

5 Demonstrations by right-wing extremist groups in the Netherlands and Germany

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The last time specific attention was paid to demonstrations by extremist groups – especially right-wing extremist groups – in the context of these Monitor reports was in the first report of 1997. The period covered in that report marked a reversal in the way local authorities in the Netherlands were reacting to demonstrations proposed by the extreme right. It was a reversal that may have been inspired by a few court rulings in which decisions to put demonstrations under a preventive prohibition were quashed (although these were not demonstrations by right-wing extremist groups). Mainly, though it was the result of a change in attitude on the part of a few mayors with regard to allowing demonstrations by the extreme right. In this chapter, the more recent developments in the Netherlands will be analysed and compared with the situation in Germany.¹

5.1 Introduction

The protection of the freedom to demonstrate, as provided by art. 9 of the Constitution of the Netherlands and art. 11 of the European Convention on Human Rights (ECHR), which the Netherlands has also ratified, requires the government to exert a considerable amount of effort to enable groups – including groups that hold offensive or provocative views – to exercise their freedom to demonstrate. For mayors and police, demonstrations are an occasion for multitasking. These officials must maintain public order and safety (including traffic safety) in and around a demonstration (keeping mind that the mayor can impose restrictions on a demonstration, if necessary), and they must protect the demonstrators from hostile reactions from the public or from opponents. The police have a third task in addition to these: investigating punishable offences (under the direction of the public prosecutor). After all, insulting or discriminatory statements that qualify for prosecution do sometimes occur at demonstrations. These tasks of maintaining order, protecting people and investigating offences sometimes clash with each other. For instance, arresting certain demonstrators on suspicion of making punishable statements may lead their fellow demonstrators to cause public disturbances. In sections 5.2 and 5.3 the actual incidents and legal developments that have taken place in the Netherlands in this area in recent years (roughly the period after 2000) will be discussed.

The aforementioned obligation to do everything possible to protect the freedom to demonstrate also applies to authorities in Germany. The German constitution guarantees the freedom to demonstrate as well (art. 8). Moreover, Germany is also bound by art. 11 of the ECHR. Nevertheless, there are important differences between

¹ This chapter was made possible in part by the use of the internal report *Strijd om de straat: een vergelijkend onderzoek naar de betogingsvrijheid voor extreemrechts in Nederland en Duitsland* (Battle for the streets: A comparative study of the freedom to demonstrate for the extreme right in the Netherlands and Germany), Amsterdam 30 June 2006, written by Peter Paul Ekker, trainee with the Anne Frank House.

the Dutch and the German situation in terms of the number and size of demonstrations as well as the legal regulations: in 2005 an important amendment to the German law on demonstrations was passed that was especially meant to address demonstrations by extreme right-wing groups. The incidents and legal developments that gave rise to this amendment will be discussed in section 5.3. Section 5.4 will wrap up the chapter with a few concluding and comparative remarks.

5.2 Freedom to demonstrate: the legal framework in the Netherlands

5.2.1 Article 9 of the Constitution and the Public Assemblies Act

Since the constitutional revision of 1983, the freedom of assembly and of demonstration have been protected by art. 9 of the Constitution.

This article went into effect in 1988 and reads as follows:

1. The right of assembly and demonstration shall be recognised, without prejudice to the responsibility of everyone under the law.
2. Rules to protect health, in the interest of traffic and to combat or prevent disorders may be laid down by Act of Parliament.

When this article was being developed, the meaning of the right to demonstrate was discussed on several occasions.² The government saw a demonstration "as the means to give public expression to feelings or demands at the social and political level, preferably involving as many people as possible."³

In accordance with the words "without prejudice to the responsibility of everyone under the law" in the first paragraph of art. 9, the authority to penalise certain forms of assembly or demonstration or to declare them unlawful is vested in the national legislature (Acts of Parliament). In that sense, the freedom of assembly and of demonstration is limited by the provisions in the Criminal Code that penalise crimes against the public order, crimes that endanger the general safety of property or persons and the various crimes of expression.

The use of the phrase "lay down rules" in the second paragraph of art. 9 of the Constitution suggests that the power to intervene in the freedom to demonstrate may be delegated to lower bodies. This is only permitted, however, insofar as intervention is being used for the protection of health, in the interest of traffic or for controlling or preventing disorder. Article 9 of the Constitution does not allow a lower body to prohibit or oppose a meeting or demonstration because this body deems the gathering undesirable on account of its content or goal, or the content of the slogans being carried. Moreover, the delegation of the power to restrict the freedom to demonstrate is to be contained in a special law that pertains to the regulation of the freedom to demonstrate.

² For an overview, see: T. Gerbranda and M. Kroes, *Grondrechten Evaluatie-Onderzoek: Documentatierapport* (Evaluation of basic rights), vol. 3, pp. 9-2 to 9-4 and A.E. Schilder, *Het recht tot vergadering en betoging: een vergelijkende studie naar het Nederlandse en Westduitse recht* (The right of assembly and the right to demonstrate: a comparative study of Dutch and West German law) (dissertation Leiden University). Arnhem: Gouda Quint 1989, pp. 24-57.

³ *Kamerstukken II* (Official Reports of the House of Representatives of the States General) 1975/76, 13 872, no. 3, pp. 38-39.

And that special law has been passed: the Public Assemblies Act of 1988 (Wet openbare manifestaties, hereafter referred to as WOM). This law makes use of the constitutional option to delegate. Authority is delegated to the city council and the mayor to impose restrictions on the exercise of the freedom to demonstrate. Article 2 of the WOM repeats that these restrictions may only concern the objectives already mentioned in art. 9 § 2 of the Constitution. According to art. 4 of the WOM, the city council may stipulate when prior notification (to the mayor) is required for demonstrations. This means that the council can insert provisions into its municipal ordinance (Algemene Plaatselijke Verordening; APV) regarding the procedure that must be followed when notifying the mayor, the information that must be provided and the periods of time involved. No additional grounds for prohibiting or otherwise restricting demonstrations may be inserted in the APV. Many municipalities have a provision in their APV demanding that in the case of a demonstration as meant in art. 4 of the WOM, the mayor must be notified at least 24 or 48 hours in advance.⁴ The reasoning behind this notification deadline is the fact that the mayor and police need time to determine how much police presence will be required to provide the demonstration with adequate supervision and to maintain order in the immediate vicinity, and to determine whether it might be necessary to impose regulations or restrictions on the demonstration or to prohibit it entirely. The mayor derives the authority to assign those restrictive regulations or to issue a preventive prohibition from art. 5 of the WOM. When deciding on a possible preventive prohibition or restrictive regulations – which may have to do with the time, duration or the route of the demonstration – the contents of the demonstration slogans or statements must be left aside. In this regard, art. 3 § 4 of the WOM forbids the mayor, upon being notified about a demonstration, from seeking information concerning the content of the messages to be made public during that demonstration.

Once a demonstration is underway, the law does provide possibilities for the mayor to intervene. On the grounds of art. 6 of the WOM he can impose instructions with which the demonstration participations must comply. Article 7 of the WOM gives the mayor the power to order that a demonstration be ended immediately. Such an order can be issued if the required prior notification to the mayor was not made, or if a prohibition was placed on the demonstration in conjunction with that notification; if demonstrators act contrary to a regulation, restriction or instruction; or if one of the interests mentioned in art. 2 of the WOM is thereby being promoted. Article 11 of the WOM stipulates that holding or participating in a demonstration in which the required prior notification was not made or

⁴ In The Hague, which is a prime example of a Dutch demonstration city, the notification deadline is 4 x 24 hours. In the legal literature it is argued that requiring prior notification for each demonstration, regardless of whether public disturbances, obstruction to traffic or danger to public health are expected – and then so far in advance – amounts to an unjustified restriction of the freedom to demonstrate (W.N. Ferdinandusse, "De strafbaarheid van een grondrecht. De Wet openbare manifestaties en het grondrechtelijk karakter van de betoging" [The punishability of a basic right: The Public Assemblies Act and the legality of demonstrations], *Nederlands Juristenblad (NJB)* 2001, pp. 615-619). On 17 October 2006, however, the Supreme Court ruled that this is not the case. See *Nederlandse Jurisprudentie* 2007, 207, with case note by Alkema and *Administratiefrechtelijke Beslissingen (AB)* 2007, 23, with case note by Brouwer & Schilder.

on which a prohibition was issued, or violating restrictive regulations or instructions, constitutes a punishable offence with a maximum sentence of two months' imprisonment or a fine of €3,350. Decisions made by the mayor on the basis of the WOM can be appealed through the administrative courts on the grounds of the General Administrative Law Act (*Algemene wet bestuursrecht*).

5.2.2 *The mayor's public order powers provided in the Municipalities Act*

Mayors also take action against demonstrations by extremist groups based on powers set down in art. 172 of the Municipalities Act and then granted to them. The enactment of an emergency order under art. 176 of the Municipalities Act occurs with quite some regularity. The power to enact an emergency order can be used if there is evidence of rebellious activity or any other serious disorder, or of serious fear that such will arise. In an emergency order the mayor can issue general rules for maintaining public order or for avoiding danger.

In case law it is generally accepted that in situations in which the possibilities offered by the WOM for avoiding serious disorderliness are inadequate, the mayor's emergency powers under art. 175 (emergency order) and 176 (emergency regulation) of the Municipalities Act can form an adequate basis for preventive intervention in a particular demonstration.⁵ The cases in which this has been accepted by the court, however, usually have had to do with meetings open to the public that are held in non-public locations. For these kind of meetings the WOM does not offer the option of a preventive prohibition.⁶ In recent years, action against these kinds of gatherings at non-public locations has been taken quite often, with the help of emergency regulations. Usually these are cases in which a neo-Nazi group, under the pretext of a concert or party, hires a hall for a gathering somewhere in the countryside. In the rural town of Aalten in May 2008, such a gathering was banned by means of an emergency regulation, while the owner of the hall (when he learned that Blood & Honour was involved) refused entrance to the hall and dissolved the contract.⁷ In February 2007 the mayor of Uitgeest issued an emergency regulation in connection with a gathering of the Nationalistic People's Movement (*Nationalistische Volksbeweging*; NVB) in a small local hall, after it became known that a group of about 80 AFA followers⁸ were on the way with the intention of holding a counter-action. The emergency regulation included a prohibition on wearing masks or hoods, but no demonstration prohibition was issued. When the AFA demonstrators neared the hall in question – most of them wearing balaclavas or shawls around their faces – fights broke out with the NVB members. After a few minutes (although it was reported in a couple of newspapers that almost half an hour had

⁵ See C.W. van der Pot, D.J. Elzinga & R. de Lange, *Handboek van het Nederlandse staatsrecht* (Handbook of Dutch Constitutional Law). Deventer: Kluwer 2006, p. 363. This was also the view of the government when the WOM was being developed, see *Kamerstukken II* 1985/86, 19 427, no. 3, p. 10.

⁶ ARRS 30 December 1993, *AB* 1994, 242, esp. Van Male.

⁷ "Concert neonazi's verboden" (Neo-Nazi concert banned), *Brabants Dagblad* 5 May 2008; "Aalten verbiedt concert neonazi's" (Aalten bans neo-Nazi concert), *De Gelderlander* 5 May 2008; "Neo-nazi's de deur gewezen" (Neo-Nazis shown the door), *De Gelderlander* 10 May 2008.

⁸ AFA stands for Anti-Fascistic Action (*Anti-Fascistische Aktie*). This is a Dutch network of local left-wing or extreme left-wing groups and persons. The AFA was formed in 1992 as part of the squatters' movement.

passed), the fights were quashed by the anti-riot squad; 25 NVB members who had committed violent acts were arrested,⁹ the AFA demonstrators were told to leave the village immediately on the grounds of the emergency regulation.¹⁰

As noted in the previous section, the WOM does provide adequate authority to maintain order (active as well as preventive) during demonstrations at public locations. In the legal literature, the general view is that even at the present moment there is still very little room – as well as little need – for creating a supplementary role for the emergency powers contained in the Municipalities Act.¹¹ Nevertheless, according to media reports and statements made by mayors, issuing emergency regulations to deal with demonstrations, especially those involving extreme right-wing groups, is an option that has been seized with quite some regularity in recent years. Interestingly, those emergency regulations often contain orders that might be taken – and therefore must be taken – on the basis of the WOM. An example is the NVU demonstration and the preceding counter-demonstration by the "Comité Artikel 1" (an anti-fascist group) on 30 May 2008 in the city of Oss.¹² Given the fact that an NVU demonstration held in Oss the year before had got out of hand, the mayor issued an emergency regulation. According to press reports, it contained orders having to do with the duration and the route of the counter-demonstration. An emergency regulation is not necessary to issue such orders, since they can be based on art. 5 of the WOM. When the 58 demonstrators from the "Comité Artikel 1" failed to stick to the fixed route during their "noise demonstration" they were arrested en masse, giving rise to skirmishes with the police. Two days later, the Public Prosecution Service announced that "after studying the dossiers" they had found insufficient proof of violation of the emergency regulation.¹³

⁹ In January 2008 one of them was sentenced to three months' in prison; several others were given community punishment orders. See L. van der Storm, "Cel voor rechtsextremist" (Jail for right-wing extremist), *de Volkskrant* 17 January 2008.

¹⁰ "Rol politie bij NVB-rel roept veel vragen op" (Role of police in NVB riot raises many questions), *Noordhollands Dagblad* 18 January 2008.

¹¹ See J.P. Loof, "De burgemeester en de demonstratievrijheid. Over beginselen van behoorlijke besluitvorming inzake betogingen" (The mayor and the freedom to demonstrate: On the principles of adequate decision-making with regard to demonstrations), *Gemeentestem* 2007, pp. 467-481 and C.W. van der Pot, D.J. Elzinga & R. de Lange, *Handboek van het Nederlandse staatsrecht*, p. 363. This view coincides with the opinion voiced by the lawmakers when the 1992 Municipalities Act was being formed with regard to the power to issue orders provided by art. 172 paragraph 3 of the Municipalities Act. It was said, in so many words, that this power cannot be used with regard to public demonstrations in the WOM sense. See *Kamerstukken I* (Official Reports of the Senate of the States General) 1990/91, 19 403, no. 64b, p. 16 ff.

¹² Other examples are the NVU demonstration and the AFA counter-demonstration held in Rotterdam on 26 January 2002 (emergency regulations with routing orders for both demonstrations so they would take place in different parts of the city and would remain separated); the demonstration of the "Platform tegen de nieuwe oorlog" (Platform against the new war) in the town of Uden on 17 January 2003, in which the Volkel air base, the target of the demonstration, was declared off-limits for the demonstrators; the NVU demonstration in Apeldoorn on 17 May 2003 (emergency regulations containing a ban on counter-demonstrations); the NVU demonstration and AFA counter-demonstration on 5 June 2004 in The Hague (emergency regulation with ban to deviate from the fixed demonstration route); the New Right demonstration, planned for 13 April 2005 (emergency regulation in which the demonstration was banned).

¹³ "Geen straf voor linkse tegendemonstranten Oss" (No penalties for left-wing counter-demonstrators in Oss), ANP press release of 3 June 2008.

So it is not unusual for restrictive measures having to do with demonstrations to be taken on an incorrect legal basis. In addition, there is always the possibility that measures referred to as emergency regulations by the media and by the mayors themselves are in fact measures that are taken on the basis of the WOM and therefore do have a correct legal basis. However, the fact that municipal administrators themselves toss the term "emergency regulation" around so carelessly when it comes to demonstrations confirms the picture that also emerges from case law: mayors do not always act with legal meticulousness when taking measures having to do with demonstrations by extremists.¹⁴

Sometimes an emergency regulation is issued for demonstrations organised by extremist groups in order to ban certain activities that have nothing to do directly with the demonstration itself and that therefore cannot be based on the WOM. An emergency regulation was applied to the NVU demonstration held on 1 March 2008 in Bergen op Zoom, for example, which stipulated that precautionary frisking could take place in the demonstration area.¹⁵ At the demonstration organised by the "Comité Kusters/Malcoci" on 18 May 2002 in Harderwijk, an emergency regulation was used to temporarily close outdoor cafés along the demonstration route. The emergency regulation is also regularly used to prohibit the wearing of masks, hoods or devices whereby a person's face is disguised during demonstrations.¹⁶

5.2.3 Article 11 of the ECHR

In addition to the Constitution and the WOM, the freedom of assembly and of demonstration is also guaranteed in art. 11 ECHR.

This article reads 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 these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

¹⁴ See J.P. Loof, "De burgemeester en de demonstratievrijheid" (The mayors and the freedom to demonstrate) and J.P. Loof, 'Demonstreren op de Laan voor de Mensenrechten: over zorgvuldige voorbereiding en motivering van demonstratiebeperkingen' (Demonstrating on the Laan voor de Mensenrechten: On carefully preparing and finding a legal basis for demonstration restrictions), *NJCM-Bulletin* 2007, pp. 467-475.

¹⁵ "Polman: 'negeer mars NVU'" (Polman: 'Ignore the NVU march), *BN/De Stem* 29 February 2008.

¹⁶ This occurred, among other things, at the NVU march to the grave of the widow Rost van Tonningen in Rheden on 2 June 2007. See H. van der Ploeg, "Kerkhof Rost op slot bij NVU-mars" (Rost cemetery closed during NVU march), *De Gelderlander* 1 June 2007.

In the case law of the European Court of Human Rights (ECtHR) pertaining to this article, various important principles have been formulated that are also of great importance to Dutch case law and practice with regard to demonstrations. The ECtHR assumes that the freedom of assembly is closely linked to the freedom of expression and should be interpreted in that light.¹⁷ The ECtHR also assumes that the right to peaceful assembly (and demonstration) should be regarded as one of the foundations of a democratic society and for this reason should not be interpreted restrictively. The protection of art. 11 ECHR is limited to *peaceful* meetings or gatherings. So far, however, an explicit definition of the notion "peaceful" has never been given. It is clear, though, that the simple fact that the public order is being disturbed or threatened because a demonstration is evoking reactions from the public or from counter-demonstrators does not mean that the demonstration no longer falls under the protection of the right to peaceful assembly.¹⁸ In this regard, the ECtHR has rightly ruled that art. 11 of the ECHR not only imposes restraint on the government but also entails positive obligations so that the freedom to demonstrate is actually possible for certain groups of people. The government should take reasonable and appropriate measures to ensure that lawful demonstrations proceed peacefully, and in this connection to deploy adequate police presence to protect the demonstrators from any hostile reactions.¹⁹

As for the individual demonstrator, if sporadic violence or other punishable acts are committed by others during the demonstration, the protection provided by art. 11 ECHR does not cease as long as he himself remains peaceful in his intentions and behaviour.²⁰ If the organisers of and participants in a demonstration do have violent intentions, however, the gathering is not protected by art. 11 of the ECHR.²¹ It is relevant to note that in a judgment from 2007, the ECtHR ruled that terminating a demonstration simply because the authorities had not been notified is not acceptable if circumstances do not allow for timely notification and there is no evidence of violence or disturbance of the peace. If the demonstration is a spontaneous reaction to a sudden political event, then termination because of the absence of notification, without any illegal behaviour on the part of the demonstrators, is a disproportionate infringement on the freedom to demonstrate, according to the Court.

5.3 A few practical questions and case law from recent years

In the beginning of the 1980s, even before art. 9 of the Constitution and the WOM had come into effect, the decision to forbid demonstrations was rejected on several

¹⁷ See ECtHR 26 April 1991, NJ 1992, 455, with case note by Dommering (Ezelin v. France). In § 37 of this judgment the ECHR describes the relationship between articles 10 and 11 ECHR as follows: "Notwithstanding its autonomous role and particular sphere of application, Article 11 must (...) also be considered in the light of Article 10 (...). The protection of personal opinion, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11."

¹⁸ EComHR, 16 July 1980, appl. no. 8440/78 *Decisions & Reports* vol. 21, p. 148 (Christians against Racism and Fascism v. VK).

¹⁹ ECtHR 21 June 1988, NJ 1991, 641 (Plattform Ärzte für das Leben); ECtHR 26 June 2006, *European Human Rights Cases* (ECHR) 2006, 107 (Öllinger v. Austria), with case note by Gerards.

²⁰ ECtHR 26 April 1991, NJ 1992, 455, with case note by Dommering (Ezelin v. France).

²¹ ECtHR 2 October 2001, *Reports of Judgments and Decisions of the European Court of Human Rights* 2001-IX (Stankov and United Macedonian Organisation Ilinden v. Bulgaria).

occasions by the courts. These were not demonstrations by right-wing extremist groups, however.²² Until the early 1990s, preventive prohibitions on demonstrations by the extreme right could count on considerable sympathy, even though the judicial rulings were often criticised by legal commentators.²³ With reference to the position taken by the government in the formation of the WOM and the case law of the ECtHR with regard to art. 11 of the ECHR (especially the concept of positive obligations), it is argued that a preventive prohibition is only permitted as a last resort in a situation of administrative force majeure. Such a situation of administrative force majeure can be said to exist if the mayor, in view of the local circumstances and having marshalled all the available resources, cannot reasonably be considered capable of providing the demonstration with the necessary protection. In brief: issuing preventive prohibitions on demonstrations by right-wing extremist groups because of a fear that the public order will be disturbed, especially by reactions from spectators or counter-demonstrators, ought not to be easily accepted by the courts.²⁴ During the years 1995-1996, a few mayors, perhaps in response to the criticism of legal scholars, decided to allow four demonstrations by right-wing extremist groups to proceed: in The Hague, Rotterdam, Zwolle and Leerdam.²⁵ In the years that followed, preventive prohibitions were issued for a number of demonstrations without these decisions being laid before the court.

If we look at the period from 2000 on, we notice that there has been an increase in the number of legal proceedings concerning decisions made by mayors with regard to demonstrations. First of all, this increase seems to be the result of the fact that more demonstrations are being organised by right-wing extremist groups (and with more counter-demonstrations by anti-fascists in response).²⁶ In addition, the idea that demonstrations by extremist groups may be banned only in exceptional cases began to gain ground, among mayors as well as within the legal system. Some mayors accepted this idea with the utmost reluctance, however. So they searched for other measures

²² The classical examples for the Netherlands are: Vz. ARRS, 27 May 1982, AB 1983, 62, with case note by Van der Veen (Pink Front) and Vz. ARRS, 30 May 1983, AB 1984, 85, esp. Boon (Afcent goodbye party).

²³ See, among others, the criticism levelled by annotator Schilder at Vz. ARRS, 1 June 1989, AB 1989, 499 (demonstration by the Centre Democrats) and A.E. Schilder, "'Dan demonstrenen ze maar niet.' Demonstratieverbod tegen extreem-rechts: de openbare orde als smoesje?" ("Then they just won't demonstrate." Demonstration ban against the extreme right: Public order as excuse?), *NJB* 1995, pp. 950-955.

²⁴ The situation of administrative force majeure has already been spelled out in the parliamentary discussion of the WOM, *Handelingen II* (Official Acts of the House of Representatives of the States General) 1987/88, vol. 41, p. 2236. This is repeated in a letter from the Minister of Foreign Affairs to the House of Representatives in June 1996 (*Kamerstukken II* 1995/96, 24 400 VII, no. 45).

²⁵ See Jaap van Donselaar, *Monitor racisme en extreem-rechts; eerste rapportage* (Monitoring racism and the extreme right: First report). Leiden: LISWO 1997. Also see A.J.T. Woltjer, "De demonstratie van extreem-rechts in Zwolle: een brug te ver?" (The demonstration of the extreme right in Zwolle: A bridge too far?), *Migrantenrecht* 1996, no. 4, pp. 75-83 and A.J. Nieuwenhuis "Vrijheid van betoging voor extreem-rechts?" (Freedom to demonstrate for the extreme right?), *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 1996, pp. 668-672.

²⁶ Earlier Monitor reports have already noted that in the period 1998-2001 only a handful of demonstrations were organised by right-wing extremists, mainly in the context of the Rudolf Hess commemoration. This small number was chiefly attributed to practical causes. With the collapse of the Centre Democrats and the ban on CP '86, there were no organisers to take the initiative and put a demonstration together.

besides a preventive prohibition to curb demonstrations as much as possible. In recent years, legal proceedings have been instituted on several occasions to challenge the lawfulness of those measures, especially by the NVU. And in many cases the NVU succeeded. The most important developments since 2000 will be discussed thematically below.

5.3.1 *Providing information when giving notification of a demonstration*

When the mayor is being notified of an impending demonstration, article 4, paragraph 3 of the WOM forbids him from demanding information about the contents of the ideas or sentiments that will be made public. The practice that was sketched out in 2001 in the magazine *Binnenlands Bestuur*²⁷ – holding extensive prior consultation on the contents of the slogans with the people who had announced the demonstration – is therefore not permitted and is against the law. This practice has also been altered. It is clear, however, that information about the aim or subject of the demonstration, and of course about the organising group and the expected number of demonstrators, can be relevant and necessary for determining the possibility of counter-reactions and thus for planning a police presence large enough to maintain public order. Requiring such information when notification of a demonstration is given is therefore logical and permissible. In contacts with the organisers of a demonstration, the police usually point out that legal action will be taken against any remarks or displays that are discriminatory, that stir up hatred or that are otherwise insulting, as soon as they take place. Although the organisers may very well wonder whether the police have a right to ask these questions in the light of art. 4 WOM, legally this is not a problem.²⁸ When the government makes such statements, it should be regarded as information on the enforcement of the criminal statutes that demonstrators may have to deal with.²⁹

5.3.2 *Further ramifications of the criterion of "administrative force majeure"*

On 24 March 2001, NVU supporters wanted to hold a march with German right-wing extremists in the neighbouring towns of Herzogenrath and Kerkrade on the German-Dutch border. The theme was "Against the criminalisation of Dutch and German nationalists" and was a reaction to the arrest of a few NVU followers during a folder distribution campaign in connection with the elections for the Dutch House of Representatives a month and a half earlier. Anti-fascists announced a counter-demonstration. The demonstrations were banned by the mayors on both sides of the border. For the first time since 1989, the group of right-wing extremists that were

²⁷ *Binnenlands Bestuur* 19 October 2001, pp. 31-35.

²⁸ No legal proceedings have yet been conducted on this question, but in conversations with officials from the civil service of the city of The Hague and with the Haaglanden police it was made clear to me that extreme right-wing groups in particular are quick to regard this kind of information as intimidating and in breach of the WOM.

²⁹ Also see National Ombudsman, report 2007-290: *Demonstreren staat vrij* (Demonstration is permitted), p. 19. There it is explained that the Haaglanden police use a standard formula for consultations with the organisers of demonstrations. This includes the statement "The banners will not involve the use of heavy sticks and the text on the banners will not be discriminatory, insulting or inflammatory." Although the Ombudsman recognises that such "agreements" have a great deal in common with the imposition of unilateral, restrictive conditions, he does not regard the practice of making such agreements as improper or unlawful.

organising the event, the "Comité Kusters/Malcoci," took the matter to court.³⁰ The mayor of Kerkrade had based the prohibition on the expectation that there would be massive participation in the demonstration 'which would far exceed the expected number mentioned in the notification' and would constitute a "large, uncontrollable, confrontational, concentrated mass of demonstrators." However, the president of the Maastricht court ruled that a prohibition is only applicable if, first of all, it is certain that the presence of the regular police force, augmented by the contingent that are available for "normal" high-risk events (such as certain professional football matches), cannot adequately guarantee public safety and maintain order. The president also said that competent authorities must make a plausible case that deploying extra police is not possible. The fact that the German co-organiser Christian Malcoci had been indirectly involved in irregularities during demonstrations in Germany was also no reason to fear disturbances of such proportions that a prohibition would be appropriate, according to the president. The president did recognise that the town could not be expected to mobilise an enormous police presence to safeguard the demonstration, but he found the argument that at least 2,000 police officers would be needed to keep the whole thing under control to be insufficiently substantiated.³¹

Less than a year later, the NVU announced plans to hold another demonstration, this time on 26 February 2002 in Rotterdam. At first the mayor issued a prohibition, arguing that because of the large numbers of counter-demonstrators that were expected, disorder could only be avoided with a disproportionately large police presence, i.e. a police presence comparable to that deployed during the EC football finals of 2000. This prohibition was also contested by the NVU, and the Rotterdam court ruled that the police presence that had been deemed necessary should not be regarded as disproportionately burdensome for the city because "exercising a basic right may require greater efforts on the part of the defendant than holding an event like a high-risk match of one of the local football clubs."³² The court also demanded that fear of disorderliness be substantiated by concrete facts, including facts gleaned from experience, in a report from the police force. This report should also present a well-founded explanation of why less severe measures would not be sufficient.

The line of the argument set out in these rulings was followed in several later legal judgements, including those made in response to decisions to ban NVU demonstrations in Harderwijk (on 18 May 2002)³³ and Apeldoorn (on 17 May 2003).³⁴ Guaranteeing the freedom to demonstrate can therefore require even more additional police enforcement than at a high-risk professional football match. And only if the fear of disorderliness is

³⁰ In 1989 it was the Centre Democrats who contested two demonstration bans, without success. See Vz. ARRS 21 March 1989, *AB* 1989, 498 and Vz. ARRS 1 June 1989, *AB* 1989, 499, with case note by Schilder.

³¹ Pres. Maastricht District Court 22 March 2001, *JB* 2001, 104, with case note by Schlössels.

³² Pres. Rotterdam District Court 24 January 2002, *KG* 2002, 42 and *NCJM-Bulletin* 2002, pp. 375-378, with case note by De Graaf. Also see A.J.T. Woltjer, "De vrijheid van meningsuiting gedemonstreerd" (Freedom of expression demonstrated), *Ars Aequi* 2002, p. 385 ff.

³³ Zutphen District Court 16 May 2002, *AB* 2002, 301.

³⁴ Zutphen District Court 13 May 2003, LJN AF8572 (LJN = National Case Law Number; the number under which judgments of Dutch courts are published on the website www.rechtspraak.nl).

based on concrete evidence and detailed risk analysis, and the police submit a report showing that there is no way that the necessary police presence can be provided on that particular day, can the mayor appeal to administrative force majeure and ban the demonstration.

This does not mean, however, that appealing to administrative force majeure is always doomed to failure in the courts. When the NVU announced a demonstration to be held in Doetinchem on 24 February 2007, and the "Comité Stop Extreem Rechts" organised a counter-demonstration, the latter was banned by the mayor. The judge upheld the prohibition because he thought the risk of large-scale disorder (partly in the light of earlier confrontations between both groups) was sufficiently substantiated, and he also deemed realistic the police's estimate that 200 police officers at the most would have to be available to keep everything under control.³⁵

5.3.3 *"Banishing" demonstrations to a remote part of the city*

The NVU demonstration held in Apeldoorn on 17 May 2003, mentioned above, was finally permitted after the initial prohibition was suspended by the court, but strict conditions were imposed regarding the duration and the location of the demonstration. The demonstration of about 80 NVU supporters lasted one hour and took place in a commercial district in Apeldoorn-Zuid that was cordoned off by three ranks of riot police and 400 police officers in order to maintain order. Afterwards, NVU leader Constant Kusters announced plans to negotiate a new demonstration at which the public *would be* present in order to hear the demonstrators' message.³⁶ This NVU demonstration, announced for 14 May 2005 in Arnhem, led to a first legal ruling concerning the "banishment" of NVU demonstrations to remote areas where the chance of disorderliness would be smaller but no public would be present to take notice of the event. Based on art. 5 of the WOM, the mayor had designated a dike along the outermost border of the city as a location for the demonstration, and 9 a.m. as the appointed time. Kusters appealed this decision in the Arnhem court, and the court ruled that designating this location and time was a disproportionate violation of the freedom to demonstrate, since hardly anyone would be present at such a location and time to take notice of what the demonstrators were saying.³⁷ The mayor's argument – that media attention for the demonstration could be expected at this location as well – did not change the court's mind.

This scenario was repeated in January 2007. The NVU gave notification of a demonstration to be held on 27 January with the theme "Close the borders to cheap East-European workers." This was to take place in the vicinity of the Apeldoorn railway station. The mayor decided to designate an alternate route for this demonstration far outside the centre of the city and to allow the demonstration to continue for only a short time (an hour and a half instead of four and a half hours). Although the route and time restriction did not go as far as the Arnhem decision, it was clear that here, too, the designated location would reduce the public's awareness of the demonstrators' point of view. In addition, because the location was difficult to reach by public transport, it would

³⁵ Zutphen District Court 23 February 2007, LJN AZ9730.

³⁶ *Apeldoornse Courant* 23 May 2003.

³⁷ Arnhem District Court 13 May 2005, LJN AT5504, AB 2005, 194.

also negatively influence the number of participants. The court found such a decision equivalent to a demonstration prohibition and, since there was insufficient reason to assume that another route (more through the centre of the city) would unavoidably lead to a situation of administrative force majeure, the court ruled that this restriction of the freedom to demonstration was unjustified.³⁸ The court also stated that carefully preparing for such a decision, and weighing the various interest, requires that a form of preliminary consultation take place with the organisers of the demonstration in order to better understand their interests in the desired location.

5.3.4 Arrest and prosecution of punishable remarks and displays at demonstrations

The most relevant provisions that place limits on what is said and displayed during a demonstration are art. 137c, 137d, 261 and 266 of the Criminal Code. Art. 261 and 266 penalise libel and deliberate defamation of individual persons. On the grounds of art. 137c, remarks made in public, orally, in writing or in images that are deliberately offensive to a group of people on account of their race, religion or other characteristics can be punished.³⁹ According to case law on this article, displaying a swastika in public with the intention of propagating National Socialist ideas is punishable.⁴⁰ Simply making the Nazi salute is not covered by this article, but making it in combination with words like "Sieg heil" is indeed punishable under this article.⁴¹

Article 137d prohibits publicly inciting hatred, violence or discrimination towards a population group on account of race, religion or other characteristics. On the basis of this article, the late Centre Democrat party leader Janmaat was convicted of shouting the words "We will abolish the multicultural society as soon as we have the chance and the power to do so" at a demonstration. This statement, in combination with the statements and displays made by others during the demonstration (such as "Full = full" and "Our own people first") were regarded as inciting to discrimination. Janmaat's conviction was upheld by the Supreme Court.⁴²

So far the increase in the number of demonstrations by right-wing extremist groups in recent years has not led to large numbers of arrests or prosecutions on the basis of the articles mentioned above. After the Rudolf Hess commemoration of 26 August 2000 in Echt, however, NVU demonstrators Kusters, Homan and Krommenhoek were convicted of inciting hatred. The occasion of the arrest was the distribution of pamphlets that included sentences such as "As any Dutch person can very well see, the composition of the Dutch population is becoming more coloured with every passing year. We are not allowed to say anything about that because that's discrimination according to the Dutch constitution" and "If the composition of the population goes on like this, the native Dutch people will disappear in no time at all." In the eyes of the district court and the court of appeals, distributing this pamphlets in the context of a demonstration at which signboards, banners and flags with neo-Nazi symbols and runic characters were carried, and at which slogans such as "Ausländer raus" were chanted, was evidence of

³⁸ Zutphen District Court 26 January 2007, LJN AZ7212. Also see J.P. Loof "De burgemeester en de demonstratievrijheid" (The mayor and the freedom to demonstrate).

³⁹ The text of these articles can be found in Appendix I of this report.

⁴⁰ Supreme Court 21 February 1995, *NJ* 1995, 452, with case note by Schalken.

⁴¹ Supreme Court 11 March 1986, *NJ* 1987, 462, with case note by Mulder.

⁴² Supreme Court 18 May 1999, *NJ* 1999, 634.

propagating Nazi ideology and therefore constituted punishable offences as referred to in art. 137c and 137d of the Criminal Code. Kusters was sentenced to six weeks' imprisonment⁴³ and the two others were given shorter prison sentences.

In 2007 Kusters was sentenced by the Arnhem police court to a community punishment order of fifty hours, a fine of €500 and a suspended sentence of one week. He was found guilty of libel on account of statements in his speech made at the NVU demonstration of 30 September 2006 in Arnhem. Here he had called the former chairman of the National Alliance, Jan Teijn, a "paedophile" and a "filthy pervert."⁴⁴ In September 2008 this charge was upheld by the Arnhem Court of Appeals.⁴⁵

Otherwise there has been no prosecution of crimes of expression committed during demonstrations. As already mentioned, before any demonstration is held, the organisers are usually told that legal action will be taken against any offensive or discriminatory statements or displays and against the carrying of Nazi symbols (swastika, Celtic cross, runic characters). In some cases this warning is even printed out and distributed to demonstration participants. Such was the case at the NVU demonstrations held on 11 November 2006 in Zoetermeer and on 24 February 2007 in Doetinchem.⁴⁶

Nevertheless, sometimes such symbols are displayed (as at the NVU demonstration in Rotterdam on 26 February 2002) without any legal action being taken – even though carrying them can be punishable in a particular context. At the NVU demonstration held in Oss on 7 April 2007 a few demonstrators were arrested. These included a German demonstrator who was wearing a swastika button. As far as we know, however, this demonstrator was not prosecuted for this action.

The practice of recent years has shown that at right-wing extremist demonstrations in the Netherlands, demonstrators from abroad (Belgium and especially Germany) usually march along as well. German demonstrators find it "attractive" that certain slogans and symbols that are prohibited in Germany do not by definition fall under the criminal statutes in The Netherlands.

One difficult problem is whether the slogans "Blut und Ehre" and "White Power," which are frequently seen on the black jackets of right-wing extremists, fall within the scope of the Dutch criminal statutes. At the NVU demonstration in Apeldoorn held on 27 January 2007, a few black American students who were unexpectedly confronted by the demonstration said they had been shocked by them.⁴⁷ An even greater legal problem is the use of otherwise neutral symbols such as the numbers 14, 18 and 88. These numbers are often used by neo-Nazis and refer to the position of letters in the alphabet. The number 18 stands for AH, the initials of Adolph Hitler. The number 88 stands for HH: Heil Hitler. The number 14 stands for a fourteen-word slogan: "We must secure the

⁴³ Den Bosch Court of Appeals 29 April 2003, LJN AF8340.

⁴⁴ "NVU-voorman hoort werkstraf eisen voor smaad" (NVU leader given community punishment order for libel), Elsevier no. 26 August 2008.

⁴⁵ Arnhem Court of Appeals 9 September 2008, LJN BF7596. The court set the fine at € 300 and sentenced Kusters to pay Teijn an additional € 300 in damages.

⁴⁶ "Horst Wessel-lied bij NVU-demonstratie" (Horst Wessel Song at NVU demonstration), *Dagblad Tubantia/Twentsche Courant* 23 March 2007.

⁴⁷ See "Demonstratie nvu verloopt rustig" (NVU demonstration proceeds calmly), *De Stentor* 27 January 2008. <<http://www.destentor.nl/apeldoorn/article1051850.ece>> (15 September 2008).

existence of our people and a future for white children." Up until now, displaying these numbers at a demonstration has never resulted in prosecution. At some demonstrations, however, banners and signs bearing these numbers have been seized by the police without being followed by legal proceedings.

There seems to be a certain reticence on the part of the police when it comes to making arrests for possible crimes of expression. This undoubtedly has to do with the fact that making such arrests during a demonstration could have a direct impact on maintaining law and order. At demonstrations, maintaining law and order is given the highest priority. Another cause may very well lie in the police's unfamiliarity with the meaning of certain slogans, symbols or numbers, although it must be said that police and the Public Prosecution Service do a great deal to keep abreast of such developments (partly by way of the National Expertise Centre for Discrimination). We do know that the police sometimes call upon demonstrators prior to the demonstration to tape over certain captions or symbols on their clothing or not to display them at all. As long as legislation or case law is not completely clear about whether these texts and symbols fall under Dutch criminal statutes, such practices by the police remain highly dubious.

5.3.5 Acts of violence at demonstrations

Since 2000 there has been a relatively small number of serious disturbances and acts of violence between different groups of demonstrators at right-wing extremist demonstrations. In most cases the police are very good at keeping everything under control. The most serious disturbances took place at the NVU demonstration held on 5 June 2004 in The Hague, when more than 500 AFA counter-demonstrators tried to break through a police cordon in order to spark a confrontation with the 50 demonstrating NVU supporters. As a result more than 300 anti-fascists were arrested and six people were wounded, including two police officers.⁴⁸ In the end, only eleven persons out of all those arrested were prosecuted for acts of violence in a public place.⁴⁹

5.3.6 Application of the proof of identity requirement

At the NVU demonstration of 15 May 2005 in Arnhem, about 300 AFA supporters held a counter-demonstration without notifying the mayor in advance; 32 anti-fascists were arrested, mainly because they were unable to show proof of identity when checked by the police.⁵⁰ On 30 September 2006 an NVU demonstration took place in Arnhem once more with another unannounced AFA counter-demonstration (this time involving only 50 participants). Strict identity checks were carried out again. Forty-seven persons were arrested for inability to show proof of identity.⁵¹

At a demonstration held by the Nationalistic People's Movement (Nationalistische Volks Beweging) on 11 November 2006 in Middelburg (against the establishment of a mosque), all the demonstrators were subjected to an identity check when they arrived at

⁴⁸ See, among others, L. Roggeveen, "Driehonderd arrestaties na links tegenprotest" (Three hundred arrests after left-wing counter-protest), *Haagsche Courant* 7 June 2004.

⁴⁹ L. Roggeveen, "Van 330 arrestanten elf vervolgd" (Eleven out of 330 detainees prosecuted), *Haagsche Courant* 12 February 2005.

⁵⁰ "Krikke naar rechter om nvu-demonstratie" (Krikke taken to court over NVU demonstration), *De Gelderlander* 17 May 2005.

⁵¹ "Aanhoudingen bij demonstratie Arnhem" (Arrests at Arnhem demonstration), *Reformatisch Dagblad* 2 October 2006.

the railway station; seven were arrested because they could not show proof of identity. As these examples show, the proof of identity requirement seems to have developed into an important additional instrument for maintaining law and order at demonstrations. Persons who are unable to show proof of identity can be detained for a maximum of six hours and subjected to measures to trace their identity.

A report from the National Ombudsman presented in 2007 revealed that subjecting groups of demonstrators to an identity check is a common procedure, at least among the Haaglanden police, and not only in connection with demonstrations by the extreme right.⁵² The use of the power to subject people to an identity check is a typical example of stretching a legal power to the edge of – or just over – its limit. When the Compulsory Identification Act (*Wet op de uitgebreide identificatieplicht*; WUID) went into effect in 2005, art. 8a of the Police Act was inserted. This stipulates that a police officer may demand to inspect a person for proof of identity insofar as it is reasonably necessary for the exercise of police duties. Failure to comply with the demand is a punishable offence (art. 447e of the Criminal Code).

The duties of the police entail maintaining law and order (art. 2 of the Police Act), which involves enforcing the law and at the same time preserving public order. This means that if demonstrators commit punishable offences (such as making excessive noise, committing crimes of expression or demonstrating without prior notification), the police are authorised in principle, on the grounds of article 8a of the Police Act, to demand proof of identity. In his report, the Ombudsman pointed out that this power can have an intimidating effect and may sometimes escalate. After all, refusing to identify oneself is also a punishable offence for which the police could draw up an official report, and they could make an arrest on that basis. That in fact would bring the demonstration to an end. The Ombudsman recommends that if the police are not planning to draw up an official report for a punishable offence, this demand for identification should be dropped. Although case law shows that an individual police officer has a certain latitude when assessing whether he or she has the authority to demand proof of identity in a specific case,⁵³ especially when it comes to maintaining law and order, subjecting demonstrators to an identity check as a "standard" procedure is going too far, certainly if there is no indication of a public disturbance. As a tool, the identity check is used to an excessive degree to obstruct the right to demonstrate rather than to maintain law and order. This is in violation of the prohibition on *détournement de pouvoir* (art. 3:3 General Administrative Law Act: Misuse of power). No judicial decisions have been made on this matter, however.⁵⁴

5.4 Demonstrations by right-wing extremist groups in Germany

Following the fairly detailed description of actual and legal developments having to do with demonstrations by right-wing extremist groups in the Netherlands since 2000, the

⁵² National Ombudsman, rapport 2007-290: *Demonstreren staat vrij*, pp. 29-31.

⁵³ The Hague Court of Appeals 4 July 2006, LJN AY0109.

⁵⁴ When the WUID was being formulated, the Minister of Justice said that the proof of identity requirement, when applied as part of the police task to maintain law and order, is intended for situations "in which the public order is disturbed or is in danger of being disturbed" (*Kamerstukken I 2003/04*, 29 218, C, p. 9).

next section is a brief discussion of a few developments in Germany. Special attention will be paid to some of the striking differences between the two countries.

5.4.1 *The legal framework*

Article 8 of the German constitution (*Grundgesetz* – GG) of 1949 guarantees the freedom to assemble and to demonstrate.

The article reads as follows:

- (1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.
- (2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

The first paragraph of this article grants the freedom of demonstration to "all Germans" alone; foreigners living in Germany cannot derive any rights from this article of the constitution. Since Germany has also ratified art. 11 of the ECHR, which makes no distinction between nationals and foreigners in the protection of the freedom to demonstrate, the European protection of the freedom to demonstrate also applies to foreigners in Germany. The first paragraph also clearly states that the protection only applies to peaceful and unarmed demonstrators. The German constitution does not provide protection to hostile, rebellious and armed gatherings. The second paragraph of art. 8 GG states that demonstrations in public areas can be subjected to restrictions under or pursuant to the law. The law that covers this is the *Versammlungsgesetz* of 1953.

A second relevant article from the constitution is art. 18 GG, in which the post-war idea of a strong and resilient democracy is expressed.

" Whoever abuses the freedom of expression, in particular [...] the freedom of assembly (Article 8) [...] in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court."

Art. 2 of the *Assemblies Act (Versammlungsgesetz)* elaborates the concept of abuse of rights as it applies to the freedom to demonstrate. Anyone who has been deprived of his claim to basic rights by the Federal Constitutional Court (*Bundesverfassungsgericht*) loses his freedom to demonstrate. This also applies to political parties that can be banned under art. 21 § 2 GG on account of unconstitutional activities, and to organisations that can similarly be banned under art. 9 § 2 GG. Anyone planning to propagate the objectives of a banned party at a demonstration cannot claim protection under the freedom to demonstrate either. Art. 3 of the *Versammlungsgesetz* prohibits the wearing of uniforms (or parts of uniforms) at demonstrations, or of similar clothing that indicates a common political persuasion. The prohibition applies not only to real uniforms but also to the wearing of army boots, bomber jackets or clothing with the same sort of appearance. Art. 14 stipulates that the competent authorities must be notified of a

demonstration at least 48 hours in advance.⁵⁵ When a demonstration is announced, the leader or organiser of the demonstration must be made known. Art. 15 paragraph 1 indicates that a demonstration can be placed under a preventive prohibition or can be disbanded if there is an immediate threat to public safety or public order. Art. 17 contains a ban on carrying weapons in a demonstration and a prohibition on wearing any mask, hood or device whereby a person's face is disguised.⁵⁶

As for regulating the behaviour at demonstrations, it is also important to note that German criminal statutes penalise a number of specific expressions and explicitly forbid displaying various symbols and gestures in public. Article 130 of the Criminal Code (*Strafgesetzbuch*; STGB) makes punishable inciting hatred and violence against specific population groups (*Volksverhetzung*). This also includes singing certain songs that propagate hatred towards foreigners or Jews, or songs that glorify Hitler and the deeds of National Socialism. The slogan "Ausländer raus" is also punishable on the basis of this article. Impugning the honourable memory of people who have died, provided that it happens in a very offensive way, is punishable under art. 189 STGB (*Verunglimpfung des Andenkens Verstorbener*).⁵⁷ Denial of the Holocaust can also be punished under this article.

Articles 86 and 86a STGB prohibit the public display or distribution of certain symbols that can be seen as the propaganda of unconstitutional organisations. This includes the swastika, a number of runic characters and certain flags, uniforms and articles of clothing. Some symbols are not punishable in and of themselves but become punishable when displayed within the context of, say, a prohibited organisation. This might include the numbers 14, 18 and 88. The making of certain gestures and the uttering of certain songs and slogans also constitute punishable offences on the grounds of art. 86 and 86A STGB. This applies to the Nazi salute, the Widerstand salute (like the Nazi salute but with thumb, index and middle fingers spread out) and greetings like "Sieg Heil" and "Heil Hitler." National-socialist songs like the "Horst Wessel Song" and "Deutschland erwache," or original National Socialist songs with altered lyrics, are also punishable. Also included in this article are slogans such as "Unsere Ehre heißt Treue," "Blut und Ehre" and "Ein Volk, ein Reich, ein Führer."

5.4.2 Demonstrations in Germany and the legal response

In Germany in the 1970s and 1980s it was mainly demonstrations held by students, peace groups and environmental groups that tested the limits of the right to demonstrate. Since the mid-1990s, demonstrations by right-wing extremists have been

⁵⁵ On the basis of case law, the German Federal Constitutional Court can make an exception for "*Spontanversammlungen*." There are demonstrations that form spontaneously in response to a particular event, without anything having been organised. See Bundesverfassungsgericht (BVerfG) 14 May 1985, *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 69, 315 (Brokdorf).

⁵⁶ It is forbidden to wear clothing or face paint that is makes it difficult to establish a person's identity –or, in the given circumstances, that is intended to make such identification difficult.

⁵⁷ R. Zippelius & T. Würtenberger, *Deutsches Staatsrecht*. Munich: Beck 2005 (31st printing), pp. 312-313.

chiefly responsible for raising legal questions with regard to making adjustments in the guarantee of the freedom to demonstrate.⁵⁸

In the first half of the 1990s, the German approach very closely resembled that taken in the Netherlands: with an appeal to the danger of disorderliness almost every demonstration by right-wing extremist groups was put under a preventive prohibition.⁵⁹ Until the mid-1990s, not a single demonstration was permitted.⁶⁰ In the years that followed, however, the number of demonstrations with an extreme right-wing stamp rose sharply. In 2001 there were more than 100, and in 2005 there were 145.⁶¹ The average number of participants in these demonstrations also skyrocketed, with up to a few thousand per demonstration. The sixty-year commemoration of the bombing of Dresden brought out an exceptionally high number: 6,000 people joined in an extreme right-wing demonstration at that time.⁶² During the first years of the twenty-first century, the "memorial services" held on the day the "martyr" Rudolf Hess died developed into international gatherings attended by 1,000 to 1,200 neo-Nazis from all over Europe.⁶³

The increase in the number of demonstrations by right-wing extremists in Germany since the mid-1990s coincides with a development in case law that can be compared with the same development in the Netherlands: a tendency of the courts to be less willing to accept preventive prohibitions on demonstrations. In the period 2001-2004 in particular there was a heated case law conflict between various lower administrative courts and the *Bundesverfassungsgericht* concerning the latitude that should be allowed for right-wing extremist demonstrations. According to the rulings made by several municipal administrations and administrative courts, demonstrative statements and displays with a Nazi content do not qualify for constitutional protection, ensuing from the resilient character of the post-war German constitution.⁶⁴ So these authorities regarded a prohibition on such demonstrations as acceptable by definition due to the threat to the public order in the sense of art. 15 paragraph 1 of the *Versammlungsgesetz*. The *Bundesverfassungsgericht*, however, consistently held that the constitutional protection of the freedom to demonstrate is politically neutral, and that the resilient character of the constitutional regulation is mainly expressed in making punishable Nazi utterances and symbols, but beyond this does not impose any extra limitations on the exercise of the

⁵⁸ O. Dörr, "Keine Versammlungsfreiheit für Neonazi's? Extremistische Demonstrationen als Herausforderung für das geltende Versammlungsrecht," *Verwaltungsarchiv* 2002, p. 485.

⁵⁹ See J. van Donselaar, *De staat paraat? De bestrijding van extreem-rechts in West Europa* (Is the state prepared? Combating the extreme right in Western Europe). Amsterdam: Babylon-De Geus 1995, p. 96.

⁶⁰ *Ibid.*, p. 98.

⁶¹ Bundesministerium des Innern, *Verfassungsschutzbericht 2007*. Berlin 2008, p. 50.

⁶² B. von Brause, "Der Kampf um die Straße. Extrem rechte Demonstrationenpolitik," *Lotta. Antifaschistische Zeitung aus Nord-Rhein-Westfalen* 2006-24, pp. 10-14.

⁶³ S. Kusicke, "Im Namen der Versammlungsfreiheit," *Frankfurter Allgemeine Zeitung* 21 August 2004, no. 194.

⁶⁴ For discussions of this constitutional quarrel, see: S. Beljin, "Neonazistische Demonstrationen in der aktuellen Rechtsprechung," *Deutsches Verwaltungsblatt* 2002, pp. 15-22; O. Dörr, "Keine Versammlungsfreiheit für Neonazi's? Extremistische Demonstrationen als Herausforderung für das geltende Versammlungsrecht," pp. 486 and 488-489, as well as W. Hoffmann-Riem, "Demonstrationsfreiheit auch für Rechtsextremisten?" *Neue Juristische Wochenschrift* 2004, pp. 2777-2782.

freedom to demonstrate for such groups.⁶⁵ Many demonstration prohibitions foundered on the *Bundesverfassungsgericht* because the authorities were not able to weigh the various interests in a verifiable ways and because of delays brought on by the authorities in coming to decisions about demonstrations. The *Bundesverfassungsgericht* indicated that in order to enable the exercising of the freedom of demonstration, the government is obliged to consult with the organisers so the planned demonstration can be steered in the right direction.

A few other important "rules" from the *Bundesverfassungsgericht* case law having to do with right-wing extremist demonstrations are:

- coming to a decision about a possible demonstration prohibition may not be postponed so long that it becomes impossible to invoke legal protection against it before the demonstration is to take place;
- the permitted duration of a demonstration may not be so severely restricted that the goal of the demonstration can no longer be reached, and the checking of demonstrators' identity cards may not take so long that there is little time left over to demonstrate;
- the route of a demonstration may not be set in such a way that the demonstration no longer has a chance of being observed by a large public;
- preventive demonstration prohibitions cannot simply be based on the character of the organising group and the expected content of the messages being communicated, but only on the threat to public safety caused by specific acts that are attributed to the participants in this demonstration (just referring to events at another random demonstration by right-wing extremists is insufficient; the fact that certain speakers at the demonstration were previously convicted of crimes of expression or other punishable offences is also insufficient);⁶⁶
- imposing restrictive measures on a particular demonstration is only permitted if those measures are aimed at discouraging specific demonstrable danger to public safety or the public order;
- the adequate measures aimed at protecting public safety or the public order must be taken by the authorities; this responsibility may not be shifted to the organisers of the demonstration by obliging them to guarantee that none of the demonstration participants will commit acts of violence;
- the danger of violence by counter-demonstrators can justify a prohibition on that counter-demonstration, but not a prohibition on the original demonstration, unless there is evidence of a so-called "*polizeilichen Notstand*;"

⁶⁵ See, among others, BVERFG 26 January 2001, 1 BvQ 9/01; BVERFG 18 August 2000, 1 BvQ 23/00; BVERFG 5 September 2003, 1 BvQ 32/03. All relevant rulings are discussed and analysed in detail in the articles mentioned in the previous footnote.

⁶⁶ As early as BVerfG 14 May 1985, BverfG 69, 315 (Brokdorf), the Court ruled that merely stating that the public order is in danger of being disturbed is insufficient grounds for a preventive demonstration ban. Also see U. Battis & K.J. Grigoleit, "Rechtsextremistische Demonstrationen und öffentliche Ordnung – Roma Locuta?," *Neue Juristische Wochenschrift* 2004, pp. 3459-3460.

- prohibitions or conditions having to do with the content of the messages being made public at a demonstration may go no further than the messages prohibited by criminal law.⁶⁷

These rules from *Bundesverfassungsgericht* case law do not mean that banning a demonstration by right-wing extremists is no longer feasible. They mean that such a prohibition cannot be based on the National Socialistic content of the demonstration alone. An immediate danger to the public order can arise if those contents are combined with "other special circumstances, such as provocative or aggressive elements, ensuing from the behaviour of the demonstrators, which directly influence coexistence with the public." With this wording, the *Bundesverfassungsgericht* hopes to put a stop to marches with a paramilitary or otherwise intimidating character and those processions that suggest that participants are prepared to use violence.⁶⁸

The most important organiser of right-wing extremist demonstrations in Germany is the Nationaldemokratische Partei Deutschlands (NPD). This party uses the demonstrations mainly "to reach the man in the street," to project an image and to protest against government policy, particularly the reform of the social system in Germany. In addition to its own following, the NDP can almost always count on an appearance from the so-called Freie Kameradschaften at its demonstrations. These are autonomous neo-Nazi groups that are not organised according to a system of laws, like a party or an association, and therefore are difficult to prohibit. The number of Freie Kameradschaften has risen in recent years to about 160 in 2007.⁶⁹ By organising large numbers of demonstrations each year, both groups (NPD and the Freie Kameradschaften) hope to give the impression that they are ready for action and thereby to appeal mostly to young people.⁷⁰ When choosing a time to demonstrate, the element of provocation also plays a part for the NPD. The Labour Day – 1 May – for example, is a day on which they particularly like to demonstrate. Since many organisations on the left of the political spectrum regard this as "their" day, "hijacking" this day always results in massive counter-demonstrations. Other favourite days for NPD demonstrations in recent years are those with special historical significance, such as the day of the capitulation of the Nazi regime, the annual Holocaust memorial on 27 January and the day Hitler came to power in 1933. As for locations, the preference is often for a 'sensitive' option such as the Brandenburger Tor, the place where the Holocaust monument is being planned in Berlin and the grave of Rudolf Hess in Wunsiedel. This choice of provocative dates and locations seems mainly to be aimed at provoking counter-demonstrations, the idea being that a disturbance will ensue and result in more media attention for the right-wing extremist message.⁷¹

⁶⁷ The summary of these rules is largely taken from W. Hoffmann-Riem, "Demonstrationsfreiheit auch für Rechtsextremisten?" *Neue Juristische Wochenschrift* 2004, pp. 2777-2782.

⁶⁸ S. Beljin, "Neonazistische Demonstrationen in der aktuellen Rechtsprechung," *Deutsches Verwaltungsblatt* 2002, p. 19.

⁶⁹ Bundesministerium des Innern, *Verfassungsschutzbericht 2007*. Berlin 2008, p. 52.

⁷⁰ *Ibid.*

⁷¹ In some cases, local administrators have called for massive counter-demonstrations to give them an excuse to prohibit the demonstration by right-wing extremists. Sometimes a city council will quickly organise a commemoration to take place exactly where and when the NPD was planning to demonstrate,

In response to a demonstration of approximately 600 NPD supporters on 29 January 2000 at the Brandenburger Tor in Berlin, protesting the construction of the new Holocaust monument, the German Minister of Justice began work on a bill to enable the prohibition of extreme right-wing demonstrations at sensitive locations. The minister was especially concerned about problems arising once the Holocaust monument would be finished.

The minister's initiative resulted in a new art. 15 paragraph 2 of the *Versammlungsgesetz*.

Eine Versammlung oder ein Aufzug kann insbesondere verboten oder von bestimmten Auflagen abhängig gemacht werden, wenn 1. Die Versammlung oder der Aufzug an einem Ort stattfindet, der als Gedenkstätte von historisch herausragender, überregionaler Bedeutung an die Opfer der menschenwürdigen Behandlung unter der nationalsozialistischen Gewalt- und Willkürherrschaft erinnert, und 2. Nach den zur Zeit des Erlasses der Verfügung konkret feststellbaren Umständen zu besorgen ist, dass durch die Versammlung oder den Aufzug die Würde der Opfer beeinträchtigt wird. Das Denkmal für die ermordeten Juden Europas in Berlin ist ein Ort nach Satz 1 nr. 1. Seine Abgrenzung ergibt sich aus der Anlage zu diesem Gesetz. Andere Orte nach Satz 1 Nr. 1 und deren Abgrenzung werden durch Landesgesetz bestimmt.

After a fairly turbulent social and parliamentary debate, the new Act came into effect on 1 April 2005. This made it possible for the area around the Holocaust monument, and other locations designated "sensitive" by law by the German states, to issue a preventive demonstration prohibition once again because of the extremism of the organising groups and the expected content of the messages being voiced and displayed at the demonstration, provided that that content is detrimental to the dignity of the victims of the Nazi regime.⁷² Now a few states have passed legislation in which other locations are designated 'no go areas' for demonstrations that are expected to be detrimental to the dignity of the victims. The state of Brandenburg, for instance, has ruled that demonstrations may not take place in the area around cemeteries, especially Waldfriedhof Halbe, the largest Germany military cemetery, without prior permission. This permission will not be given if the demonstration is of a National Socialist character.

The *Verfassungsschutzbericht* (Annual Report of the Office for the Protection of the Constitution) for 2006 and 2007, published by the German Ministry of the Interior, clearly states that as a result of amendments to the *Versammlungsgesetz* the number of right-wing terrorist demonstrations has already begun to decline. In the last two years it has fluctuated around 80. At certain locations it is easier now to impose a preventive prohibition. But the number of demonstration notifications is dropping as well, now that

so that the demonstration can be banned because it conflicts with another activity. See W. Hoffmann-Riem, "Demonstrationsfreiheit auch für Rechtsextremisten?," *Neue Juristische Wochenschrift* 2004, pp. 2779-2780.

⁷² A new provision in the STGB (article 130 paragraph 4) was also introduced at the same time. This stated that the glorification or justification of the National Socialist regime, done in a way to violate the memory of the victims, is now a punishable offence.

demonstration locations that are interesting from a provocative point of view have become off-limits.

5.5 Conclusion

After an administrative reversal began in the mid-1990s with regard to allowing demonstrations by right-wing extremists in the Netherlands – a reversal that was probably inspired by the reasoning undergirding the WOM, passed in the late 1980, and by legal criticism of earlier case law on demonstration prohibitions – the legal developments that took place after 2000 were mainly the result of legal rulings (usually by administrative judges in summary proceedings). There the requirements placed on decisions to prohibit or restrict a particular demonstration are made more explicit in terms of careful preparations for and substantiation of such decisions and in terms of the proof that the mayor must put forward in order to demonstrate that this is a situation of administrative force majeure that can justify a demonstration prohibition. Permitting an extremist demonstration can require a police presence comparable to that needed for a high-risk professional football match; banishing such a demonstration to a remote corner of the city is out of the question, as is the preventive checking of messages that might be communicated at the demonstration.

Since 2000 there has been an increase in the annual number of demonstrations by the extreme right. These have mainly been demonstrations by the NVU, often attended by participants from Germany and Belgium. At the same time, experience with demonstrations has shown that the police and the mayor are sometimes quite intrusive when providing "information" about action that will be taken against messages and displays that are deemed discriminatory or in any other way punishable. If, as a result, texts or symbols of questionable punishability are seized or required to be taped over, the authorities will find themselves on exceedingly thin ice with regard to the constitutional freedom of expression and freedom to demonstrate. The same goes for imposing compulsory identification on groups of demonstrators without any evidence or clear threat of punishable offences or disturbances.

Compared with the Netherlands, Germany has a more elaborate centralised arrangement with regard to the freedom to demonstrate – the *Versammlungsgesetz* – while the German penal code forbids carrying various National Socialist texts and symbols. In Germany (since the mid-1990s) there has also been an increase in the number of demonstrations by the extreme right, especially the NPD. In the period 2000-2004 a fierce case law debate raged between lower administrative courts and the *Bundesverfassungsgericht* concerning the constitutional space provided for right-wing extremist demonstrations in the "resilient" German constitutional structure. The *Bundesverfassungsgericht* has marked out clear lines in that debate that have a great deal in common with Dutch case law in terms of making it less easy to accept preventive demonstration prohibitions and in terms of preparing for and substantiating other decisions having to do with right-wing extremist demonstrations.

One important practical difference between the Netherlands and Germany has to do with the number of demonstrations by extremist groups and the number of persons attending these demonstrations. In the light of these numbers, and in the light of the special history of the country, it is not very surprising that legislative change is the instrument that has

been seized to introduce the possibility of a preventive prohibition based on the expected content of the messages to be aired during the demonstration, at least certain for very special sites in the country. In 2005 a provision was added to the *Versammlungsgesetz* that makes it possible to issue a preventive prohibition on demonstrations if they take place at locations that are of important historical significance in the light of inhumane treatment during the Nazi regime, and if they impugn the dignity of Nazi victims.

The Dutch WOM explicitly rules out a preventive check of the contents of the messages, but the ECHR does offer some room (under the ECHR, a restriction of the freedom to demonstrate to protect the rights of others can also take the form of a preventive check).⁷³ So I think that the new German legislation, although quite controversial in Germany, does not immediately have anything to fear from an ECHR perspective.

Extreme right-wing demonstrations in both countries often lead to great disorderliness, mainly as a result of violent counter-demonstrations. In 2004 the German professor and *Bundesverfassungsgericht* judge Hoffmann-Riem remarked in an article that of course citizens are free to express their displeasure with and aversion to right-wing extremist views, but when counter-actions get out of hand it only serves as grist for the NPD mill because it generates extra media attention. He pointed to another way to respond to right-wing extremist demonstrations. In 2001 a demonstration of right-wing extremists was treated to a shower of confetti and a chorus of laughing machines (from the toy shop), all under the motto "Leipzig lacht über den Karneval in Braun" (Leipzig laughs at the brown carnival).⁷⁴ This kind of reaction arouses media attention, too, but in my opinion it's at least a clearer and less controversial image of public aversion than violent actions.

⁷³ See the aforementioned A.E. Schilder, "Dan demonstreren ze maar niet" ('Then they just won't demonstrate').

⁷⁴ W. Hoffmann-Riem, "Demonstrationsfreiheit auch für Rechtsextremisten?," p. 2780.