(IN)TOLERANCE FOR INTOLERANT PROTEST
Content-based restrictions on protests: desirable?

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Introductory remarks

The tolerance for intolerant protest seems to be decreasing in the Netherlands. In February 2016, the Minister of Security and Justice informed the Dutch Parliament that content-related restrictions on demonstrations from Muslim extremist organizations are allowed because of public order grounds. Furthermore, in the last couple of months, the mayor of the Dutch capital Amsterdam imposes content-related restrictions on Pegida-demonstrations.¹ This is quite remarkable because the Dutch Public Assemblies Act – de Wet openbare manifestaties – contains an explicit prohibition on imposing content-based restrictions on demonstrations.

The German law does not know such a prohibition. Furthermore, in contrast with the Dutch law, the German demonstration law gives the local authorities the power to restrict demonstrations because of the content.

All this raises the question whether the Dutch Public Assemblies Act should be amended: should the mayor be entitled to impose content-based restrictions?

To answer this question, I will first briefly explain the way in which the right to demonstrate is regulated in the Netherlands. After that, I will explain in greater detail the prohibition on content-related restrictions in the Dutch Public Assemblies Act (section two) and the two mentioned examples that are at odds with this prohibition (section three). In the fourth and fifth section of this paper, I will analyse the German law on this point. The core of this comparative study will be discussed in section six. In this section I will give some arguments whether amending the Dutch law on this point, following the example of the German law, is desirable. I will conclude with some final remarks.²

1 The right to demonstrate in the Netherlands

Article 9 of the Dutch Constitution – de Grondwet – guarantees the right to demonstrate. This right can be restricted by Act of Parliament.³ Local authorities – the municipal council and the mayor – also have the power to restrict the right to demonstrate, but only to protect health, in the interest of traffic and to combat or prevent disorder.⁴

The authorities fulfil a double role in respect to demonstrations: next to their power to restrict demonstrations, they have – based on the case law of the European Court on Human Rights (ECtHR) – the duty to protect and facilitate demonstrations.⁵

In the Public Assemblies Act – an Act of Parliament –, the primary legislature created some powers for the local authorities to regulate the right to demonstrate to protect health, in

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¹ Pegida stands for Patriotische Europäer gegen die Islamisierung des Abendlandes.
² This article is an abstract of a sub-topic of my thesis titled Het recht om te demonstreren. Een vergelijkende studie naar de betogingsvrijheid in Nederland, Duitsland en Engeland vanuit internationaalrechtelijk perspectief (The right to demonstrate. A comparative study of the freedom to demonstrate in the Netherlands, Germany and in England from an international law perspective) (diss. Groningen), Den Haag: Boom juridisch 2016.
³ Article 9 paragraph 1 Constitution.
⁴ Article 9 paragraph 2 Constitution in conjunction with the Public Assemblies Act.
⁵ See, for example, ECtHR 21 June 1988, appl. no. 10126/82 (Plattform ‘Ärzte für das Leben/Austria), NJ 1991, 641, with commentary from E.A. Alkema.
the interest of traffic and to combat or prevent disorder. Article 4 Public Assemblies Act in conjunction with municipal bylaws – *Algemene Plaatselijke Verordeningen* – require a prior notification for demonstrations in public places. In response to a notification, the mayor may impose restrictions and – as the ultimate remedy – a prohibition. During a demonstration, the mayor may also impose restrictions and – if necessary – he may order the persons holding or participating in a demonstration to end it and disperse forthwith. Holding or participating in a demonstration which has been prohibited and infringement of a restriction or order is punishable.

2 Prohibition on content-related restrictions in Dutch protest law

Article 5 paragraph 3 of the Public Assemblies Act contains an explicit prohibition on imposing restrictions and prohibitions related to the content. During the legislative history of the Public Assemblies Act, the government stated that this prohibition relates, in particular, to the texts and symbols on banners.

Even if the content of a (controversial) demonstration gives rise to hostile audience or non-peaceful counterdemonstrations, the mayor is not entitled to impose content-related restrictions and prohibitions. What is more, he has the duty to protect such a demonstration against violent actions of hostile audience and counterdemonstrators. In this light he has to show quite some effort. In the case of hostile audience or counterdemonstrations, restrictions and prohibitions are only allowed if there is a so called ‘administrative force majeure situation’. That is to say a situation in which the authorities, despite the necessary efforts, do not have sufficient police forces in order to allow a demonstration to proceed.

The prior does not mean that demonstrators may use all the words and symbols they want to during a demonstration. On the basis of the Articles 136c and 136d of the Dutch Penal Code – *het Wetboek van Strafrecht* –, hate speech and insulting a group of people is punishable. During or after a demonstration, the public prosecutor can arrest the individual protesters that express themselves in a criminal way. However, the public prosecutor nor the mayor has the power to impose preventive content-related restrictions, even when it is clear that demonstrators will express themselves in a criminal way.

3 Contrary Dutch legal practice

Remarkably, the legal practice is sometimes not in accordance with Dutch law in this respect. Two examples.

In February 2016, the Dutch Minister of Security and Justice wrote in a letter to the Dutch Parliament that, on public order grounds, demonstrations of Muslim extremist groups can be restricted, ‘for example in the use of particular flags or symbols, or in the location of the demonstrations’.

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6 Article 5 paragraph 1 Public Assemblies Act.
7 Articles 6-7 Public Assemblies Act.
8 Article 11 Public Assemblies Act.
11 Kamerstukken II 2015/16, 29 614, no. 39, p. 5.
Even more interesting is the content-related restriction – a prohibition to show swastikas on banners during demonstrations – imposed by the mayor of the capitol Amsterdam on demonstrations of the anti-Islamic organization Pegida Nederland. The backdrop of this restriction is the following.

Pegida Nederland, an organization that finds its origin in Dresden (Germany), has organised several demonstrations since October 2015 in several Dutch municipalities. During these demonstrations, the Pegida-demonstrators used banners displaying a picture of a trash bin with a few symbols in it, inter alia a flag of the Islamic State (IS) and a swastika. This is Pegidas way of expressing that it is against the Islamization of Europe and that it distances itself from the Nazi ideology.

In principle, showing a swastika is punishable on the basis of the Articles 136c and 136d of the Dutch Penal Code. However, on the 22th of February 2016, the Public Prosecutor decided – after the arrest of a few Pegida-demonstrators for showing a swastika during a demonstration – that it is not punishable to show a swastika in a rejecting context. Nevertheless, the mayor of Amsterdam has been prohibiting demonstrators since February 2016 to show this symbol during demonstrations, regardless of the context in which the swastika is shown. In a letter from the 29th of August 2016, the mayor explained to the municipal council why he imposes this restriction on demonstrations. He states a few reasons.

In the first place, to create a less complex situation and more clarity for the police. As a result of the imposed prohibition, the police does not have to make a distinction between cases in which showing a swastika is punishable, and cases in which it is not; showing a swastika is now punishable, regardless of the context.

In the second place, the mayor points at the history of Amsterdam. In no other city in the Netherlands, so many Jewish fellow citizens were transported and murdered by the Nazis during the Second World War. Nowadays, Amsterdam still has the biggest Jewish community in the Netherlands. To protect this community, the mayor decided together with the public prosecutor and the Chief of Police to prohibit swastikas during demonstrations, regardless of the context.

In the third place, the display of the symbol can provoke hostile audience and, with that, disorder. This may occur in particular if the police can take action against demonstrators that show swastikas in a punishable way, while in the other case the police cannot take action if the swastikas are shown in a non-punishable way.

The fourth and last reason is that the restriction is not related to the content or the purpose of the demonstration. ‘After all, Pegida Nederland demonstrates against Islam and the political asylum policy, and not against Nazism’, according to the mayor.

On the 27th of February 2016, the leader of Pegida Nederland, Edwin Wagensveld, was arrested during a demonstration in Amsterdam for infringement of the content-related restriction of the mayor: he had shown a picture of a swastika in a trash bin. Edwin Wagensveld had to appear in court on the 8th of September 2016. He came to court wearing a t-shirt with exactly the same picture – including a swastika – as he showed on a banner during the demonstration. Right before his trial, the police arrested him for wearing this t-shirt. The court postponed the trial indefinitely.

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12 See the news item ‘Arrestanten vrijuit na tonen hakenkruis in Enschede’ of the 22th of February 2016, accessible via www.tubantia.nl.
13 See the letter from the mayor of Amsterdam to the municipal council of the 29th of August 2016 with the subject ‘Manifestaties Pegida & NVU’.
14 See the news item ‘Pegida-voorman opgepakt om spandoek; “Ik heb schijt aan u”’ of the 27th of February 2016, accessible via www.at5.nl; see also the news item ‘Pegida-voorman Edwin Wagensveld opgepakt bij demonstratie’ of the 27th of February 2016, accessible via www.nrc.nl.
15 See the news item ‘Hakenkruis Voorman Pegida bij rechtbank opgepakt voor vergrijp waarvoor hij ook terecht zou staan’ of the 8th of September 2016, accessible via www.nrc.nl.
In the trial that (still) has to come, the court has to assess whether the infringement of the restriction imposed by the mayor is punishable. To answer that question, the court will have to determine whether the restriction imposed by the mayor is legitimate. Having regard to Article 5 paragraph 3 Public Assemblies Act, the court will, in my view, have to come to the conclusion that the restriction imposed by the mayor is unlawful and therefor that the behaviour of Edwin Wagensveld is not punishable.

The four arguments of the mayor are not convincing in my opinion. Clarity for the police and the protection of the Jewish community against anti-Semitic symbols are – however understandable – no lawful reasons for the mayor to restrict a demonstration. Restrictions are only possible to protect health, in the interest of traffic and to combat or prevent disorder.

That the display of the swastikas can provoke hostile audience and, with that, disorder, is neither a valid reason to impose content-related restrictions. In principle, the mayor can only restrict a demonstration if there is a so called ‘administrative force majeure situation’. Up until now, the situation is not that serious. And even if the situation is that serious, the mayor can only impose non-content-related restrictions. The law simply prohibits the imposing of content-related restrictions.

I do not understand how the restriction is not related to the content or the purpose of the demonstration. Apparently, one of the purposes of the demonstrators is to show that they distance themselves from the Nazi ideology. For that reason, the use of the symbol is connected with the content of the demonstration. Moreover, it is not up to the mayor to decide what is and is not related to the content.

4 The right to demonstrate in Germany

Article 8 of the German Constitution – das Grundgesetz – guarantees the right to freedom of peaceful assembly for all the Germans. This right includes the right to demonstrate.16

The primary legislature created in the German Federal Assembly Act – das Versammlungsgesetz – powers for the local authorities to regulate demonstrations. Since 2006, German states are entitled to issue their own Versammlungsgesetze. Until now, six German states have made use of this authorisation by issuing their own act. The other twelve states didn’t. In those states, the federal act is still in force on the basis of Article 125a paragraph 1 of the German Constitution.

Like the Dutch Public Assembly Act, the assembly acts from the federation and the states require a notification for demonstrations in public places. Article 15 paragraph 1 of the Federal Assembly Act prescribes that local authorities may impose restrictions or – as the ultimate remedy – a prohibition on a (notified) demonstration if the public security or the public order is at immediate risk when the demonstration will take place. The fear for the immediate risk must be based on concrete and visible facts. The state assembly acts do have a statutory provision similar to that of Article 15 paragraph 1 of the Federal Assembly Act.

5 Content-related restrictions in German protest law

Until the early nineties, several right extremist demonstrations took place in Germany.17 In the course of the nineties, these demonstrations were more and more preventive prohibited by

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local authorities and lower courts because the right extremist demonstrations would not be protected by the Constitution due to their content.\(^\text{17}\)

The German Federal Constitutional Court – *das Bundesverfassungsgericht* – qualifies these demonstration prohibitions as unlawful.\(^\text{19}\) In 2003, this Court ruled that the constitutional protection of the right to demonstrate is politically neutral. The resilient nature of the Constitution is mainly reflected in the criminalization of Nazi expressions and symbols. In all other respects, there are no additional restrictions on the exercise of the right to demonstrate for right extremist groups, according to the Court.\(^\text{20}\) To quote the words of Constitutional Court judge Hoffmann-Riem: ‘neo-Nazis also have the right to demonstrate’.\(^\text{21}\)

As from the second half of the nineties the number of right-wing extremist demonstrations is – again – increasing in Germany, the public demand for farther-reaching restrictions of these demonstrations is also increasing. The Minister of Justice complies with this demand, after 600 right-wing extremists demonstrated at the *Brandenburger Tor* on the 29th of January 2000 against the construction of the Holocaust Memorial. On April 1, 2005, his proposal gains force of law.

Since then, under the new Article 15 paragraph 2 of the Federal Assemblies Act, right-wing extremist demonstrations can be prohibited or restricted if they occur at memorial sites that commemorate the victims of degrading treatment under the Nazi regime and if the content of these demonstrations undermines the dignity of the victims of the Nazi regime. Undermining the dignity can be the case if the Nazi regime is condoned, glorified, justified or trivialized.\(^\text{22}\)

Article 15 paragraph 2 of the Federal Assemblies Act designated the Holocaust Memorial in Berlin as a memorial site in aforementioned sense. There-besides, this provision empowers states to appoint other such memorial sites.

Under the terms of Article 15 paragraph 2 of the Federal Assemblies Act different types of restrictions may be imposed: not only place- and time-related restrictions,\(^\text{23}\) but also content-related restrictions.\(^\text{24}\)

Together with Article 15 paragraph 2 of the Federal Assemblies Act, Article 130 paragraph 4 of the German Penal Code – *das Strafgesetzbuch* – is introduced in 2005. Under this penal provision, it is punishable to glorify or justify the Nazi empire during a demonstration in a manner that denigrates the dignity of the victims of the Nazi regime.\(^\text{25}\)

Legal scholars are critical of the new provisions. According to some, the provisions are at odds with the principle of equality under Article 3 of the Constitution, because the pro-

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\(^{22}\) VGH München 26 February 2010, 10 CS 10.412.


\(^{24}\) BVerfG 6 April 2006, NVwZ 2006, 815.

visions relate only to the victims of the Nazi regime, and not to the victims of, for example, the German Democratic Republic regime.26 Others argue that, as under Article 15 paragraph 2 of the Federal Assembly Act demonstrations can be banned already only because of the content, the new provisions are also at odds with the freedom of expression under Article 5 of the Constitution.27

6 Content-based restrictions on protest in Dutch law: desirable?

Would it be desirable, following the example of German law, to introduce content-based restrictions on protest in Dutch law? In 1995, the Dutch legal scholar Schilder from the VU University in Amsterdam answered this question in the affirmative. He suggests to incorporate a formal statutory provision under which demonstrations, that evidently (will) have a racist nature, can be banned preventive as well as repressive.28

Such a provision would be innovative in two ways in the Dutch law: it makes it possible to preventively take action based on the content against a demonstration as such. Under the current law, content-related restrictions are allowed only in a repressive manner and only against individual demonstrators.

Schilder substantiates his point of view with a number of arguments. In the first place, the United Nations (UN) International Convention on the Elimination of All Forms of Racial Discrimination encourages or even forces to prohibit demonstrations with a racist nature. Secondly, there are some snags attached to the current system: (a) the mayor is, even if he wants to take repressive action, bound by the three target criteria of Article 9 paragraph 2 of the Constitution and Article 2 of the Public Assemblies Act; in other words: even during a demonstration, he is not entitled to take action against criminal statements; (b) the public prosecutor can take criminal action only against individual demonstrators; the demonstration, as such, cannot be restricted based on substantive grounds; (c) the damage is already done if only repressive action can be taken. The third and last argument of Schilder is that the proposed provision is in line with the European Convention of Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR).29

I have some concerns about the point of view of Schilder. Article 2 of the UN International Convention on the Elimination of All Forms of Racial Discrimination prescribes: ‘States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races (…)’. It could be argued that Schilder his proposed prohibition is not an ‘appropriate means’ because it disproportionately interferes in the freedom to demonstrate of protesters which are not guilty of discriminatory conduct, although they are part of a demonstration with an obvious racist nature. For that reason, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) as well as the Council of Europe’s European Commission for Democracy through Law (Venice Commission) recommend the authorities, in het event of racial discrimination and other forms of hate speech, to take action only against the individu-

als who are guilty of this. In principle, the authorities should leave the demonstration as such as it is.  

From a demonstration law point of view, such an approach is preferable. The issue should be addressed appropriately, the demonstration as such and the freedom to demonstrate should, preferably, be left alone.

That the mayor is also bound to the target criteria if he wants to take repressive action, does not alter the fact that the public prosecutor can take action against criminal statements. In my opinion, there is no need to give the mayor also the power to take action against criminal statements.

It is quite unfortunate that the damage has already been done if only repressive action can be taken. However, for two reasons I argue to adhere to the current regime. In the first place, the freedom to demonstrate is in my view such an important fundamental right, that preventive content-related restrictions on demonstrations are not preferable. That demonstrators cannot be prohibited preventively to express themselves in a criminal way, is, in my view, a price we must pay in order to give the freedom to demonstrate the space that would be due. In the second place, a preventive prohibition because of the content of the demonstration is at odds with everything our Constitution already exuded for centuries: stay away, as far as possible, from the content of a message.

The ECHR and the ECtHR case law do not preclude the proposed prohibition. However, they do not make it compulsory either. International organizations which base their recommendations on, inter alia, the ECHR and the ECtHR case law, reject such a prohibition in principle.

All this makes me conclude that it is not desirable to incorporate a formal statutory provision in Dutch law under which demonstrations, that evidently (will) have a racist nature, can be banned preventive as well as repressive.

Final remarks

The German painter and poet Wilhelm Busch (1832-1908) said: ‘Toleranz ist gut, aber nicht gegenuber den Intoleranten’. In my view however, tolerance is only really worth something if it is also shown to intolerant people. Nevertheless, tolerance should not be confused with indifference. In my view, Dutch demonstration law finds the right balance. There is tolerance – preventive interference with the content of a demonstration and content-related restrictions on a demonstration as such are prohibited – without getting indifferent. The public prosecutor can – and will – take action against criminal statements.

Considering inter alia the recommendations of international organizations, I reach the conclusion that the freedom to demonstrate in the Netherlands would be affected disproportionately, if we were to allow further content-related restrictions on demonstrations in Dutch law.
