

The International Media Law, Policy & Practice Conference 2017

Report by Eugénie Coche

Introduction

Students are not often given the chance to run a conference in which they present a topic on which they have done academic research. However, at the end of the elective course [International Media Law, Policy & Practice](#), which is taught and coordinated by Dr. Tarlach McGonagle, such a conference was held. This course is offered by the Institute for Information Law (IViR), at the University of Amsterdam, for students enrolled in the *Informatierecht* LL.M. programme.

In order to give a clear overview of some of the issues faced by media law in today's society, three panels were organised. Each of them was chaired by a student and involved invited expert speakers. The first panel focused on chilling effect and public debate; the second discussed the rise of fake news and the third concerned threats to media freedom and pluralism. A moot court was also organized, in which four students participated. Its central focus was hate speech and incitement to hatred in the context of social media (Twitter) and in times of heightened threats of terrorism. The judges named Jacob van de Velde as best speaker.

At the conference itself, I made concluding remarks about every panel and gave an overview of the main discussion points that had been raised throughout the sessions. The present report will focus mainly on the panels' presentations and give a short conclusion of the conference as a whole.

Panel I - Chilling effect and public debate

Chair: Aviva de Groot (IMLPP) Speakers: Gill Phillips (Director of Editorial Legal Services, Guardian News & Media) (via Skype), Bojana Kostic (IMLPP), Roel Maalderink (Winner, <i>Internetscriptieprijs 2016</i> & alumnus IMLPP) Commentator: Ronan Ó Fathaigh (IViR)

Nowadays, given that most traditional newspapers also have an online presence; readers can participate in public debate by means of comments. However, as was very well explained by Aviva de Groot in her introduction, such public debate is now at risk for different reasons. One of the reasons is that comments are being moderated by private parties who are economically driven and threatened with liability for illegal comments posted by users on their platforms. The next sections will elaborate on this as well as on other sources of chilling effects on public debate.

Firstly, news media websites tend to restrict their comments sections, to close them down or to redirect comments to social media, primarily because of the latter's better architecture and policies for comments and because of the financial burden for moderation on news media sites.¹ Such action can have as a consequence that the quality and fairness of the debate is diminished. Gill Phillips addressed this problem by first recognizing that, besides the added value of comments, there is also a downside to them: there is hardly any control over them, the loudest commenter often wins and comments can amplify and magnify fake news.

While it might therefore seem desirable to restrict comments, Phillips stressed the importance of distinguishing between facts and someone's opinion as the latter is a value judgment, which is not susceptible of proof.² According to her, reliable and accurate comments are a matter for education and self-regulation and not one for legislation or criminalization.³ In her opinion, one of the possible methods for restricting comments, without therefore amounting to censorship, would be to adopt a *post-moderating* model. Such a model has been adopted by the *Guardian News* and includes both spam filters and human moderators to restrict illegal comments. Importantly, news media should be as transparent as possible in their filtering process and always offer commenters the possibility to challenge decisions.

The importance of transparency was also emphasized by Bojana Kostic who discussed the impact that automated processes, governed by algorithms, has on public debate. Algorithms automatically assess comments based on previous ratings contained in the system's database. Besides pointing out the lack of a precise definition of 'unacceptable comments', she also stressed the need to take into account the due process principle. Accordingly, users should be informed about both the algorithmic modelling and the decision-making process in order to be able to question the accuracy of decisions. Moreover, automated processes should still have some human intervention and there should always be an effective and accessible redress mechanism. The issue of moderation algorithms is far from being settled as there are still a lot of unanswered questions surrounding the subject and practice.

Besides the moderation of comments by news media websites and the use of algorithms for doing so, another chilling effect on the public debate is the fact that news media websites are now threatened with liability for comments presented on their pages. In light of this, Ronan Ó Fathaigh analysed the approach of the European Court of Human Rights in cases concerned with liability for comments, ranging from *Delfi v. Estonia*⁴ and *MTE & Index v Hungary*,⁵ to *Pihl v. Sweden*.⁶ He concluded that the Court has moved away from an evidence-based approach to a future-risk approach. Accordingly, the Court has shifted from a high liability

¹ C. Goujard, 'Why News Websites are closing their Comments Section', 8 September 2016, <<https://medium.com/global-editors-network/why-news-websites-are-closing-their-comments-sections-ea31139c469d>>, accessed on 18/07/2017.

² *Lingens v. Austria* App No 9815/82 (ECtHR, 8 July 1986), para. 46.

³ This reasoning can be seen in light of the Court's 'reasoning in *Fressoz & Roire v. France* App No. 29183/95 (ECtHR 21 January 1999), para. 54, in which journalists are required to act in accordance with the ethics of journalism and thus to provide 'reliable and precise information'.

⁴ *Delfi AS v. Estonia* App No 64569/09 (ECtHR, 16 June 2015).

⁵ *MTE & Index v. Hungary* App No 22947/13 (ECtHR, 2 February 2016).

⁶ *Rolf Anders Daniel Pihl v. Sweden* App No 74742/14 (ECtHR, 9 March 2017).

threshold, established in *Delfi*,⁷ where the speech had to be *clearly* unlawful, to a lower threshold where offensive speech which ‘may have negative consequences for the comment environment’ can now also lead to liability.⁸ Unlike in *MTE & Index v Hungary*,⁹ there exists no requirement any more that the negative consequences shall be *foreseeable*.

Finally, Roel Maalderink informed us about the growing phenomenon of *online shaming*. This arises when a person, after having made an online statement which has gone viral, is subject to severe criticism and/or ridicule online. According to him, in order to counter the issue, it should be more clearly defined when speech contributes to the public debate or is merely meant to satisfy people’s curiosity. One of the recommendations he made is that there should be more awareness of the issue. His LL.M. [thesis](#),¹⁰ which won the [Internetscriptieprijs 2016](#), certainly contributes to this need for more awareness.

Panel II - Fake news: problem or hype?

Chair: Barbara van den Berg (IMLPP)
Speakers: Melanie Klus (IMLPP), Sanne Kruikemeier (Amsterdam School of Communication Research, University of Amsterdam), Thomas Bruning (*Nederlandse Vereniging van Journalisten*)

When discussing fake news, most of us tend to think that this is a very recent issue as it has triggered a lot of attention since the last US presidential elections. However, Thomas Bruning pointed out that fake news is, in fact, very old but that its importance has grown. This is because of different factors such as the fact that news is now global, that there are new media actors through the use of social media and that some commercial interests now prevail above informative ones. The commercial interests can, for example, be derived from the business model of social media. According to him, the problem of fake news is amplified by the fact that culture plays a role in whether or not something amounts to fake news, which is problematic having regard to the global nature of news. Indeed, a parody or exaggeration could, depending on the public’s cultural background, be either perceived as a joke or as fake news.

When countering fake news, Sanne Kruikemeier and Melanie Klus stressed the importance of distinguishing between the different types of speech as the granted protection varies accordingly. The right to freedom of expression, guaranteed under Article 10 of the European Convention on Human Rights, protects satire¹¹ but excludes hate speech from its scope.¹² According to Sanne Kruikemeier, the consequences of fake news are threefold: it leads to misinformation, to mistrust and it can harm people exposed to it. In order to counter fake news, she stressed that awareness has to be raised about algorithms and their working process,

⁷ *Delfi AS v. Estonia* App No 64569/09 (ECtHR, 16 June 2015), para. 115.

⁸ *Rolf Anders Daniel Pihl v. Sweden* App No 74742/14 (ECtHR, 9 March 2017), para. 35.

⁹ *MTE & Index v. Hungary* App No 22947/13 (ECtHR, 2 February 2016), para. 86.

¹⁰ R.B. Maalderink, ‘De Digitale Schandpaal en Wat we er tegen kunnen doen’, January 2016.

¹¹ *Vereinigung Bildender Künstler v. Austria* App No 68354/01 (ECtHR, 25 January 2007), para. 33.

¹² *M’Bala M’Bala v. France* App No 25239/13 (ECtHR, 20 November 2015).

that information should be double-checked and that social media should take action as they have some responsibilities.

Melanie Klus also analysed whether the State's positive obligations could be used to counter fake news on social media platforms such as Facebook. She stated that this would depend on different factors such as the nature of the speech, the sources of fake news and the medium through which it is spread. When taking into account the important role played by Internet intermediaries, their great level of dominance, their control over the available information and the fact that such platforms are accessible to anyone, she concluded that the State's positive obligations could, in certain circumstances, ultimately extend to the activities of internet intermediaries.

Importantly, all the speakers raised their concern about the fact that there still exists no clear definition of what fake news is, which makes it very difficult to counter. Consequently, big commercial companies, such as Facebook or Google, who are not subject to traditional media legislation, have to interpret 'fake news' and take measures against it based on their terms of service. Besides endangering the users' right to freedom of expression, such practice also threatens the concept of pluralism. Indeed, those companies, who are in a position of dominance, get to decide for the public which sources of news they should look at. However, the importance of news on social media should not be overlooked as it gives people an alternative channel for receiving news and participating in the public debate.

Panel III – Threats to media freedom and pluralism

Chair: Geert Lokhorst (research master student, Information Law)
Speakers: Leon Trapman (IMLPP), Otto Volgenant (Boekx Advocaten), Albana Shala (Chair, UNESCO International Programme for the Development of Communication Council & Free Press Unlimited Programme Coordinator)

When discussing media freedom, Geert Lokhorst stressed the importance of the State's positive obligations in ensuring an effective system of protection for journalists and in creating a favourable environment for public debate for everyone. In light of this, he paid attention to the protection of journalists and more particularly to the protection of their sources and of whistle-blowers. He then focused on the Dutch standards of protection and concluded that the Netherlands presented, in terms of media pluralism, the [lowest-threat level](#)¹³ after [Germany](#)¹⁴ in the EU and was ranked second highest on [media freedom](#)¹⁵ in the world.

¹³ Centre for Media Pluralism and Media Freedom, 'Media Pluralism Monitor 2016, Monitoring risks for Media Pluralism in the EU and Beyond, Country Report: Netherlands', p. 4; Commissariaat voor de Media, 'Jaarverslag 2016', April 2017, p. 27.

¹⁴ Centre for Media Pluralism and Media Freedom, 'Media Pluralism Monitor 2016, Monitoring risks for Media Pluralism in the EU and Beyond, Country Report: Germany', p. 4.

¹⁵ Freedom House, 'Freedom in the World 2016', p. 22.

The protection of whistle-blowers was further elaborated on by Leon Trapman, who informed us about their direct and indirect protection under the Council of Europe's framework.¹⁶ He then provided an analysis of the level of protection of whistle-blowers under the Dutch legal framework: the House for Whistle-Blowers Act¹⁷ and [Publeaks](#). He then analysed the legal framework in light of the criteria that have been developed by the European Court of Human Rights in cases such as [Guja v. Moldova](#)¹⁸ and [Heinisch v. Germany](#).¹⁹ Those criteria include the considerations whether there were alternative channels for disclosure, whether the disclosed information caused harm, whether there was a public interest in the disclosure and whether the disclosure was made in good faith.

Following that, Otto Volgenant explained the issues concerning source protection. According to the [Goodwin](#) case,²⁰ protection of sources is one of the basic conditions for press freedom and for journalists to be able to fulfil their role as public watchdog. Unless there is an overriding requirement in the public interest, a journalist cannot be forced to reveal his or her source. He used various cases to demonstrate the abuses made by governments on journalists for disclosure of their sources. The European Court of Human Rights has already found a violation of Article 10 ECHR in respect of shortcomings in source protection under the Dutch legal system on three occasions.²¹ This was very well illustrated by the [Sanoma](#) case in 2010, in which the lack of adequate procedural safeguards for source protection in the Dutch legal system was shown.²² Accordingly, the Court found that no information which would permit identification of the source should be gathered before an independent review by a judge or other impartial decision-making body had taken place, which establishes the existence of an overriding public interest in the disclosure of journalistic sources. The lack of appropriate safeguards in the law was again confirmed in the [Telegraaf](#) case.²³ Consequently, the Netherlands is in the process of adopting new legislation, such as the draft Act on Intelligence Services,²⁴ which has not yet entered into force.²⁵ The Act strives for a better balance between

¹⁶ D. Voorhoof, 'Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the standards of the Council of Europe', in: O. Andreotti, Ed., *Journalism at Risk. Threats, challenges and perspectives*, Council of Europe, Strasbourg, 2015, pp. 105-143; J.P. van den Brink and E.W. Jurjen, 'Bescherming van klokkenluiders onder artikel 10 EVRM: een blik op de Straatsburgse en Nederlandse jurisprudentie en een beoordeling van de voorgestelde wetgeving', in: *Nederlands Tijdschrift voor de Mensenrechten*, 40-1, 2015, p. 36-61.

¹⁷ Wet van 14 april 2016, houdende de oprichting van een Huis voor klokkenluiders (Wet Huis voor klokkenluiders).

¹⁸ *Guja v Moldova* App No 14277/04 (ECtHR, 12 February 2008).

¹⁹ *Heinisch v Germany* App No 28274/08 (ECtHR, 21 July 2008).

²⁰ *Goodwin v. United Kingdom* App No 28957/95 (ECtHR, 1 December 1997).

²¹ *Voskuil v. The Netherlands* App No 64752/01 (ECtHR, 22 November 2007); *Sanoma Uitgevers B.V. v. The Netherlands* App No 38224/03 (ECtHR, 14 September 2010); *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* App No 39315/06 (ECtHR, 22 November 2011).

²² *Sanoma Uitgevers B.V. v. The Netherlands* App No 38224/03 (ECtHR, 14 September 2010).

²³ *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* App No 39315/06 (ECtHR, 22 November 2011).

²⁴ Voorstel van Wet inzake wijziging Wet op de Inlichtingen- en Veiligheidsdiensten, 28 November 2016.

²⁵ When the Conference took place, the Act was still in the progress of being adopted. However, on 11 July 2017, the Dutch Senate approved the text of the Bill but it is not yet known when the Act will enter into force.

security and privacy by means of independent committees who will have a supervisory role, both prior and after disclosure of the information.²⁶

The final speaker, Albana Shala, concluded with some practical insights on the issues surrounding the safety of journalists. A huge amount of journalists have been and are still being killed in the context of their journalistic activities, which results in a chilling effect on media freedom. She stressed the fact that there is a lack of response mechanisms put into place by States. Interestingly, Otto Volgenant asked her whether technology, such as the use of drones, could help to keep journalists safer. She replied by stating: 'If you get a drone you'll only get a drone's view which is very different from a journalist's one reporting truths. The human dimension cannot be captured by a drone.'

Conclusion

The conference had several recurrent and interrelated themes. The first involves the positive obligation of States to create a favourable environment for freedom of expression.²⁷ This obligation could be used to develop measures to foster participation in public debate, counter fake news and protect journalistic sources. However, those positive obligations are not clear-cut and depend on numerous factors. The different subjects discussed by each panel presented a lot of complexities. While Panel I expressed the dangers of using automated processes, Panel II made clear that in order to counter fake news, restrictive measures will have to be taken by Internet intermediaries such as filtering mechanisms. This illustrates very well that protecting one particular interest will often lead to the restriction of another interest and that media law, and more generally the right to freedom of expression, is a question of balance. This conference has shown that there are still a lot of challenges to be faced, but without challenges there would be no changes.

²⁶ Voorstel van Wet op de inlichtingen-en veiligheidsdiensten 20XX, Paragraaf 3.2.2. Toetsingscommissie inzet bevoegdheden.

²⁷ *Dink v. Turkey* App No 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR, 14 September 2010), para. 106.