom of expression

Freedom of expression, historically referred to as the freedom of press and print, is a broad concept, heavily influenced by developments in the media. It consists of the freedom of expression of opinions, obtaining information, and its distribution in any form, including press, books, radio, television, the Internet, films etc.

1. Scope of protection

Freedom of expression is codified in Article 54 of the Polish Constitution and its scope is as described above, i.e. expression of opinions, obtaining information and its distribution.

Article 54 complements the rule of freedom of the media expressed in Article 14 of the Polish Constitution. Article 14, in spite of its brevity, is of substantial importance as it is included in Chapter I of the Polish Constitution ("The Republic"). It underlines that freedom of the media is crucial for the existence of a democratic state of law.

Nevertheless, freedom of expression is addressed not only to the press and to broadcasters but also to individuals. Bearing this in mind, it is clear that freedom of assembly cannot exist where freedom of expression is not granted.

2. The intervention

Article 54 section 2 sets forth an absolute prohibition on preventive censorship, i.e. a situation where any content has to be presented to a public authority and this authority has a discretional right to decide whether it may be published, partially or as a whole.

Licensing of the press is also prohibited, unlike the licensing of TV and radio broadcasting which is admissible. This differentiation is justified by technological limitations, i.e. the state has a certain number of frequencies which can be granted to broadcasters. TV and radio licensing requirements and proceedings are set forth in the Radio and Television Act.

Freedom of expression does not cover the distribution of false information. Furthermore, false information which violates somebody's personal rights constitutes a basis of both liability for damages and criminal liability.

Some specific types of content may also be prohibited in separate statutes. For example, the promotion of paedophilia is a crime carrying a penalty of up to two years imprisonment. Other examples are: the promotion of fascism or other totalitarian systems, the promotion of racial, religious and ethnic hatred etc.

3. Justification

A statute may restrict the freedom of expression, just like in the case of the freedom of assembly, provided that it is necessary in a democratic state of law to ensure its safety, public order, protection of the environment, health, public morality, or other persons' freedoms and rights. The restrictions must not violate the essence of this freedom.

In the case of freedom of expression, the main justifications for restrictions are: public order (e.g. in the case of the promotion of fascism or other totalitarian systems etc.) and the protection of public morality (e.g. in the case of the promotion of paedophilia).

On the other hand, civil and criminal liability for the distribution of false information is required in order to protect other persons' freedoms and rights.

The licensing of TV and radio broadcasting seems to be unjustified in light of the above rule, however, one must note that this restriction is explicitly admitted in Article 54 of the Polish Constitution.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

Public assemblies are notified to the competent executive authority of the municipality in which the assembly is to take place. It may be, depending on the type of municipality, the president of a city, a mayor of a town, or the head of a commune.

The notification must be made no earlier than 30 days before the intended date of the assembly and at the latest 3 days before that date.

The decision on prohibiting an assembly must be delivered both to the organizer and the relevant provincial governor (in Polish: *wojewoda*) within 3 days of the notification of the assembly, but not later than 24 hours before the intended date of the assembly.

The decision may be appealed against to the relevant provincial governor. The appeal must be delivered within 24 hours of its delivery. The authority must consider the appeal within the next 24 hours. The appeal does not supersede the decision, which means that as long as the decision is not reversed by the provincial governor, the assembly cannot take place.

The decision on the disbanding of an assembly made by the delegated officer during the assembly must be delivered in writing to its organizer within 72 hours of disbanding the assembly. Both the organizer and the participants of the assembly may appeal against the decision within 3 days of the disbanding of the assembly.

The legality of the above decisions may be examined by administrative courts: i.e. a territorially competent provincial administrative court and the Supreme Administrative Court. An illegal administrative act constitutes a basis of a claim for damages.

D.) SPECIAL PROVISIONS FOR SPONTANEOUS PROTESTS/PROCESSIONS

Spontaneous protests/processions are assemblies which were not notified before the gathering due to unexpected events. Polish law does not set forth specific rules regarding such gatherings. Formally, calling such an assembly and leading it constitute a misdemeanour carrying the penalty of a fine, restriction of liberty, or imprisonment of up to 14 days.

Nonetheless, the Constitutional Tribunal states that a court which assesses whether a certain case constitutes a misdemeanour as described above must take into consideration whether the omission was caused by a disregard of the obligation or negligence, or by the spontaneous nature of the event which caused the gathering. Otherwise, punishment may constitute an unjustified restriction on the freedom of assembly.

E.) FORBIDDEN PLACES OF DEMONSTRATIONS

There are no provisions regarding specific public places in which assemblies are forbidden.

Nonetheless, it is worth mentioning that the Act on the Protection of former Nazi Holocaust Sites provides separate requirements for notifying assemblies taking place in such places.

Furthermore, if an assembly is to take place near to the premises of diplomatic representatives, consular offices, special missions or international organizations enjoying diplomatic immunities and privileges, the territorially competent Police Commissioner and the Ministry of Foreign Affairs must be notified. The Head of the Government Security Bureau (BOR) must also be notified if the assembly is to take place near to premises for which BOR provides security. The competent local government authority is obliged to notify the above authorities. Nonetheless, they do not have the power to prohibit the assembly.

F.) LEGAL PROTECTION OF THE PARTICIPANTS OF AN ASSEMBLY

The competent authority is obliged to assess the necessity of using the police to secure an assembly and to ensure such security if necessary. Participants are also protected by the provisions of criminal law.

Preventing or trying to prevent the organising or a course of an assembly which was not prohibited constitutes a misdemeanour carrying the penalty of a fine, restriction of liberty, or imprisonment of up to 14 days.

The same punishment may be imposed on a person who unlawfully occupies a place which another person has the legal right to use as the organizer or leader of an assembly, or unlawfully prevents participants from leaving the place of an assembly.

Preventing prohibited legal assembly through the use of violence or unlawful duress constitutes a crime carrying the penalty of a fine, restriction of liberty, or imprisonment of up to 2 years.

G.) CRIMINAL RESPONSIBILITY

1 Illegal public gathering

It must be noted that under Polish law an assembly is never illegal, as the Polish Constitution guarantees the freedom of assembly.

Nevertheless, calling a gathering without notification, leading it, or leading a prohibited or disbanded gathering, constitutes a misdemeanour carrying the penalty of fine, restriction of liberty, or imprisonment of up to 14 days.

The same punishment may be imposed on a participant of an assembly who carries a weapon, explosive materials or other dangerous equipment, even if he/she has a required licenses for those items. If he/she does not, carrying such items constitutes a crime, regardless of whether it took place during an assembly.

The leader of an assembly may also be punished with a fine for a misdemeanour if he/she wilfully fails to request that a person whose behaviour violates any provisions of law, or who prevents or aims to prevent the assembly's course, leave the gathering. This punishment may also be imposed if he/she wilfully fails to disband an assembly, where circumstances justify such a decision.

A participant may be punished with fine for a misdemeanour if he/she does not obey a leader's order to leave the assembly or the decision to disband it.

2. Violation against provisions restricting the freedom of expression

Slandering another person, a group of people, or a legal entity with reference to conduct or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence necessary to perform their activity, is a crime carrying the penalty of a fine or restriction of liberty. It may be punished by imprisonment of up to one year if it is done with the use of the mass media.

Criminal proceedings regarding the above crime are initiated only upon a motion of a private prosecutor.

In addition, a punishment may be imposed for the distribution of certain types of prohibited content, like promotion of paedophilia or totalitarian regimes (both carrying a penalty of fine, restriction of liberty or imprisonment up to 2 years).

Please contact maciej.wesolowski@dlapiper.com or marta.frackowiak@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN SPAIN

A.) GENERAL DESCRIPTION OF THE APPLICABLE LEGAL ADMINISTRATIVE PROCEDURES

The Spanish Constitution of 1978 includes, among others, the recognition and guaranteeing of fundamental rights and civil liberties, as one of the basic pillars of the so-called Social and Democratic State of Law as established by the Spanish Constitution.

The right of assembly, primary manifestation of our fundamental rights, came originally into force by means of Law 17/1976, of 29 May. It was actually approved prior to the drafting and entry into force of the Constitution. The contents of such law were subsequently amended throughout Spain's political transition.

I Freedom of assembly

Freedom of assembly is governed by the Spanish Special Law 9/1983 (as lastly amended on 1 October 2011), the "Act".

Further to the entry into force of the Constitution, which guaranteed the freedom of assembly, it seemed necessary to have a more detailed regulation of such right (i.e. to establish that the right of assembly shall not require any prior authorization in order to be exercised). In short, the Act aims to regulate the core of the right of assembly, adjusting it to the guidelines of the Constitution.

The Act eliminates the preventive system of authorizations, and ensures the effectiveness of the right through speedy court procedures that avoid the complex pre-existing and obstructive administrative procedures, in accordance with the provisions of consistent constitutional case law.

For cases of assembly in public areas and for public events, prior notice to the authorities shall be required. Such acts shall be prohibited only where there are reasonable grounds to anticipate the disturbing of public order or danger to persons or property, and consequently the provisions of section 21 of the Constitution shall apply.

1. Scope of protection:

"Section 21 of the Spanish Constitution:

1. [The Constitution guarantees] the right to peaceful and unarmed assembly. The exercise of this right shall not require any prior authorization.

2. In the case of assembly in public places and demonstrations [organisers] shall give prior notice to the relevant authority. The exercise of the right can then only be prohibited where there are reasonable grounds to envisage disorderly conducts or any danger to persons or property".

Such notices shall meet certain formal requirements such as the inclusion of the organisers' details, place, date, time, itinerary, if any, and all security measures to taken, or the request of protection measures from the authorities.

2. Intervention

The government authority may suspend and, if necessary, proceed to break up any assemblies and demonstrations on the following grounds:

- if they are deemed illegal under the applicable Criminal Laws;
- if there is an obvious risk of public disorder, involving danger to persons or property.
- if attendees wear paramilitary uniforms.

The decision to ban a particular assembly/demonstration shall be notified in advance to the attendees, in the relevant legal form.

The suspension, change of the place of assembly/demonstration, or the outright ban shall be implemented pursuant to the provisions of the Special Law 1/1992, of 21 February, on the Protection of Public Safety.

a. Outdoor Assemblies:

In relation to assemblies in public areas and for public events, prior notice to the relevant authority shall be required. Such meetings shall only be banned where there are reasonable grounds to envisage the disturbing of public order, or any danger to persons or property, and the provisions of section 21 of the Constitution shall apply.

In fact, Section 3 of the Act ensures that the governing authority shall enforce and guarantee the right of assembly, and therefore such meetings shall be protected against those who try to somehow stop or disturb them.

This type of outdoor gatherings shall be reported to the authorities, at least, 10 days (and maximum 30 days) prior to the scheduled commencement of the assembly/demonstration. Under extraordinary circumstances, the notice may be delivered 24 hours in advance.

If the governing authority deems that material grounds exist for the restriction of such right, the governing authority may ban/limit the assembly or demonstration, or endeavour to change the date, place, time, or route, as and if appropriate. The resolution for such change shall include in detail the supporting reasons therefor. Such resolution shall be notified to the parties, within 72 hours of it being taken.

b. Indoor Assemblies:

According to Section 2 of the Act, in no event shall the Act apply to the right of assembly, in relation to the following types of meeting:

"a) meetings held by private individuals at their own homes.

b) meetings held by private individuals in public or private spaces with family and/or friends.

c) meetings held indoors by political parties, unions, business organizations, civil and commercial companies, associations, corporations, foundations, cooperatives, and other owners Communities legally constituted entities, for their own purposes and by invitation only to its members or others nominally invited.

d) meetings held indoors in a professional capacity with clients, for any purposes related to their profession.

e) meetings held in units, ships and other military establishments, which are governed by their specific legislation."

II Freedom of expression

1. Scope of protection:

Section 20 of the Spanish Constitution sets forth as follows:

"1. [The Constitution] guarantees and protects the rights:

a) to freely express and disseminate thoughts, ideas and opinions verbally, in writing or by any other means of reproduction;

b) to produce and create literary, artistic, scientific and technical works;

c) to academic freedom.

d) to freely communicate and/or receive valid and truthful information to/from any media. The law shall govern the rights to the conscience and professional secrecy clause, in the exercise of such freedoms.

2. The exercising of these rights cannot be restricted by any form of censorship.

3. The law shall regulate the organization and parliamentary control of social media by the State or other public entity, and shall guarantee the access to the media of significant social and political groups, respecting the pluralism of society and the various Spanish official languages.

4. Such freedoms are limited only by the due respect to the rights recognized in this Section [of the Spanish Constitution], in the provisions of the laws implementing them and, in particular, by the right to personal honour, personal privacy, personal own image, and the image and protection of youth and childhood.

5. The seizure of publications, recordings and other media shall be performed only after a specific court order has been issued to such extent."

Similarly, the freedom of the press and printing industry is regulated by Law 14/1966, which guarantees the right to freedom of expression. Interpretation of this Law shall always be performed in accordance with the provisions of the Spanish Constitution (such Law is over 12 years older than the Constitution).

2. Intervention

According to Section 55 of the Spanish Constitution, the fundamental rights and freedoms guaranteed under the Law above may be suspended only in the event of declaration of emergency or siege, in the terms provided in the Constitution (with certain exceptions linked to terrorism).

3. Justification

In a true democracy, an active and healthy public opinion is a must.

Regarding press freedom, it is necessary to achieve a high level of disclosure to keep citizen well informed. Press freedom is crucial for the actual and effective existence of a democratic system. It is impossible to assert popular sovereignty and free choice of executive and legislative power, if citizens are not properly informed on the operation of such powers and authorities.

Therefore, restrictions on such rights may only be imposed if strictly necessary, and always balancing the measures applied against the "general good" sought.

B/C.) DEADLINES AND AUTHORITIES INVOLVED

The exercise of these rights shall be notified in writing by the organizers or promoters, at least, ten calendar days (at the most, thirty days) in advance. In extraordinary or unpredictable circumstances, shorter notice is allowed, provided that this is duly justified. Upon the receipt of a timely communication, the Government Delegate in the relevant province/region may only reject it for good cause, or suggest an alternative date or route. Such rejection/ban/limitation can always be reviewed by a Court, through a simple and informal administrative appeal. The Court shall issue its resolution promptly so that the assembly/demonstration may take place if it complies with the relevant legal requirements.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS.

A 24-hour notice can be made under extraordinary and serious circumstances, provided that there are sufficient reasons to justify the holding of an assembly in a public area.

E.) PLACES WHERE DEMONSTRATIONS ARE PROHIBITED.

According to current legislation, there are no areas where demonstrations are prohibited.

Notwithstanding the above, Section 494 of the Spanish Criminal Code provides for penalties and/or imprisonment to be imposed on those who promote, lead or preside demonstrations or other gatherings in the surroundings of the Spanish Parliament, the Senate or the Regional Legislative Assemblies, which disrupt the normal operation thereof.

F.) LEGAL PROTECTION OF THE ASSEMBLY PARTICIPANTS.

The rights and freedoms set forth in Section 20 of the Spanish Constitution enjoy the following protective measures, as established under the Constitution:

1. Citizens are entitled to claim protection of their rights under Section 20 of the Spanish Constitution, before the Courts, by means of a simple and speedy procedure (Section 53.2 of the Spanish Constitution).

2. Citizens may also file, upon fulfilment of the relevant requirements and procedures established in such regard, a constitutional complaint ("Recurso de Amparo") before the Spanish Constitutional Court, for the protection of the rights guaranteed in Section 20 of the Constitution (art. 53.2 and art. 161.1.b of the Spanish Constitution).

3. Citizens are also entitled to file a constitutional complaint against laws and regulations having the force of law, which affect and infringe the rights in Section 20 of the Spanish Constitution (Section 53.1 and Section 161.1.a) of the Spanish Constitution).

4. The Spanish Ombudsman ("Defensor del Pueblo") is appointed under the provisions of Section 54 of the Spanish Constitution, as the High Commissioner of the Parliament for the defence of the rights contained in Title I of the Constitution, in accordance with Section 20 thereof.

G.) CRIMINAL LIABILITY.

1 Illegal public gathering:

Section 513 of the Penal Code states:

"Illegal meetings and demonstrations are punishable by law. The following meetings shall be deemed illegal:

1. Those held for the purpose of committing a criminal activity.

2. Those attended by people with firearms, explosive devices, and weapon-like or otherwise dangerous items."

For scenario 1, the clear suspicion of the planning of an alleged offence would be enough to consider the meeting as illegal. For scenario 2, the ones carrying weapons or dangerous items shall be precisely the promoters or attendants.

Any actions taken by the authorities at a particular gathering shall be consistent with law and always follow the principle of proportionality, with the meaning that if the gathering is peaceful but has not been notified in advance, authorities may request participants to end the same, and initiate an investigation for possible administrative offences under the provisions of the Special Law 1/1992, of 21 February, on the Protection of Public Safety. A violent break up involving a disproportionate use of force would not be legally permitted. The Spanish Supreme Court has declared on several occasions (Judgements of 30 April 1987, 6 February 1991, and 16 October 1991) that some factors, such as the behaviour and conduct of the demonstrators in the particular case, and their reaction towards the presence of the security forces, shall be taken into account in order to assess whether the use of force was legitimate or not.

The absence of prior notification may have punitive consequences for the organizers or promoters, but not for the participants, who may not be aware of the lack of such notice.

2. Infringement of provisions restricting the freedom of expression:

Sections 205-216 of the Spanish Criminal Code state that any action that affects the right to honour by the misuse of freedom of expression shall be punished.

BASIC REGULATIONS GOVERNING

- Spanish Constitution, Sections 20 & 21.
- Spanish Criminal Code, Section 494.
- Special Law 4/1997, governing the use of video cameras by the Security Forces in public areas (BOE no. 186 of 5 August).
- Special Law 1/1992 on the Protection of Public Safety (BOE no. 46 of 22 February), as amended by Judgment 341/1993 issued by the Constitutional Court, by Law No. 4/1997, fourth-additional provision, by Law 10/1999 and the Organic Law 7/2006.
- Special Law 9/1983, regulating the right of assembly (BOE no. 170 of July 18), as amended by Law 4/1997, by Law 9/1999, and by Law 9/2011.
- Royal Decree 596/1999, which approves the Regulation of development and implementation of the Special Law 4/1997 (BOE no. 93 of 19 April).

Please contact diego.ramos@dlapiper.com or joseIgnacio.monedero@dlapiper.com for further information.

THE RIGHT TO FREEDOM OF ASSEMBLY AND EXPRESSION IN ENGLAND, WALES AND SCOTLAND

INTRODUCTION

We have been asked to advise on the right to freedom of assembly and expression in the United Kingdom.

The term "United Kingdom" refers to four separate countries, being England, Wales, Scotland and Northern Ireland. These four countries divide into three distinct legal jurisdictions: English law, which applies in England and Wales; Scots law, which applies in Scotland; and Northern Irish law, which applies in Northern Ireland.

The UK Parliament (based in London) has the power to pass Acts of Parliament (otherwise referred to below as "statutes") which apply to all four countries. However, both Scotland and Northern Ireland have devolved powers to pass laws which only take effect within that jurisdiction. Further, England and Wales and Northern Ireland are both common law jurisdictions, which means that rules of law within the jurisdiction can be developed by the Courts by way of case law. Scotland also has its own distinctive legal history and traditions, which have developed through a combination of statutory provisions and common law. We deal with both statute and common law further below.

Whilst there can be some overlap between the three jurisdictions, as certain statutes passed in London will apply in each jurisdiction, for the purposes of this note we cover only English law and Scots law.

A.) GENERAL DESCRIPTION OF THE APPLICABLE ADMINISTRATIVE PROCEDURES

Whilst there are strong traditions of both public protest and free speech in the United Kingdom and each of its distinct legal jurisdictions, historically these were not expressed as positive rights. Instead, the position at common law was that people were free to associate, assemble and express themselves as they wished, provided that their actions were not in any way unlawful.

A constitutional shift across the UK arose from the incorporation into law in October 2000 of the European Convention on Human Rights, by way of the Human Rights Act. Furthermore, in Scotland, the legislation that established the Scottish Parliament's powers, Scotland Act 1998, also embeds the ECHR into its legal framework[10]. Under the Human Rights Act, Article 10 gives a right to freedom of expression and Article 11 a right to peaceful assembly. The effect of the Human Rights Act is to prevent any public body such as the police and local government from acting in ways which conflict with the principles as set out in the Convention.

It should be noted, however, these are only two of a series of rights set out in the Convention, which must be weighed against each other, and that there are a number of restrictions which limit the right to complete freedom of speech and to assembly. In particular, a number of statutory powers have been granted in the last 13 years in order to increase the scope of police to prevent the free movement of protestors, and the free expression of political protest. We refer to a number of these statutes further below.

I Freedom of Assembly

For the purposes of this note, the term "assembly" is used generally to refer to both static demonstrations and marches, save where otherwise specified[11].

Historically, this freedom was protected on the basis that people were free to associate and assemble to the extent that their conduct was not otherwise unlawful. However, cases in which freedom of assembly triumphed tended in practice to be unusual, in view of the wide range of statutory and common law "exceptions" to the legal principle; the approach of common law was "*hesitant and negative, permitting that which was not prohibited*"[12]. Article 11 of the Human Rights Act now gives a positive right to peaceful protest.

[10] Both ss.29 & 57 of Scotland Act 1998 create a positive obligation upon Scottish legislature to ensure all statutes and legislation they create is compatible with ECHR, and provides that the devolved Scottish Parliament may not create laws which are incompatible with human rights.

[11] The Public Order Act refers to marches as "processions" and to all other static demonstrations as "assemblies". A "procession" is defined as people moving along a route (*Flockhart v Robinson* [1950] 2 K.B. 498); the law does not provide a minimum number to constitute a procession.

[12] *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

1. Scope of protection

The wording of Article 11 (Schedule 1) of the Human Rights Act is as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of those 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."

2. The intervention

As set out above, Article 11 expressly anticipates that the right to freedom of peaceful assembly should be limited, for the following reasons:

(a) In the interests of national security or public safety, or for the prevention of disorder or crime. The police have a vast range of statutory and common law powers and duties in relation to the policing of protest.[13] It is not possible to cover all of these in this advice; however, in broad terms, the police are required to ensure that any force or tactics of containment used in managing protest should be "reasonable"[14] and excessive use of force is unlawful;[15]

(b) For the protection of health or morals;[16]

(c) For the protection of the rights and freedom of others.

Owners of land on which assemblies are proposed to take place must have given permission; a failure to obtain permission amounts to trespass. Parties who are likely to be affected can seek injunctive relief from the Court (or in Scotland, an interdict).[17]

The Protection from Harassment Act 1997 ("**PHA**"), whilst introduced with the aim of protecting victims of stalking, has been used by a number of individuals and companies to take action against protestors. Pursuant to section 1 of the PHA in England and Wales, and under section 8 in Scotland, it is an offence for a person to pursue a course of conduct which causes alarm or distress, and which the person knows or ought to know amounts to "harassment". Harassment is defined as alarming the person or causing the person distress. A person who believes they may be a victim of harassment may apply to the Court for an injunction prohibiting that harassment. Examples of cases where the PHA has been used against protestors include *RWE Npower plc and another v Carrol and others* [2007] EWHC 947 (QB), where the Claimant energy company was able to obtain an injunction preventing the trespass onto their land on the basis that the protest involved "professional" protestors who had indicated their intention to carry on protesting indefinitely and where it was felt that their actions may cause distress to the Claimant company's employees.

It should further be noted that the right being protected is that of peaceful assembly; the protection does not extend to riot, violent disorder or affray, all of which are criminal offences in England, and which are discussed further below.

a) Outdoor assemblies

We deal with both static assemblies and public processions in turn below.

Static assemblies

The position in respect of public assemblies differs slightly under English and Scots law.

English law

Public meetings may be held in the open air in places to which the public have free access, provided that the owner of the land has consented; if the owner/occupier has not given permission, the protestors are trespassing, which can give rise to both civil and criminal liability.

---

[13] A non exhaustive list includes The Terrorism Act 2000, the Criminal Justice and Police Act 2001, the Anti Terrorism, Crime & Security Act 2001, the Criminal Justice Act 2003; the Criminal Justice and Licensing (Scotland) Act 2010, and the Police, Public Order and Criminal Justice (Scotland) Act 2006

[14] This is required under the Criminal Law Act 1967, the Police and Criminal Evidence Act 1984 and the common law. Scotland also has similar provisions within Police (Scotland) Act 1967 regarding the powers of police officers, and Scots common law.

[15] There are, however, difficulties for the police in assessing what is reasonable and/or excessive. For example, the policy of "kettling" (ie forcing demonstrators into a contained area by the formation of large cordons of police officers) has proved to be controversial, especially as it can involve the detention of ordinary bystanders as well as protesters. However, in March 2012, the European Court of Human Rights held that the policy was lawful and did not involve a breach of human rights, provided that it had been rendered unavoidable by circumstances beyond the control of the authorities and was necessary in order to avert a real risk of serious injury or damage (*Austin v United Kingdom* [2012] 55 EHRR 14). One case where the police use of force was found to be excessive and unreasonable was at the inquest into the death of Ian Tomlinson, a 47 year old bystander who was hit by a baton and pushed to the ground during the course of the G20 protests in April 2009.

[16] In the case of *City of London Corp v Samede* [2012] EWCA CW 160, the English Court ordered the removal of a camp by the Occupy London movement (campaigning for social justice) from the graveyard of St Paul's Cathedral. The reasons given by the Court included the strain on public health facilities, as well as the owner's property rights and some damage to local businesses.

[17] This is a remedy in the form of a Court order which can be obtained urgently and which prohibits a person, group of people or a company from continuing to do a certain act (prohibitory injunction). The remedy is discretionary and will only be granted if it is just and convenient to do so; it will not be granted if damages would be a sufficient remedy.

Assemblies cannot simply gather in parks which are ostensibly open to the public either, as many local authorities have specific by laws governing the use of parks for such purposes, and breach of those by laws is a criminal offence.

It may be possible to hold an assembly on the highway, but the assembly must be *"reasonable and non obstructive taking into account its size, duration and the nature of the highway"* and *"not inconsistent with the primary right of the public to pass and repass"*[18]. Unreasonable obstruction of the highway is a criminal offence.[19]

In terms of the policing of assemblies, the senior police officer present at an assembly may impose conditions as to its location and duration, as well as the number of people who may be present. These conditions may be issued where it is believed that (a) the assembly may result in serious public disorder, serious damage to property, or serious disruption to the life of the community; or (b) that the purpose of organising the assembly is to intimidate others.[20] The conditions do not have to be issued in advance of the public assembly.

The police may also apply to the Council to ban an assembly if the chief officer reasonably believes that it is likely to be held without the owner's permission, or where it may result in serious disruption to the life of the community, or to land, a building or monument of historical, archaeological, architectural or scientific importance.

Scots law

Scotland has a similar approach to public assemblies; however in Scotland trespass is treated as a civil wrong rather than a criminal act and any action will require Court intervention for damages or prevention of future assemblies. In practice, however, the police have powers to intervene on the grounds of maintaining public safety and order.

Public processions

A procession in the streets is subject to a requirement that the organisers should give advance notice to the police. The notice provisions are different under English law and Scots law and are dealt with in turn below.

English law

Under English law, a notice is required if a procession is intended to demonstrate support for or opposition to the views or actions of any group, to publicise a cause or campaign, or to mark or to commemorate an event.[21] Where notice is required, it must be in writing and must include the date of the procession, the time it will start, the proposed route and the name and address of the organiser. The written notice must be delivered to a police station in the area where the procession is planned to start six clear days in advance or if that is not reasonably practicable, as soon as delivery is reasonably practicable.

Notice must be given unless it is not reasonably practicable to do so in advance[22]. This is intended to allow for a completely spontaneous procession[23]. Notice is also not required for a funeral procession or a procession commonly or customarily held[24].

Where a public procession is held, each of the persons organising it is guilty of an offence if the requirements as to notice have not been satisfied or if the actual date, time or route differs from what was specified in the notice.

The police have extensive powers to impose conditions on marches, and even to ban them if the senior police officer reasonably believes that the march may result in serious public disorder, serious damage to property, serious disruption to the life of the community, or that the purpose of the march is to intimidate others. Conditions can relate to the route, banners or duration of the procession/march. Failure to comply with a valid condition (by either the organisers or the participants) is a criminal offence, although it is a defence if it can be shown that the failure arose from circumstances beyond that person's control.

Scots law

In Scotland, a person proposing to hold a march or procession in public must give 28 days' notice to the local authority of the area in which the procession is to be held[25], and the Chief Constable of the Scottish Police Authority. The notice given should specify the particulars of the planned activity including (a) the date and time when the procession is to be held; (b) its route; (c) the likely size of

[18] *DPP v Jones* [1999] AC 240.

[19] Section 137, Highways Act 1980.

[20] Section 14, Public Order Act 1986.

[21] Sections 12 and 13, Public Order Act 1986.

[22] In the case of a prosecution, it is for the Magistrates Court to decide whether notice could or should have been given.

[23] Section 11, Public Order Act 1986.

[24] Examples include the Lord Mayor's Show, the Notting Hill Carnival and other annual local parades.

[25] S.62 Civic Government (Scotland) Act 1982.

the procession; (d) the arrangements for control in place and proposals to minimise any issues and ensure the safety of the public; and finally (e) details of the person proposing and taking responsibility for the event.

The local authority may, after police consultation, decide to prohibit the holding of the procession or impose any restrictions necessary to mitigate concerns and ensure public safety. Any restriction must be based upon consideration of the likely effect the procession would have upon public safety, public order, potential for damage to property and any disruption which would be incurred by local communities. Any decision may also be appealed to the Sheriff Courts.[26]

b) Indoor assemblies

A major practical hurdle for indoor meetings is the need to find premises. Candidates at local, parliamentary and assembly elections are entitled to the use of schools and other public rooms for the purposes of holding election meetings[27]; otherwise, local authorities have a discretion to decide to whom to let their halls, provided the decision is not illegal under the Human Rights Act.

Universities and higher and further education institutions are under a duty to ensure that *"freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers"*[28].

3. Justification

Restrictions must be justified under Article 11.

II: Freedom of Expression

Whilst freedom of expression has been described as the *"lifeblood of democracy"*[29], the position prior to the implementation of the Human Rights Act (as with freedom of assembly) was that *"every citizen has a right to do what he likes, unless restrained by common law... or by statute"*.[30] Article 10 now gives a positive right to freedom of expression. It is a right which overlaps with other rights, including the right to manifest one's beliefs (Article 9), the right to protest (Article 11) and the right to vote and stand for office (Protocol 1, Article 3).

1. Scope of protection

The wording of Article 10 of the Human Rights Act is as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. 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 10 therefore imposes two different types of obligations on the state: negative obligations, meaning that the state must itself refrain from unnecessary censorship of artistic, political or commercial expression; and positive obligations, to help individuals and the media to exercise their right to freedom of expression.

2. The intervention

Again, Article 10 expressly anticipates that the right to freedom of expression should be limited. This is in recognition of the fact that Article 10 can come into conflict with other rights, such as the right to a fair trial (Article 6), the right to privacy (Article 8), and the right to freedom of thought, conscience and religion (Article 9).

By way of example, Article 8 has been used (somewhat controversially) by a number of celebrities to seek injunctions against the press preventing or seeking to prevent the publication of articles about their private life[31]. This has led to a debate on the extent to which disclosure of such information is in the public interest. The balance

[26] For example, in *Aberdeen Bon Accord Loyal Orange Lodge 701 v Aberdeen City Council*, 2002 SLT (Sh. Ct.) 52; where the Scots Court overturned the local authority's prohibition on the basis that there was insufficient reasoning as to why such a restriction on liberties was justified.

[27] Sections 45 and 46 Representation of the People Act 1983 for England and Wales.

[28] Section 43, Education (No 2) Act 1956.

[29] *R v Secretary of State for the Home Department, ex parte Simms* [2005] 2 AC 115, at 12.6.

[30] *Attorney General v Guardian Newspapers (No 2)* [1990] AC 109.

[31] A number of high profile celebrities have used Article 8 to bring injunctions preventing publication of newspaper articles discussing their private life, including preventing the reporting of the injunction at all ("**super injunctions**"). These have proved controversial and have been seen by some as an attack on press freedom. In the case of *CTB v News Group Newspaper* Manchester United footballer Ryan Giggs obtained an injunction to prevent details of an extra marital affair being published. The injunction later had to be lifted, however, after Giggs' name was published on Twitter, a Scottish newspaper (which was not bound by the injunction) published a barely disguised photograph of him, and an MP chose to use Parliamentary privilege to name him in the House of Commons. Another example is the Trafigura affair, where a company had obtained a super injunction against The Guardian newspaper preventing not only disclosure of an internal document containing dumping of toxic waste in the Ivory Coast, but of the injunction itself. When an MP tabled a parliamentary question concerning the affair, the company sought to argue that the newspaper would be in breach of the injunction if it reported the question. Subsequently, the Parliamentary Under Secretary of State for Justice confirmed the question could be reported, and the injunction was lifted.

between Article 8 and Article 10 has been widely debated as part of the Leveson Inquiry into Press Standards[32], and also in Scotland, in the subsequent McCluskey Review[33].

In addition, the English Courts can prevent publication of an article on the grounds that publication would amount to a breach of confidence[34]. The landmark case is the House of Lords decision in *Campbell v MGN Ltd* [2004] UKHL 22, where the Court held that a newspaper had been entitled to disclose that the fashion model Naomi Campbell was a drug addict who was receiving treatment, but no details of the treatment she was receiving. There is an overlap between liability in equity for breach of confidence and the new doctrine of breach of privacy which some commentators believe has begun to emerge since the implementation of the Human Rights Act.

The press is also required to comply with defamation laws, defamation being the publication of an untrue statement about a person which tends to lower his reputation in the opinion of right thinking members of the community[35]. In English law, the basis of the claim is injury to reputation, whereas under Scots law, defamation includes injury to the feelings of the person defamed as well as injury to reputation. The remedies are damages and an injunction (or in Scotland, an interdict)[36]. In England and Wales, pursuant to the Defamation Act 2013[37], a Claimant will be required to show that the statement caused or is likely to cause serious harm[38]. Defences under the Defamation Act 2013 to a claim for defamation include that the imputation is substantially true, or that the statement was an honest opinion or a matter of public interest.

The press must also ensure that the reporting of police investigations and of trials does not breach Article 6 and failure to do so can result in a claim for contempt of Court[39].

Broadcasters, meanwhile, must comply with the Broadcasting Code, which is designed to balance the broadcasters' rights to freedom of expression with the rights of viewers and listeners, as well as programme participants and subjects. There are boundaries that relate to standards and fairness. We do not propose to deal with this in any further detail in this note.

In addition, there are a number of restrictions which apply not only to the media but to the wider public at large, and in particular to protestors.

Pursuant to the Public Order Act 1986, it is an offence for a person to use threatening, abusive, or insulting words or behaviour or to display any material which is threatening, abusive or insulting if that person does so with the intent to stir up either racial hatred, religious hatred or hatred on grounds of sexual orientation, or if in the circumstances either racial hatred, religious hatred or hatred on the grounds of sexual orientation is likely to be stirred up[40].

Further, pursuant to the Terrorism Act 2006, any statement which is likely be understood as a *"direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism"* is also illegal. The definition of "terrorism" includes the use or threat of action where the intention is to *"influence the government or an international governmental organisation or to intimidate the public"* and *"the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause"*. Actions which fall within the definition of terrorism include not only serious violence against a person, serious damage to property, endangerment of life or a serious risk to the health or safety of the public, but also actions *"designed seriously to interfere with or seriously disrupt an electronic system"*[41].

---

[32] The Leveson Inquiry is a judicial public inquiry into the culture, practices and ethics of the British press. Lord Justice Leveson was appointed in July 2011 after a series of scandals involving British newspapers, most notably the now defunct News of the World, where it was stated that the newspapers had engaged in phone hacking and police bribery. The victims of phone hacking included not only politicians and celebrities but also relatives of deceased British soldiers and victims of the 7/7 London bombings. Leveson has recommended a new body to regulate the press but whether his recommendations will be implemented is currently the subject of political debate.

[33] Available at http://www.scotland.gov.uk/Resource/0041/00416412.pdf

[34] This is an equitable remedy which allows a person to claim if confidential information about that person becomes known and where it would be unfair if it were disclosed to others.

[35] *Slim v Stretch* [1936] 2 All ER 1237.

[36] We not here that in relation to Scotland, defamation provides a delictual right (similar to the English Tort) for individuals to seek redress, and arises as a common law right rather than the equitable basis for redress England.

[37] It should be noted the Defamation Act 2013 is not yet in force.

[38] In the case of bodies trading for profit, this means that the Claimant must show serious financial loss.

[39] In July 2011, The Sun and the Daily Mirror were both found to have been in contempt of Court in respect of their coverage of the murder of Joanna Yeates, a 25 year old whose body was discovered on 25 December 2010 in North Somerset. The police initially suspected and arrested her landlord Christopher Jefferies; the media coverage was described by commentator Roy Greenslade as "*character assassination on a large scale*". Mr Jefferies also won substantial damages for defamation from six newspapers.

[40] Sections 17 29 of Public Order Act 1956.

[41] Section 1, Terrorism Act 2000. The wording of section 1 has been criticised by human rights organisations and by free speech campaigning organisation Article 19 as *"both vague and excessively broad in its reach"*.

There is also a ban on publishing or distributing obscene publications pursuant to the Obscure Publications Acts 1959 and 1964. We do not propose to discuss this in any further detail in this note.

Finally, actions for defamation can also be brought against members of the public, although this is less common[42].

One category protected by Article 10 is that of political expression. This means that members of Parliament can speak freely during parliamentary proceedings without fear of legal action on the grounds of defamation, contempt of Court or breaching the Official Secrets Act. In the Scottish Parliament, Members are protected from legal challenge in relation to defamatory statements and where they have inadvertently referred to an active Court case, but are not protected where they make statements in breach of a Court Order or from immunity on other grounds. We do not propose to discuss this further in this note[43].

3. Justification

Restrictions must be justifiable under Article 10.

B/C.) DEADLINES AND AUTHORITIES RESTORED

There are no deadlines for notice to be given for outdoor assemblies. For public processions, the notice provisions set out above must be complied with.

D.) SPECIAL PROVISIONS FOR PROMPT AND SPONTANEOUS PROTESTS/PROCESSIONS

English law

Spontaneous processions do not require notice to be given, but any organisers may be required to show that the procession was genuinely spontaneous and it is not simply the case that notice was not given. Failure to give notice can result in a criminal sanction. Spontaneous protests can also take place, but as set out above, the police can then impose conditions on that protest, and the police are afforded power to take actions necessary to safeguard the public and bring any incident under control. Failure to comply with those conditions can result in criminal sanctions. Offences can also be committed by individuals if they block or obstruct public road either through spontaneous demonstration or marching.

Scots law

Whilst there are no specific legal implications for spontaneous protest, the police are afforded the ability to take certain actions necessary to safeguard the public and bring any incident under control. Arrest by officers is not justified unless there is an imminent danger posed by the actions of those involved, but they may require the activities to be halted or dispersed so long as their actions have a genuine and legitimate purpose. A spontaneous procession will be subject to the provisions discussed with regards to the Civic Government (Scotland) Act as noted above, and depending upon the circumstances this may result in a criminal offence by failing to give notice of the procession. Additionally, whilst generally a largely stationary demonstration is permissible, there are offences that can be committed by individuals if they block or obstruct public roads either through spontaneous demonstration or marching.

E.) FORBIDDEN PLACES OF DEMONSTRATION

Broadly, there are no places where any demonstration is expressly "forbidden", provided that the demonstration is in all other respects lawful. The one exception is Parliament Square in London and the adjoining pavements. Part 3 of the Police Reform and Social Responsibility Act 2011 concerns protest in Parliament Square; various activities are designated as "*prohibited activities*", including the operating of amplified noise equipment, erecting or keeping erected a tent or structure for "*facilitating, sleeping or staying in place*" or placing or keeping any sleeping equipment for the purpose of sleeping overnight.

Scotland does not have specific restrictions to prevent freedoms of assemblies in certain areas, and each occasion is considered on its own merits. The police do have the powers to remove individuals who are in breach of the peace or causing nuisance to the public, and as described above there are measures available to deal with isolated or spontaneous incidents. If a march takes place through an area protected by a National Park Authority then further consents may require to be sought in addition to those from local government and police noted above.

[42] A recent example, however, has been the action brought by Lord McAlpine against various Twitter users who incorrectly linked him to allegations of child abuse.

[43] It is, however, referred to at 22 above.

F.) LEGAL PROTECTION

An application can be made to the High Court (or to either the Sheriff Court or the Court of Session in Scotland) relying on a Convention right if the applicant believes that a public authority has acted or proposes to act in a way that it is incompatible with a Convention right, and the applicant is or would be a victim of that act[44].

G.) CRIMINAL RESPONSIBILITY

We deal with English and Scots law in turn below.

I) Illegal public gathering

English law

It is not possible to give a comprehensive list of all the criminal offences which may arise in these circumstances. However, in broad terms, as set out above, public gathering will be illegal and potentially result in criminal sanctions in the following circumstances:

(a) trespassing on private land[45];

(b) breach of a by law by using a public space without permission, or obstructing a highway (as referred to above);

(c) failure to give notice for a procession pursuant to section 11 of the Public Order Act 1986, to comply with conditions imposed by the police (sections 12/14) and organising a prohibited procession (section 13);

(d) where the gathering is not peaceful and results in riot[46], violent disorder[47], affray[48] or threatening or abusive behaviour[49];

(e) in cases of harassment;

(f) obstructing a police officer[50].

The sentencing guidelines for these offences vary and we do not propose to cover the various possible penalties, but a number of the above are punishable by imprisonment as well as a fine.

Scots law

In Scotland the relevant offences are:.

(g) Failure to give notice for a march or procession under the Civic Government (Scotland) Act 1962[51];

(h) Harassment, and obstruction of the police, as well as breaches of local by-laws;

---

[44] Section 7 Human Rights Act 1998.

[45] This is an offence under Sections 14A and 14C Public Order Act 1986 and Sections 61 and 68 Criminal Justice and Public Order Act 1994. Failure to leave an exclusion zone when directed is an offence under Section 112 Serious Organised Crime and Police Act 2005. Other offences may also be committed. For example, in *Chandler v DPP* [1964] AC 763 an attempt by nuclear disarmers to enter and sit down outside an RAF base was held to be a conspiracy to commit a breach of the Official Secrets Act 1911.

[46] "**Riot**" is defined in Section 1 of the Public Order Act 1986 as "*where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety*".

[47] "**Violent disorder**" is defined in Section 2 of the Public Order Act 1986 as "*where 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety*".

[48] "**Affray**" is defined in Section 3 of the Public Order Act 1986 where one person "*uses or threatens unlawful violence towards another and his conduct in such as would cause a person of reasonable firmness present at the scene to fear for his personal safety*".

[49] This is an offence pursuant to sections 4 and 5 of the Public Order Act 1986.

[50] The police can issue directions to maintain peace. In *Piddington v Bates* [1960] 3 All ER 660, a protestor who wished to join a picket, notwithstanding a police officer's instructions not to do so, was arrested for obstruction; the English Court held that "*a police officer charged with the duty of preserving the Queen's peace must be left to take such steps, on the evidence before him, he thinks are proper*". However, since the introduction of the Human Rights Act, there appears to be a greater willingness on the part of the English Court to challenge the exercise of discretion by police officers. In the case of *Redmond Bate v DPP* [2000] HRLR 249, which concerned individuals who had been arrested for refusing to stop preaching on the steps of Wakefield Cathedral, the Court stated that "*free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative providing that it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having*".

[51] S. 65 Civic Government (Scotland) Act 1982

(i) Breach of the Peace. Whilst commonly used, it is a rather indistinct crime and focuses upon the distress or fear caused to the public from threats or violence rather than identifying any specific actions themselves;

(j) At common law, the offences of mobbing (equivalent to rioting), malicious mischief, uttering threats (making of threats) and reckless endangerment to the public.

Trespass is not generally considered a criminal action in Scotland, save in certain limited instances such as national security. Instead, the above crimes are likely to be used to prosecute the consequences of undesired trespass.

II- Violation against provisions restricting the freedom of expression

We deal with English law and Scots law in turn below.

English law

The main criminal offences are those set out above in relation to racial hatred, religious hatred or hatred on the grounds of sexual orientation.

Scots law

Further to the offences noted above, at common law Scotland also recognises the offences of shameless indecency, and malicious mischief, which may be relevant to certain types of protest, as well as breaches of the peace. One additional set of measures of note are those contained in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, creating specific provisions to limit offensive chanting and communications at football matches[52].

Please contact paul.stone@dlapiper.com or judith.hopper@dlapiper.com for further information.

[52] This was introduced in response to the historically tense relationship between the "old form" clubs (Rangers and Celtic) and perceived sectarian aggression. There has been some criticism of the drafting of the legislation and some commentators have seen it as an attack on free speech.

CONTACTS

AUSTRIA

ANDREAS DAXBERGER
Partner
Vienna
T +43 1 531 78 1962
andreas.daxberger@dlapiper.com

MICHAEL KOMUCZKY
Vienna
T +43 1 531 78 1962
michael.komuczky@dlapiper.com

CZECH REPUBLIC

PETER VALERT
Partner
Prague
T +420 222 817 366
peter.valert@dlapiper.com

MGR. EVA RUHSWURMOVÁ
Prague
T +420 222 817 802
eva.ruhswurmova@dlapiper.com

FRANCE

FRÉDÉRIK AZOULAY
Partner
Paris
T +33 1 40 15 66 32
frederik.azoulay@dlapiper.com

ELSA DE MULLENHEIM
Paris
T +33 1 40 15 25 77
elsa.demullenheim@dlapiper.com

GERMANY

DR. MATHIAS HANTEN, M.B.L. – HSG
Partner
Frankfurt
T +49 69 271 33 381
mathias.hanten@dlapiper.com

ANDREA MÜNCHEN, LL.M.
Avocat à la Cour
Frankfurt
F +49 69 271 33 388
andrea.muenchen@dlapiper.com

DR. THILO STREIT LL.M. (UNIV. OF TEXAS, AUSTIN)
Counsel
Cologne
T +49 221 277 277 352
thilo.streit@dlapiper.com

SONJA KUCHLING
Berlin
T +49 30 300 13 14 21
sonja.kuchling@dlapiper.com

HUNGARY

MONIKA HORVATH
Partner
Budapest
T +36 1 510 1115
monika.horvath@dlapiper.com

ADAM TOKAR
Budapest
T +36 1 510 1184
adam.tokar@dlapiper.com

ITALY

STEFANO MODENESI
Partner
Milan
T +39 02 80 618 513
stefano.modenesi@dlapiper.com

BENEDETTA CICCONI
Rome
T +39 06 68 880 631
benedetta.cicconi@dlapiper.com

ANTONIO CARINO
Milan
T +39 02 80 618 617
antonio.carino@dlapiper.com

POLAND

MARTA FRACKOWIAK
Partner
Warsaw
T +48 22 540 74 03
marta.frackowiak@dlapiper.com

MACIEJ WESOLOWSKI
Warsaw
T +48 22 540 74 90
maciej.wesolowski@dlapiper.com

SPAIN

DIEGO RAMOS
Partner
Madrid
T +34 91 790 1658
diego.ramos@dlapiper.com

JOSE IGNACIO MONEDERO
Counsel
Madrid
T +34 91 790 1662
joseIgnacio.monedero@dlapiper.com

UNITED KINGDOM

PAUL STONE
Partner
Leeds
T +44 113 369 2700
paul.stone@dlapiper.com

JUDITH HOPPER
Leeds
T +44 113 369 2519
judith.hopper@dlapiper.com

ALISON EWART
London
T +44 20 7796 6587
alison.ewart@dlapiper.com

www.dlapiper.com