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Securing a favourable environment for journalists

in the Netherlands

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Executive summary

In its 2016 Recommendation on protection of journalism and safety of journalists and other media actors,[1] the Committee of Ministers of the Council of Europe (CoE) called on the organisation's 47 member states to 'create and secure a favourable environment' for the right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights. This very timely and in-depth study examines the extent to which such a 'favourable environment' exists in the Netherlands.

The study's **overall conclusion** is that while Dutch law, policy and practice secure an environment that is **by and large favourable** for freedom of expression, journalistic activities and the safety of journalists,[2] there is **still room for improvement in several areas**.

The study first gives an overview of the Council of Europe's legal framework. It then examines Dutch law (including draft laws and case-law), policy and practice to assess the extent to which they adhere to the Council of Europe's standards. Taking its cue from the Committee of Ministers' Recommendation, the study contains particular focuses on **prevention** of threats and risks for freedom of expression, journalistic activities and safety of journalists and other media actors; **protection** and support measures, and **prosecution** of those behind threats and violence targeting journalists.[3]

The study identifies a number of **strengths and weaknesses** of the Dutch framework, a selection of which is listed below. It also draws attention to a number of existing or emerging trends which require continued monitoring and vigilance.

Strengths

- Adequate regulation and procedures are in place for anyone who threatens or harms journalists to be prosecuted in accordance with the rule of law;
- The protection of whistle-blowers has a legislative basis and is supplemented by relevant practical initiatives;
- Blasphemy has been decriminalized and offences such as *lèse-majesté* and insulting a foreign head of state are in the process of being removed from the Dutch Criminal Code.

According to the CoE framework, prosecution should be effective, adequate and thorough, impartial and independent, prompt and conducted under public scrutiny. The study shows that a variety of legal rules, doctrines and institutions ensures the proper application of these principles in the Netherlands. Special attention is paid to the principle of truth-finding (*waarheidsvinding*), the rights of crime victims and the rules governing the use of force by police officers.

[1] Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016.
[2] The Netherlands were ranked fifth in the Reporters Without Borders Press Freedom Index in 2017.
[3] The fourth pillar, 'promotion', falls outside the scope of this study since it concerns the promotion of the contents of the Recommendation, whereas the study focuses on journalists' legal position.

In the context of whistle-blowing, progress has been made with the adoption of the House for Whistle-blowers Act and the development of the Publeaks platform. Future research and implementation of the House for Whistle-blowers Act could further improve the functioning of both.

As the offences of *lèse-majesté* and insulting a foreign head of state do not provide for a public interest defence, they are not in line with the case-law of the European Court of Human Rights. Their imminent removal from the Dutch Criminal Code is therefore to be welcomed from the perspective of freedom of expression.

Weaknesses

- Source protection is not sufficiently guaranteed when secret surveillance measures are used against journalists;
- There is a lack of publicly available formal guidance concerning protection of journalists during public assemblies;
- Freedom of access to information legislation is not totally in accordance with European standards.

Following several rulings by the European Court of Human Rights against the Netherlands, the right to source protection for journalists in criminal proceedings is finally being codified. Nevertheless, the revised Intelligence and Security Services Act fails to offer journalists and other media actors an adequate level of source protection.

Both the police and mayors are responsible for safeguarding public order during public assemblies such as demonstrations. However, there is a lack of (public) documentation that specifically mentions the important role and sometimes vulnerable position of journalists during such assemblies.

The right of access to information is governed by the Openness of Government Act, which is not yet fully in accordance with relevant European standards. For example, the absolute grounds for refusal to give access, laid down in the Openness of Government Act, are in conflict with the principles of proportionality and subsidiarity.

Significant trends

- An increasing incidence of threats against journalists;
- Instances of denial of access for journalists to particular events or (public) spaces, such as press meetings of political parties;
- Concentration of media ownership, which could raise issues or concerns for media independence and pluralism.

Journalists are facing an increasing amount of both physical and online threats,[4] which have a severe chilling effect on freedom of expression. Journalists are being threatened with, for example, violence or legal action. Sometimes these threats are specifically directed at female journalists or journalists with an ethnic background.

[4] See: M.W.A. Odekerken & A.F.M. Brenninkmeijer, *Een dreigend klimaat*, 2017.

Some political parties barred journalists from their meetings during the most recent election period, thereby obstructing journalists from reporting on matters of public interest.

Although mergers and acquisitions can have positive effects and help traditional media survive in the digital age, the high concentration of ownership in the Dutch newspaper market and a high cross-ownership between different media sectors could put media independence and pluralism at risk.

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Additional information

The study has been researched and written by Geert Lokhorst and Leon Trapman, both of whom are research masters students at the Institute for Information Law (IViR), Faculty of Law, University of Amsterdam. The methodology used is explained briefly at the start of the study and very extensively in the second appendix.

The Project Leader, Dr. Tarlach McGonagle, senior researcher/lecturer at IViR, supervised the research and edited the study. Mr. Otto Volgenant, Boekx Advocaten, acted as special adviser. Valuable comments on an earlier draft version of the study have also been received from the project's expert advisory board and in response to presentations at two conferences.

The present version of the study is a pre-final draft. We welcome feedback on this draft study **until 15 May 2018**. Please send your comments and suggestions to: fefj@ivir.nl. This e-mail address should also be used for academic or media enquiries about the study; the contact person is Leon Trapman.

The study has been carried out in accordance with The Netherlands Code of Conduct for Academic Practice, as agreed by the Association of Universities in the Netherlands. It is part of a larger project, entitled *Audit of freedom of expression in the Netherlands*, which has received funding from the Democracy & Media Foundation. The study and its key findings will form the basis of a policy paper on the same topic that is currently being prepared by the project team.

More information about the project is available at:
https://www.ivir.nl/projects/auditoffreedomofexpression.

1. Introduction

On 19 January 2007, editor, journalist and columnist Fırat Dink was assassinated by nationalist extremists in Istanbul, Turkey. This happened after Dink had been convicted by a Turkish court for 'denigrating Turkish identity', as he had published a series of articles on the identity of Turkish citizens of Armenian origin. The case was brought before the European Court for Human Rights (ECtHR). In its judgment, the ECtHR held that the Turkish authorities had failed to protect both Dink's right to life and his right to freedom of expression. With regard to the latter, the Court stated that member states are 'required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'.[5] This favourable environment requires the absence of any measures or circumstances that have a chilling effect on freedom of expression. The ECtHR thus formulated a clear positive obligation for member states to protect the right to freedom of expression.

On 13 April 2016, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2016)/4 on the protection of journalism and safety of journalists and other media actors. The Recommendation pans out the obligation to create a 'favourable environment' for participation in public debate by everyone, as formulated in the *Dink* judgment and other cases of the ECtHR. Based on this case law, the Recommendation offers a set of guidelines for member states in order to create such an environment and ensure the absence of any measures with a chilling effect. The protection of journalism and safety of journalists is supported by four pillars: prevention, protection, prosecution and promotion.

This study examines the extent to which the Dutch legal framework manages to create a favourable environment, in light of the case law of the ECtHR, standard-setting texts of the Council of Europe and the standards that are formulated in Recommendation CM/Rec(2016)/4. Although, as of 2017, the Netherlands are ranked fifth on the World Press Freedom Index,[6] there remain reasons for concern. In 2016, the Netherlands were ranked second. Commissioned by the Dutch Association of Journalists (*Nederlandse Vereniging van Journalisten* or *NVJ*), Marjolein Odekerken and Alex Brenninkmeijer published a report in which they flagged a number of threats that Dutch journalists are currently facing.[7] (Threats of) violence and judicial procedures limit journalists in properly fulfilling their task as a public watchdog.

Following the structure of the Recommendation (prevention, protection and prosecution), the relevant and important aspects of the Dutch legal framework will be discussed. The fourth pillar, promotion, is left out of the research. This pillar concerns the promotion of the text of the Recommendation. This study focuses on the substantive aspects of the Recommendation: the journalists' legal position.

Each chapter deals with a separate theme. Of course, some themes are closely connected to others, but an effort is made to keep the structure of the paper nevertheless clear and logical. The

[5] ECtHR 14 September 2010, 7124/09 (Dink v. Turkey), par. 137.
[6] https://rsf.org/en/ranking
[7] Odekerken & Brenninkmeijer 2017. An extensive report on similar threats throughout the member states of the Council of Europe (and Belarus) was published around the same time: Clark & Grech 2017.

substantive chapters of this report (Parts 2, 3 and 4) all have the same structure. At the start of the chapter, general remarks on the theme of the chapter are made. Secondly, the legal framework of the Council of Europe is discussed, followed by a discussion of Dutch law and practice. At the end of each chapter, concluding remarks are made, sometimes accompanied by suggestions or recommendations to improve the current Dutch legal framework.

The report also offers a chapter on the Dutch Constitutional framework and a brief discussion of the Dutch media landscape in the first appendix to this report. It is hoped that this research will prove of use for studies on the protection of journalism and safety of journalists in other member states of the Council of Europe. Therefore, an in-depth explanation of the used methodology can be found in the second appendix to this report.

2. Framework

2.1. Methodology

The study on the Dutch legislative framework and practice and its compliance with the relevant standards of the Council of Europe (CoE) was conducted as a case study. As there were many objects to be studied within the case, but only one possible observation per object, the study demanded the use of multiple sources to corroborate the findings. Within this case study, two steps are made to find converging data in multiple sources. First is the analysis of the Dutch framework and the relevant CoE norms. This analysis follows the classic methodology of doctrinal legal research, trying to find the right applicable norms and their current interpretation. As this relies on the analysis of (official) documents and comments in legal literature, it gives only a limited account of the situation. Therefore, the second step is the triangulation of the results in the first step through a group discussion and semi-structured interviews with professionals in the subject of interest. This enabled us to assess whether the practice deviated from black-letter law. These discussions and interviews further assess the social context surrounding the law. Furthermore, discussions and interviews enable comparison of viewpoints. Opinions of professionals provide further depth for the case study.

Compliance with standards of the Council of Europe implies that the study also encompasses a strong comparative element. This comparative element tries to define the similarities and differences between two frameworks. One framework is the principles of the European Court of Human Rights (ECtHR), as reflected by the Committee of Ministers in the Recommendation on the protection of journalism and safety of journalists. The other framework is the legal framework and practice in the Netherlands. As a comparative project, the standards of the Council of Europe functioned as a benchmark to assess the standards and practice in the Netherlands and gave direction to the start of the study. As such, a top-down comparison is made, where the norms of the Council of Europe are a functional description of what (minimal) requirements the Dutch system should adhere to or internalise.

To account for both the comparative and case-oriented elements of the study, the substantive chapters of this study follow a standard structure. First, a general introduction to the subject will be given that will explain the relevant focus of the chapter. Second, the European norms with regard to this subject will be given, referencing both the case law of the ECtHR and the Recommendation and other CoE texts. Third, the relevant aspects of the Dutch legal framework and practice will be set out. Fourth, the European norms and Dutch frameworks and practice will be compared in order to assess relevant similarities and differences and to provide for meaningful conclusions.

For the analysis of (official) documents and legal literature focused on the Netherlands, we tried to be as comprehensive as possible. This means that we tried to incorporate all relevant texts on the subjects of interest. With regard to the analysis of relevant ECtHR principles, we used the Recommendation as a starting point, using documents that have been written for and referenced to during negotiation and drafting of the Recommendation.[8] Furthermore, recent case law of the ECtHR

[8] These are: Leach 2013; Andreotti 2015; and McGonagle, Voorhoof & Van Loon 2015.

was checked in order to assess whether the principles mentioned in the referenced case law have been further developed by the Court. In case of the use of Recommendations and Declarations of the Committee of Ministers, the most recent publications on the specific subjects were used. By using the most recent Recommendations and Declarations, we sought to ensure that these principles reflected current opinions of the Committee of Ministers.

For a broader discussion of the methodologies used in this study, please see the appendix on methodology.

2.2. Article 10 ECHR

Freedom of expression is protected by Article 10 of the European Convention on Human Rights. The article reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The first paragraph defines the right to freedom of expression as such, the second paragraph contains an exhaustive list of the possible restrictions of this right. All restrictions are subject to a three-step test: they have to (i) be prescribed by law; (ii) serve a legitimate aim, and (iii) be necessary in a democratic society.[9] The three elements of the test will be discussed briefly.

(i) Prescribed by law. The word 'law' can mean both written and unwritten law.[10] If this were not the case, common-law member states could not enjoy the protection of Article 10(2) ECHR. Moreover, it is required that the law is both accessible and foreseeable. Accessibility means that citizens must be able to have an adequate indication of the rules applicable to a case. Foreseeability entails that citizens can have a reasonable expectation of the consequences of a given action and adapt their conduct accordingly.[11]

(ii) Legitimate aim. Article 10(2) lists nine aims which for which restrictions on the right to freedom of expression can be justified.[12] Other legitimate aims are possible in relation to the last sentence of

[9] Harris, O'Boyle & Warbrick 2014, p. 614.
[10] ECtHR 26 April 1979, 6538/74 (Sunday Times v. the United Kingdom), par. 47.
[11] ECtHR 26 April 1979, 6538/74 (Sunday Times v. the United Kingdom), par. 47.
[12] For an in depth discussion of the aims, see Harris, O'Boyle & Warbrick 2014, p. 652-683.

Article 10(1) ECHR, such as to ensure the quality and balance of television programmes[13] or to ensure the rights and needs of a specific audience.[14]

(iii) Necessary in a democratic society. The ECtHR assesses whether the interference corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities were relevant and sufficient to justify the interference.[15]The ECHR leaves the member states of the Council of Europe a certain margin of appreciation in restricting the right to freedom of expression. For expression relating to matters of general interest, the margin is relatively narrow as these expressions generally enjoy a high level of protection.[16] In cases dealing with, for example, morals or religion, this margin is clearly wider, since the domestic states are 'closer to the action' and are therefore better able to give an assessment of the content of a case. However, the margin of appreciation always has its limits as it 'goes hand in hand with a European supervision'.[17] In the end, it is for the ECtHR to decide whether an interference was allowed or not.

In a steady stream of cases, the ECtHR has elaborated the scope of Article 10 ECHR, for example with regard to its internal limitations under paragraph 2, its interplay with other rights and its relation with Article 17 ECHR (the prohibition of abuse of rights). Over the years, the Court has assessed the scope of the provision, for example, in the context of defamation, hate speech, access to information, source protection and whistle-blowing.[18] The scope of Article 10 ECHR is constantly adjusted to modern societal developments and thus follows the living instrument doctrine: interpretation of the rights codified in the ECHR in the light of present-day conditions guarantees that these rights are practical and effective.[19] A good example of this present-day interpretation is the fact that Article 10 ECHR also applies in an online environment.[20]

The concepts and principles that are important for this research will be discussed in the substantive chapters on the comparison of the Dutch framework with the Recommendation (Part 2 of this report).

2.3. Recommendation CM/Rec(2016)4: terminology

For a proper understanding of the text of the Recommendation, it is necessary to clarify some of the most important terms that are used in it: 'favourable environment', 'other media actors', 'public debate' and 'chilling effect'. All of these terms are derived from the case law of the ECtHR on Article 10 and show that the Recommendation has its foundations in this case law.

[13] See ECtHR 5 November 2002, 38743/97 (Demuth v. Switzerland), par. 37.
[14] This and other aims are discussed in ECtHR 24 November 1993, 17207/90 (Informationsverein Lentia and others v. Austria), par. 32.
[15] ECtHR 27 March 1996, 17488/90 (Goodwin v. the United Kingdom), par. 62.
[16] ECtHR 7 February 2012, 39954/08 (Axel Springer AG v. Germany), par. 90.
[17] ECtHR 7 December 1976, 5493/72 (Handyside v. the United Kingdom), par. 48-49.
[18] For an overview of the development of the ECtHR's case law, see the introduction by Dirk Voorhoof in Voorhoof & McGonagle 2016, p. 28-33.
[19] ECtHR 25 April 1978, 5856/72 (Tyrer v. the United Kingdom), par. 31.
[20] See also: Research Division of the European Court of Human Rights 2015, p. 17-35.

'Favourable environment'[21]

The creation of a 'favourable environment' for freedom of expression – sometimes also called an 'enabling environment' – by member states is the cornerstone of the Recommendation. The term is derived from the case law of the ECtHR. In the 2010 judgment in the case *Dink v. Turkey*, the Court held:

'*States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter*'.[22]

The ECtHR thus formulated a positive obligation for member states to ensure the right to freedom of expression. In earlier judgments, the Court already elaborated on the doctrine of positive obligations under Article 10 ECHR and formulated specific obligations for member states, such as the obligation to safeguard freedom of expression from threats of private persons,[23] the obligation to investigate acts of violence against and intimidation of journalists[24] and the obligation to create a regulatory framework to ensure journalists' freedom of expression exercised online.[25] The obligation formulated in *Dink* to create a 'favourable environment' encompasses all of these specific obligations and brings them under the umbrella of this general term.[26] The essential features of such a favourable environment, such as access to information and media pluralism, are thoroughly discussed in the Recommendation and form its very essence.

'Other media actors'

The Recommendation protects both journalists and *other media actors*. The ECtHR has acknowledged that other entities than traditional journalists can play the role of public watchdog, too. Amongst these entities are, for instance, non-governmental organisations[27] and informal campaign groups.[28] This broadening of the notion of public watchdog is supported by standard-setting texts of the Council of Europe[29] and other international bodies,[30] all of which observe that the rapidly changing media landscape comes with a variety of new media actors, such as bloggers, vloggers and other self-publishers. To emphasize that these entities are not traditional journalists, but should nevertheless enjoy a special level of protection when contributing to public debate, the scope of the Recommendation extends not only to journalists, but also to these *other media actors*.

[21] Recommendation CM/Rec(2016)4, Appendix, Principles, under 13.
[22] ECtHR 14 September 2010, 7124/09 (Dink v. Turkey), par. 137. See also McGonagle 2015, p. 9-35.
[23] ECtHR 29 February 2000, 39293 (Fuentes Bobo v. Spain), par. 38.
[24] ECtHR 16 March 2000, 23144/93 (Özgür Gündem v. Turkey), par. 42-43. See also the ECtHR Research report on Positive obligations on member States under Article 10 to protect journalists and prevent impunity, available online: http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf
[25] ECtHR 5 May 2011, 33014/05 (Editorial Board of Pravoye Delo and Shtekel v. Ukraine), par. 64.
[26] See further: McGonagle 2015.
[27] ECtHR 15 February 2005, 68416/01 (Steel and Morris v. the United Kingdom), par. 89.
[28] ECtHR 14 April 2009, 37374/05 (Társaság a Szabadságjogokért v. Hungary), par. 27.
[29] See e.g. Recommendation CM/Rec(2011)7.
[30] See e.g. UN Chief Executives Board, *Plan of Action on the Safety of Journalists and the Issue of Impunity and Human Rights Committee, General Comment No. 34*, under 44.

The Recommendation seeks to protect any person or entity that contributes to public debate and therefore takes a functional approach to the definition of a journalist.[31] By doing so, the Recommendation is drafted in accordance with the aforementioned living instrument doctrine: in order for the rights enshrined in the ECHR to be practical and effective, they have to be interpreted in the light of present-day conditions.[32]

'Public debate'[33]
As already stated, the Recommendation protects journalists and other media actors who contribute to public debate by acting as a public watchdog. They are able to hold powerful forces in society to account and expose abuses. Article 10 ECHR protects not only the information as such, but also the style of reporting: in its case law, the ECtHR has repeatedly stressed the principle of editorial independence.[34] Public watchdogs are allowed to offend, shock, disturb, provoke and exaggerate to convey their message.[35] The Recommendation stresses that not only traditional reporting, but also other contributions to public debate, such as satire,[36] should be protected. This ties in with the principle that not only journalists should be protected, but also other media actors. As opposed to journalists, these 'other media actors' are more likely to use satire to contribute to public debate.

'Chilling effect'[37]
Legal actions that discourage people from exercising their right to freedom of expression to participate in public debate have a chilling effect. These measures are not allowed under Article 10 ECHR.[38] The 'favourable environment' that member states have to ensure necessarily also encompasses the absence of legal measures with a chilling effect.
The Recommendation states that criminal sanctions have a greater chilling effect than civil sanctions: prison sentences for press offences are allowed only in exceptional circumstances.[39] Moreover, a sanction does not actually have to be imposed to have a chilling effect: the fear of a sanction can be enough.[40]

2.4. Dutch Constitutional framework

Hierarchy
The Dutch Constitution does not contain one, specific provision about the hierarchy of norms in the Dutch legal framework. This hierarchy follows from a variety of, sometimes implicit, rules. At the top

[31] Recommendation CM/Rec(2016)4, under 4.
[32] ECtHR 25 April 1978, 5856/72 (Tyrer v. the United Kingdom), par. 31.
[33] Recommendation CM/Rec(2016)4, Appendix, Principles, under 29.
[34] See for example ECtHR 23 September 1994, 15890/89 (Jersild v. Denmark), par. 31 and ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 102.
[35] ECtHR 7 December 1976, 5493/72 (Handyside v. the United Kingdom), par. 49 and ECtHR 26 April 1995, 15974/90 (Prager & Oberschlick v. Austria), par. 38.
[36] ECtHR 25 January 2007, 68354/01 (Vereinigung Bildender Künstler v. Austria), par. 33.
[37] Recommendation CM/Rec(2016)4, Appendix, Principles, under 33.
[38] ECtHR 27 March 1996, 17488/90 (Goodwin v. the United Kingdom), par. 39.
[39] ECtHR 10 June 2003, 33348/96 (Cumpana and Mazăre v. Romania), par. 115.
[40] ECtHR 10 June 2003, 33348/96 (Cumpana and Mazăre v. Romania), par. 114. For the Netherlands, this aspect is relevant especially in the context of blasphemy and defamation: see Chapter 3.5.

of the Dutch hierarchy of norms stand the treaties between the Netherlands and other states, followed by respectively the Charter for the Kingdom of the Netherlands, the Constitution, Acts of Parliament, governmental decrees and ministerial decrees. The Charter for the Kingdom of the Netherlands will not play a role in this research project, since it mainly concerns the political relationship between the Netherlands and the overseas areas that together form the Kingdom of the Netherlands.

Legislative process

In the Netherlands, Bills may be presented by the Lower House of the States General (*Tweede Kamer*) and the Government (*regering*).[41] The Council of State (*Raad van State*) issues a non-binding advice on every new Bill.[42] After this advice, the Parliament discusses the Bill and members of the Parliament can propose amendments to it.[43] If the majority of the Parliament votes in favour of an amendment, it becomes part of the Bill. If the Parliament votes in favour of a Bill, it is passed on to the Upper House of the States General (Senate or *Eerste Kamer*). The Senate cannot propose amendments: it must consider the Bill as sent to it.[44]

Delegation of the legislative power is allowed to a certain degree to for example the Ministerial Council, being the council of all ministers, or a single minister. In such a case, this will result in a governmental or ministerial decree, which is not subject to the approval of the States General. As already stated, a ministerial decree has a lower status than governmental decrees, which are further overruled by Acts of Parliament, the Constitution and the Charter for the Kingdom.

Freedom of expression

The right to freedom of expression is laid down in Article 7 of the Dutch Constitution. This Article reads:

1. No one shall require prior permission to publish thoughts or opinions[45] through the press, without prejudice to the responsibility of every person under the law.
2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
4. The preceding paragraphs do not apply to commercial advertising.

Unlike Article 10 ECHR, Article 7 makes a distinction between different media. The first paragraph only applies to the press, the second paragraph to radio and television and the third paragraph is

[41] Article 82 Dutch Constitution. The Dutch Constitution is online available in English: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008
[42] Article 73 Dutch Constitution.
[43] Article 84 Dutch Constitution.
[44] Article 85 Dutch Constitution.
[45] Please note that the term 'thought or opinions' in paragraphs 1 and 3 also includes expressions of a factual nature, such as news reports. See *Kamerstukken II* 1976/77, 13872, nr. 7, p. 26.

applicable to the 'residual category': film, internet, the spoken word, etc.[46] In addition, Dutch case law makes a distinction between the right to *publish* information (which cannot be subject to prior permission) and the right to *disseminate* that information (which can under circumstances be subject to restrictions).[47] Some authors are of the opinion that Article 7 is outdated, as the distinctions mentioned above are hardly justifiable in the digital age.[48]

When it comes to the scope of both articles, it is noteworthy that the scope of Article 7 is relatively narrow. Under Article 10 ECHR, freedom of expression also includes the right to receive information,[49] whereas Article 7 of the Constitution only applies to publication and dissemination of information. Moreover, according to paragraph 4 of Article 7, commercial advertising falls outside the scope of the right to freedom of expression. Under Article 10 ECHR, this is not the case.[50]

All the points mentioned above show that Article 7 has a relatively narrow scope, can be considered outdated and of a complex nature. This is one of the reasons that most Dutch cases concerning freedom of expression are dealt with under the regime of Article 10 ECHR.[51] According to Article 94 of the Dutch Constitution, provisions of treaties that are 'binding on all persons' are directly applicable in the national legal system. Article 10 ECHR is such a provision that is binding on all persons.[52]

Apart from the practical motives that are involved, another reason for the large role of Article 10 ECHR in comparison with Article 7 of the Dutch Constitution is of a purely legal nature. This reason can be found in Article 120 of the Dutch Constitution. According to that article, 'the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'. Although Acts of Parliament cannot be reviewed on constitutionality, they can be reviewed on compatibility with the earlier mentioned provisions of treaties that are 'binding on all persons', among which is Article 10 ECHR. In practice, this means that a judge can only review a specific Act of Parliament on compatibility with Article 10 ECHR, and not on compatibility with Article 7 of the Dutch Constitution.

The first sentence of paragraph 2 of Article 7 of the Dutch Constitution reads: 'Rules concerning radio and television shall be laid down by Act of Parliament.' The most important pieces of legislation in this aspect are the Dutch Media Act and the Telecommunications Act.

The Media Act[53] applies to both the National Public Broadcasting agency (*Nederlandse Publieke Omroep* or *NPO*) and commercial broadcasters and contains provisions on for instance protection of minors and coverage of events of high importance to the public.[54] Moreover, it establishes the Dutch

[46] *Kamerstukken II* 1975/76, 13872, nr. 3, p. 35.
[47] HR 28 november 1950, *NJ* 1951/137 (APV Tilburg).
[48] Kortmann 2015, p. 469-470. See also, for example, the debate on the revision of the Constitution in *Kamerstukken I*, 2011/12, 31570, p. 8.
[49] See Article 10(1) ECHR and ECtHR 26 April 1979, 6538/74 (Sunday Times v. the United Kingdom).
[50] ECtHR 24 February 1994, 15450/89 (Casado Coca v. Spain), par. 35. See also: Shiner 2007, p. 95-110.
[51] Kortmann 2015, p. 469-470.
[52] Barkhuysen 2004, p. 45.
[53] See https://www.government.nl/topics/the-media-and-broadcasting/contents/media-act-rules-for-broadcasters-and-programming. The Media Act is only available in Dutch: http://wetten.overheid.nl/BWBR0025028/2017-02-01
[54] For a statistic overview of the Dutch media landscape, see Appendix I.

Media Authority (*Commissariaat voor de Media* or *CvdM*[55]). The Dutch Media Authority is an independent supervisory body, responsible for upholding the rules of the Media Act. However, its competences are limited with regard to the rules on the functioning of the *NPO*.[56] Both the *NPO* and *CvdM* fall under the responsibility of the Dutch Minister of Education, Culture and Science.
The latest version of the Media Act, originating from 2008, has been subject to a long process of revision over the past few years. On 25 October 2016, the Dutch Senate agreed on the latest package of amendments. The provisions and amendments that are relevant to this research will be discussed in Chapter 3.1.

The Telecommunications Act[57] sets out the rules regarding electronic communications services and the infrastructures they use. Themes covered in the Act are, amongst other things, licensing, frequencies, market regulation and consumer protection.
The Radiocommunications Agency (*Agentschap Telecom*) and the Authority for Consumers & Markets (*Authoriteit Consument & Markt*) are responsible for upholding the rules of the Act. The relevant aspects of the Telecommunications Act will be discussed in Chapter 3.1.

Privacy and source protection
Both Articles 10 and Article 13 of the Dutch Constitution are important in the context of privacy in general, and more specifically in the context of a journalist's right to protection of sources. Article 10 reads:

1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.
2. Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.
3. Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament.

Article 13 reads:[58]

1. The privacy of correspondence shall not be violated except in the cases laid down by Act of Parliament, by order of the courts.
2. The privacy of the telephone and telegraph shall not be violated except, in the cases laid down by Act of Parliament, by or with the authorisation of those designated for the purpose by Act of Parliament.

Together with the Articles 11 (right to physical integrity) and Article 12 (right to inviolability of one's home), they form the Dutch equivalent of the right to privacy guaranteed by Article 8 ECHR.
Once again, Article 8 ECHR is 'binding on all persons' and is therefore directly applicable in national procedures.[59]

[55] See https://www.cvdm.nl/english/
[56] Article 7.11 Media Act.
[57] The Telecommunication Act is available in Dutch: http://wetten.overheid.nl/BWBR0009950/2017-03-10
[58] However, this article currently is being revised.
[59] Barkhuysen 2004, p. 45.

Restrictions on these rights have to be laid down in Acts of Parliament. The most important Acts in the context of journalism are the Act on Source Protection in Criminal Procedures (*Wet bronbescherming in strafzaken*) that is now in the making and the recently revised Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten* or *Wiv*). The latter Act regulates the competences of the Dutch General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst* or *AIVD*) and the Military Intelligence and Security Service (*Militaire Inlichtingen- en Veiligheidsdienst* or *MIVD*). A special Review Committee on the Intelligence and Security Services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten* or *CTIVD*) is responsible for the supervision of the *AIVD* and *MIVD*.
On 11 July 2017, the Senate approved a Bill to amend the *Wiv*.[60] The amendments concern a broadening of the Services' competences and adjusts the *Wiv* to the digital age. The consequences for the right to source protection for journalists of the new *Wiv*, as well as the drafting process of the Act on Source Protection in Criminal Procedures will be discussed in depth in Chapter 3.3.

[60] *Handelingen I* 2016/17, 35, item 12.

3. Prevention

3.1. Media independence and media pluralism

I. Introduction

The Recommendation mentions media independence and media pluralism in one sentence: 'Member States should, in accordance with their constitutional and legislative traditions, ensure the independence of the media and safeguard media pluralism, including the independence and sustainability of public-service media and community media, which are crucial elements of a favourable environment for freedom of expression.' There is a strong overlap between media pluralism and independence in Council of Europe (CoE) texts. For example, independence is mentioned as a measure to promote content diversity in the Recommendation (2007) 2 on media pluralism and diversity of media content.[61] The European Court of Human Rights (ECtHR) also seems to recognise a strong overlap between the two principles. In the cases of *Informationsverein Lentia and others v. Austria* and more recently *Manole and others v. Moldova,* the Court stated that the state, as the ultimate guarantor of pluralism, must ensure access to impartial information.[62] Because of the close relationship between media independence and media pluralism, we will discuss both subjects in one chapter.

The Recommendation identifies five principles for the operation of media independence and pluralism: (I) an obligation to ensure the independence of the media, including the independence and sustainability of public-service media; (II) a positive obligation to guarantee pluralism in the media sector, which entails ensuring a diversity of voices; (III) the possible use of independent media regulatory authorities to ensure pluralism and safeguarding the independence of these regulatory authorities; (IV) transparency in media ownership; and (V) prevention of concentration where this is detrimental to pluralism. In the following sections, the European and Dutch legal framework and practice will be discussed separately. These frameworks will be compared following the five principles in the conclusion.

II. European framework

The European Court of Human Rights (ECtHR) gives guidance on the role and responsibilities of the state with regard to media independence and pluralism. Almost all of these cases relate to broadcasting frequencies: a scarce resource for which the authority holds the exclusive right to authorise use. In the case *Informationsverein Lentia v. Austria,* the Court concluded that the State is the ultimate guarantor of pluralism.[63] Furthermore, it concluded that a monopoly on broadcasting imposes the greatest restrictions on the freedom of expression, which is only justified where it corresponds to a pressing need.[64] As such, a State may not in principle block private broadcasters from entering the market. In *Demuth v. Switzerland* the Court confirmed that refusing to grant a

[61] Recommendation CM/Rec(2007)2.
[62] ECtHR 24 November 1993, 17207/90 (Informationsverein Lentia and others v. Austria); ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 107.
[63] ECtHR 24 November 1993, 17207/90 (Informationsverein Lentia and others v. Austria) par. 38.
[64] ECtHR 24 November 1993, 17207/90 (Informationsverein Lentia and others v. Austria) par. 39.

broadcasting licence constitutes an interference with Article 10 ECHR.[65] However, Member States have a margin of appreciation to impose specific criteria that aim to guarantee pluralism. This includes the need to ensure the quality of the broadcasts and balancing of programmes.[66] In this regard, decisions of regulatory authorities should be based on a clear legal framework, duly reasoned and open to review by competent authorities.[67]

Moving away from the duties of regulatory authorities when providing for broadcasting frequencies, important insights in pluralism and independence are given in the case *Manole and others v. Moldova*.[68] This case dealt with the issue of political control on the public-service broadcaster. Nine Journalists, editors and producers complained that they were subjected to control by the ruling party of Moldova. The Court reiterated that there is no democracy without pluralism and that is imperative to avoid a situation where powerful economic or political groups obtain a position of dominance over the media and exercise pressure on its editorial freedom.[69] States have the duty to ensure access to a range of opinions and comments that reflect the diversity within the country. Indispensable in this regard is that the public-service broadcaster transmits impartial, independent and balanced news and provides a forum with as broad a spectrum of views and opinions as possible.[70] However, the means by which to achieve media independence and pluralism falls within the State's margin of appreciation.[71] The Court does give some substantive recommendations: 'supervisory bodies of the public-service broadcasters should be defined in a way which avoids any risk of political or other interference.'[72] As such, states must ensure sufficient guarantees to protect the independence of the public-service broadcaster in their legislative framework, 'so that it is able to broadcast impartial news and information to the public.'[73]

In 2007, The Committee of Ministers of the CoE adopted a Declaration on media concentration and a Recommendation on media pluralism and diversity of media content.[74] These documents give valuable background to the relevant CoE principles on independence of the media and pluralism. The Declaration states a concern that policies designed to promote solely the competitiveness of media systems and market efficiency can be detrimental to the existence of sufficiently independent and autonomous channels capable of presenting a plurality of ideas and opinions to the public. Globalisation and concentration of the media poses a challenge to diversity of media outlets and the existence of a multiplicity of channels for the expression of a plurality of ideas and opinions. The Declaration states that States should take positive measures to safeguard and promote pluralism, for example through competition law or sector-specific rules. In conclusion, the Declaration stresses: the separation of control of the media an political authority; the need for regulatory measures to guarantee transparency of ownership and prevention of concentration; mechanisms for monitoring market concentration; the existence of adequately equipped and editorially independent public-

[65] ECtHR 5 November 2002, 38743/97 (Demuth v. Switzerland).
[66] Schulz, Valcke & Irion 2013, p. 72.
[67] ECtHR 11 October 2007, 14134/02, (Glas Nadezha EOOD and Elenkov v. Bulgaria), par. 51; ECtHR 17 June 2008, 32283/04 (Meltex Ltd. & Mesrop Movsesyan v. Armenia), par. 83.
[68] ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova).
[69] ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 95-98.
[70] Schulz, Valcke & Irion 2013, p. 77.
[71] ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 100.
[72] ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 102.
[73] Schulz, Valcke & Irion 2013, p. 71.
[74] Declaration of 31 January 2007; and Recommendation CM/Rec(2007)2.

service media; and encouraging the development of non-profit media.

Recommendation (2007)2 on media pluralism and diversity of media content further touches upon some now recognisable themes, including the general need for pluralism and diversity of media content for a functioning democracy. Furthermore, it recommends Members States to include in national law or policy, measures concerning the allocation of broadcasting licences, must-carry obligations, transparency in media ownership and the adoption of specific measures if general competition rules are insufficient.[75] Further recommendations include the need to separate political authority from influence and control of the media and guarantee independence, including providing for secure funding for public-service media and financial measures to protect and promote structural pluralism.[76]

Finally, the principle of net neutrality is worth mentioning. Net(work) neutrality entails, in short, that all internet traffic should be treated equally. This prevents a situation in which only a few entities, the 'loudest voices', dominate the media landscape. In Europe, net neutrality is regulated by EU Regulation 2015/2120.

III. Dutch framework

The Dutch Media Act and the Media Decree – which provides for more detailed rules based on delegation to the Ministerial Council – form the core of legislation on the independence and pluralism of (public-service) media. Article 2.1 of the Media Act states that that there is a public media remit which consists of, among others, the provision of public-service media with the aim of providing information, culture and education for a diverse and broad audience. These public-service media should accommodate the democratic, social and cultural needs of the Dutch society. This includes providing for an offering that is well-balanced, pluralistic, varied, of high quality and is characterised by a large variety of form and content (Article 2.1(2)(a)). Furthermore, it states that public-service media provide for a media offering that is independent from commercial influences and government influence, except as provided for by law (Article 2.1(2)(d) Media Act). At the outset, the Media Act creates high expectations with regard to media independence and pluralism.

Media independence – public-service broadcasting

Independence from commercial and government influence is a central theme in the Dutch regulation of public-service media. Van Eijk states in this regard that the relation between government and (public-service) media is controlled by a normative framework that takes as its starting point the 'arms-length principle'.[77] In applying this principle, the government needs to avoid any appearance of meddling with the (editorial) content of the media.[78] According to Van Eijk, the Media Act reflects this 'arms-length principle' (*overheid op afstand*). The Media Act itself is highly detailed, describing the tasks and responsibilities of different independent public institutions within the system that regulates public-service media. Those institutions include: the Dutch Public Broadcasting Foundation (*Stichting Nederlandse Publieke Omroep* or *NPO*) that guides and coordinates public-service media

[75] Recommendation CM/Rec(2007)2.
[76] Recommendation CM/Rec(2007)2.
[77] Van Eijk 2016b, p. 3.
[78] Van Eijk 2016b, p. 3.

independently from the authorities;[79] a similar Foundation *RPO* which promotes cooperation and coordination of regional public-service media;[80] the separation between the *NPO* and the broadcasting organisations that provide the content of programmes; a supervisory and enforcement mechanism that enforces the Media Act as controlled by the independent Dutch Media Authority (*Commissariaat voor de Media*);[81] an evaluation committee tasked with the evaluation of public-service media practice, consisting of at least five independent specialists;[82] and a separate foundation called *NTR* that focuses mainly on societal, cultural, religious and spiritual needs that are not sufficiently represented by other (public-service) broadcasters.[83] Furthermore, the maximum allocated airtime (*toegewezen uren*) that authorities and political parties can claim for their broadcasts is set by the Dutch Media Authority.[84] However, political parties are free to buy advertising space outside of the allocated airtime.[85]

With regard to financial independence, Articles 2.143 and 2.146 of the Media Act state that public-service media are funded from the State's public treasury and commercials. These funds should be sufficient to provide for a media service of high quality. In this regard, Article 2.144 states that the minimum contribution from the State's public treasury was 577.093 million Euro as of 1998 and is adjusted annually according to the growth of the number of households and consumer price index. However, this was reduced by 57.284 million Euro per annum on 18 December 2013.[86] This shows that while the funds seemed to be very stable, it is possible to adjust the prices through an amendment of the Media Act. This financial dependence could in practice lead to a culture of indirect instructions through subsidies or possibly a chilling effect on critical reporting due to a fear of cutbacks.

Despite the many checks and balances put in place by the Media Act, there was still criticism from scholarly literature, which also provoked criticism from the Dutch Senate (*Eerste Kamer*). This was mainly focused on the appointment procedure of the Supervisory Board of the most important institution within the public-service media framework: the *NPO*. Up to 1 January 2017, the Supervisory Board was appointed by a selection committee that was appointed by the Minister or Minister of State.[87] There have been multiple political appointments as a result of this procedure.[88] At least between 1975 and 2003, all chairpersons of the Supervisory Board were selected based on party affiliation, meaning that the presiding Minister or Minister of State chose a fellow party member as the new chairperson.[89] Of further importance is that according to Article 2.8 Media Act, the members of the Board of Directors are appointed directly by the Supervisory Board. During the planned amendment of the Media Act in the period 2015-2017 – which planned to strengthen the role of the *NPO*[90] – the Dutch Senate demanded that the amendments should be accompanied with

[79] Article 2.2 Media Act.
[80] Article 2.60a Media Act.
[81] Articles 7.1 to 7.21 Media Act.
[82] Article 2.185 Media Act.
[83] Aricle 2.35 Media Act and Article 3 Media Decree.
[84] Article 6.5 Media Act.
[85] Van der Burg 2015.
[86] Law Amending the Media Act 2008, *Stb*. 2013, 570.
[87] Van Eijk 2016, p. 46-47.
[88] Van Eijk 2016, p. 46-47.
[89] Hins 2016.
[90] Act of 16 March 2016, *Stb.* 2016, 114.

further distance of the authorities from appointing directors and further transparency on the role of the *NPO.*

The issue in the preceding paragraph was solved in two ways. With regard to the transparency of the role of the *NPO,* the legal framework now explicitly states on basis of what policy documents the *NPO* gives guidance.[91] More importantly, a new procedure for the appointment of members of the Supervisory Board has been made, further distancing the Minister or Secretary of State from these appointments. The Supervisory Board itself creates a vacancy notice, based on advice from multiple institutions in the public-service media sector. A nomination committee of the Supervisory Board advises the Minister or Minister of State on possible candidates. The Minister or Minister of State can only deviate from this advice if it is contrary to the law, diligence or other substantial interests.[92] On 4 July 2017, Minister of State for Economic Affairs Martijn van Dam was appointed to the Board of Directors of the *NPO*. This appointment has met with criticism, stating that it is contrary to the intentions of the new procedures. The Supervisory Board has stated that the appointment was based on the qualities of Van Dam and not his political background.[93]

Editorial independence of (commercial) media
As follows from ECtHR case law and relevant CoE texts, commercial (broadcasting) media should not be unduly limited in their commercial roles.[94] In the Netherlands, providing a commercial broadcasting channel is only allowed with permission of the independent Dutch Media Authority.[95] Grounds of refusal have to be provided by law. The refusal is only possible if the applicant provides incorrect information or will not obey the Media Act or its delegated legislation.[96] These are primarily rules regarding advertising and European productions, as set by the Audiovisual Media Services Directive 2010/13/EU of the European Union. This directive has provisions on, *inter alia*, commercial communications, advertising and sponsoring, the right to use audiovisual content for short news reports and a prohibition of audiovisual media that contains incitement to hatred.

Non-broadcast commercial media are free to pursue their functions without prior permission. This freedom is based on Article 8 of the Dutch Constitution. As such, there are no rules in the Dutch legal framework on the independence of non-broadcast media from the authorities. With regard to editorial independence, different codes of conduct and ethics exist without governmental control: these codes are all forms of self-regulation.[97] The Codes play an important role, for example in defamation procedures before the Press Council (*Raad voor de Journalistiek* or *RvdJ*). The *RvdJ* is a self-regulatory body and does not have the competence to impose sanctions.
Public service media institutions are, on the basis of the Articles 2.88 and 3.5(2) of the Media Act, obliged to create an editorial statute. These statutes contain the journalistic rights and duties of the institutions' employees and have to guarantee the quality of journalism and the independence of editorial boards. Media institutions are not very transparent about their policy; the Dutch Association

[91] Article 2.2(3) and Article 2.52 Media Act.
[92] Article 2.5 Media Act.
[93] Takken & Van den Dool 4 July 2017.
[94] ECtHR 24 November 1993, 17207/90 (Informationsverein Lentia and others v. Austria), par. 39; also in general: ECtHR 5 November 2002, 38743/97 (Demuth v. Switzerland).
[95] Article 3.1 and 3.2 Media Act.
[96] Article 3.3 Media Act and Article 15 Media Regulation.
[97] *Leidraad van de Raad voor de Journalistiek* and *NVJ Code voor de Journalistiek*.

of Journalists (*NVJ*) knows of the contents of only one editorial statute of all the Dutch public media services.[98]

Commercial media and the Telecommunications Act

The Dutch Media Act is not the only regulatory instrument to allow commercial parties to pursue their commercial broadcasting activities. While the Dutch Media Act (mainly) regulates the content and organisation of (public-service) media, the Telecommunications Act and Frequency Decree regulate access to physical infrastructures and electronic communications services. Chapter 3 of the Telecommunications Act regulates the conditions for obtaining licences to use (broadcasting) frequencies. This is primarily of importance for radio broadcasting. Dutch television broadcasting is mainly provided through underground cable networks.[99] Television distribution through wireless networks is only provided by one company: Digitenne. A recent auction for the frequencies was cancelled because Digitenne was the only contender.[100]

Dutch Telecommunications regulation is strongly influenced by Directives of the European Union. With regard to the permission to provide electronic communications services, for example radio stations or broadcasting television, the Telecommunications Act follows the Authorisation Directive 2002/20/EC of the European Union. Providing an electronic communications service cannot be limited to any other restrictions than a general obligation to register, unless there is a scarcity of resources – i.e. frequencies and number distribution. In these cases, frequencies should be distributed based on auctions or comparative test. Public broadcasters are exempted from this tender on the basis of Article 3.7 of the Telecommunications Act.

In a comparative test, qualitative criteria with regard to pluralism can be imposed. This includes the advancement of cultural and linguistic diversity and pluralism of the media.[101] Frequencies assigned to commercial broadcasting can be combined with demands related to securing democratic, social, linguistic and cultural interests and pluralism of the media.[102] Pluralism and diversity were also mentioned as a reason for increasing the capacity of frequencies for radio broadcasting through digitalisation.[103] However, regardless of all the preceding elements, no assignments of radio frequencies can be found where pluralism and diversity have taken a guiding or determining role.

Media pluralism in public-service media

As has already been stated in the introduction to the Dutch legal framework, the mission statement of the *NPO* is the provision of an offering that is well-balanced, pluralistic, varied, of high quality and characterised by a large variety of form and content. The evaluation commission of the *NPO* is tasked with evaluating whether the *NPO* adheres to this mission.[104] Article 3b of the Media Decree determines specifically that the evaluation commission should evaluate the balance and pluralism of

[98] This is the statute of the *NOS*, a public broadcasting organisation which has an obligation to make news programmes for the public television channels.
[99] Dommering 2016, p. 469.
[100] See: https://www.agentschaptelecom.nl/onderwerpen/radio-en-televisie/digitale-televisie/veiling-digitale-ethertelevisie (available in Dutch).
[101] Article 3.1(5)(d) Telecommunications Act.
[102] Article 9(3) Frequency Decree.
[103] *Stcrt.* 2011, 5064 (*Regeling verlenging en digitalisering landelijke commerciële radio-omroep)*.
[104] Article 2.184 and 2.185 Media Act.

the public media service.[105] This is one of the many checks and balances in place to guarantee pluralism in the media. Following the order of the Media Act, other institutions and rules with regard to pluralism will be discussed below. These are: the *NTR,* content produced by external producers, the Dutch Journalism Fund, *must-carry* obligations, the Mediamonitor and rules regarding competition law.

The NTR is a foundation that has the task of offering national public media services that fulfil societal, cultural, religious and spiritual needs in such a way that, in combination with other public-service broadcasters, a balanced image is created of the diversity in the Netherlands.[106] Article 3 of the Media Decree specifically states that the *NTR* provides for (I) information and reflections on political and societal developments, (II) offerings for societal groups that would otherwise be under-represented, (III) offerings regarding ethnic or cultural minorities, and (IV) cultural, educative and consumer-informing information.

The *NPO* is responsible for the allocation of airtime for public-service broadcasting organisations. These organisations provide the content to be shown on the public-service channels of the *NPO*. With the recent budgetary cuts and amendments to the Media Act, the amount of broadcasting organisations that may use the *NPO*'s channels has been reduced from 21 in 2015 to eight in 2016, down to six in 2017.[107] This reduction has met with protests from directors of the broadcasting organisations.[108] The reduction of recognised broadcasting organisations could lead to less pluralism in public-service media. This issue has also been flagged by the Dutch Media Authority.[109] In reaction to this issue, the *NPO* now has the competence to directly hire independent, external producers that can directly offer their services without first applying to the broadcasting organisations.[110]

Media pluralism for commercial entities

The Dutch Journalism Fund (*Stimuleringsfonds voor de Journalistiek*) is a public fund meant for the maintenance and promotion of pluralism of the press, as far as this is of interest for the creation of information and public opinion.[111] Articles 8.11 to 8.14 of the Media Act give a non-exhaustive list of possible reasons for granting a subsidy to publishers of a press organisation. These reasons include protecting the press organisation from bankruptcy, funding the start-up of the operation of a press organisation and funding research on improving the operating position of a press organisation or a press industry as a whole. The rules on maximum funds are further regulated in the 'Ministerial Decree on the Establishment of Maximum Subsidies Dutch Journalism Fund 2017'.[112] The fund has a total expendable budget of € 2 million per year. In order to be eligible for this fund, the applicant has to clarify why his activities are to the benefit of the strengthening of the Dutch press or benefits pluralism of the press.[113] Recent projects, led by or funded by the Dutch Journalism Fund, include the

[105] The Media Decree is secondary legislation to the Media Act, containing legislative acts delegated to the government.
[106] Article 2.35 Media Act.
[107] Article 2.23 Media Act.
[108] De Vries 2013.
[109] Commissariaat voor de Media 2017, p. 36.
[110] Article 2.54 Media Act.
[111] Article 8.3 Media Act. See also https://www.svdj.nl/dutch-journalism-fund.
[112] *Stcrt.* 2016, 71141.
[113] Article 1 Ministerial Regulation on the Establishment of Maximum Subsidies Dutch Journalism Fund 2017.

investigation of further improvement of the Publeaks platform by Free Press Unlimited[114] and the investigation of regional 'news ecosystems' throughout the country.

Must-carry rules have been implemented in order to ensure that all providers of digital or analogue programme packages such as electronic communications service providers include a minimum amount of broadcasting channels in their service. This obligation follows from Article 31 of the Universal Service Directive 2002/22/EC of the European Union. Digital packages have to provide for at least 30 television broadcasting channels and at least 10 radio channels and analogue packages have to include at least 15 television channels and at least 10 radio channels. On 24 May 2017, former Minister of State Dekker announced his intention to propose an amendment to abolish must-carry rules.[115] According to the Minister of State must-carry is not necessary to uphold pluralism and diversity. The average programme package includes 45.2 channels, much higher than the legal minimum. Furthermore, audiovisual programmes have grown greatly through video-on-demand. However, influence on the composition of the programme package by consumers has been lowered due to two developments. First, the Programme Boards have been abolished, meaning that consumers have less influence on the supply of channels. Second, cable company Ziggo has a share of 53.6% in the market for distribution of television signals.[116] Experts have signalled this development as an issue for pluralism.[117] A strong market position without must-carry obligations could lead Ziggo to control the content that reaches a large proportion of the Dutch population.

Rules on media concentration and transparency of ownership have a legal basis in Article 7.21 of the Media Act. The Dutch Media Authority is responsible for research on developments of concentrations and economic circumstances on the national and international media markets and its consequences on pluralism and independence of the media. The results of this research are reported each year by the *Mediamonitor* of the Dutch Media Authority.[118] The Mediamonitor used to be regulated through the Temporary Act Media Concentration. This temporary Act contained strict rules for media concentration. These rules stated that mergers or acquisitions that could lead to more than 35% market share in newspapers or a combined market share in the press, radio and broadcasting markets of 30% were forbidden.[119] The Dutch Competition Authority (*Nationale Mededingingsautoriteit* or *Nma*)[120] had the competence to block these concentrations. For all companies in general, including journalistic and media entities, transparency of ownership is further regulated by the Chamber of Commerce (*Kamer van Koophandel*), where companies have to register and file their annual accounts.[121]

The Temporary Act Media Concentration was repealed on 1 January 2011. Since then, concentrations in the media are regulated through the general Competition Act. A downside to regulation media concentration to the Competition Act is that this act focuses on economic aspects

[114] See also Chapter 3.4.
[115] Dekker 24 May 2017.
[116] Wokke 5 April 2017.
[117] Commissariaat voor de Media 2016
[118] See, for example: Commissariaat voor de Media 2016.
[119] Article 2 Temporary Act Media Concentration.
[120] After a merger with two other independent government agencies, the *NMa* now is called the Authority for Consumers & Markets (*Autoriteit Consument & Markt* or *ACM*).
[121] Van der Burg 2015.

of concentration and not pluralism and independence.[122] Furthermore, the Competition Act has no rules on cross-ownership like the 30%-rule in the Temporary Act Media Concentration.[123] As a result, the markets have become more concentrated. In 2013, the four largest media companies in the Netherlands had a joint market share of 70% to 90% across all media services.[124] This level of concentration has not lowered in the following two years. At the end of 2015, almost 80% of the Dutch newspaper market were in the hands of *De Persgroep* and *TMG,* [125] with *De Persgroep* owning almost half of the newspapers.[126] *Bertelsmann, Sanoma Group* and the *NPO* controlled for 84% of the television market in 2015.[127] As such, the overall Dutch media market is dominated by the *NPO*, *De Persgroep, TMG, Bertelsmann* and *Sanoma Group*. Finally, there is only one newspaper agency in the Netherlands: the *Algemeen Nederlands Persbureau ANP*.[128] These concentrations have also been flagged as a risk by the Media Pluralism Monitor of the European University Institute. [129]

However, it would be a mistake to view these concentrations as a purely negative development. With regard to concentration in the newspaper market, Dutch newspapers have reduced 40% in their distribution in the period between 2002 and 2015. A recent Mediamonitor stated that this is due to the shift from print to internet news consumption. Revenue from online advertisements has also been lower than revenue from print newspaper subscriptions.[130] These developments have made mergers and acquisitions necessary for the continued existence of a number of Dutch newspapers. The Minister of Education, Culture and Science (OC&W) has stated that these developments were the main reason for revoking the Temporary Act Media Concentration.[131]

IV. Conclusion

This last section will compare the European and Dutch framework within the context of the five principles mentioned in the introduction to this chapter. These are: (I) ensure the independence of the media, including the sustainability of public-service media; (II) guarantee pluralism in the media sector; (III) the possible use and safeguarding of independent media regulatory authorities to ensure pluralism; (IV) transparency in media ownership; and (V) prevention of concentration detrimental to pluralism.

(I) Ensure the independence of the media, including the sustainability of public-service media

Following the relevant standards at the European level, there should be a separation of control between the media and political authority.[132] This requires an editorially independent public-service media that is adequately equipped through secure funding and financial measures.[133] This independence should be sufficiently guaranteed in the legislative framework.[134]

[122] Van der Burg 2015.
[123] Van der Burg 2015.
[124] Van der Burg 2015.
[125] Commissariaat voor de Media 2017, p. 7.
[126] Commissariaat voor de Media 2016, p. 20.
[127] Commissariaat voor de Media 2016, p. 24.
[128] Van der Burg 2015.
[129] Van der Burg 2015.
[130] Commissariaat voor de Media 2017, p. 20.
[131] *Stb*. 2010, 835.
[132] Declaration of 31 January 2007.
[133] Recommendation CM/Rec(2007)2.
[134] ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 111.

The 'arms-length' principle is a foundation of the Dutch legal framework with regard to public-service broadcasting. Checks and balances are in place to ensure the independence of public-service media, placing controlling and guiding roles in different organisational bodies independent from authorities and powerful political groups. The funding of the public-service broadcasting seems less independent. The funds can be changed through an amendment of the Media Act, meaning that there is still some dependence on the good graces of the majority of Parliament.

The independence of commercial media is guaranteed both constitutionally and in the Media Act. The Constitution provides for a general prohibition of prior permission to regulate the written press.[135] Editorial control is organised in self-imposed codes of conduct. With regard to television broadcasting, the Dutch Media Authority has to give prior permission to provide a commercial broadcasting channel. However, refusal must be based on the limited grounds in the Media Act, which is mainly composed of rules based on the Audiovisual Media Services Directive. For broadcasting frequencies, independence is guaranteed through strict limitations on the grounds of refusal as based on the Access Directive.

(II) Guarantee pluralism in the media sector

States have a duty to ensure access to a range of opinions and comment that reflect the diversity within the country. In this regard, the public-service broadcaster should provide a forum with as broad a spectrum of views and opinions as possible.[136] With regard to broadcasting frequencies, states have a margin of appreciation to refuse a licence for the legitimate need for the quality and balance of programmes.[137] In this regard, the Council of Europe's Declaration on media concentration of 31 January 2007 mentions must-carry obligations to guarantee pluralism.

The notion of pluralism is a central focus for public-service broadcasting. The public media remit requires public-service media to provide for a diverse and broad audience and have a large variety of forms and content.[138] Furthermore, public-service media is supported by the broadcasting foundation *NTR* in providing media services that fulfil the needs of groups and minorities that are not represented sufficiently by the public-broadcasting organisations. With regard to these public-service broadcasting organisations, some problems with regard to diversity may arise due to the extensive reduction of the amount of organisations that are allowed to use the *NPO*'s channels.

With regard to commercial parties, the Telecommunications Act states that special frequencies can be assigned for the advancement of cultural and linguistic diversity and pluralism of the media. While these principles are mentioned as factors for the need to digitalise radio, there has so far not been a specific assignment on the basis of pluralism and diversity. For electronic communications service providers who provide for television services, must-carry rules apply. These rules guarantee that end-users get a minimum package of public-service and commercial broadcasting channels. Furthermore, a public Dutch Journalism Fund is in place in order to promote pluralism of the press.

[135] Article 8 Dutch Constitution.
[136] ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 101.
[137] ECtHR 5 November 2002, 38743/97 (Demuth v. Switzerland), par. 43-44.
[138] Article 2.1 Media Act.

(III) Use and safeguarding independent media regulatory authorities to ensure pluralism

In *Manole and others v. Moldova*, the Court stated that supervisory bodies of public-service media should be defined in a way that avoids any risk of political or other interference. As was shown in the analysis of the Dutch legal framework, there were some issues on risks of political interference of the central guiding and coordinating body of the Dutch public-service broadcaster: the *NPO.* Since the beginning of 2017, the risk has been reduced through the distancing of the Minister or Minister of State from appointing the Supervisory Board of the *NPO* and the legal determination of the bases on which the *NPO* determines its policy. Furthermore, the Dutch Media Authority has an important role in overseeing compliance with the Media Act by both public-service and commercial media actors. This guarantees that there is no arbitrary action from authorities or political groups.

(IV) Transparency in media ownership

The Declaration on media concentration calls for regulatory measures to guarantee transparency of ownership of media organisations and the implementation of mechanisms to monitor market concentration. In the Dutch legal framework, this is accomplished through the Chamber of Commerce and the Mediamonitor of the Dutch Media Authority. The Chamber of Commerce provides for a public platform where organisations can be found, including their annual accounts. The Mediamonitor provides an annual overview of the Dutch media landscape.

(V) Prevention of concentration detrimental to pluralism

Following the European framework, media concentration can be detrimental to pluralism. States are recommended to take positive measures to safeguard and promote pluralism through competition law or sector-specific rules.[139] Specifically, under Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, states should adopt specific measures if general competition rules show to be insufficient.[140] General competition rules that solely promote competitiveness of media systems and market efficiency can be detrimental to media independence and pluralism.[141]

With regard to this pillar the Dutch legal framework and practice does show a risk. This has also been addressed by the Media Pluralism Monitor of the European University Institute.[142] The Dutch legal framework provided for a strict prohibition on media concentration until 1 January 2011. Since the abolition of these prohibitions, media concentration is only regulated on the basis of economic considerations, as provided for in the Competition Act. This has resulted in high concentration on the newspaper market and a high cross-ownership between different media sectors. However, mergers and acquisitions can have positive effects too, since they can be a way for newspapers to survive in a news environment that is dominated by the use of Internet.

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[139] Declaration of 31 January 2007.
[140] Recommendation CM/Rec(2007)2.
[141] Declaration of 31 January 2007.
[142] Van der Burg 2015.

3.2. Access to information

I. Introduction

The Recommendation states that a comprehensive legal framework that enables journalists to contribute to public debate should guarantee public access to information.[143] The gathering of information is an essential preparatory step for journalistic activities. Authorities making access to information cumbersome or arbitrarily restricting it may become a form of indirect censorship.[144] Recommendation 2002(2) on access to official documents underscores the importance of the availability of information on issues of public interest. Access to information encourages informed participation in matters of common interest and helps maintain integrity and effectiveness of administrations, while avoiding the risk of corruption.[145]

This chapter will further analyze the case law of the European Court of Human Rights (ECtHR), followed by a brief discussion of Recommendation 2002(2) on access to official documents and the Council of Europe's (Tromsø) Convention on Access to Official Documents. It will then examine the relevant provisions in the Dutch legal framework and its compliance to the standards at the European level.

II. European framework

The ECtHR has historically been reluctant to include access to information as an element of the right to freedom of expression as guaranteed by Article 10 ECHR. In its earlier case law, the ECtHR merely recognised that "the right to freedom to receive information basically prohibits governments from restricting a person from receiving information that others which or may be willing to impart to him".[146] The ECtHR stated that Article 10 ECHR 'does not (...) confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.'[147] However, in 2009 the Court advanced towards a broader notion of 'freedom to receive information'.[148] In the *TASZ* case, the Court concluded that the censorial power of an information monopoly – when the authorities refuse to release information to the media or other 'public watchdogs' – calls for the most careful scrutiny.[149] Arbitrary restrictions are an obstacle to the essential preparatory step of journalists in gathering information, especially when the authorities have a monopoly on this information.[150] Furthermore, if there is a law on access to information, restricting access to documents should be prescribed by law.[151] High costs for the authorities cannot be accepted as a valid argument against publication, especially when it was their own choice not to actively publish information.[152]

[143] Recommendation CM/Rec(2016)4.
[144] Recommendation CM/Rec(2016)4.
[145] Recommendation CM/Rec(2002)2.
[146] ECtHR 26 March 1987, 9248/81 (Leander v. Sweden), par. 74-75.
[147] ECtHR 26 March 1987, 9248/81 (Leander v. Sweden), par. 74-75.
[148] ECtHR 14 April 2009, 37374/05 (Társaság a Szabadságjogokért v. Hungary), par. 35.
[149] ECtHR 14 April 2009, 37374/05 (Társaság a Szabadságjogokért v. Hungary), par. 36; ECtHR 28 November 2013, 39534/07 (OVESSG v. Austria), par. 41.
[150] ECtHR 25 April 2006, 77551/04 (Dammann v. Switzerland), par. 52.
[151] ECtHR 25 June 2013, 48135/06 (Youth Initiative for Human Rights v. Serbia), par. 25-26.
[152] ECtHR 28 November 2013, 39534/07 (OVESSG v. Austria), par. 46.

More recently, the Court adjudicated the case *Magyar Helsinki Bizottság v. Hungary* on the refusal to disclose information to a NGO on the appointment of public defenders. This case stipulates four principles that determine whether access to information is instrumental for freedom of expression and its denial would constitute a violation of this right.[153] First, the information sought should be necessary to enable the exercise of the freedom to receive or impart information to others. The Court puts emphasis on the gathering of information as a preparatory step in journalistic activities. Denial of information, which relates to the information monopoly as mentioned in *Dammann* and *TASZ*, could hinder or impair this right.[154] Second, the information should meet the public-interest test, meaning information on 'matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community'.[155] Third, the Court states that an important consideration is the role of the person seeking access to information, particularly whether this person seeks access with a view to inform the public as a public watchdog. Fourth, it is important to consider whether the information is ready and available.[156] Following these criteria, the Court still does not recognise a general right of access to information under Article 10 ECHR.

The principles of the Recommendation on access to official documents and the Tromsø Convention are more encompassing that those of the ECtHR. Specifically, the CoE standards do not limit the right to information that is of public interest and defines no limitation to special categories of persons, such as public watchdogs. The Recommendation on access to official documents relates to all information recorded in any form from any governmental entity performing public functions or exercising administrative authority.[157] This emphasis on 'performing public functions' and 'exercising administrative authority' means that it does not include legislative or judicial authorities and their functions. It encourages the governments of the member states to give access to documents promptly and on an equal basis, without obliging the applicant to give reasons for wanting access.[158] This access should be free of charge or limited to the actual costs incurred by the authorities.[159] Limitations on the access should only be allowed when they are provided for by law and are proportionate and necessary with regard to a limited number of aims.[160] The Tromsø Convention of 2009 follows the same outline as the Recommendation. [161] It is important to note that the Tromsø Convention has not entered into force due to a lack of the requisite number of ratifications.

Freedom of movement for journalists

In order to perform their function in society effectively, journalists may need to be able to access locations which are closed to the general public. This type of access to locations benefits the ability to collect information of public interest. For example, journalists may need to be able to make photographs at a manifestation or riot, regardless of the general order for rioters to disperse. The

[153] ECtHR 8 November 2016, 18030/11 (Magyar Helsinki Bizottság v. Hungary).
[154] ECtHR 8 November 2016, 18030/11 (Magyar Helsinki Bizottság v. Hungary), par. 158-159.
[155] ECtHR 8 November 2016, 18030/11 (Magyar Helsinki Bizottság v. Hungary), par. 162.
[156] ECtHR 8 November 2016, 18030/11 (Magyar Helsinki Bizottság v.Hungary), par. 170.
[157] Recommendation CM/Rec(2002)2.
[158] Recommendation CM/Rec(2002)2.
[159] Recommendation CM/Rec(2002)2.
[160] Recommendation CM/Rec(2002)2.
[161] Council of Europe Convention on Access to Official Documents CETS No. 205.

rights of journalists in these situations are also recognised in the Recommendation on the protection of journalism and safety of journalists. The Committee of Ministers states that the state should not unduly restrict the free movement of journalists because mobility and access is important for information-gathering purposes. In this regard, law enforcement should respect the position of journalists covering demonstrations and other events. Furthermore, state authorities should accept relevant journalistic credentials such as press cards and have an obligation to ascertain the status of journalists.

These principles in the Recommendation reflect the case law of the European Court of Human Rights (ECtHR). The Court stated in *Najafli v. Azerbaijan* that the physical ill-treatment of a journalists during the dispersal of a demonstration seriously hampered the exercise of the journalist's right and duty to receive and impart information. Najafli had made clear efforts to identify himself as a journalist by wearing both a journalist's badge and telling the police officers he was a journalist.[162] However, the rights of journalists to receive and impart information while 'ordinary' citizens should disperse, is not unlimited. In *Pentikäinen v. Finland,* the Court found the interference of a journalist's freedom of movement 'necessary in a democratic society' where a journalist disobeyed police orders after a demonstration had turned into a riot.[163] It is important in this regard that the Court explicitly stressed that the finding of no violation should be seen in light of the particular circumstances of the instant case.[164] In this case, the Court found that the journalist already had ample opportunities to make photos of the riot. At the time the journalist was apprehended, only twenty demonstrators were left.[165] Furthermore, no penalties were imposed on the journalist and no sanctions were imposed with respect to a publication.[166] In the words of the Court: The applicant was not prevented from carrying out his work as a journalist either during or after the demonstration.[167]

III. Dutch framework

The core of the Dutch access to information regime is Article 110 of the Dutch Constitution and the Act on the openness in administrations (*Wet Openbaar Bestuur* or *WOB*). The Dutch government has not (yet) ratified the Tromsø Convention. We therefore cannot assume that the Netherlands strives for full compliance to this Convention in the current legal framework. However, the Minister of Internal Affairs has stated in 2011 that any changes to the *WOB* should be in accordance with the Tromsø Convention.[168] The ratification is put on hold until a full investigation has been made on the compliance of the full Dutch legal framework with the Convention.[169] We are not aware of any full investigation since these statements of the Minister. This study looks at the WOB and assume that the Dutch government does pursue compliance with all relevant CoE standards mentioned above.

Foundations of open government

Article 66 of the Dutch Constitution guarantees that Sessions of Parliament are accessible to the public. This principle applies *mutatis mutandis* to the legislative bodies of the provinces and

[162] ECtHR 2 October 2012, 2595/07 (Najafli v. Azerbaijan).
[163] ECtHR 20 October 2015, 182/10 (Pentikäinen v. Finland).
[164] ECtHR 20 October 2015, 182/10 (Pentikäinen v. Finland), par. 114.
[165] ECtHR 20 October 2015, 182/10 (Pentikäinen v. Finland), par. 6.
[166] ECtHR 20 October 2015, 182/10 (Pentikäinen v. Finland), par. 79.
[167] ECtHR 20 October 2015, 182/10 (Pentikäinen v. Finland), par. 114.
[168] *Kamerstukken II* 2010/11, 32802, 1.
[169] *Kamerstukken II* 2010/11, 32802, 1.

municipalities (Article 23 *Provinciewet* and Article 23 *Gemeentewet*). Article 121 of the Dutch Constitution states that court sessions are accessible to the public, with some exceptions as determined by law.

The accessibility of court judgments is further determined in Article 362 Code of Criminal Procedure,[170] Article 28 Code of Civil Procedure,[171] and Article 8:67(2) General Administrative Law Act.[172] These Articles all state the principle of accessibility to the public. Court hearings, on the other hand, can be restricted if this is appropriate with regard to the interests of public order or public morality, state security, minors or the privacy of the parties, and if a public hearing would seriously prejudice the proper administration of justice.[173] The choice for a closed hearing falls within the discretionary powers of the judiciary. As such, a balance of interests should be made with due regard to the European Convention on Human Rights and specifically Article 6 of this Convention.[174] Access to information regarding court hearings is regulated further in the '*Persrichtlijn rechterlijke macht*'. This directive for the press states how the courts should provide the press with information before, during and after proceedings.[175]

Article 110 of the Dutch Constitution states that the government endeavours to fulfil its functions in publicity, according to the rules to be set in Acts of Parliament (*wet in formele zin*). This rule is not found in the Chapter on fundamental rights (Chapter 1 of the Dutch Constitution) but in Chapter 5 on legislation and administration. This means that no fundamental right on access to government information can be distilled from this Article.[176] It would therefore be more plausible that conflicts arising out of a dispute regarding access to information will be interpreted according to Article 10 ECHR as interpreted by the ECtHR instead of invoking Article 110 of the Dutch Constitution.

The WOB

The *WOB* is the general law on the access to official documents. It is applicable to a broad scope of administrative bodies (Art. 1a). It seems *prima facie* that the Act is consistent with the Recommendation on access to official documents and the Tromsø Convention: it has a similar general structure to those two texts. The European instruments propose applicability for all government and private bodies that exercise administrative authority. The *WOB* is applicable to administrative bodies and documents that pertain to administrative matters.[177] While this focus on specific bodies or functions within the government is present in the Recommendation and Tromsø Convention, it is not present in ECtHR case law. Legislative and judicial bodies could also hold information monopolies that inhibit the preparatory phases of journalistic activities, but these bodies are excluded from the *WOB.*

[170] *Wetboek van Strafvordering.*
[171] *Wetboek van Burgerlijke Rechtsvordering.*
[172] *Algemene Wet Bestuursrecht.*
[173] Article 269 Code of Criminal Procedure, Article 27 Code of Civil Procedure and Article 8:62 General Administrative Law Act.
[174] Van Mierlo 2016.
[175] Maandag and others 2011, p. 11.
[176] Van Schagen 2016.
[177] Daalder 2011.

The WOB starts with the principle of the public interest in openness of information. As such, the starting point is in favour of access to information. The specific rules on this access on request are governed by Articles 3-7. These articles state, *inter alia*, that applying to the WOB is not limited to special categories of persons and that no reason for the request needs to be given. Furthermore, the information should be given promptly – in principle within four weeks.

It is important to note the linguistic difference between 'openness' (*openbaarheid*) in the Dutch WOB and 'access' (*toegang*) in the European framework. This denotes the point that the *WOB* also recommends the active disclosure of information without specific requests. Articles 8 and 9 create obligations for administrative bodies to actively disclose information without a request. However, the success of these Articles has been limited. Active disclosure has been debated almost constantly for the past seven years, with some political parties arguing for broadening the obligations for active disclosure.[178] A broader obligation for active disclosure has been approved by the Lower House and is currently under discussion in the Senate.[179] However, success for this legislative Bill seems unlikely. A recent report on the impact of the new Bill concluded that active disclosure is financially unfeasible.[180] The report has not been without criticism, leading to questions in Parliament on the objectivity of the research goals.[181] Furthermore, the initiators of the Bill have requested the Senate to adjourn the discussion until after deliberation between them and the Minister of Internal Affairs.[182]

Limitations to access

Articles 10 and 11 of the WOB specify the limitations of access. The limitations in Article 10 concern relative and absolute grounds of refusal. These grounds are almost completely identical to the limitations in the Recommendation and the Tromsø Convention. Relative grounds include information with regard to economic and financial interest of the Dutch state, investigation of criminal acts and supervision of administrative authorities. Personal data, trade secrets, and information that could endanger public order (*veiligheid van de staat*) and unity of the government (*eenheid van de Kroon*) are mentioned as absolute grounds of refusal. Another absolute ground is information on personal attitudes towards policies for different actors as mentioned in Article 11. An issue with absolute grounds is its compatibility with the standards of the CoE. Article 10 ECHR, the Recommendation on access to public documents and the Tromsø Convention all argue for a balancing of interests as a basis for limitations on access to information. Limitations should be based on the principles of proportionality and necessity in a democratic society. Refusal based on an absolute ground, without referral to proportionality or necessity, is therefore contrary to the standards of the CoE.[183]

The costs of access to information is governed by Articles 7 and 12 *WOB* and the Ministerial Resolution on tariffs in openness of administrations.[184] In accordance with CoE standards, reasonable costs for accessing information can be borne by the applicant. In the Netherlands, this is restricted to

[178] *Kamerstukken II* 2011/12, 33328, 2.
[179] *Kamerstukken I* 2015/16, 33328, 1.
[180] Kuipers, Van der Steenhoven & Staal 2016.
[181] *Kamerstukken II* 2017/18, 33328, 40.
[182] *Kamerstukken II* 2017/18, 33328, 40.
[183] Daalder 2011.
[184] *Besluit Tarieven Openbaarheid van Bestuur, Stb*. 2001, 415.

the costs incurred by creating copies of documents. Following Article 2 of the Resolution, less than six photocopies are free, for 6-13 copies a standard rate of EUR 4.50 applies and for more than 14 copies, a rate of EUR 0.35 per copy is used.

Abuse of WOB requests

A recent discussion on the *WOB* has been the so-called 'abuse of *WOB*-requests'. Until the recent 'Act prevention of abuse *WOB*',[185] administrative authorities would incur a penalty, based on the General Administrative Law Act (*Awb*), payable to the applicant (*dwangsom*) if the request was not handled within the statutory term. This created an incentive for applicants to make a large number of vague requests, with the intention of profiting from the penalties.[186] The amendment has put a halt to this practice. Article 15 now precludes the general provisions on penalties in the *Awb* from the *WOB.* In order to counteract the possible effect of slower reactions to *WOB*-requests, the amendment has made it possible to first file a complaint directed at the administrative authority in order to get a quick response.[187] This is in contrast to the previous situation, where an unresponsive authority had to be dealt with through an application to the courts.[188] Moreover, It is still possible to request a penalty through a court order. After the period to react to a request has expired, the applicant can request an administrative judge to apply this penalty as long as the administrative authority does not react to the request. However, this procedure can be seen as more burdensome than the previous *dwangsom* procedure.

This development has drawn criticism from different political parties and applicants who act in good faith.[189] An alternative solution to the practice would have been to create a right of refusal for 'vexatious requests', as mentioned in the Tromsø Convention.[190] However, the Explanatory Memorandum to the Convention states that this refusal would only be met if the request is manifestly unreasonable on multiple aspects.[191]

Journalists and access to information

Minister Donner, at that time Minister of Internal Affairs, stated in his speech on World Press Freedom Day in 2011 that the openness in administrations is not meant for press freedom, but the controllability and propriety of government administration. According to Donner, taking the *WOB* as a criterion for press freedom, makes the press dependent on information that the government provides.[192] In 2015, Volgenant and McGonagle argued that the WOB is still far from perfect for journalists. It takes too long to obtain information and authorities prefer to give access to as little information as possible.[193] The ECtHR has recognised that news is a perishable commodity and to delay its publication may deprive it of its value and interest.[194] As such, information of public interest

[185] Act of 31 October 2016, *Stb.* 2016, 301.
[186] See, for example: District Court Rotterdam 23 December 2015, ECLI:NL:RBROT:9732.
[187] Article 15a *WOB*.
[188] Article 7:1(f) General Administrative Law Act.
[189] Van der Sluis 2016; *Handelingen II* 2014/15, 95, item 3, p. 1.
[190] Daalder 2011, p. 240.
[191] Kleinhout 2013.
[192] Daalder 2011, p. 238.
[193] Volgenant & McGonagle 2016, p. 24-27.
[194] ECtHR 26 November 1991, 13585/88 (Observer and Guardian v. the United Kingdom), par. 60.

blocked by time-consuming administrative hurdles could impair the freedom of expression in Article 10 ECHR.

On a different level, (police) authorities and the press also work together to ensure the quick provision of information that is of public interest. The P2000 press alarm is a system which provides for alerts to the press in case of certain incidents. These incidents range from traffic collisions to demonstrations and (attempted) murder.[195] This press alarm has not been without shortcomings. On 19 May and 22 November 2016, the Dutch Association of Journalists (*NJV*) reported that it is in contact with the National Ombudsman to address a multitude of complaints regarding the alarm.[196] Incidents are often not registered in the press alarm at all or very late after the incident. In an article of the *NVJ* in 2014, the organisation reported that there were as much as eight complaints a day about the press alarm.[197] Due to a lack of information about incidents, journalists are not able to get to the place of the incident on time. This is especially a problem for photo journalists.

A related issue to the lacking press alarm is the position of photojournalists with regard to the active dissemination of photos by the police and other public authorities. While the publication of the photos or their distribution to journalists could be seen as a positive act of active disclosure, such a 'tape on desk'-policy could also constrain journalism. The *NVJ* criticizes this practice because it can give a limited view of the full story.[198] Furthermore, it could be seen as a form of unfair competition, which has already lead to an agreement to put a watermark on photos disseminated by the police.[199] Furthermore, the 'tape on desk' policy could be used as an excuse to restrict access for journalists, hampering the possibility of a journalistic viewpoint.

Freedom of Movement for journalists

The use of drones is a new way for journalists to obtain information, without having to physically move to the location of the information. This can be a valuable tool, especially in dangerous situations or on dangerous or hardly accessible locations. In 2015, the *NVJ* and journalist Peter Oudshoorn started a court procedure against the Dutch State because of the restrictive rules on the use of drones for journalists.[200] At that time, it was required to report the use of a drone to several authorities, 48 hours in advance; a rule that is hard to live up to for people who cover the latest news. Moreover, as opposed to regular citizens, journalists risked a fine for the use of a drone without a licence. These rules restricted the freedom of news-gathering and therefore had a chilling effect on freedom of expression.

During the procedure, then Minister of State Sharon Dekker announced that the rules would be broadened: as of 1 July 2016, journalists are allowed to make use of drones with a weight of less than 4 kilograms without a licence, if certain organisational measures are taken.[201] The duty to report the

[195] https://www.nvj.nl/politie-en-pers/melding-klachten-persalarm/incidentenlijst-persalarmering
[196] See https://www.nvj.nl/nieuws/gesprek-vertegenwoordiger-ombudsman-over-klachten-persalarmering and https://www.nvj.nl/nieuws/overleg-ombudsman-over-persalarmering-en-watermerk-foto%E2%80%99s (both available in Dutch).
[197] Bruning 12 September 2014.
[198] https://www.nvj.nl/nieuws/%E2%80%98je-weet-niet-welke-foto%E2%80%99s-niet-worden-gemaakt%E2%80%99
[199] https://www.nvj.nl/nieuws/overleg-ombudsman-over-persalarmering-en-watermerk-foto%E2%80%99s
[200] Volgenant & McGonagle 2017.
[201] See https://www.nvj.nl/nieuws/journalistiek-gebruik-drones-eindelijk-zicht (available in Dutch)

use in advance now only applies to drones heavier than 4 kilograms. Both the *NVJ* and Peter Oudshoorn have stated to be happy with the adjusted requirements but continued the court procedure on fundamental grounds. On 9 November 2016, the District Court The Hague ruled that the new regulation takes the journalistic interest in freedom of news-gathering sufficiently into account.[202]

On 28 January 2016 the Mayor of Noordoostpolder issued an emergency order barring journalists from entering the village Luttelgeest, being part of his municipality. Journalists were not allowed to enter an information meeting about a new asylum centre or film on public premises near the meeting. This was not the first instance of a full refusal of the press, with similar issues arising in Harderwijk and Heesch.[203] Following this incident, the Dutch Association of Editors-in-Chief filed a complaint against this restriction of freedom of access for journalists.[204] The situation was finally ended by the mayor stating that there was no emergency order issued, but merely a mistake. A draft version of the order had been posted by mistake on the municipal website.[205]

The 'Pocketbook order and safety' (*Zakboek orde en veiligheid*) – which is discussed more extensively in the chapter on protection – states that journalists should get access to the area behind the so-called red and white police tape.[206] On the other hand, the Pocketbook also states that journalists should be forbidden to enter dangerous areas in critical situation if this complies with the principles of proportionality and subsidiarity. The right to access the area behind police tape was also discussed in the judgment of the District Court Almelo of 7 July 2004. In this case, a press photographer had entered an area closed by the police in order to photograph a building that was on fire. The court stated that a competence of the police to give instructions does not give *carte blanche* to the authorities to limit journalistic freedoms. The court stated that professional member of the press may, in certain circumstances, have more rights than other civilians. On the other hand, the court considered that in the case of an order to clear a dangerous area should be adhered to by a journalist if his presence is a significant burden to the functioning of the police.[207] According to the Pocketbook order and safety, the freedom of movement of journalists may be restricted to enter dangerous areas if this complies with the principles of proportionality and subsidiarity. In the case of acute emergency situations, journalists should be enabled to enter these dangerous areas, where possible under (police) escort.[208]

These rights of freedom of movement of the press are further supported by the Guidebook on the position of the press during police action *(Leidraad over de positie van de pers bij politieoptreden*). This guidebook can be found on the website of the *NVJ*.[209] The Guidebook mentions multiple important principles: (I) the possibility for journalists to work in areas closed to the public; (II) the safeguard of journalists against detention when performing their jobs during riots or protests; (III)

[202] District Court The Hague 9 November 2016, ECLI:NL:RBDHA:2016:13313.
[203] De Weerd 29 January 2016.
[204] http://www.omroepflevoland.nl/SiteFiles/Doc/Plasterk_5F9F6B60170D914FC1257F5E0040FB5D.pdf
[205] http://www.nu.nl/binnenland/4219004/geen-noodbevel-rond-bijeenkomst-azc-luttelgeest.html
[206] Nederlands Genootschap van Burgemeesters 2017.
[207] District Court Almelo 7 July 2004, ECLI:NL:RBALM:2004:AP8633.
[208] Nederlands Genootschap van Burgemeesters 2017.
[209] https://www.nvj.nl/politie-en-pers/beleid-leidraad-en-tips/leidraad-over-positie-pers-politieoptreden

the right of the police to restrict access to public spaces in case of disorder, where the presence of people, including journalists, could hinder their tasks; (IV) the competence of the Mayor to order or proclaim an ordinance to protect public order in exceptional circumstances, including to forbid the use of cameras or microphones during, for example, hostage takings.

It is not clear whether the norms in the guidebook should be inferred from Article 7 of the Dutch Constitution and Article 10 ECHR or that the guidebook itself has any legal merit. The Guidebook can only be found on the website of the Dutch Association of Journalists *NVJ*. On the other hand, the Guidebook states that it was drafted by the ministers of justice and internal affairs.[210] Furthermore, the National Ombudsman declared in a rapport that the Guidebook gives an overview of the constitutional rights of the press and the competences of police authorities to limit these rights.[211] Further support for its legal merit seems to follow from the discussions on the protection of sources in Parliament.[212] Here the Minister of justice stated that, though the Guidebook is published on the website of *NVJ*, the full policy of public prosecutors and police with regard to actions against journalists is found in the 'Instruction on application of coercive measures against journalists'.[213] The formal position is also recognised in the judgment of the District Court Almelo of 3 May 2004. Here the court concluded that, according to the text of the instruction on application of coercive measures against journalists, the guidebook is still valid.[214] However, the Guidebook is no longer mentioned in the 2012 version of the Instruction, which replaced the 2002 version as discussed by the district court of Almelo. It is unclear whether this could mean that the Guidebook is no (longer) valid law.

While the statement of the Minister seems to indicate that the Guidebook has binding force, the instruction does not match the guidebook at all. The instruction almost exclusively determines the right and obligations during the prosecution of journalists and the use of force to obtain information from them. Also, where the guidebook states that journalists are, in principle, safeguarded from detention, the instruction clearly states that, in principle, all usual coercive measures apply. These are two completely opposite starting points. According to the instruction, the role and societal function of the journalist should be assessed when the public prosecutor determines whether prosecution is appropriate. This procedural step commences much later than the detention mentioned in the guidebook.

Press cards provide further support for the freedom of movement and special position of journalists during protests, riots and demonstrations. A press card can enable journalists to identify themselves more easily. The guidebook on the position of the press during police action states that anyone who can prove he or she is journalist as his main occupation and has a legitimate interest in the card, can order a 'police press card'.[215] These cards are distributed by the *NVJ*.[216]

[210] https://www.nvj.nl/politie-en-pers/beleid-leidraad-en-tips/leidraad-over-positie-pers-politieoptreden
[211] https://www.nationaleombudsman.nl/uploads/20130122_r_2012.07763.pdf
[212] *Kamerstukken II* 2014/15, 34032, 8.
[213] *Aanwijzing toepassing dwangmiddelen tegen journalisten, Stcrt. 2012, 3656.*
[214] District Court Almelo 7 July 2004, ECLI:NL:RBALM:2004:AP8633.
215 https://www.nvj.nl/politie-en-pers/beleid-leidraad-en-tips/leidraad-over-positie-pers-politieoptreden
216 https://www.nvj.nl/perskaarten

According to the guidebook, the police press card allows journalists to enter areas that are off limit to the general public.[217] This access is subject to recognition of the police press card by the authorities. In this regard, the guidebook states that Mayors need to decide on the recognition of the press cards. The Ministers of Justice and Internal Affairs have recommended Mayors to do so. As the police press card was first issued in 1980, the decisions of the Mayors cannot be found in digital archives. To assess whether the cards are, in fact, recognised in all municipalities, we would need to obtain these documents from all 388 Dutch municipalities individually. According to the Guidebook, the police press card has been recognised by the Minister of Justice.[218]

Recognition of press cards and the rights they bring also follow from Dutch court cases. In the case of the District Court Almelo of 3 May 2004, the public prosecutor recognised that the press card is a way to get a preferential position in the gathering of news (but does not give an absolute right to enter every place).[219] The police press card of the *NVJ* has not been the only press card recognised in the Dutch courts. In the case of the District Court Den Haag of 15 December 2015, the court stated that the applicant could be identified as a journalist because he was provided with a press card from vrijepers.org.[220] The website vrijepers.org provides a press card on payment, without needing to show any journalisting activities. Other press cards can be ordered from INC-Nieuws and Freelancers Associatie.[221]

Freedom of movement in private spaces?
It goes without saying that a journalist does not have the freedom to enter any private property or establishment and start taking pictures or rummaging through paperwork.[222] With regard to the dissemination of information, the ECtHR has also concluded that the Convention does not bestow any freedom of forum, meaning that a private company may limit freedom of expression within their premises.[223]

A right of access to private property cannot be discerned from either the European framework or Dutch legislation. Still, critical voices can be heard in some instances where journalists are barred from private institutions, mainly those having a public function. Political parties DENK and VVD have restricted access to some or all journalists from their meetings. In case of DENK, journalists were barred from entering their meeting during the elections. Secretary of the *NVJ* Thomas Bruning stated that while parties are free to choose when and where to address the media, it is imperative for a functioning democracy to enable journalists to report and check. [224] In case of VVD, journalists that had published a critical article on the chairperson of the party were barred from a press meeting discussing the issues in that article.[225] In their report *A threatening climate*, Odekerken and

217 https://www.nvj.nl/politie-en-pers/beleid-leidraad-en-tips/leidraad-over-positie-pers-politieoptreden
218 https://www.nvj.nl/politie-en-pers/beleid-leidraad-en-tips/leidraad-over-positie-pers-politieoptreden
219 District Court Almelo 3 May 2004, ECLI:NL:RBALM:2004:AO8788.
220 District Court The Hague 15 December 2015,ECLI:NL:RBDHA:2015:14518.
221 http://sargasso.nl/media/INC-nieuws-perskaart.pdf http://www.freelancersassociatie.nl/services-2/perskaart/
222 Maandag and others 2011, p. 38.
223 ECtHR 6 May 2003, 44306/98 (Appleby and others v. the United Kingdom).
224 http://www.parool.nl/binnenland/nvj-berispt-denk-voor-wegsturen-journalisten~a4475107/
225 http://nos.nl/artikel/2170531-weigering-journalisten-door-vvd-is-een-blamage-voor-nederland.html

Brenninkmeijer also flagged these incidents.[226] The report was written commissioned by the *NVJ* and describes the working climate for Dutch journalists in 2017. In the report, Odekerken and Brenninkmeijer stated that these and many other incidents contribute to a threatening climate for journalists in the Netherlands, which has a chilling effect on freedom of expression. The report is concluded by a series of recommendations to improve the climate, such as awareness raising amongst politicians and journalists themselves.

IV. Conclusion

While the Minister of Internal Affairs stated that the Dutch legal framework should move towards implementation in accordance with the Tromsø Convention,[227] there is definitely room for improvement. While the *WOB* follows the standards of the CoE and ECtHR on a general level, there are some discrepancies that should be viewed critically. First, the *WOB* states a list of types of documents that should always be refused. These absolute grounds of refusal are in conflict with the principles of proportionality and subsidiarity as defined in Article 10 ECtHR, the CM's Recommendation on access to public documents and the Tromsø Convention. Furthermore, the recent changes to the penalty clauses of the *WOB* could make it more burdensome to obtain information, as the possibility to demand penalties payable to the applicant (*dwangsommen*) has been made dependent on a court order. Coupled with the signal of Volgenant and McGonagle that access already took too long and was too limited before the amendments, a watchful eye should be kept on the functioning of access to information for journalists in practice.

With regard to legislative and judicial bodies, no general requirements can be distilled from the CoE Recommendations or the Tromsø Convention. For these bodies, the case law of the ECtHR provides the relevant framework. The restrictive approach of the Court states that access to information should apply to information of public interest, meant to be disseminated to the public and requested by a public watchdog. Furthermore, it is important to consider whether the information is ready and available.[228] Access to Sessions of Parliament on all levels and access of the public to court hearings and judgments is enshrined in both the Constitution and the Acts of the highest legislator. As such, these legal frameworks comply with the principles of ECtHR case law.

Freedom of movement

The 'Guidebook on the position of the press during police action' has a somewhat unclear legal status and some aspects seem hardly reconcilable with the 'Instruction on application of coercive measures against journalists'. The Guidebook provides rules on press cards to be issued by the *NVJ*; this and other press cards are recognised by public authorities.

Several challenges arise with respect to the freedom of movement of journalists: limitations on the use of drones are not as strict any more, but barring journalists from attending public or private meetings forms a threat to the favourable environment that journalists must be able to operate in. Odekerker and Brenninkmeijer make valuable recommendations in this regard, of which it is hoped that they can improve the climate journalists are working in. Although the ECtHR does not provide

[226] The report is available in Dutch: https://www.nvj.nl/nieuws/nvj-ziet-aanbevelingen-brenninkmeijer-nieuwe-aanknopingspunten-verbeteren-veiligheid

[227] *Kamerstukken II* 2010/11, 32802, 1.

[228] ECtHR 8 November 2016, 18030/11 (Magyar Helsinki Bizottság v. Hungary), par. 158-170.

for a right of access to private property, barring journalists from meetings on matters of public interest has an unavoidable chilling effect on freedom of expression.

3.3. Source protection

I. Introduction

The Recommendation calls on the CoE's member states to put in a place a legal framework that reflects, amongst other things: 'privacy, data protection, confidentiality and security of communications and protection of journalistic sources'.[229]

The ECtHR has acknowledged the importance of journalistic source protection in the judgment *Goodwin v the United Kingdom*. The Court stated that source protection for journalists is 'one of the basic conditions for press freedom'.[230] This has been affirmed in several standard-setting works. The EU Parliament, for example, stated in its 1994 Resolution on the Confidentiality of Journalists' Sources that source protection 'increases the transparency of decision-making procedures'.[231] In addition, PACE Recommendation 1950 (2011) on the protection of journalists' sources states that it is 'a basic condition for […] the full exercise of journalistic work'.[232]

In its *Nordisk Film & TV A/S v. Denmark* decision, the ECtHR held that the right to source protection is twofold: it is 'relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest'.[233] A source is 'any person who provides information to a journalist'.[234] However, according to the ECtHR, only people that provide information voluntarily and on purpose can be regarded as sources.[235]

II. European framework

According to the ECtHR in the *Goodwin* case, a chilling effect on freedom of expression will occur whenever an order for source disclosure is given. However, not only will such an order give rise to a chilling effect on the freedom of expression of the journalist concerned, it will also affect other journalists who see a colleague disclose the identity of his source.[236]

In certain circumstances, an order for source disclosure can be justified by an overriding public interest in the identity of the source.[237] Moreover, the ECtHR has emphasized that a source disclosure order can be justified when the source's aim is to cause harm. However, this has to be judged on a case-by-case basis and courts must be slow to assume that this is the case.[238] Because these measures interfere with a journalist's freedom of expression under Article 10 ECHR, they are subject to a proportionality and subsidiarity test.

[229] Recommendation CM/Rec(2016)4, under 2.
[230] ECtHR 27 March 1996, 17488/90 (Goodwin v. the United Kingdom), par. 39.
[231] European Parliament resolution of 18 January 1994 on the confidentiality of journalists' sources.
[232] Recommendation 1950 (2011), under 2.
[233] ECtHR 8 December 2005, 40485/02 (Nordisk Film & TV A/S v. Denmark).
[234] Recommendation No. R(2000)7, Appendix, Definitions, under c.
[235] ECtHR 8 December 2005, 40485/02 (Nordisk Film & TV A/S v. Denmark).
[236] ECtHR 15 December 2009, 821/03, (Financial Times Ltd and others v. the United Kingdom).
[237] ECtHR 27 March 1996, 17488/90 (Goodwin v. the United Kingdom), par. 39.
[238] ECtHR 15 December 2009, 821/03, (Financial Times Ltd and others v. the United Kingdom), par. 66 and ECtHR 22 November 2012, 39315/06 (Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands), par. 128.

Dutch legislation related to source protection has been tested against the standards of the ECHR multiple times. This happened for the first time in the case *Voskuil v. the Netherlands*. In this case, the ECtHR ruled that Dutch authorities had violated Article 10 ECHR by detaining Dutch journalist Voskuil for seventeen days, after he had refused to reveal the identity of his source in a criminal procedure. The detention was an attempt to compel Voskuil to reveal his source's identity. In the words of the Court: 'such far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forwards an sharing their knowledge with the press in future cases'.[239]
In the case *Sanoma Uitgevers B.V. v. the Netherlands*, the Netherlands once again violated Article 10 ECHR. At the time, under the Dutch Code of Criminal Procedure, an order for seizure of journalistic materials was entrusted to the public prosecutor. In this case, the prosecutor got a judge involved in an advisory role, although there was no regulation that explicitly prescribed this.
According to the ECtHR, an order for source disclosure in a criminal court procedure always has to be preceded by a preliminary judicial investigation by an independent body,[240] in order to balance the public interest against the right to protection of sources. The voluntary involvement of a judge in an advisory role was not sufficient: this procedure has to be legally codified.
The third time the Netherlands violated Article 10 ECHR in the context of source protection, was in the 2012 *Telegraaf Media v. the Netherlands* case. Journalists of the Dutch newspaper *De Telegraaf* had published an article which contained state secrets. Documents containing these secrets were leaked to the newspaper by officials of the General Intelligence and Security Service (*AIVD*).[241] To return the documents to the *AIVD* and to identify the official who had leaked the documents, the Dutch public prosecutor ordered *De Telegraaf* to hand over the documents. The ECtHR was of the opinion that there were no relevant and sufficient reasons to give such an order: To identify the official who leaked the documents, detailed examination of the documents was not necessary.[242] Moreover, since the information was already known to the public, withdrawing the documents from circulation would not prevent the dissemination of its content.

Surveillance
The ECtHR has acknowledged that surveillance measures constitute an interference with freedom of expression.[243] In several judgments, the Court has found that mass surveillance measures have to be accompanied by sufficiently precise, effective and comprehensive safeguards.[244] Although member states enjoy a fairly wide margin of appreciation in designing a system to protect national security,[245] safeguards have to protect objects of mass surveillance measures from abuse of power by state authorities.
The ECtHR tested the Dutch surveillance legislation with respect to journalists in the aforementioned case *Telegraaf Media v. the Netherlands*. Apart from the surrender order of the secret General Intelligence and Security Service (*AIVD*)[246] documents, the *De Telegraaf* journalists were made

[239] ECtHR 22 November 2007, 64752/01 (Voskuil v. the Netherlands).
[240] ECtHR 14 September 2010, 38224/03 (Sanoma Uitgevers B.V. v. the Netherlands), par. 100.
[241] See 'Dutch Constitutional Framework', Chapter 2.4.
[242] ECtHR 22 November 2012, 39315/06 (Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands), par. 129-132.
[243] See for example ECtHR 29 June 2006, 54934/00 (Weber and Saravia v. Germany).
[244] See for example ECtHR 12 January 2016, 37138/14 (Szabó and Vissy v. Hungary).
[245] ECtHR 29 June 2006, 54934/00 (Weber and Saravia v. Germany).
[246] See Chapter 2.4.

subject to the use of surveillance powers. On 11 July 2008, the Supreme Court upheld the judgment of the District Court of The Hague that the interference with the journalists' right to freedom of expression was allowed under Article 10(2) ECHR.[247] The integrity of the *AIVD* was at stake, as it seemed that someone had leaked the documents to the journalists. Telegraaf Media took the case to Strasbourg. As in the *Sanoma* case, which dealt with orders for source disclosure in criminal procedures, the ECtHR came to the conclusion that the use of surveillance powers by Security Services has to be subject to 'prior review by an independent body with the power to prevent or terminate' the measure.[248] In the case of *De Telegraaf*, this review mechanism was absent. The Netherlands had therefore violated Article 10 ECHR.

III. Dutch framework

Historically, journalists in the Netherlands did not have a right of non-disclosure. This changed in 1977, when the Supreme Court (*Hoge Raad*) delivered a judgment in which it stated that, in certain circumstances, a journalist was allowed not to disclose his source: source disclosure was the norm and non-disclosure the exception.[249] However, the *Goodwin* judgment in which the ECtHR formulated the right to source protection, led to the inevitable reversal of that principle: non-disclosure became the norm, disclosure the exception.[250] The currently pending proposal[251] to amend the Code of Criminal Procedure (which would result in an Act on Source Protection in Criminal Procedures or *Wet bronbescherming in strafzaken*) gives this principle a legal foundation and codifies the journalists' privilege to refuse the revelation of a source's identity.

This legislative proposal also takes the other ECtHR judgments, in which the Netherlands violated Article 10 ECHR, into account. After the *Voskuil* case, the Dutch government decided to regulate the use of coercive measures against journalists. The current legal framework allows the court to order a journalist's detention for a maximum of thirty days, if he does not answer the questions asked to him (in the *Voskuil* case: disclose his sources).[252] A set of proposed articles in the Bill would allow a judge, before deciding to apply such a coercive measure, to ask the advice of an expert in the field.[253] A more concrete framework to apply in these cases can be found in a separate set of Guidelines on the use of coercive measures against journalists.[254] These Guidelines, originating from 2002, have been updated in 2012.

The *Sanoma* judgment also had its influence on the amendments regarding orders for source disclosure. Taking the judgment into account, the new framework would prescribe that any seizure of journalistic material has to be preceded by a decision of an investigative judge.[255] In the current framework, it is the public prosecutor who orders this seizure; he is a party in the procedure and is therefore not independent.

[247] Supreme Court 11 July 2008, ECLI:NL:HR:2008:BC8421 (Telegraaf).
[248] ECtHR 22 November 2012, 39315/06 (Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands), par. 100.
[249] Supreme Court 11 November 1977, *NJ* 1978/399.
[250] Supreme Court 10 May 1996, *NJ* 1996/578.
[251] *Kamerstukken II* 2014/15, 34032, 2.
[252] Articles 218 and 294 Dutch Code of Criminal Procedure.
[253] *Kamerstukken II* 2014/15, 34032, 2, F and *Kamerstukken II* 2014/15, 34032, 9.
[254] Aanwijzing toepassing dwangmiddelen tegen journalisten, *Stcrt.* 2012, 3656.
[255] *Kamerstukken II* 2014/15, 34032, 9.

Criticism of the proposal has focused on the definition of the word 'source'.[256] Compared to the definition used by the Council of Europe in CM Recommendation R2000(7) ('any person who provides information to a journalist'), critics find the definition in the Dutch framework too narrow: in order to fall under the definition of a source, the person must have provided the information *on condition* that his/her identity would be kept secret. This criterion does not appear in the European framework. An amendment to the Bill, to bring the Dutch definition into line with the definition of the Council of Europe, by deleting this extra criterion, was approved by the Lower House of Parliament.[257]
Moreover, an amendment has been proposed to change the scope of the right of non-disclosure.[258] The current legislative proposal aims to apply to journalists and publicists *in the context of newsgathering*. This last term is considered confusing, since publicists often contribute to public debate without necessarily being involved in the process of newsgathering. The deletion of this term would bring the proposal into line with Recommendation CM/Rec(2016)4, which states that not only journalists, but also *other media actors* should be protected. However, the proposed amendment was eventually withdrawn by its proposers.[259]

In both 2013 and 2016 the Dutch government published an Action Plan for the implementation of the judgments, in which it states that once the legislation has been adopted, the Court's judgments will be executed.[260] It must be noted that the revision process is taking a long time. The ECtHR judgments that proved the insufficiency of the Dutch system with regard to source protection in criminal procedures date from 2007 (*Voskuil*), 2010 (*Sanoma*) and 2012 (*Telegraaf*), the Bill was submitted to the Lower House of Parliament in the fall of 2014. On 6 February 2018, the Lower House of Parliament finally approved the Bill. The Bill will now be discussed once again in the Senate. As of now it is unknown when the final voting takes place, let alone if the proposal will be approved.[261] All this means that more than ten years after the first ECtHR judgment that proved the inadequacy of the Dutch regulatory framework, the Dutch regulation on source protection in criminal procedures is still not in line with the standards of the Council of Europe.

Surveillance
After the *Telegraaf Media v. the Netherlands* case, Telegraaf Media has brought another case to Strasbourg. The circumstances were similar to the first *Telegraaf* case. It once again concerned the interception by the *AIVD* of journalists' communications, after confidential information was leaked by *AIVD* officials. Moreover, the houses of the journalists were searched. On 14 October 2016, the ECtHR decided that the application should not be further examined, as the Dutch government had issued a unilateral declaration in which it acknowledged that Article 10 ECHR had been violated.[262] In 2009, the Review Committee on the Intelligence and Security Services (*CTIVD*)[263] had already

[256] Volgenant 2016, p. 3.
[257] *Kamerstukken II* 2014/15, 34032, 12.
[258] *Kamerstukken II* 2014/15, 34032, 10.
[259] See https://www.tweedekamer.nl/debat_en_vergadering/plenaire_vergaderingen/details?date=06-02-2018#2018A00355 (available in Dutch)
[260] The most recent Action Plan can be found here: https://rm.coe.int/16806a8add
[261] 15 February 2018.
[262] ECtHR 14 October 2016, 33847/11 (Telegraaf Media Nederland Landelijke Media B.V. and Van der Graaf v. the Netherlands).
[263] See Chapter 2.4.

declared that the surveillance measures were disproportionate at the moment they were initially taken.
The Dutch Supreme Court decided in 2015 that a source of the information – in this case an *AIVD* official – does not enjoy the same level of protection under Article 10 ECHR as a journalist.[264] The circumstance that the interference with the right to protection of sources was disproportionate with regard to the journalists does not influence the case of the *AIVD* official. The unlawfulness of the interception of communication has a relative character: it is only unlawful with regard to the journalists, not with regard to the *AIVD* officials. This point of view brings to mind the principle that the ECtHR advocated in the aforementioned *Nordisk Film & TV A/S v. Denmark* decision: with regard to source protection, a distinction has to be made between a journalist and his source.[265]

In the Netherlands, all citizens and legal entities can be subject to mass surveillance by the national security agencies. The competences of these security agencies are regulated in the Intelligence and Security Services Act (*Wiv*, see also Chapter 2.4). The *Wiv* dates from 2002 and is outdated: in its 2017 revision process, it was adapted to new technologies and new security threats by expanding the security services' competences. On 14 February 2017, the Lower House of Parliament approved a Bill to amend the *Wiv*, after which the Senate approved the Bill on 11 July 2017.[266] The revised *Wiv* is controversial and has received criticism on many accounts. A group of organisations, including the Dutch Association of Journalists (*Nederlandse Vereniging van Journalisten* or *NVJ*) and the Privacy First Foundation (*Stichting Privacy First*), had previously stated their intention to challenge the new *Wiv* in court to have it reviewed against the standards of the ECtHR and the CJEU, if the Bill would be passed by the Senate in its current form.[267] On 12 July 2017, the *NVJ* reiterated its intention to challenge the Act in court.[268] On 21 March 2018, a referendum on the *Wiv* will take place.[269] The outcome of the referendum is not binding, but merely advisory.

The scope of this research does not allow an in-depth discussion of all the points of criticism; only those concerning the position of journalists will be dealt with.
The main aspect of the amendments concerning journalists and other media actors is a built-in safety mechanism with regard to interception of communication of journalists that can involve processing data of journalistic sources. The introduction of the safety mechanism is the direct result of the ECtHR *Telegraaf* judgment and proves its influence on the Dutch legal framework.
The Act therefore implements an earlier, temporary regulation on the use of surveillance powers against lawyers and journalists.[270] This temporary regulation required the permission of a special committee for the use of surveillance powers against journalists. The members of this committee were appointed by the government. The implemented version of the temporary regulation requires the District Court of The Hague to give this permission instead of the committee. This procedure

[264] Supreme Court 31 March 2015, ECLI:NL:HR:2015:768.
[265] ECtHR 8 December 2005, 40485/02 (Nordisk Film & TV A/S v. Denmark).
[266] *Handelingen II* 2016/17, 52, item 25 and *Handelingen I* 2016/17, 35, item 12.
[267] https://www.villamedia.nl/artikel/mogelijke-rechtsgang-om-sleepnetwet-wiv (available in Dutch)
[268] https://www.nvj.nl/nieuws/nvj-rechter-over-sleepnetwet-wiv
[269] See https://www.kiesraad.nl/adviezen-en-publicaties/proces-verbalen/2017/11/proces-verbaal-definitief-verzoek-referendum-wiv/index (available in Dutch)
[270] Regeling van de Ministers van Binnenlandse Zaken en Koninkrijksrelaties en van Defensie van 16 december 2015, *Stcrt*. 2015, 46477.

ensures the independence of the decision to intercept communication from a specific journalistic entity and thereby brings this aspect of the Act in line with the standards of the Council of Europe.

The Dutch Council of State found a discrepancy between the previously discussed amendments to the Code of Criminal Procedure and the amendments to the Intelligence and Security Agencies Act.[271] Under the former, the required permission for an order for disclosure extends to *all* journalistic communications, whereas the latter proposal only requires permission for investigation measures that try to determine journalistic *sources*. The suggestion of the Council of State to level the two systems was followed: under the *Wiv*, permission is now also required for investigation measures that extend beyond the determination of journalistic sources.[272]

The broad competences of the security agencies will lead to interception of communications that cannot be linked directly to the ongoing investigation. The common term for this intercepted communication is 'bycatch'. In principle, this 'bycatch' of intercepted communication can be stored for three years, unless it is not relevant for *any* ongoing investigation at the moment of interception. Although this is a highly controversial aspect of the Act in itself, the present study concentrates on the position of journalists with regard to 'bycatch'.
The use of measures leading to bulk interception of communication is not subject to prior judicial supervision. This is striking, as the ECtHR stated in the *Telegraaf* case that 'in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge'.[273] The new *Wiv* does not apply this principle, which increases the likelihood of abuse of power. This risk can have a chilling effect on freedom of expression.[274]
An exception to the rules concerning the storage of bycatch is made for lawyers: 'bycatch' involving communication between a lawyer and his client has to be destroyed immediately. Despite criticism of the absence of a similar principle for communication of journalists,[275] the storage of 'bycatch' involving journalistic communication is allowed in the final version of the Bill. The reason given by the responsible Minister for this different treatment is that it is always clear whether or not someone is a lawyer: every lawyer is required to register with the Dutch Order of Lawyers (*Nederlandse Orde van Advocaten* or *NOvA*). However, there is no such thing as an exhaustive list of journalists, which would make it practically impossible to see if a communication originates from a journalist.[276]
There may be something to this point of view, but it seems hardly reconcilable with the standards of the Council of Europe and raises the question whether this version of the Act would offer sufficient safeguards against abuse. The framework can have a chilling effect on a journalist's freedom of expression: the possibility that a communication is intercepted and stored as 'bycatch' means that

[271] *Kamerstukken II* 2016/17, 34588, 4, under 11.
[272] *Kamerstukken II* 2016/17, 34588, 3, under 3.3.2.5.3.
[273] ECtHR 22 November 2012, 39315/06 (Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands), par. 98.
[274] In addition, the tension between the *Wiv* and Article 13 of the Dutch Constitution is resolved by including electronic communications in Article 13 and allowing the use of surveillance measures without prior judicial control.
[275] See the proposed amendment to the Bill by Kees Verhoeven: *Kamerstukken II* 2016/17, 34 588, 10. See also, for example: https://www.freepressunlimited.org/nl/nieuws/kom-op-voor-bronbescherming (available in Dutch). The OSCE also expressed its concerns: https://www.villamedia.nl/artikel/ovse-stuurt-plasterk-verbetersuggesties-voor-afluisterwet-wiv (available in Dutch)
[276] *Kamerstukken II* 2016/17, 34588, 18.

there is a constant risk that a journalist is being monitored. The authorisation of an independent authority may be required in the case of direct use of surveillance powers against journalists, but as long as there is a permanent risk that communication can be intercepted and stored as 'bycatch', the right to source protection is practically non-existent.
As a result of this risk, journalists are likely to be more careful when communicating with their sources and when searching for information on the Internet. A journalist who conducts extensive research on terrorist weapons, organisations or activities could wrongly appear on the radar of the General Intelligence and Security Service.
Moreover, the aspects of journalistic communication and communication between a lawyer and his/her client are different from each other. For a lawyer, it is the actual content of an act of communication that needs to be protected against interferences of state authorities. For journalists, it is not only about the content (*what* is communicated), but also about the persons involved (*who* is communicating), more specifically the identity of journalistic sources. The latter can already be determined by investigating the metadata of the communication, for which access to the actual content is not necessary. This makes the position of a journalist even more delicate in comparison to the position of a lawyer. Once again, this shows that the *Wiv* should include an exception for the storage of 'bycatch' involving journalistic communication.

In its 2017 report on the use of surveillance powers against lawyers and journalists,[277] the Review Committee on the Intelligence and Security Services (*CTIVD*) that is responsible for the surveillance on the Dutch intelligence and security services *AIVD* and *MIVD* once again expressed its concerns about the so-called indirect use of surveillance powers against journalists. It had already done so in an earlier stage of the legislative process of the *Wiv*, when the Bill was discussed in the Lower House of Parliament.[278]
Indirect use entails that, in order to trace a journalist's source, surveillance powers are used against persons who are suspected to be sources, but not against not journalists themselves. Neither the old nor the new *Wiv* contains any provisions about this matter and the *CTIVD* therefore acknowledges that this indirect use is, for now, not prohibited under Dutch law. The *CTIVD* also admits the absence of any clear case law on the indirect use of surveillance powers. Nevertheless, the *CITVD* advocates the introduction of an independent review system for indirect surveillance measures, similar to the one used for direct surveillance.
The reason that the Dutch government gives for allowing indirect surveillance measures against journalists without any prior judicial review, is that *journalists* are protected, not the *persons communicating with* journalists.[279] As such, this point of view is not incompatible with the principle of the ECtHR that sources do not enjoy the same level of protection as journalists.[280] Nevertheless, it seems clear that indirect surveillance measures can easily be used to circumvent the independent review system that applies to direct surveillance. It is therefore logical to agree with the *CITVD* that, whenever a surveillance measure is used to identify a journalistic source, the measure should be subject to an independent review. In that regard, the direct or indirect character of the measure should not matter.

[277] See https://www.ctivd.nl/documenten/rapporten/2017/03/21/index (available in Dutch)
[278] CTIVD, *Standpunt CTIVD*, February 2017, p. 7.
[279] *Kamerstukken II* 2016/17, 34588, 18.
[280] ECtHR 8 December 2005, 40485/02 (Nordisk Film & TV A/S v. Denmark).

A new Bill on the prosecution of 'computer criminality' was approved by the Lower House of Parliament in December 2016 and is currently being discussed in the Senate.[281] The Bill, amongst other things, broadens the authorities' competences with regard to the hacking of computers or computer networks[282] used by criminals and allows websites on which criminal activities occur to be taken down. Already in 2013, the proposal had been criticized by the Dutch Association of Journalists (*NVJ*): journalists who report on criminal activities (without committing criminal offences themselves) are exposed to the risk that their computers could be hacked or published content could be made inaccessible.[283] This risk can have a chilling effect on freedom of expression: the easier a computer can be hacked, the more likely it is that a journalist's sources will be disclosed.
The only provision meant to protect journalists – a public interest defence – was considered too vague. Moreover, according to the *NVJ,* the system did not provide for enough adequate safeguards to meet the standards of the ECtHR as set out in the *Telegraaf* case: prior judicial control is possible only to a very limited extent and is therefore ineffective.
In answer to questions asked by members of the Parliament on this matter, the responsible Secretary of State stated that the Computer Criminality Act would be interpreted in light of Act on Source Protection in Criminal Procedures,[284] which was at that time expected to be completed before the Computer Criminality Act, and that measures against journalists would be applied with the utmost restraint. The Secretary of State has stated that until the latter Act is completed, the old regime on journalistic source protection will serve as a guideline for the interpretation of the Computer Criminality Act.[285] As discussed above, this old framework is not in accordance with the CoE standards – that was the reason to revise the old framework in the first place.

IV. Conclusion

Source protection is a heavily debated issue in the Netherlands. Over the past years, the Dutch regime has been challenged in court several times. Three judgments (*Voskuil, Sanoma* and *Telegraaf Media*) are codified in the new legal framework that is still in the making. The proposal to amend the Code of Criminal Procedure enhances the position of journalists with regard to their right of non-disclosure and finally codifies the journalistic right to protection of sources.
The new Intelligence and Security Services Act has gained national and international attention. Despite the fact that several aspects of the proposal are highly controversial, the Senate approved the Bill on 11 July 2017. Regarding the position of journalists, the criticism concentrates on two aspects of the Bill: the absence of an exception for journalistic communication with regard to 'bycatch' and the indirect use of surveillance powers against journalists without any prior judicial review. By not taking these points of criticism properly into account, the new *Wiv* still disregards the importance of source protection for journalists to be able to contribute to public debate. The same is true for the proposed Computer Criminality Act that is currently being discussed in the Senate: in absence of adequate safeguards and a proper source protection framework to adhere to, the framework does not match the standards of the Council of Europe.

[281] *Kamerstukken II* 2015/16, 34372, 2.
[282] 'Computer' must be interpreted broadly: apart from 'regular' computers, the term also applies to, for example, smartphones and computer servers.
[283] See https://www.nvj.nl/nieuws/nvj-zeer-kritisch-over-wetsvoorstel-computercriminaliteit-iii (available in Dutch)
[284] See Chapter 3.3.
[285] See *Strct.* 2012, 3656.

3.4. Whistle-blowers

I. Introduction

The earlier chapter on source protection focused on the position of journalists with regard to orders for source disclosure and mass surveillance measures. Of course, the right to source protection for journalists can influence whistle-blowers: if their anonymity is not guaranteed, whistle-blowers will be reluctant to share information. But, in the words of the ECtHR, the protection of journalists is twofold: 'relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest.'[286] This chapter places emphasis on the direct protection[287] of whistle-blowers under Article 10 ECHR.

II. European framework

Recommendation CM/Rec(2016)/4 states that a CoE member state's legal framework should 'guarantee […] protection of journalistic sources and whistle-blowers'.[288] By referring to both terms separately, the text shows that there is a difference between a 'regular' source and a whistle-blower. There is no single, straightforward definition of a whistle-blower. Several standard-setting texts by bodies of the Council of Europe and other international organisations provide definitions that look similar, but are not the same. For example, the 2014 CM Recommendation on the protection of whistle-blowers defines a whistle-blower as: 'any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector'.[289] A second text, PACE Resolution 1729 (2010) on the protection of whistle-blowers, gives the following definition: 'concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk'.[290] Although these texts are not binding, they are taken into account by the ECtHR in its case law.[291]

Cases concerning whistle-blowing often arise in a work-related context. In its case law, the ECtHR stresses the fact that an employee has a duty of loyalty towards his/her employer:[292] confidential information in the possession of the whistle-blower should, in principle, be kept secret. In the public sector, this duty is heavier than in the private sector.[293] In certain circumstances, the public interest involved in the disclosure of information outweighs the duty of loyalty. Six factors[294] are examined by the ECtHR in cases of interferences with freedom of expression in the context of whistle-blowing:

- **Alternative channels for disclosure**. According to the ECtHR, in principle all allegations should be clarified internally. This is part of the whistle-blower's duty of loyalty towards his/her employer. Only if this is impossible, impracticable or proves to be ineffective, one can

[286] ECtHR 8 December 2005, 40485/02 (Nordisk Film & TV A/S v. Denmark)
[287] See for the difference between direct and indirect protection: Van den Brink & Jurjens 2015.
[288] Recommendation CM/Rec(2016)/4, Appendix, Guidelines, under 2.
[289] Recommendation CM/Rec(2014)7, Appendix, Definitions, under 1.
[290] PACE Resolution 1729 (2010), par. 1.
[291] See for example ECtHR 21 July 2011, 28274/08 (Heinisch v. Germany), par. 37-40.
[292] ECtHR 12 February 2008, 14277/04 (Guja v. Moldova), par. 70.
[293] ECtHR 21 July 2011, 28274/08 (Heinisch v. Germany), par. 64.
[294] See, for example, ECtHR 12 February 2008, 14277/04 (Guja v. Moldova) and ECtHR 8 January 2013, 40238/02 (Bucur and Toma v. Romania). An in-depth discussion of these factors can be found in: Van den Brink & Jurjens 2015. See also: Voorhoof 2017.

deviate from this principle and disclose the allegations externally, it is allowed to. When no internal disclosure procedure is offered at all, disclosure to the media will sooner be justifiable.[295]

- **Public interest involved in the disclosure**. The ECHR leaves little space for member states to interfere with a debate on matters of public interest.[296]
- **Harm**. The interest of the company concerned to keep the information secret has to be balanced with the public interest in disclosure of the information.
- **Authenticity of the disclosed information**: in order to be protected, the disclosed information has to be true.
- **Good faith**. The whistle-blower should act in the public interest. In a court case, it is not for the whistle-blower to prove his good faith, it is for the opposite party to prove the absence of good faith.[297]
- **Severity of the sanction**: this factor plays a role when the ECtHR assesses the sanction that was imposed by the national authorities: a severe sanction makes it more likely the interference was not justified.

In a 2017 Resolution, the PACE urged Council of Europe member states to improve the protection of whistle-blowers, by – amongst other things – recognising a 'right to blow the whistle' in all cases where information is disclosed in good faith and is clearly in the public interest.[298] Member states should also exempt whistle-blowers from criminal liability. It is noteworthy that the requirement of authenticity of the information and the principle of internal clarification are not mentioned by the Parliamentary Assembly. In its 2014 Recommendation, the Committee of Ministers does not refer to the principle of internal qualification: the Recommendation states that '[t]he individual circumstances of each case will determine the most appropriate channel'.[299] This means that there would be no hierarchy between the different, i.e., external and internal, channels. However, the ECtHR still adheres to the factors listed above.

III. Dutch framework

Although, in general, these same criteria are applied by the Dutch Courts, not always explicitly references to the framework of the ECtHR are made. In 2012, the case *Quirijns/TGB* was decided by the Supreme Court. The judgment received a lot of attention, as it was the first time in years that the Supreme Court decided a case on whistle-blowing. The Supreme Court did not explicitly refer to all the relevant factors: for instance, it did not address the authenticity of the information.[300]
It is expected that the further development of these criteria in the ECtHR's case law will result in their stricter application by the Dutch courts.
Other than case law, two developments are worth mentioning in the context of whistle-blowers.

[295] ECtHR 19 January 2016, 49085/07 (Görmüş and others v. Turkey).
[296] See for example: ECtHR 7 February 2012, 40660/08 and 60641/08 (Von Hannover v. Germany (no. 2)), par. 110.
[297] ECtHR 21 July 2011, 28274/08 (Heinisch v. Germany), par. 85.
[298] PACE Resolution 2171 (2017), under 7.3. See also PACE Recommendation 2106 (2017) which accompanied the Resolution.
[299] Recommendation CM/Rec(2014)7, Appendix, under 15.
[300] Van Uden 2013.

House for Whistle-blowers Act

The House for Whistle-blowers Act came into force on 1 July 2016.[301] The House is the successor of the Advice Point for Whistle-blowers (*Adviespunt Klokkenluiders*), an institution that provided potential whistle-blowers with independent advice, free of charge. The experiences of the Advice Point were helpful in the creation of the House for Whistle-blowers Act.[302] The Act introduces a clear legal protection system for whistle-blowers. In the Act, the criteria that can be derived from the ECtHR's case law are visible. For example, a suspicion of abuse only falls within the scope of the Act if this suspicion shows that the public interest is at stake;[303] the public interest involved is one of the factors which the ECtHR takes into account in cases concerning whistle-blowers.

Every employer who has at least fifty employees should adopt a procedure on internal notifications by whistle-blowers. This approach is in accordance with the standard of the ECtHR: internal disclosure should be the starting point.[304] In the Act, a whistle-blower is defined as an employee, which seems a rather narrow approach. However, the whistle-blower does not need to have a contract of employment with his/her employer: an employee can also be anyone who has worked for the employer other than on the basis of a contract of employment.[305] Besides 'normal' employees, interns and volunteers also fall within the scope of the Act. The definition of employee resembles the formula used in the Council of Europe's Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, which places emphasis on 'a work-based relationship' and therefore does not require a contractual relationship between the whistle-blower and the employer.[306]

A – newly constituted – House for Whistle-blowers is divided in two departments, which both assist the whistle-blower in the procedure. An Advisory Department informs whistle-blowers about the steps that need to be taken in case of suspicion of abuse.[307] A second step is taken by the Inquiries Department, which is allowed to start an inquiry on, amongst other things, the authenticity of the information.[308] The House for Whistle-blowers seeks to protect whistle-blowers by, for example, keeping their identities secret. Moreover, it prohibits the employer from causing the whistle-blower, who turned to the House and followed the correct procedure, any disadvantages.[309] After the inquiry, the House can publish a report on its investigations. The House will not publish the report if a legitimate interest of the company outweighs the public interest in disclosure of the information.[310] This balancing of interests appears to be in line with the standards of the ECtHR.

The Dutch Minister of Interior and Kingdom Relations, who is responsible for the Act, has stated that the establishment of the House for Whistle-blowers does not deprive a whistle-blower from the possibility to take his allegations to the media.[311] This brings the text of the aforementioned

[301] *Stb.* 2016, 147.
[302] Mirshahi & Nicolai 2016.
[303] Article 1 sub d House for Whistle-blowers Act.
[304] See Van Uden 2013.
[305] Article 1 sub h House for Whistle-blowers Act.
[306] Recommendation CM/Rec(2014)7, Appendix, Definitions, under a.
[307] Article 3 sub a House for Whistle-blowers Act.
[308] Article 4 House for Whistle-blowers Act.
[309] Article 8 House for Whistle-blowers Act.
[310] Article 17 House for Whistle-blowers Act.
[311] *Handelingen I* 2015/16, 33258, 21, p. 9.

Recommendation on the protection of whistle-blowers to mind: the channels for disclosure that member states should offer to whistle-blowers include disclosure to the media.[312]
In the words of the Minister, it would not be held against the whistle-blower in an eventual court procedure, if he decided to turn to the media instead of the House. Time will tell whether this actually is the case.
Two points can be made in this regard. The House can offer a level of protection that the media never could. Although it is *allowed* to turn to the media, to follow the procedure of the House for Whistle-blowers may be a wiser choice. Moreover, the principle established by the ECtHR that internal disclosure should be the starting point, is not clearly expressed in the House for Whistle-blowers Act. It is true that the Act obliges employers with more than fifty employees to adopt an internal notification procedure, but it does not codify the standard that disclosure to the media is a last resort, in light of an employee's duty of loyalty: it is only allowed if following the internal procedure remains without result or is expected to be of no use.[313] Although the House will advise a potential whistle-blower to follow the internal procedure if it exists and is convenient, a legal basis for this standard would have been clearer.

In March 2017, it appeared that an employee of the General Intelligence and Security Service (*AIVD*) had worked for the House for Whistle-blowers until November 2016.[314] It is unclear whether the government official left because of the discussion about his secondment to the House or for other reasons. The detachment of the official is remarkable in light of the independence of the House and its duty to protect the anonymity of potential whistle-blowers. Although the House itself assured that the *AIVD* official never dealt with actual whistle-blower cases, it is doubtful whether the Minister of Internal Affairs, responsible for both the House for Whistle-blowers and the *AIVD*, should have allowed the detachment of the *AIVD* official in the first place. The fear that the official might not be entirely independent can lead to hesitation to approach the House as a whistle-blower.

Despite the criticism of different aspects of the House for Whistle-blowers, the first results of the House for Whistle-blowers were positive: in its first annual report it was stated that within nine months, the House had been approached by over five hundred potential whistle-blowers, out of which seventy appeared to be 'real' whistle-blowers. These numbers are twice as high as expected when the House was established.[315]

Publeaks
Publeaks is not a legal development, but a private, collaborative initiative. The online platform Publeaks was established by the Publeaks Foundation in cooperation with sixteen major news organisations in September 2013.[316] Over the years following its establishment, more news organisations joined. Publeaks offers individuals the possibility to leak confidential information in the

[312] Recommendation CM/Rec(2014)7 of Committee of Ministers to member States on the protection of whistleblowers, under 14.
[313] See also Recommendation CM/Rec(2014)7.
[314] https://www.nrc.nl/nieuws/2017/03/12/aivder-gedetacheerd-bij-huis-voor-klokkenluiders-7329458-a1550026 (available in Dutch)
[315] https://huisvoorklokkenluiders.nl/wp-content/uploads/2017/03/Jaarverslag-Huis-voor-Klokkenluiders-2016.pdf, p. 7 (available in Dutch). See also: http://nos.nl/artikel/2162903-huis-voor-klokkenluiders-verrast-door-drukte.html (available in Dutch).
[316] www.publeaks.nl

public interest. The leaker decides which of the organisations (s)he wants to share the information with.
It is therefore not a platform for whistle-blowers *strictu senso*: the leaker does not have to be an employee, nor does (s)he have to make use of an internal notification procedure before turning to Publeaks. The anonymity of the information suppliers is guaranteed, which means that it is never clear to the media organisations that receive the information who the supplier is. Moreover, it remains unclear if the source of the information first tried to get his allegations clarified internally.

These findings contribute to the main points of criticism against Publeaks. According to critics, this lack of knowledge of the identity of the source could lead to careless media disclosures and too large a focus on transparency.[317] However, the participating media organisations have given assurances that they apply the same journalistic standards (investigation of authenticity, adversary hearing, search for supplementary sources, etc.) to information leaked to them through the Publeaks platform as to information that they gain by other means.[318] This ensures that Publeaks does not endanger journalists acting in accordance with the ethics of journalism.[319]

Over the past few years, Publeaks has started to play a substantial role in the journalistic field: use of the platform has led to important disclosures by news organisations on matters of public interest. A reference can be made to the news that a Dutch politician had taken money from the pension fund of the newspaper he owned.[320]
Still, there is room for improvement. On 17 May 2016, the foundation Free Press Unlimited received the sum of € 32,000 to investigate the possible improvement of Publeaks' functioning.[321] The sum was granted by the Dutch Journalism Fund (*Stimuleringsfonds voor de journalistiek*) on the basis of the Dutch Media Act.[322]
Initiatives similar to Publeaks were developed in other countries such as France[323] and Italy.[324] More platforms are planned to be developed in other countries.[325]

IV. Conclusion

The Dutch courts do not always consistently apply the criteria as set out by the ECtHR. The House for Whistle-blowers Act gives the principles a legal foundation. However, the relationship between the different possible disclosure channels remains unclear: the fact that the Committee of Ministers, Parliamentary Assembly and ECtHR apply different standards makes the matter even more blurred. Since the House for Whistle-blowers Act is relatively new and there is no case law yet that deals with this matter, time will tell how big this problem will be in practice. The first results of the House, however, are positive. Publeaks, the second major development, also has proven its worth. Despite

[317] Beckers, Van de Bunt & Van Wingerde 2013, p. 38. See also Van de Bunt 2013.
[318] See for example https://www.trouw.nl/home/vanaf-vandaag-anoniem-lekken-naar-media-via-doorgeefluik-publeaks~a4ae0130/ and http://www.volkskrant.nl/binnenland/vanaf-vandaag-anoniem-lekken-naar-media-via-doorgeefluik-publeaks~a3506349/. Both *Trouw* and *de Volkskrant* cooperate with Publeaks.
[319] ECtHR 21 January 1999, 29183/95 (Fressoz and Roire v. France), par. 54.
[320] http://www.volkskrant.nl/politiek/krol-ontdook-voor-tienduizenden-euro-s-aan-pensioenpremies~a3520996/
[321] *Stcrt.* 2016, 41812.
[322] See Chapter 2.4.
[323] www.sourcesure.eu
[324] https://irpi.eu/en/leaks/
[325] See https://www.freepressunlimited.org/sites/freepressunlimited.org/files/brochure_publeaks_2016.pdf.

warnings concerning sensationalism and carelessness, disclosures to Publeaks have initiated investigations on matters of public interest. The grant received from the Dutch Journalism Fund can contribute to the review and improvement of this initiative.

3.5. Prosecution of journalists

I. Introduction

This chapter will deal with prosecution of journalists for criminal acts. This topic can be easily linked to orders for source disclosure in criminal proceedings: if a journalist declines to disclose his/her source, the court can order his/her detention.[326] However, since that topic is closely connected to the right to protection of sources, this matter was dealt with in the previous chapter. This chapter focuses on three subjects: a journalist's duty to obey the criminal law, blasphemy and defamation.

II. European framework

As part of their duties and responsibilities, journalists are – in principle – obliged to obey the criminal law.[327] The ECtHR connects this principle to the 'ethics of journalism': journalists do not enjoy an unrestricted freedom to report on matters of general interest.[328] However, sometimes the public interest involved in the disclosure of certain information outweighs this duty to obey the criminal law. On a case-by-case basis, it is for the courts to decide whether a correct balance has been struck between the public interest involved in the disclosure of certain information and protection of one of the legitimate aims in Paragraph 2 of Article 10 ECHR that national criminal laws seek to protect.[329]

The case-law of the ECtHR on prosecution of journalists is rather casuistic. Nevertheless, important factors in assessing the justifiability of an interference can be distinguished. These important factors include, for example, the level of public interest involved in disclosure of the information. Even a strong public interest will be unlikely to completely outweigh the duty to obey the criminal law.[330] This could be the case if disobeying the criminal law was necessary to bring a problem to the attention of the public.[331] Therefore, other factors are of major importance too. For instance, it matters if the journalist had alternative, less far-reaching means to prove his point. Moreover, a severe sanction can have a chilling effect on freedom of expression and is less likely to be allowed under Article 10 ECHR. However, the simple fact that a journalist is convicted can already have a chilling effect, even when the penalty is of a minor nature.[332] The extent to which the sanction interferes with the actual expression also plays a role: if the sanction that is imposed for a certain statement does not prevent the statement itself from being made – for example when a journalist is

[326] Articles 218 and 294 Dutch Code of Criminal Procedure.
[327] ECtHR 10 December 2007, 69698/01 (Stoll v. Switzerland), par. 102.
[328] ECtHR 21 January 1999, 29183/95 (Fressoz and Roire v. France), par. 54-55.
[329] ECtHR 20 October 2015, 11882/10 (Pentikäinen v. Finland), par. 110.
[330] Fedorova & Van der Staak 2016.
[331] See for example ECtHR 24 May 2011, 22918/08 (Mikkelsen and Christensen v. Denmark).
[332] See for example ECtHR 23 September 1994, 15890/89 (Jersild v. Denmark), par. 35, ECtHR 10 December 2007, 69698/01 (Stoll v. Switzerland), par. 154 and ECtHR 20 October 2015, 11882/10 (Pentikäinen v. Finland), par. 113.

fined for a publication but the publication itself remains available – the sanction might be less of a problem.[333]

Blasphemy

Various member states of the Council of Europe have criminal blasphemy laws.[334] Regulation and policy concerning religious beliefs generally fall within the margin of appreciation of the member states.[335] Nevertheless, in the end it is for the ECtHR to decide whether these laws are compatible with Article 10 ECHR.[336] In most countries blasphemy laws are a dead letter already, but the mere presence of the offence of blasphemy could have a chilling effect on freedom of expression. The Recommendation indeed states that abuse, misuse or even *threatened use* of blasphemy laws can be effective means to silence journalists.[337] The PACE has repeatedly urged CoE member states to decriminalise blasphemy. In its 2006 Resolution on freedom of expression and respect for religious beliefs, the Parliamentary Assembly reiterated that an 'open debate on matters relating to religion and beliefs' should be possible and that blasphemy laws should not curtail freedom of expression.[338] In a 2007 Recommendation, the Parliamentary Assembly once again emphasized the need to decriminalise blasphemy.[339] Moreover, the Venice Commission is also of the opinion that the 'offence of blasphemy should be abolished'.[340]

Defamation[341]

Journalists should not be punished for 'assisting in the dissemination of statements made by another person'.[342] This would result in a chilling effect on public debate. When an interviewee makes defamatory statements, it is the interviewee who should be prosecuted, not the journalist.

The ECtHR allows expressions that 'offend, shock or disturb…'. This is a prerequisite of a democratic society that is based on 'pluralism, tolerance and broadmindedness'.[343] In addition, journalistic freedom of expression 'also covers possible recourse to a degree of exaggeration, or even provocation'.[344] Expressions that do not contribute to public debate and are therefore gratuitously offensive are not allowed under Article 10 ECHR[345] and could in extreme cases even be subject to the regime of Article 17 ECHR, which prohibits the abuse of the rights enshrined in the ECHR.

[333] Fedorova & Van der Staak 2016.
[334] For an overview, see: Koltay & Temperman 2017.
[335] See for example ECtHR 25 November 1996, 17419/90 (Wingrove v. the United Kingdom), par. 53.
[336] ECtHR 7 December 1976, 5493/72 (Handyside v. the United Kingdom), par. 49.
[337] Recommendation CM/Rec(2016)4, Appendix, Principles, under 36.
[338] PACE Resolution 1510 (2006). See also PACE Resolution 1563 (2007) and Recommendation 1804 (2007).
[339] Recommendation 1805 (2007).
[340] http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)011-e, p. 46.
[341] An in depth discussion of the ECtHR's defamation standards can be found online: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804915c5, p. 9-20.
[342] ECtHR 23 September 1994, 15890/89 (Jersild v. Denmark), par. 35.
[343] ECtHR 7 December 1976, 5493/72 (Handyside v. the United Kingdom), par. 49.
[344] ECtHR 26 April 1995, 15974/90 (Prager and Oberschlick v. Austria), par. 38.
[345] ECtHR 20 September 1994, 13470/87 (Otto-Preminger-Institut v. Austria), par. 49.

The Recommendation states that defamation laws should 'include freedom of expression safeguards that conform to European and international human rights standards, including truth/public-interest/fair comment defences and safeguards against misuse and abuse'.[346]

The PACE is of the opinion that defamation should be decriminalised, as the mere possibility to be sentenced for one's statements already has a chilling effect on freedom of expression. In its 2007 Resolution, the Parliamentary Assembly urges member states to apply defamation laws with the utmost restraint and abolish prison sentences without delay.[347] Other bodies of the Council of Europe are not as outspoken about the abolition of prison sentences, although the ECtHR has repeatedly stated that the criminal nature of a sanction already has a disproportionate chilling effect on freedom of expression.[348] In addition, the ECtHR has held that prison sentences for press offences will be compatible with Article 10 ECHR only in exceptional cases.[349]

Public figures, for instance politicians, must show a greater degree of tolerance towards criticism than private persons.[350] The reason behind this is that public figures knowingly enter public life. Therefore, they are constantly subject to close scrutiny by journalists and the public: these circumstances are taken into account if a journalist – or any person– makes defamatory statements about a public figure.
In some countries, heads of state have a special position with regard to defamation. Defamatory statements against, for example, the monarch or a foreign head of state can be criminal offences, are distinguished from 'regular' defamatory statements. According to the ECtHR, this special legal status is only allowed as long as the contribution of the defamatory statements to public debate can justify these statements.[351] If nothing could possibly justify the statements, this would inevitably lead to a chilling effect on public debate. The criterion of the ECtHR puts the existence of provisions on defamation of heads of state under pressure as they have a chilling effect. Similar to the ECtHR, the Parliamentary Assembly calls on member states to 'remove from their defamation legislation any increased protection for public figures'.[352]

III. Dutch framework

A recent, important case before the Dutch Supreme Court shows the way in which the Netherlands apply relevant standards of the Council of Europe.[353] In 2008, journalist Alberto Stegeman made a television report on security shortcomings at Schiphol Airport. As part of this report, he secretly accessed Schiphol in the trunk of a car. Then, he falsified an access card and using this card, he entered Schiphol a second time, again without any problems. Stegeman's report led to improved security measures at Schiphol Airport.

[346] Recommendation CM/Rec(2016)4, Appendix, Guidelines, under 6.
[347] Resolution 1577 (2007). See also Recommendation CM/Rec(2016)4, Appendix, Guidelines, under 6.
[348] ECtHR 10 June 2003, 33348/96 (Cumpănă and Mazăre v. Romania); ECtHR 27 March 2008, 20620/04 (Azevedo v. Portugal).
[349] ECtHR 10 June 2003, 33348/96 (Cumpănă and Mazăre v. Romania), par. 115.
[350] ECtHR 8 July 1986, 9815/82 (Lingens v. Austria), par. 42. See also ECtHR 26 April 1995, 15974/90 (Prager and Oberschlick v. Austria).
[351] ECtHR 25 June 2002, 51279/99 (Colombani and others v. France), par. 68 and ECtHR 15 March 2011, 2034/07 (Otegi Mondragon v. Spain), par. 60. See also: McGonagle 2016, p. 32 et seq.
[352] Resolution 1577 (2007), under 17.5.
[353] This case and other cases are discussed in: Volgenant 2016b.

Stegeman was charged for both trespassing and forgery of documents, which are both criminal offences in the Netherlands. In first instance, Stegeman was convicted for the charges, but an appeal procedure finally led to a judgment by the Supreme Court.[354] The Supreme Court recalled the *Fressoz and Roire* judgment of the ECtHR: journalists should act in good faith, provide accurate and reliable information in accordance with the ethics of journalism.[355] In addition, the Supreme Court emphasized the factors that should be taken into account in assessing the interference with the right to freedom of expression in this case. A balance has to be found between the public interest (that is, the inadequate security at one of Europe's biggest airports) involved in disclosure of the information and one's duty to obey the criminal law. Furthermore, the Court stated that attention has to be paid to the presence of alternative ways of disclosure. The Court emphasized that the sanction imposed on Stegeman did not prevent his message from being spread.[356] It shows that the Supreme Court takes into account the important factors that can be derived from the case-law of the ECtHR. The Supreme Court finally referred the case back to the District Court of The Hague.
Using the framework set out by the Supreme Court, the District Court convicted Stegeman only for falsifying the access card. Stegeman himself had proven that there were alternative, lighter ways to bring the insufficient security at the airport to the attention of the public: he had already accessed Schiphol in the trunk of a car. Moreover, Stegeman already had video evidence of the deficient security. Committing the criminal offence of forgery of documents was not necessary. The case was once again brought before the Supreme Court, which upheld the judgment by the District Court of The Hague.[357] Stegeman took the case to Strasbourg, but the ECtHR declared the case – without any reasoning – inadmissible.[358]

Blasphemy
On 1 March 2014, blasphemy was removed from the Dutch Criminal Code.[359] Originally created in 1886, the provision was considered outdated and a dead letter. As even the *threatened use* of a blasphemy law can have a chilling effect on freedom of expression, removing blasphemy as a crime from the Criminal Code is a welcome development, from the perspective of freedom of expression. Although blasphemy as such is no longer prohibited, insulting people on the ground of their religion still is. The first paragraph of Article 137c of the Criminal Code reads:

'Any person who verbally or by means of written or pictorial material gives intentional public expression to views insulting to a group of persons on account of their race, religion or convictions, their heterosexual or homosexual preferences or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or to a fine of the third category.'[360]

The current Dutch framework thus leaves space for insulting a religious belief as such, but insulting *people on grounds of their* religion remains prohibited. This development appears consistent with the approach taken by the ECtHR and the CoE.

[354] Supreme Court 26 March 2013, ECLI:NL:HR:2013:BY3752.
[355] Supreme Court 26 March 2013, ECLI:NL:HR:2013:BY3752, par. 4.3.
[356] Supreme Court 26 March 2013, ECLI:NL:HR:2013:BY3752, par. 4.4.
[357] Supreme Court 13 October 2015, ECLI:NL:HR:2015:3057.
[358] https://www.villamedia.nl/artikel/rechtszaak-tegen-stegeman-ten-einde (available in Dutch)
[359] *Stb.* 2014, 39. See further: Janssen 2017.
[360] Translated by the authors of this study.

Defamation

In the Netherlands, defamation is both a tort and a criminal offence. When assessing tort liability[361] for unlawful speech, the court take the following factors into account:[362]

- **The nature of the accusations and severity of the expected consequences.** Severe accusations and expected consequences are more likely to result in liability.
- **The severity of the wrongdoing the publication seeks to address.** This factor contains a 'public interest' element:
- **The extent to which the published material is supported by facts.** An adequate factual basis reduces the chance that the expression is found defamatory.
- **Exact formulation of the expression.** A nuanced statement is less likely to be defamatory.
- **Proportionality.** Were there other, lighter means to bring the message under the attention of the public?
- **Possible measures.** What could have been done to limit the harm caused to the affected person?

These factors together form a balancing test: the outcome depends on the exact circumstances of the case. Please note that, like under the Criminal Code, there is room for a public interest-defence; a successful invocation of this defence can lead to avoidance of liability.

Apart from being a tort, defamation also is prohibited under the Criminal Code and thus a criminal offence.[363] However, in order for the public prosecutor to investigate a case, the person defamed needs to press charges first.

Defamatory statements can be justified if the statements were made in the public interest. This defence brings the text of the Recommendation to mind, which states that such a public interest defence is important to adjust defamation laws to the European and international human rights standards.[364]

The punishment consists of either a fine or a prison sentence for a maximum of six months. This prison sentence is noteworthy in the light of the point of view advocated by the Parliamentary Assembly: prison sentences for defamatory statements should be abolished without delay.[365] More important is perhaps the standard of the ECtHR: prison sentences for press offences are only allowed in exceptional cases. Dutch practice shows that these sentences are imposed with the utmost restraint.

Other than the Dutch courts, the Press Council (*Raad voor de Journalistiek*[366]) also deals with complaints about defamatory statements of journalists. This self-regulatory body gives its judgment on, amongst many other things, 'tendentious' reporting and wrongful accusations. However, the Press Council does not have the competence to impose sanctions (apart from ordering rectifications or apologies); it merely expresses whether the borders of the ethics of journalism have been exceeded.

[361] Article 6:162 Dutch Civil Code.
[362] See Supreme Court 24 June 1983, ECLI:NL:HR:1983:AD2221 and Supreme Court 11 May 2012, ECLI:NL:HR:2012:BV1031.
[363] Article 261 Dutch Criminal Code.
[364] Recommendation CM/Rec(2016)4, Appendix, Guidelines, under 6.
[365] Resolution 1577 (2007).
[366] https://www.rvdj.nl/english

In their 2017 report, *A threatening climate*, Odekerken and Brenninkmeijer signalled an alarming increase of threats to press charges against journalists.[367] Threats to charge journalists for their publications can lead to self-censorship and can therefore have a chilling effect on freedom of expression. For journalists who are self-employed this chilling effect can be even more severe, as they would not be (financially or otherwise) supported by an employer if the charges lead to a court case. There is a risk that journalists decide not to publish a certain article, in fear of a possible charge. The authors of the report made several recommendations to the different actors involved to change this for the better, such as awareness-raising amongst journalists and politicians.

Lèse majesté and insulting a foreign head of state are also criminal offences under the Dutch Criminal Code,[368] but a legislative proposal aims to abolish these articles.[369] Under the current regime, the punishment for *lèse majesté* consists of either a fine or a prison sentence for a maximum of five years, depending on which 'form' of *lèse majesté* is involved. For insulting a foreign head of state, the maximum prison sentence is two years or a fine. The provisions leave no space for contribution to public debate and seem hardly reconcilable with the ECtHR's jurisprudence.

The legislative proposal to abolish the provisions was approved by the Lower House of Parliament on 10 April 2018.[370] As of this writing, it is still unknown when the vote in the Senate will take place. If the Senate also approves the proposal, defamation of heads of state, either national or foreign, would then become subject to the regime of the 'regular' defamation provisions, which do leave space for a public interest defence to justify the expressions. However, the (aggravated) prison sentence for *lèse majesté* or insulting a foreign head of state would be one third higher than the regular prison sentence for defamation, as is generally the case for defamation of civil servants.[371]

IV. Conclusion

The Stegeman case shows that the Supreme Court implements the criteria of the ECtHR: in principle, journalists are obliged to obey the criminal law, unless there is an overriding public interest. Recent developments show that the Dutch government seeks to keep the legal framework in line with the standards of the Council of Europe: a possible criminal charge for blasphemy is no longer a threat to journalists.

Defamation is a tort that could lead to payment of damages. Moreover, it is a criminal offence that can be punished with a prison sentence. There is a proposal to delete lèse majesté and insulting a foreign head of state from the Criminal Code. As a result, these 'special' categories of defamation, in which there is no place for a public interest defence, would cease to exist. Odekerken and Brenninkmeijer's study shows that journalists are under pressure because of an alarming increase of charges against them: an alarming development. The measures proposed by the authors of the report seek to help to decrease the threats and avoid self-censorship amongst journalists and other media actors.

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[367] The report is available online via: https://www.nvj.nl/nieuws/nvj-ziet-aanbevelingen-brenninkmeijer-nieuwe-aanknopingspunten-verbeteren-veiligheid (Dutch)

[368] Articles 111-113 and 118-119 Dutch Criminal Code.

[369] *Kamerstukken II* 2015/16, 34 456, 2 and 3.

[370] https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A34456 (available in Dutch).

[371] Article 267 Dutch Criminal Code.

4. Protection

4.1. Safety and support of journalists in practice

I. Introduction

In the section on General Principles of Recommendation (2016)4, the Committee of Ministers states that freedom of expression without fear implies at a minimum that the safety, security and protection of everyone is guaranteed. This counts especially for journalists and other media actors, as there is an expectation that they can contribute to public debate without fear and without having to modify their conduct.[372] As such, the State has a positive obligation to safeguard the lives of those in its jurisdiction and thus to guarantee the safety and physical integrity of everyone.[373] This requires effective criminal law provisions, operational measures to protect individuals and specific attention to the vulnerable position of journalists. In this chapter, the relevant rules and practices on the safety of journalists will be discussed. Criminal law provisions and prosecution will be discussed in the next chapter.

II. European framework

The European Court of Human Rights (ECtHR) stresses the positive obligation of Member States to protect journalists from harm caused by third parties. In *Özgür Gündem v. Turkey*, the Court stated that based on Article 10 ECHR, authorities have a positive obligation to protect participants in public debate. The Court stated that 'genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals'.[374] The obligation to take preventive measures arises if there is an immediate risk to the life of an individual due to criminal acts of a third party and the State has failed to take measures to avoid that risk.[375] In *Dink v. Turkey,* the Court stated that Member States have a positive obligation to 'create a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions and ideas without fear'.[376]

In *Gongadze v. Ukraine* the Court identified two elements for the positive obligation to safeguard life. These elements are summarized as follows by Leach:
'(i) a duty on the state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions; and

[372] Recommendation CM/Rec(2016)4, par. 18.
[373] Recommendation CM/Rec(2016)4, par. 20.
[374] ECtHR 16 March 2000, 23144/93 (Özgür Gündem v. Turkey), par. 43.
[375] ECtHR 28 March 2000, 22492/93, (Kiliç v. Turkey), par. 63.
[376] ECtHR 14 September 2010, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (Dink v. Turkey), par. 137; see further: McGonagle 2015, p. 9-35.

(ii) in certain circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual.'[377]

The positive obligation as described in *Gongadze v. Ukraine* is, however, not unlimited. In *Kilic v. Turkey* the Court stated that it does not entail impossible or disproportionate burdens. The authorities knew or ought to have known of the existence of a real and immediate risk from criminal attacks of a third party to the life if an identified individual or individuals, and failed to take measures within the scope of their powers which might have been expected to avoid the risk.[378]

Furthermore, in *Makaratzis v. Greece,* the Court stated that unregulated and arbitrary action is incompatible with effective respect for human rights.[379] Policing operations must therefore be sufficiently regulated within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.[380]

Recommendation (2016)4 on the protection of journalism and safety journalists and other media actors sets out very specific recommendations that Member States should follow when designing their preventative systems for the protection of journalists. State authorities have a duty to prevent or suppress offences against individuals when they know or should know of the existence of a real and immediate risk to the life or physical integrity of these individuals. To achieve this, preventive operational measures should be taken, such as police protection. Protocols and training programmes should be developed for State authorities that are responsible for protecting journalists.[381] Furthermore, early-warning and rapid-response mechanisms should be established or supported, to ensure immediate access to protective measures for journalists. Also, victims of attacks should be provided with relocation and shelter insofar as needed. Members States should also encourage guidelines and procedures for the deployment of journalists in difficult or dangerous assignments. Lastly, a legal framework should define the limited circumstances in which law enforcement officials should be allowed to use force and firearms.

III. Dutch framework

This section will give a broad discussion of the different preventative operational measures for the safety and support of journalists by or with the aid of the Dutch authorities. Additionally, some practices of the Dutch Association of Journalists (*NVJ*) and several media organisations will be discussed in order to give the full breadth of both state and societal measures for the safety of journalists.

[377] Leach 2013; and ECtHR 8 November 2005, 34056/02 (Gongadze v. Ukraine), par. 164-168; See also: ECtHR 28 October 1998, 23452/94 (Osman v. the United Kingdom), par. 115.
[378] ECtHR 28 March 2000, 22492/93, (Kiliç v. Turkey), par. 62-63; see also: ECtHR 28 October 1998, 23452/94 (Osman v. the United Kingdom), par. 116.
[379] ECtHR 20 December 2004, 50385/99 (Makaratzis v. Greece), par. 58.
[380] ECtHR 20 December 2004, 50385/99 (Makaratzis v. Greece), par. 58.
[381] For example, judges, prosecutors, police officers, military personnel, prison wardens, immigration officials and other State authorities, as appropriate.

Framework for immediate aid and safeguarding by the authorities

The main task description of the Dutch police is mentioned in Article 3 of the Police Act: the effective enforcement of the legal order and providing aid to those that need it.[382] This Article therefore entails a general legitimisation to enforce the public order. Depending on the situation civil servants carrying out police duties fall under either the authority of the Mayor of a municipality or the public prosecutor. In the case of the enforcement of criminal law, the public prosecutor is the authority; in the case of enforcement of the legal order and providing aid it is the mayor (Article 11 Police Act). For further guidance, Article 38b of the Police Act states that municipalities should create an integral safety plan (*integraal veiligheidsplan*) that provides for the goals that the municipality pursues with regard to safety.

Immediate aid can be called for through emergency number 1-1-2, which is standardised in the entire European Union through Article 26 of Universal Service Directive 2002/22/EC. Furthermore, the Dutch Association of Journalists *NVJ* operates an emergency number for journalists planning to travel to dangerous areas.[383]

In the case of the need for immediate aid, the police have a general competence based on the Police Act.[384] Furthermore, following Articles 160 and 163(5) Code of Criminal Procedure (*Wetboek van Strafvordering*), any public prosecutor and investigating officer is obliged to accept the report of a crime by anyone (*aangifte ontvangen*). This went wrong in at least one instance, where a police department in The Hague declined to accept the report of a Spanish journalist residing in the Netherlands.[385] According to the reaction of the Dutch authorities following the incident, the Spanish journalist was invited to report the crime and lodge a complaint about the refusal.

Within the Dutch framework, mayors have a central position to safeguard public order based on the Municipalities Act. The competences of the mayor to safeguard public order includes giving orders in case of a disruption of the public order or a serious fear of disruption (Article 172 Municipalities Act). Furthermore, the mayor is charged with the supervision of public assemblies, including demonstrations (Art. 174 Municipalities Act). In the case of riots or serious disorder, the mayor can give all orders and ordinances to enforce public order, except those in conflict with the Dutch Constitution (Article 175 and 176 Municipalities Act).[386] This means that (journalistic) freedoms may only be constrained if this is in prescribed by law and in accordance with the principles of proportionality and subsidiarity as stated in Article 10(2) ECHR.[387] As such, giving orders to journalists on the basis of this competence calls for a high level of scrutiny. Orders and ordinances by authorities that affect journalists, but also others, are limited by fundamental rights. The 'Pocket book order and safety' (*Zakboek openbare orde en veiligheid*) – a book containing advice for mayors and their staff – states that journalists should only be forbidden to enter dangerous areas in crisis situations if this

[382] *Politiewet 2012*, *Stb*. 2012, 315.
[383] https://www.nvj.nl/veiligheid (available in Dutch).
[384] Article 7 Police Act.
[385] Council of Europe 2016.
[386] The difference between an order and an ordinance is that an order is targeted to a specific person or group of persons, while the ordinance is applicable to all persons present in a certain area. Furthermore, due to the direct applicability of certain international treaties (Article 94 Dutch Constitution), provisions of the ECHR will also fall under the limitations to the competence of the mayor to issue orders and ordinances according to the principle of *Lex superior derogat legi inferiori*.
[387] Bruning & Jong 2016, p. 29.

complies with the principles of proportionality and subsidiarity. In the case of acute emergency situations, journalists should be enabled to enter these dangerous areas, where possible under (police) escort.[388]
As regards the practice of immediate protection through the competences of the mayor, documentation that specifically mentions the vulnerable position of journalists seems to be scarce. For example, in the framework of the integral safety plan as drafted by the association of Dutch municipalities *VNG,* not a single word is mentioned about journalists.[389] Furthermore, a general search on the main websites of the police and public prosecution service delivers zero results with regard to the protection of journalists.[390] The only time journalists are mentioned, is in the Pocket book for Dutch mayors, but this mention was only on free movement. Nothing was mentioned about protection against attacks by third parties. This seems a bit strange after the recent growth of attacks on journalists in the Netherlands,[391] for example during demonstrations against *zwarte piet,*[392] during demonstrations against ISIS,[393] and when reporting on a deadly shooting in Venlo.[394] With regard to this last incident, the general secretary of the NVJ stated that inactivity or absence of the police causes no-go areas for the press.[395]

When the vague norms established in the Police Act and Municipalities Act entail or lead to the use of force, authorities are bound by the Official Instruction for Police, Royal Military Police and Other Investigating Officers (*Ambtsinstructie voor de politie, de koninklijke marechaussee en andere opsporingsambtenaren*).[396] The rules give clear conditions ranging from the general use of force and firearms to providing medical assistance. In this document, no specific mention is made of journalists.

Finally, the Dutch legal framework provides for different instruments to protect victims of criminal acts (for a full discussion on this subject, please see the next chapter on Prosecution). Relevant for the present chapter are the provisions on the specific protection needs against victimisation, intimidation and retaliation. In this regard, Article 10 of the Decree on victims of criminal acts states that civil servants charged with the investigation of criminal acts should make an individual assessment of the specific protection needs of the victim during or as soon as possible after first contact.[397] An important aspect of the individual assessment is that the civil servant should take into account the characteristics of the victim. This could also entail the identification of the victim as a journalist, as this would be in accordance with the case A*dali v. Turkey* of the ECtHR,[398] which is discussed in further detail in the following chapter.

In November 2017, Sjoerd Sjoerdsma (member of the Lower House of Parliament) launched an initiative to start an emergency fund for journalists who get into trouble abroad.[399] The fund,

[388] Nederlands Genootschap van Burgemeesters 2017, p. 24.
[389] Van Gaalen 2013.
[390] Last checked on 13 April 2018.
[391] Nab 2017.
[392] Bol 2016.
[393] Cornelissen 2014.
[394] https://www.1limburg.nl/cameraman-en-journalist-aangevallen-blerick (available in Dutch)
[395] Cornelissen 2014.
[396] *Stb*. 1994, 275 and amendments until *Stb*. 2016, 504.
[397] *Stb.* 2016, 310 (*Besluit Slachtoffers van strafbare feiten*).
[398] ECtHR 31 March 2005, 38187/97, (Adali v. Turkey), par. 231.
[399] See https://www.villamedia.nl/artikel/kamer-wil-noodfonds-voor-journalisten (available in Dutch)

amongst other things, should finance trainings for journalists, as well as finance court procedures against journalists abroad.

Collaboration between the authorities and the NVJ

The *NVJ* and Dutch national police have agreed to meet every three months to discuss collaboration between the press and police. These meetings are on, for example, incidents regarding journalists during riots or guest lectures at the police academy on relations between press and police and the rights of journalists in public spaces.[400] On 11 August 2016, the *NVJ* and national police came to an agreement on the best courses of action during protests and other incidents. Journalists are advised to contact the operational commander of the police unit on site. This enables the police to be on the alert for possible incidents arising between journalists and protestors. Additionally, journalists are advised to call the emergency number 112 and always press charges in case of incidents.[401]

Further activities of the *NVJ* with regard to the safety of journalists include training of journalists in collaboration with the Dutch army. These trainings are meant to prepare journalists that plan to travel to conflict areas.[402]

INSI Safety Code and protection of freelancers[403]

After the killing of Dutch journalist Jeroen Oerlemans in Libya in October 2016, the *NVJ* and the Dutch Association for Photo Journalists asked large Dutch media organisations to sign the International News Safety Institute Safety Code (INSI Safety Code).[404] This Code was drafted by leading journalist groups and media organisations, following the murder of American journalist James Foley by ISIS.[405] As of February 2018, seven Dutch organisations have signed the Code, which pays attention to the safety of journalists (both staff and freelance) in conflict zones. The Code urges employers to protect journalists in several ways. For example, they should provide for sufficient safety training. In addition, journalists should be made aware of the social, political and physical circumstances of the area they are going to report from. Traumatic stress should be recognised and treated adequately.

Several major news organisations, such as Newsweek, Reuters and Bloomberg preceded the Dutch companies in signing the Code. Although the text of the Code is not binding, it is an important tool that can be used to make media organisations aware of their duties and of the risks that journalists in conflict zones are exposed to. The Code also seeks to protect freelance journalists, who are in an even more vulnerable position since they are usually unable to enjoy the support of an employer that staff journalists do. This delicate position was also stressed by Odekerken and Brenninkmeijer in their 2017 report, *A threatening climate*, which was commissioned by the *NVJ*. The issue was further discussed at a parliamentary hearing in response to the report on 14 March 2018. Amongst other journalists, public officials and the secretary general of the *NVJ*, journalists John van den Heuvel and Paul Vugts, who had to go into hiding after receiving personal threats, provided input into the

[400] See https://www.nvj.nl/nieuws/periodiek-overleg-nvj-en-nationale-politie (available in Dutch)
[401] See https://www.nvj.nl/nieuws/afspraken-politie-journalisten-nood (available in Dutch)
[402] See https://www.nvj.nl/veiligheid/veiligheidstrainingen/verslaggeving-conflictgebieden (available in Dutch)
[403] https://newssafety.org/about-insi/insi-safety-code/
[404] See https://www.nvj.nl/nieuws/veiligheidsmaatregelen-journalisten-dienst-%C3%A9n-freelancers and https://www.nvj.nl/nieuws/zeven-mediaorganisaties-ondertekenen-insi-convenant-veiligheid (both available in Dutch)
[405] Foley was killed by terrorist group ISIS in August 2014.

discussion. They mentioned among other things that although they themselves felt supported by the news organisations they work for, freelance journalists are not supported in the same way.[406] The so-called 'Culture of Safety Alliance' (ACOS), which is formed by a coalition of several worldwide media organisations, has also launched an initiative to endorse protection standards for freelancers.[407] Until now, only the Dutch Broadcast Foundation (*NOS*), which has a statutory obligation to make news programmes for the public television channels, has joined the Alliance. These developments show that the position of freelance journalists is under pressure and attention should be paid to improvement of their situation.

IV. Conclusion

The Recommendation on the protection of journalism and safety of journalists provides for seven priorities for the safety of journalists in action. These are: (I) the duty to prevent or suppress offences through preventive operational measures; (II) protocols or training programmes for authorities; (III) recognition of journalists during protests; (IV) use of early-warning and rapid-response mechanisms; (V) relocation and shelter; (VI) guidelines and procedures for deployment of journalists in dangerous situations; and (VII) clear criteria on the use of force by law enforcement. In this conclusion, these priorities will be compared to the practice in the Netherlands.

With regard to the duty to prevent or suppress offences, the Dutch Municipalities Act provides for a broad framework to apply force in case of disturbances to public order. Within the more specific guidelines on the powers of the mayor and police officers, protection of journalists against attacks by third parties seems to be fully absent. On the other hand, specific protective measures during protests and other incidents seem to be fulfilled through collaboration between the *NJV* and the police. The agreement on best courses of action gives more clarity on the possibilities to prevent or suppress offences against journalists in practice. A recommended further step is to implement this agreement into integral safety plans, the policy book for mayors or public guidelines for the police. With this step, the first and third principle of the Recommendation could be met fully.

With regard to the second principle, the need for protocols and training programmes, nothing public can be found. The website of the police academy does not provide public information on the exact substance of their training. The fourth principle, early-warning and rapid-response mechanisms, is provided through the standardised 1-1-2 emergency telephone number and the statutory obligation for investigators to accept any reports of crime by any person. The fifth principle, measures on relocation and shelter, can be found in the Decree on victims of criminal acts, which provides for an individual assessment of the specific protection needs of victims. For the deployment of journalists in difficult or dangerous assignments, principle VI, the *NVJ* collaborates with the army to prepare journalists through trainings. Moreover, the *NVJ* has called on media organisations to sign the INSI Safety Code, which makes the organisations aware of their duties towards journalists in conflict zones. Recent developments show that especially the position of freelancers is under pressure. Lastly, with regard to principle VII, Official Instruction for Police, Royal Military Police and Other

[406] See: https://www.nvj.nl/nieuws/%E2%80%98-toeval-nog-geen-ernstige-incidenten-zijn-gebeurd%E2%80%99 and https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2018A00578.
[407] https://dartcenter.org/content/global-safety-principles-and-practices

Investigating Officers states under what limited circumstances the use of force by the authorities is allowed.

5. Prosecution

5.1. Prosecution of those who harm journalists

I. Introduction

The previous chapter discussed the safety and support of journalists in situations where there is a risk of physical harm. In this chapter, the focus will be on the subsequent steps. Those steps consist of the effective investigation and prosecution of those who harm journalists. States have a positive obligation to carry out effective, independent and prompt investigations into the ill-treatment of journalists by state or non-state actors. [408] The positive obligation to protect journalists is therefore not only applicable to harm done by third parties, such as harm caused during a riot. [409] It also has specific relevance for the investigation and prosecution of the ill-treatment of journalists by (police) authorities. As the Recommendation states in its Guidelines: '[i]t is imperative that everyone involved in the killings of, attacks on and ill-treatment of journalists and other media actors are brought to justice.'[410]

II. European framework

The Recommendation sets out general requirements for the investigation and prosecution of those who harm journalists and a specific section on the subject of impunity. The general requirements determine that investigations should be effective and meet the requirements of adequacy, thoroughness, impartiality and independence, promptness and public scrutiny. Effectiveness means that investigations should be capable of leading to facts, identification and if appropriate punishment of those that that commit crimes against journalists. In this sense, there is an obligation of conduct to take every reasonable step to collect evidence and prosecute.

The requirements of adequacy and thoroughness overlap. If an investigation meets the requirement of thoroughness, which means that it is complete and detailed, it will generally also be adequate, meaning good enough for the particular purpose. Four substantive elements of these requirements are mentioned in the Recommendation. First, the investigation should assess whether there is a connection between the violence and the exercise of journalistic activities. This assessment should also take account of racist or gender-related issues. Second, investigations should be carried out by specialised, designated units of the states with training in human rights norms and safeguards. Third, different roles in the crimes, such as authors, instigators and accomplices should be considered. Fourth, victims should be provided with legal remedies, financial compensation, medical and psychological treatment, relocation and shelter insofar as needed.

The requirements of impartiality and independence demand that persons or institutions implicated in any way must be excluded from the investigation. This also entails the integrity of court proceedings and independence and impartiality of the judiciary. Judges, prosecutors, lawyers and

[408] Recommendation CM/Rec(2016)4.
[409] Cornelissen 11 August 2014.
[410] Recommendation CM/Rec(2016)4.

witnesses should be protected, if necessary. Finally, the requirement of public scrutiny demands that the investigations are subject to public oversight.

Impunity is discussed as a separate subject within the paragraphs on prosecution. Unacceptable delays in the prosecution can lead to impunity. One way to combat impunity is by abolishing time-bars for the prosecution of state agents charged with crimes against journalists. Additional or aggravated penalties should be established to prosecute officials who prevent or obstruct investigations. Furthermore, an amnesty or a pardon should not be given without convincing reasons. In the case of investigations not resulting in prosecution and punishment, states may establish special enquiries. With regard to impunity, states should co-operate and exchange information when crimes against journalists involve cross-border or online dimension.

The preceding exposition of the principles in the Recommendation is supported by case law of the European Court of Human Rights (ECtHR). The violation of safeguarding an effective investigation are mostly adjudicated based on Articles 2 and 3 of the Convention, which encompass the right to life and prohibition of torture.

In *McCann and others v. UK*, the Court stated that the obligation to protect life 'requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia agents of the State'.[411] This effectiveness should be capable to lead to the identification of those responsible.[412] This means that 'authorities must have taken all reasonable steps to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death or the persons responsible, whether the direct offenders or those who ordered or organised the crime, will risk falling foul of this standard.'[413]

With regard to the thoroughness and adequacy of the investigations, the Court found a violation of Article 2 ECHR in *Kiliç v. Turkey* due to the limited scope and short duration of an investigation into the killing of a journalist. In *Adali v. Turkey,* the requirements of thoroughness and adequacy were also violated. The Court stated that 'the authorities failed to inquire sufficiently into the motives behind the killing of Mr. Adali'.[414] No steps were taken to investigate political motivation or a link between the killing and the work of Mr. Adali as a journalist.[415]

Investigations must also be conducted independently from those implicated in the events. In *Adali v. Turkey,* the Court stated that independence is 'not only a lack of hierarchical or institutional connection, but also practical independence'.[416] In *Najafli v. Turkey*, the Court concluded that while the investigations were not conducted by the same exact police department, it was carried out by

[411] ECtHR 27 September 1995, 18984/91 (McCann and others v. the United Kingdom), par. 161.
[412] ECtHR 9 May 2003, 27244/95 (Tepe v. Turkey), par. 176-182; ECtHR 14 September 2010, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (Dink v. Turkey), par. 82-91.
[413] ECtHR 8 November 2005, 34056/02 (Gongadze v. Ukraine), par. 176.
[414] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 231.
[415] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 231.
[416] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 222.

colleagues employed by the same authority.[417] In the absence of an independent investigation, the Court therefore found a violation of Article 3 ECHR.

Following *Adali v. Turkey,* State authorities must act on their own motion in case of the killing of a journalist and not wait for the initiative of the next of kin.[418] In this case, the Court also stated that the victim or his next of kin should have effective access to the procedure, emphasising the importance of their involvement in the investigation, providing them with information and enabling them to present evidence.[419] The authorities had failed to enable the applicant to learn about the progress made in the investigation. The rights of victims and next of kin further encompass the right to an effective remedy with respect to the crime committed, including a claim to compensation.[420]

III. Dutch framework

The Dutch framework on prosecution has no separate rules on the prosecution of those who harm journalists. The prosecution of those people is therefore governed by the general rules on criminal liability and prosecution. The central legal texts in the Dutch legal framework are the Dutch Penal Code, the Code of Criminal Procedure and the Police Act. The Dutch Penal Code provides what facts are punishable and whom can be punished, including authors, instigators and accomplices.[421] The competence to investigate and prosecute criminal acts lies first and foremost with the public prosecutor (*officier van justitie*), who is mentioned 983 times in the Code of Criminal Procedure. Public prosecutors are supported by police officers (Article 12 Police Act), or 'investigating officers' in the legal language of the Code of Criminal Procedure. Furthermore, there is a State Criminal Investigation Department (*Rijksrecherche*) in place to investigate facts or behaviour that may lead to the criminal liability of persons with public authority (Article 49 Police Act). The State Criminal Investigation Department is only charged with investigating crimes that (are able to) seriously impair the integrity of the state and should be dealt with without any appearance of bias.[422]

The duty to investigate generally lies with public prosecutors and police officers.[423] During the investigation, all investigating civil servants have to report the investigated criminal act and all actions they have taken and found in official minutes (*proces-verbaal*) as soon as possible.[424] This is not the only Article in the Code of Criminal Procedure where requirement with regard to promptness are imposed. Investigating officers, public prosecutors and other parties involved in the investigation are subject to multiple provisions that indicate time-frames such as 'as soon as possible', 'within 24 hours' or 'immediately'.[425] According to Cleiren and Crijns however, these provisions only apply at later stages of the investigation, when the suspect knows that s/he is being investigated.[426] These rules therefore relate to the rights of the suspect during the investigation and prosecution and not

[417] ECtHR 2 October 2012, 2594/07 (Najafli v. Azerbaijan), par. 52.
[418] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 221.
[419] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey).
[420] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 253.
[421] Articles 47-54 Dutch Criminal Code.
[422] Article 3 Instruction on tasks and State Criminal Investigation Department (*Aanwijzing taken en inzet rijksrecherche*), *Stcrt.* 2010, 20477.
[423] Article 141 Code of Criminal Procedure.
[424] Article 153 Code of Criminal Procedure.
[425] Cleiren & Crijns 2010, p. 24.
[426] Cleiren & Crijns 2010, p. 25.

the rights of victims. While no general rule on promptness can be discerned in the Dutch provisions on criminal prosecution, the Dutch courts do recognise a duty of promptness if delays are detrimental to the victim.[427]

While there is no explicit statutory obligation to take certain specific investigatory steps in any or all cases,[428] investigation in criminal cases is aimed at finding the full truth *(Waarheidsvinding).*[429] The public prosecutor has the prerogative to decide what steps will be taken. The judge-commissioner (*rechter-commissaris*) acts as a balance to this precendence. The judge-commissioner is in charge of supervising the course of the investigation.[430] Within this competence, the judge-commissioner is also responsible for supervising the completeness of the investigation. The judge-commissioner can conduct investigatory steps in his/her own capacity or based on a request by the public prosecutor or the suspect.[431]

Discretionary power of the public prosecutor
Following the investigation, the public prosecutor decides whether or not to pursue a prosecution. In this regard, Article 167 Code if Criminal Procedure states the 'discretionary principle' for the public prosecution service (*Opportuniteitsbeginsel*). The discretionary principle enables the public prosecutor to waive prosecution if there is no public interest in the prosecution. While the second paragraph of Article 167 implies that there is a general duty to prosecute, practice shows that the principle is used as a reason to only prosecute when there is a public interest.[432] The discretionary principle also implies that the public prosecutor is free to choose what criminal acts he will prosecute and on what legal basis.

The discretionary principle is not only circumscribed by the principles mentioned in the previous paragraph. There are at least two other ways through which the public prosecution service can be ordered to start proceedings. The first method is a request by the victim to prosecute the suspect, provided for in Article 12 Code of Criminal Procedure. If the public prosecutor decides to discontinue the prosecution, the victim or other directly interested parties can request a Court of Appeal to order the public prosecutor to continue the prosecution. Another possibility lies with the Minister of Justice. On the basis of Article 127 Judiciary Act, the Minister has the competence to give instructions to the public prosecution service. This includes instructing the public prosecutor not to end the prosecution on the basis of the discretionary principle.[433] This competence of the Minister is put in check by the responsibilities the Minister has towards Parliament.[434]

[427] Cleiren & Crijns 2010, p. 29; and Court of Appeal The Hague 18 June 2009, ECLI:NL:GHSGR:2009:BI8688.
[428] Investigation is characterised by its broad discretionary freedom to apply investigatory powers. As such, no statutory rules on investigatory steps or time-frames can be distinguished; See further: Cleiren & Crijns 2010, p. 20.
[429] Jörg, Kelk & Klip 2012, p. 219.
[430] Article 170 Code of Criminal Procedure.
[431] Articles 181, 182 and 182(7) Code of Criminal Procedure.
[432] Valkenburg 2015.
[433] Valkenburg 2015.
[434] Articles 42(2) and 68 Dutch Constitution.

Conviction

There are no specific laws or instructions from public institutions with regard to the prosecution of those who harm journalists. However, following the case law of the Dutch courts, it is clear that the court does find it important that the victim is a journalist. In the case of the district court *Oost-Brabant* of 23 September 2013, the court stated that it did not take lightly the fact that the threats made by the suspect were aimed at impeding the journalistic activities of the victim. The court therefore concluded that imprisonment was in order, as opposed to alternative punishments such as community service or a fine.[435] This conclusion is also in accordance with the Guideline on criminal procedure for threats.[436] This guideline and other similar 'guidelines on criminal procedure' serve as a framework for the punishment demanded by the public prosecutor. The Guideline on criminal procedure for threats states that the victim's status, such as being a mayor or a politician, can be a reason to directly summon the suspect instead of imposing a penalty order or other extra-judicial remedy. While many other criminal offences are supported with such guidelines, the guideline on criminal procedure for threats is the only guideline where a rule on the special status of the victim exists. While the Guideline does not mention journalists, it would seem that it could be applied just as well for journalists. The district court *Oost-Brabant* moreover seems to recognise this in its judgment.[437]

Prosecution of (police) authorities

The standards of the ECtHR were applied to the Dutch legal framework and practice in *Ramsahai and others v. the Netherlands* of the ECtHR in 2007.[438] It concerned the fatal shooting of Moravia Ramsahai by two police officers and the subsequent investigation. For the first fifteen and a half hours, the investigation was carried out by the same police department as the office where the investigated officers worked. After this, it was taken over by the State Criminal Investigation Department. Afterwards, the case was sent to the local public prosecutor who was ordinarily in charge of investigating crimes in co-operation with the investigated officers' department.

The Court concluded first that the investigation was inadequate due to certain shortcomings. Some investigatory steps – such as testing the hands of the officers and the lack of an adequate pictorial record of the trauma caused to the victim. Furthermore, the two officers had not been kept separated and were not questioned until after three days following the incident. Second, the Court stated that the investigation had not been sufficiently independent: the State Criminal Investigation Department showed up too late, after essential parts of the investigation had already been carried out by the same force as the two officers belonged to. With regard to the public prosecutor, the Court stated that it would have been better if the investigation had been supervised a public prosecutor not connected to the police force. However, because of the independence of the Dutch Public Prosecution Service and the fact that the applicants made use of an independent tribunal, the Court concluded that the position of the public prosecutor did not violate the obligation for an independent investigation.

[435] District Court Oost-Brabant 23 September 2013, ECLI:NL:RBOBR:2013:5195.
[436] *Stcrt.* 2015, 40616 (*Richtlijn voor strafvordering bedreiging*).
[437] District Court Oost-Brabant 23 September 2013, ECLI:NL:RBOBR:2013:5195.
[438] ECtHR 15 May 2007, 52391/99 (Ramsahai and others v. the Netherlands).

In reaction to this case, the Netherlands made some adjustments to the 'Instruction on use of force by police officers'.[439] This instruction sets out the relevant procedures in case of the use of force by police officers leading to death or severe physical injury and the use of firearms that has lead to any bodily injury.[440] The investigation of the facts of these incidents lies with the State Criminal Investigation Department. Because of the limited competence of this department and limited capacity,[441] investigations of less serious incidents are dealt with by the chief of police.

The 'Instruction on use of force by police officers' states the importance of effective, objective, prompt, independent and thorough investigation of the use of force by authorities.[442] Any appearance of bias should be avoided. The investigation is therefore carried out by the State Criminal Investigation Department and not by the local police force.[443] The Department must be informed immediately about the use of force. The local public prosecutor has to be informed as soon as possible.[444] The local police force may only take measures to freeze the situation, take care of victims and check for witnesses. If necessary, investigatory steps may be performed by the local police force if these are necessary measures for the investigation of the Department (note the double necessity).[445] This would be the case when evidence would otherwise be lost. These steps can be verified by the Department.

In order to further adhere to the Court's judgment, the police officer concerned should be heard within 24 hours after the incident.[446] Also, the chief prosecutor has to safeguard that the local public prosecutor leading the investigation under no circumstances has close ties with the department of the police force where the police officers under investigation belong to.[447] To further distance the relations between the police officers and the public prosecutor, the final decision to prosecute lies with the chief prosecutor and therefore not the local public prosecutor.

In all cases of the use of force not regulated by the 'Instruction on use of force by police officers', officers are obliged to report all facts and circumstances to their superior immediately.[448] These cases do not fall under the responsibility of the State Criminal Investigation Department, but under the disciplinary rules under public servants law.[449] The use of force, neglect of duty and other violations are punished by the chief of police, or by the Minister of Justice in case of a violation by the chief of police.[450] They therefore fall under an internal investigation.[451] The responsibility for these internal investigations lies ultimately with the chief of police, but the implementation differs per local police force. While some forces work with the *ad hoc* assignment of internal investigation to

[439] *Stcrt.* 2006, 143 (*Aanwijzing handelswijze geweldsaanwending (politie)ambtenaar*)
[440] Article 3.2 Instruction on use of force by police officers; see further: Van der Steeg & Timmer 2016, p. 172.
[441] *Stcrt.* 2010, 20477 (Instruction on tasks and State Criminal Investigation Department (*Aanwijzing taken en inzet rijksrecherche*)).
[442] Article 1 Instruction on use of force by police officers.
[443] Article 4.1 Instruction on use of force by police officers.
[444] Article 4.2 Instruction on use of force by police officers.
[445] Article 4.2 Instruction on use of force by police officers.
[446] Article 4.4 Instruction on use of force by police officers.
[447] Article 4.6 Instruction on use of force by police officers.
[448] Article 17 Official Instruction for the police, Royal military police and other investigating officers.
[449] Article 125 Public Servants Act.
[450] Article 77(3) Resolution on the legal position of police officers.
[451] Van der Steeg &Timmer 2016, p. 172.

civil servants, other forces have permanent bureaus for internal investigation, so-called *Bio's* (*Bureau Interne Onderzoeken*).[452]

In cases concerning the prosecution of civil servants of the courts, the Code of Criminal Procedure provides for a legal instrument to safeguard the independence and impartiality of the proceedings. Article 510 states that the public prosecution service can request the Dutch Supreme Court (*Hoge Raad*) to appoint a different court of equal order to decide the case.

Rights of victims and next of kin

In cases where the public prosecutor decides not to prosecute – which s/he is free to choose according to Article 167 of the Code of Criminal Procedure – the victim or his/her next of kin has the possibility to request the prosecution on the basis of Article 12 of the Code of Criminal Procedure. The use of this legal action in order to prosecute police officers who use force has risen drastically in recent years. [453] The Courts of Appeal, which have the competence to judge these requests, investigate the facts surrounding these requests with a high level of scrutiny.[454]

Other rights of the victim and his/her next of kin are mentioned in Articles 51a to 51e of the Code of Criminal Procedure. First, the victim has the right to be brought into contact with an organisation for victim support.[455] The Decree on victims of criminal acts provides for a detailed description of the different rights of victims and obligations of care for the authorities. These rights and obligations consists of, among others, information, advice and support regarding access to the criminal procedure, emotional and psychological support and advice on victimisation, intimidation and retaliation.[456] Access to the criminal procedure for the victim also consists of the right to read procedural documents and even the right to speak in the case of serious crimes.[457] Furthermore, the victim has a right to demand compensation during the criminal procedure.[458]

Cross-border protection of journalists

Based on Articles 552qa to 552qe of the Code of Criminal Procedure, the public prosecutor can start investigations in cooperation with competent authorities of other states. Article 552i of the Code and the 'Guideline information-exchange with regard to mutual assistance in criminal cases' provides for a framework for treating foreign requests for assistance in finding proof of criminal acts.

On 2 October 2016, photo-journalist Jeroen Oerlemans was shot dead in Libya. The Dutch public prosecution service is currently investigating his death. This investigation is currently being carried out by the International Crimes Team (*Team Internationale Misdrijven*), an organisation specialised in the investigation of war crimes.[459] It is still unclear what form this investigation will take, either through cooperation with investigating authorities of other states or if the Dutch authorities will investigate themselves with the permission of the Libyan authorities. The Dutch Association of

[452] Van der Steeg 2004, p. 293.
[453] Van der Steeg 2016.
[454] See, for example: Court of Appeals The Hague 4 August 2015, ECLI:NL:GHDHA:2015:2177.
[455] Article 51aa Code of Criminal Procedure.
[456] Article 3 Decree on victims of criminal acts.
[457] Article 51b and 51e Code of Criminal Procedure.
[458] Article 51f Code of Criminal Procedure.
[459] Volkskrant 7 October 2016.

Journalists (*NVJ*) stresses the importance of this international investigation, stating that it is a signal against the impunity against the killing of journalists.[460]

IV. Conclusion

As stated at the beginning of this chapter, the investigation and prosecution of those who harm journalists should be effective and meet the requirements of adequacy, thoroughness, impartiality and independence, promptness and public scrutiny. In the conclusion to this chapter, we will compare the substantive standards to these principles as mentioned by the ECtHR and CoE with the legal framework and practice in the Netherlands.

1. Effectiveness

As stated in the paragraphs on the European framework, the authorities have an obligation to take every reasonable effort to collect evidence and prosecute. Deficiencies in the investigation risk falling foul of the obligations of the European Convention of Human Rights.[461] Within the Dutch framework, the obligation to collect evidence is safeguarded by the checks and balances in the system of investigation and prosecution. First, the main responsibility for the investigation lies with a specialised organisation: the public prosecution service with investigating officers at their disposal. Within the investigation, the judge-commissioner has a special position to supervise the collection of evidence and can order additional investigatory steps in order to find the full truth. During the investigation of the use of force by police officers, the State Criminal Investigation Department is also bound by effectiveness as stated in the Instruction on use of force by police officers. Furthermore, the general rules on criminal procedure also apply to the prosecution of police officers, including the competences of the judge-commissioner.

With regard to reasonable efforts to prosecute, the discretionary principle of the public prosecutor could give some reason to doubt effectiveness. However, due to the checks in place: victims and their next of kin can request prosecution. This check was also deemed sufficient by the ECtHR in *Ramsahai and others v. the Netherlands.*[462]

2. Adequacy and thoroughness

Four principles with regard to adequacy and thoroughness are of importance. First, there is an obligation to look for a connection between the violence and the victim's activities as a journalist. Second, different roles in the crimes should be considered. Third, there should be specialised, designated units with human rights training. Fourth, victims should be provided with remedies, compensation, treatment, relocation and shelter as needed. With regard to thoroughness in general, the preceding paragraphs on effectiveness already show that the Dutch legal framework stresses the finding of all the facts.

First, there are no explicit rules that state that the public prosecutor or investigating officers should always investigate the person of the victim. On the other hand, the principle of fullness of the investigation, the controlling function of the judge-commissioner and the multitude of rights of the victim does point to an obligation to take the identity of the victim into account during the

[460] Breemen & Breemen 2017, p. 8294.
[461] ECtHR 8 November 2005, 34056/02 (Gongadze v. Ukraine), par. 176.
[462] ECtHR 15 May 2007, 52391/99 (Ramsahai and others v. the Netherlands).

investigation. The Dutch courts also seem to attach importance to the finding that the victim is a journalist. Second, with regard of the role of the suspect, the Dutch Criminal Code provides for general rules for the prosecution of authors, instigators and accomplices.

Third, with the exception of the International Crimes Team currently investigating the killing of journalist Jeroen Oerlemans, we could not find a specialised, designated unit with human rights training. So apart from this team, which is mostly occupied with crimes in other countries, no such unit can be found.

Finally, the rights of victims are strongly embedded in the Dutch framework, which includes rights with regard to information on the criminal case, rights to treatment, compensation, relocation and shelter and other remedies based on individual needs.

3. Impartial and independent

Impartiality and independence of the proceedings means, among other things, that persons or institutions implicated in the crimes should be excluded from involvement. This includes the need so safeguard the integrity of court proceedings and independence and impartiality of the judiciary. In *Adali v. Turkey*, the ECtHR stated that there should be a practical independence,[463] meaning also that investigations conducted by the same police department as the department of suspected police officers is in violation of impartiality and independence.[464] Furthermore, in *Ramsahai and others v. the Netherlands,* the Court concluded that while impartiality is institutionally embedded through a separate public prosecution service, the (local) public prosecutor should not have connections too close to the police officers that s/he investigates.[465]

In the Dutch legal framework, the independence of the investigation is safeguarded through the specialised State Criminal Investigation Department. This department is called upon if any appearance of bias needs to be avoided, and especially in cases concerning the (lethal) use of force by police officers. Impartiality in later stages of the investigation and prosecution is safeguarded through the existence of an institutionally semi-independent public prosecution service. In case of a possible conflict of interest of a local public prosecutor – for example if there is a strong connection between this prosecutor and police officers under investigation – the Chief public prosecutor has the authority to appoint a different public prosecutor. Perhaps independence could be safeguarded further if a different public prosecutor would be appointed in any case. Further safeguards for independence can be found in the role of the judge-commissioner, who is responsible for supervising the public prosecutor in later stages of the investigation.

4. Promptness

In 2007, the Netherlands was reprimanded for its slow investigation in the case *Ramsahai and others v. the Netherlands*: it took too long before the police officers under investigation were heard.[466] The

[463] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 222.
[464] ECtHR 2 October 2012, 2594/07 (Najafli v. Azerbaijan), par. 52.
[465] ECtHR 15 May 2007, 52391/99 (Ramsahai and others v. the Netherlands), par. 345.
[466] ECtHR 15 May 2007, 52391/99 (Ramsahai and others v. the Netherlands), par. 330.

principle of promptness infers a duty to start investigations without initiative of the victim or their next of kin and a certain degree of expeditiousness.[467]

With regard to the use of force by police officers, the principle of promptness is safeguarded through the Instruction on the use of force by police officers. The State Investigation Department must be informed immediately about the use of force and start investigation as soon as possible; police officers need to be heard within 24 hours. In all other cases, a duty of promptness is less clear. While the Dutch courts do seem to state a duty of promptness during the investigation in favour of the victims of a crime, this principle is not explicitly mentioned in the Code of Criminal Procedure. On the other hand, the principle of promptness as enshrined in ECtHR case law applies directly in Dutch law, meaning that adherence to this principle should be sought nonetheless.

5. Public scrutiny
The requirement of public scrutiny demands that the investigations are subject to public oversight. With regard to the accessibility of court proceedings and judgments to the public, please see chapter 3.2 on access to information. Public scrutiny is further safeguarded through the victim's right to receive information about the case. Furthermore, we notice that attacks against journalists are often high on the agenda of news agencies.

6. Impunity
The prevention of impunity could be accomplished by preventing delays, establishing aggravated penalties for officials who prevent or obstruct investigation, denying amnesty or pardon if there is no convincing reason, abolishing time-bars for the prosecution of state agents, establishing special inquiries in case of impunity and international co-operation and exchange of information.

In the Dutch framework, delays in the investigation are controlled by the judge-commissioner and the courts. The Dutch framework provides for aggravated penalties for abuse of power, opportunities or means granted by his official capacity in Article 44 Dutch Penal Code. This encompasses the obstruction and prevention of investigations. An amnesty or a pardon could be provided without convincing reason on the basis of the discretionary principle of the public prosecutor. On the basis of this principle, prosecution is not pursued except if it is in the public interest. However, victims or their next of kin can still request prosecution and the Minister of Justice can order it. Special rules on time-bars for state agents and special inquiries in the case of impunity are not provided for in the Dutch framework. Lastly, international co-operation and exchange of information are provided for in general in the Code of Criminal Procedure, secondary legislation and a specialised International Crimes Team.

[467] ECtHR 31 March 2005, 38187/97 (Adali v. Turkey), par. 221.

6. Conclusion

Attacks on journalists and journalism are a growing concern for international organisations and NGOs around the world. Freedom House reported that press freedom deteriorated to its lowest point in 13 years in 2016.[468] Attacks on journalism are not just taking place in totalitarian states where free speech is non-existent.[469] There is also growing concern in the Netherlands. Odekerken and Brenninkmeijer recently reported a growth in threats made to journalists in the Netherlands.[470] Our study has given an overview of the Dutch framework for the protection of journalists and journalism and assessed its compliance to standards on journalistic freedom of the Council of Europe and European Court of Human Rights. It has shown that while the Netherlands is a known forerunner on press freedom, there is definitely room for improvement. This conclusion will give a summary overview of the strengths and weaknesses of the Dutch framework (please see the dedicated conclusions for each specific subject in their respective sections).

Prevention

States should create a favourable environment for journalists and other media actors to contribute to public debate without fear through the implementation of an effective legal framework. In this study, 'prevention' was divided into the subjects: media independence and pluralism, access to information, protection of sources and whistle-blowers and protection of journalists from (arbitrary) criminal prosecution in case of overriding public interest.

The State is the ultimate guarantor of media independence and media pluralism. The ‘arms-length’ principle (*overheid op afstand*)[471] serves to safeguard independence of public-service media through institutional independence and organisational checks and balances – including independent regulatory authorities the Dutch Media Authority and (at least since 1 January 2017) the *NPO*. On the other hand, practice has shown that a political majority can alter and potentially undermine the funding of the public-service media, possibly creating issues with regard to independence through secure funding and financial measures.[472] Commercial broadcasting and other commercial media are safeguarded from state influence through clearly delineated limitations to the free exploitation of media enterprises. These include the freedom of the press as enshrined in the Dutch Constitution and audiovisual media and telecommunications regulation at the European Union.

With regard to maintaining media pluralism, the public-service broadcaster *NPO* strives to serve as a forum for a range of opinions and comment that reflect the diversity within the country.[473] This is reflected in its public media mission and the foundation *NTR* that focuses specifically on pluralism and diversity of content. Another public policy is the Dutch Journalism Fund that promotes pluralism in the press. With regard to commercial parties, the Media Act contains a 'must-carry' rule for the provision of (digital) TV providers. While provisions on media pluralism are in place for the allocation

[468] Dunham 2017, p. 3
[469] Clark & Grech 2017.
[470] Nab 2 May 2017.
[471] Van Eijk 28 November 2016b.
[472] See further: Recommendation CM/Rec(2007)2.
[473] See, in this regard: ECtHR 17 September 2009, 13936/02 (Manole and others v. Moldova), par. 101.

of (radio) frequencies, there has not been any assignment based on considerations of pluralism and diversity. Some issues on diversity and pluralism in public-service media may occur in the near future due to the reduction in the number of broadcasting organisations that are given time-slots on the *NPO*'s channels. Media pluralism could also be threatened by concentration of ownership.[474] In the Netherlands, sector-specific rules on concentration of media ownership have been abolished, leading to a high concentration on the newspaper market and overall high concentration between different media markets.

Access to information is codified in several Constitutional provisions. The legislative and judiciary branches of the state are accessible for the public (in principle). Documents of administrative authorities are accessible through the Openness of Government Act (*Wet openbaarheid van bestuur WOB*), which shows a lot of overlap with the Tromsø Convention and the CM Recommendation on access to official documents.[475] While the Minister of Internal Affairs has stated that changes to the *WOB* must be in accordance to the Tromsø Convention,[476] two points of the *WOB* are currently still lacking. First, the *WOB* provides for absolute grounds of refusal, while European standards demand that any limitation of access is in accordance with the principles of proportionality and subsidiarity. Second, obtaining information from reluctant administrative authorities has become more burdensome and time-consuming, which could lead to unacceptable delays in the collection of information that is of public interest.

The protection of sources has been a recurrent issue in the Netherlands. Several cases at the European Court of Human Rights have shown the need for reform. Currently, the Dutch legislator is discussing an amendment to the Code of Criminal Procedure to finally codify the protection of journalistic sources. These amendments will need to be accepted in order to put the Dutch framework on a par with the relevant European standards. In the meantime, the Dutch government has been criticized for the restrictive approach of source protection in the new proposal on the Intelligence and Security Services Act. The proposal makes the interception of journalistic communication possible though 'bycatch' during mass surveillance and the indirect use of surveillance powers to trace a journalist's source.

The European standards with regard to whistle-blowing are embedded in the House for Whistle-blowers Act. The Dutch courts have not yet applied this Act in an actual case. Alternatively, the online platform Publeaks is a private, collaborative initiative that provides for the possibility of whistle-blowers to leak information to collaborating press organisations. This initiative has recently been awarded a grant from the Dutch Journalism Fund in order to enable further improvement of the platform.

Prosecution of journalists follows the principles as set by the European Court of Human Rights: an obligation to obey criminal law in principle with a derogation on the basis of overriding public interest. The Dutch courts take the nature of the accused into account. Furthermore, the Dutch legislator has removed blasphemy from the Criminal Code. Legislative proposals to abolish lèse-majesté and insulting a foreign head of state are still on the table. These criminal provisions do not

[474] Recommendation CM/Rec(2007)2.
[475] Recommendation CM/Rec(2002)2.
[476] *Kamerstukken II* 2010/11, 32802, 1.

provide for derogations on the basis of public interest, in contrast to 'regular' defamation. Defamation is a civil offence and can result in tort liability. Apart from that, defamation is still a criminal offence that can be punished by a prison sentence. Although not explicitly in conflict with European standards, the Parliamentary Assembly is of the opinion that defamation should be decriminalised.[477]

Protection
Authorities should put in place preventive operational measures for cases of immediate attacks on journalists. While the Dutch framework provides the competence to protect journalists and public order in general in the Municipalities Act and Police Act, a more substantial organisation of these measures in a legislative framework is lacking. Collaboration between the Dutch police and the Dutch Association Journalists *NVJ* has led to some specific protective measures during protests and other incidents. We would recommend to implement these measures in public policy.

This same lack of a clear (legal) framework is also observable with regard to protocols and training programmes. Public information on the protocols and training of police officers seems to be lacking. It is unclear whether police officers have sufficient knowledge of the position of journalists in the field. On the other hand, warning mechanisms, the use of force by officers and measures on relocation and shelter are clearly described as legal obligations for police officers in the field.

Prosecution
The European standards require that prosecution is effective, adequate and thorough, impartial and independent, prompt and under public scrutiny. Furthermore, impunity should be avoided.

With regard to the effective collection of evidence, the Dutch legal system has no statutory provisions demanding certain steps should always be taken in investigations. However, the principle of fullness of the investigation (*waarheidsvinding*) entails a need to find all relevant evidence to the crime. There are also checks in place through the existence of a semi-independent public prosecution service responsible for the investigation and a judge-commissioner responsible for supervising the investigation.[478] Investigation of use of force by police officers also falls within these checks, with the addition that the *de facto* investigation is not carried out by investigating (police) officers, but an independent State Criminal Investigation Department. With regard to effectiveness of the prosecution, the discretionary principle gives the public prosecutor the competence to discontinue prosecution at will. This could possibly lead to a violation of an effective prosecution. However, in *Ramsahai and others v. the Netherlands,* the European Court of Human Rights concluded that this is not the case since victims or their next of kin can request the courts for continued prosecution.

Adequacy and thoroughness are safeguarded first through the principle of fullness of the investigation (*waarheidsvinding*), which includes the need to look for a connection between the crime and the victim's activities. This is also safeguarded through the rights of the victim and his/her next of kin, which includes a right to be heard. Other rights of the victim of importance are: rights to information on the case, rights to (psychological) treatment, compensation, relocation and shelter

[477] Resolution 1577 (2007).
[478] The public prosecution service is independent from the police but employed by the Minister of Justice, so it is not a fully independent institution.

and other remedies based on individual needs. A last element of adequacy and thoroughness is that there should be specialised units with human rights training. The International Crimes Team is a specialised unit with regard to war crimes. Other specialised units with human rights training could not be found.

In the Netherlands, impartiality and independence of the investigation are first safeguarded through the State Criminal Investigation Department if any appearance of bias should be avoided or if a police officer has used (lethal) force. In the stage of investigation and prosecution, impartiality and independence are safeguarded through an institutionally semi-independent public prosecution service. In case of a (strong) tie(s) between a local police officer and a local public prosecutor, the Chief prosecutor can appoint a substitute public prosecutor. This is in accordance with ECtHR standards. However, the Court does recommend a full separation to avoid the appearance of bias. To achieve this, it would be necessary to appoint an external public prosecutor in any case of use of force by an officer.

Promptness is safeguarded in guidelines with regard to investigation of use of force by police officers. The situation is less clear in other situations. No explicit mention of promptness in investigations is made in the legal framework. On the other hand, ECtHR case law functions as guidance for investigations, meaning that promptness is provided for indirectly. Public scrutiny is provided for through access to court hearings and judgments and rights of the victim to information about the case. Impunity is provided for in the supervisory power of the judge-commissioner, aggravated penalties for abuse of power and rights of the victim and next of kin to request prosecution.

Final remarks – room for improvement?
While the rules on protecting the integrity of criminal investigation and prosecution are well provided for, considerations regarding journalists and human rights based considerations are lacking in the frameworks on protection and prosecution. Searching for the word journalist in public documents of the police and public prosecution service delivers few results. It would be interesting to see the collaborations between the Dutch Police and *NVJ* result in substantive policy instruments for the police.

With regard to prevention, the Dutch legal framework shows a strong frame with some dents that, when fixed, could show full compliance to the relevant standards on the European level. Threats to media pluralism due to high concentration, a continued lack of a recognition of journalists in criminal law and surveillance, and an Act on access to information in partial conflict with Article 10 ECHR are examples of these dents. It is our hope that such issues can be fixed before prevention is too late.

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Appendix I – Dutch media landscape

The *Mediamonitor*, a part of Dutch Media Authority (*Commissariaat voor de Media*[479]), maps the Dutch media landscape on an annual basis. It mainly focuses on the possible consequences of media concentration and issues annual reports on changes and trends in the Dutch media landscape.[480]

Trends

The most recent trend report available describes the trends signalled in 2016.[481] The report shows, amongst other things, that the use of traditional media (radio, television and printed media) is decreasing, whereas the use of online media is increasing. For example, in 2016, 29% of newspaper readers read articles on their smartphone, as opposed to 21,6% back in 2014. Furthermore, so-called 'hybrid' newspaper subscriptions, where the reader reads the paper online on weekdays and only receives a physical copy during the weekends, have become more popular over the past few years.

The trend report shows that traditional media companies are struggling with the rising power of tech companies such as Facebook and Google. The traditional companies increasingly focus on the online environment, for example by investing in digital developments and IT projects. Moreover, in a successful attempt to compensate the decreasing advertising turnover, several market players acquired online platforms where advertising still is booming business.

Contrary to 2016, in 2015 the *Mediamonitor* also monitored the trust in the media. The trend report of that year showed that trust in the printed media had increased in comparison to 2001. Of all the member states of the European Union, trust in newspapers and magazines was the highest in the Netherlands. Trust in radio and television, on the contrary, showed a decrease compared to 2001:

	% Trust level 2001	**% Trust level 2015**
Printed media	57%	63%
Radio	71%	66%
Television	75%	57%
Internet	-	43%
Social media	-	19%

As the table shows, trust in social media was low in 2015, and even decreased in 2016. In that year, the trust level was only 17%.[482] To illustrate: 66% of the people worried about the sale of their personal data by social media platforms and 57% does not know if social media can be trusted *at all*.

[479] See Chapter 2.4.
[480] http://www.mediamonitor.nl/english/about-the-mediamonitor/
[481] http://www.mediamonitor.nl/trends/trends-in-2016/ (available in Dutch)
[482] http://www.mediamonitor.nl/trends/trends-in-2016/

Television market

	% Reach 2016 (2012)[483]	**% Market share 2016 (2012)**[484]
Nederlandse Publieke Omroep (NPO)		
NPO 1	44,8% (51,2%)	21,9% (21,4%)
NPO 2	24,2% (30,7%)	6,1% (6,8%)
NPO 3	21,2% (31,4%)	4,1% (6,4%)
Bertelsmann		
RTL 4	35,9% (41,4%)	14,5% (14,8%)
RTL 7	15,0% (21,3%)	3,9% (4,7%)
Sanoma Group[485]		
SBS 6	25,0% (30,7%)	7,8% (7,8%)

In 2016, Dutch people watched television for approximately 183 minutes per day. The percentages show that the reach of television channels is slowly decreasing every year. It is suspected that the decrease is caused by the users' shift to online distribution channels.
The table above displays the market shares of the most important channels as of 2016. A part of the channels is owned by the *Nederlandse Publieke Omroep* (National Public Broadcasting agency or *NPO*),[486] another part by commercial parties Bertelsmann and Sanoma Group. In 2017, Sanoma sold SBS 6 and other channels it owned to Talpa Media, which then replaced Sanoma in the top three players with the biggest market share. Numerous other, smaller television channels appear in the Dutch media landscape, some of which are owned by Bertelsmann and Sanoma Group. The regional channels, with the exception of one channel, all fall under the responsibility of the *NPO* and have a total market share of 1,4%.[487]

[483] http://www.mediamonitor.nl/mediamarkten/televisie/televisie-in-2016/ (available in Dutch)
[484] http://www.mediamonitor.nl/mediabedrijven/marktverhoudingen/ (available in Dutch)
[485] As of 2017, SBS6 is no longer owned by the Sanoma Group, but became part of Talpa Media. See: http://nos.nl/artikel/2167491-het-is-nu-officieel-sanoma-verkoopt-sbs-aan-talpa.html (available in Dutch)
[486] See also Chapter 2.4.
[487] The Dutch government is in the process of creating a separate, regional branch of the *NPO* which will be responsible for the regional channels.

Newspaper market

	Average physical edition size 2016 (2011)[488]	**% Reach 2016 (2011)**[489]	**% Market share 2016 (2011)**[490]
De Persgroep			
Algemeen Dagblad	369.152 (427.388)	9,2% (11,0%)	12,7% (10,3%)
de Volkskrant	258.415 (258.175)	5,2% (5,8%)	8,9% (6,2%)
Trouw	105.560 (102.973)	4,4% (2,3%)	3,6% (2,5%)
Telegraaf Media Groep			
De Telegraaf	426.827 (597.579)	9,0% (14,9%)	14,4% (14,4%)
Metro[491]	397.913 (434.390)	7,5% (11,6%)	10,7% (8,4%)
Mediahuis			
NRC Handelsblad	145.339 (199.993)	2,5% (3,5%)	5,0% (4,8%)

The table above shows the most recent data are available with regard to the reach and market share of newspapers. Just like the television data, the most recent numbers are compared to those of five years earlier.

In 2016, a total of 896 million printed newspaper editions circulated amongst the total Dutch population of approximately 17 million people. The statistics show that the total number of circulated editions decreases every year. Exact numbers are not yet available, but it is expected that this decrease is caused by the shift to online reading: the same has been the case in earlier years.[492]

In 2016, the biggest newspapers were owned by three companies (De Persgroep, Telegraaf Media Groep and Mediahuis), which together had a market share of 85,2%. In 2017, Mediahuis acquired Telegraaf Media Groep, thereby limiting the number of key players in the newspaper market to two instead of three. The companies offer a variety of national and regional newspapers, some of which are available for free. Various other companies own regional newspapers and religious newspapers, usually in relatively small editions.

[488] See the *Nationaal Onderzoek Multimedia* (National Research Multimedia) website: http://www.nommedia.nl/Doelpagina-Artikellijst/2045/2103547/Update-NOM-Dashboard-print-oplagecijfers-en-digitale-censusdata-2016-Q1-t-m-2016-Q4.html (available in Dutch)
[489] http://www.mediamonitor.nl/nieuws/marktaandelen-en-bereik-nederlandse-dagbladenmarkt-2016/ (available in Dutch). Percentage of reach stands for the percentage of people older than 13 that reads an issue of a newspaper. One copy can be read by several people: reach of a newspaper therefore does not equal the size of a newspaper edition.
[490] http://www.mediamonitor.nl/nieuws/marktaandelen-en-bereik-nederlandse-dagbladenmarkt-2016/ (available in Dutch)
[491] *Metro* is the only freely available newspaper on this list. It is funded by advertisers and spread in public places such as train stations, libraries, etc.
[492] See http://www.mediamonitor.nl/mediamarkten/dagbladen/dagbladen-in-2015/ (available in Dutch)

The number of physical copies per issue, reach and market share of the six biggest national newspapers in print as of 2016 are displayed above. The data are compared to the data concerning five years earlier, 2011.[493]

It is noteworthy that some newspapers show a decrease of physical copies (*Algemeen Dagblad, De Telegraaf, Metro* and *NRC Handelsblad*), whereas the editions of *Trouw* and *de Volkskrant* have grown compared to 2011. With the exception of *Trouw*, all the newspapers show a decrease in their reach of physical issues.
The growing market shares of *de Volkskrant* and *Trouw* are partly a result of the increasing edition sizes. The other factor, that also explains the growing market shares of the newspapers with decreasing edition sizes, is the disappearance of two free newspapers that together had a market share of 12,7% in 2011.[494]

With regard to the digital distribution of national newspapers, the *Nationaal Onderzoek Multimedia* (National Research Multimedia or *NOM*) reports an average growth of 32,2% in 2016.[495] This percentage is an estimate, since not all newspapers share their complete data on online distribution. Moreover, the reach of the online copies is unknown: it remains unclear how many people actually read the downloaded newspaper. Both the incomplete data and the fact that the *NOM* only started monitoring digital distribution in 2014 make it difficult to draw general conclusions from the available information.

[493] See http://www.mediamonitor.nl/nieuws/marktaandelen-en-bereik-nederlandse-dagbladenmarkt-2016 for the 2016 data, and http://www.mediamonitor.nl/mediamarkten/dagbladen/dagbladen-in-2011/ for the 2011 data, except where noted otherwise.
[494] *Sp!ts* had a market share of 7,1%, *De Pers*' market share was 5,6%.
[495] See https://www.villamedia.nl/artikel/digitale-oplagen-landelijke-dagbladen-groeien-sterk (available in Dutch)

Appendix II – Extensive methodology

Introduction and research question

A research question defines the scope of the work and gives meaning and direction to the researchers studying the subject. In the case of this work, the aim of the study is focused on exploration and perhaps, to a limited extent, also as an advice on best practices and possible improvements. The study mainly explores if and how the Dutch legal framework and practice are in accordance with the relevant standards of Article 10 ECHR, as further specified through standard-setting work of the Council of Europe (CoE) and European Court of Human Rights (ECtHR). The research question can therefore be defined as follows: *does the Dutch legal framework and (its) practice comply with relevant standards of the Council of Europe and European Court of Human Rights with regard to the protection of journalism and the safety of journalists and other media actors?*

In the following pages, a broad discussion will be set out on the relevant methodologies of the study. While the research will primarily be a case study, there will be multiple steps in obtaining the full picture of the legal framework and practice in the Netherlands. The study therefore follows a mixed methods design. The study consists of three steps: (i) a doctrinal analysis of the Dutch framework and standards of the CoE and ECtHR; (ii) group discussions and in-depth interviews with key specialists in the field of journalism; and (iii) a comparison between the standards of the CoE and ECtHR and our findings on the Dutch legal framework and practice.

The relevant methodological theories that form a basis of the research are as follows. First, the study is a case study on the Netherlands, meaning that relevant literature on case study research will be discussed. Second, in examining the documentation and literature on the Dutch framework and practice and CoE and ECtHR standards, a classic doctrinal approach will be used. With regard to the doctrinal aspect the research relies heavily on official documents, including law and case law, with support of commentaries of leading scholars on Dutch law. Third, the case study tries to go deeper than pure doctrinal research through focus-group discussions and semi-structured interviewing. This step will give a deeper understanding of the similarities and differences between black-letter law and practice in the Netherlands. Fourth, the Dutch case will be assessed on their compliance with the relevant norms and standards portrayed in the Recommendation and other relevant norms at the European level, meaning the Council of Europe and case law of the ECtHR. As such, top-down comparative research is done between international norms and national norms and practice.[496]

Case study research

A case study is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-world context. The focus of a case study is to get a full understanding of the real-world phenomenon, taking an intensive approach.[497] Case studies are performed if a researcher is interested in the unique features of the case. As such it is ideographic.[498] A downside to ideographic

[496] Rosenblum 2007, p. 770.
[497] Yin 2014, p. 16; Swanborn 2010, p. 2.
[498] Bryman 2015, p. 61. Babbie 2010, p. 309.

case studies is the generally limited generalizability of the results. A single instance of a phenomenon could hardly represent a more general truth. As Babbie notes, this can be reduced through comparison.[499] Our hope is that this study will give an impulse for comparable studies in other European countries.

Of first importance is to answer what should be defined as the case. Yin describes a case as 'some real-life phenomenon that has some concrete manifestation', defined by spatial, temporal and other concrete boundaries.[500] This is could be complemented with Babbie's description, arguing it is a 'limitation of attention to a particular instance of something'.[501] Within our working definition, the real-life phenomenon would be the Dutch legal system, limiting the attention to the legal and practical protection of journalists and journalism, and placing boundaries at the Dutch territory and contemporary world.

Second is to get a grip on what constitutes good case study analysis. Yin gives some useful insights in types of case study design. In our case, preference goes out to Yin's embedded case study design. Within the case study, special attention is given to subunits such as protection of sources and independence of the media.[502] This embedded design does come with a need to relate subunits to the full case and keep an eye on other venues of interest that could come to light, which could create the need for more subunits.

Third is the assessment of the relevant steps that should be taken in the analysis. In this regard, Swanborn takes a somewhat historical approach to the case study method. When giving a description of the 'normal' steps and focuses of a case study, he refers to the analysis of the development of social phenomena:

1) the study of a social phenomemon within the boundaries of one social system;
2) by monitoring or collecting information on the development of the phenomenon;
3) with a focus on process-tracing (describing and explaining developments);
4) using several sources, main ones being documents, interviews and observation;
5) with a final stage of inviting stakeholders to debate their perspectives and preliminary research conclusions.[503]

In contrast to Swanborn, we are more interested in the current framework and issues. So the process-tracing in step three is of less importance to our study. Development certainly has a role in finding the correct interpretation of legal rules and real-world practice. However, this will not be given a central focus.

An important aspect with regard to validity is that a case study has a lot of variables and little data points. By this we mean that while there are many objects to be studied within the case, the single-case study only has one observation per object. This results in a need to rely on multiple sources of evidence, looking for converging data. Yin calls this triangulation, stating that over-reliance on documents in case studies has made some mistakenly assume that it is the unmitigated truth. Any

[499] Babbie 2010, p. 311.
[500] Yin 2014, p. 34.
[501] Babbie 2010, p. 309.
[502] Yin 2014, p. 55.
[503] Swanborn 2010, p. 13.

conclusion or finding is more convincing if there are multiple sources to back it up.[504] Reading documents is the first step, but according to Swanborn it is never sufficient. In order to amplify and strengthen our knowledge, we need information from key people.[505]

As such our research case study will focus on the framework, practice and issues of the protection of journalists and journalism in contemporary Dutch law. Triangulation will be sought through the research of primary (legal) documents, comments in the literature, and group discussions and in-depth interviews with different players in the field of journalism at an advanced stage of the study.

Doctrinal legal research

The legal doctrinal method involves the analysis and application of legal concepts in a legal framework. The doctrinal method takes an internal perspective of the law, considering it as a closed, logical system which can be analysed, deducing logical interpretations from the framework of rules. This has been described by scholars such as Westerman as using the legal system not only as the subject of inquiry, but also as the theoretical framework.[506] Legal doctrine has at its core business the interpretation of legal norms, consisting of the interpretation of (legal) texts.[507] Van Hoecke therefore describes the doctrinal legal approach as a hermeneutic discipline:

'In a hermeneutic discipline, texts and documents are the main research object and their interpretation, according to standard methods, is the main activity of the researcher. This is clearly the case with legal doctrine.'[508]

The study comprises a broad and in-depth analysis of legal texts and case law that relate to the protection of journalists and journalism. This part of the analysis is doctrinal in nature: it focuses in obtaining a solid interpretation of the prevailing norms. An important pitfall that we deal with is that of subjectivity: a normative approach could lead to a point that the legal scholar tries to apply her view of the law as 'the law'. Therefore, there is a need to distance the researchers' perceptions and try, as far as possible, to define standards based on (authoritative) sources. These authoritative sources follow from the idea that a rule can be 'explained' by the existence of a higher norm, from which that rule is derived, or the existence of underlying values or principles, or of a larger network of legal rules and principles.'[509]

The first stage in the doctrinal approach is the collection of relevant information. This consists of (e.g.) statutory texts, treaties, general principles of law, binding precedents such as case law and, as a secondary source, (Dutch) scholarly legal writing.[510] A pitfall in this stage is described by Brems as the omission of selection criteria from the full corpus of case law and legal documents. The reader cannot assess the validity of the study if this selection is not specified.[511] This pitfall is almost

[504] Yin 2014, p. 17.
[505] Swanborn 2010.
[506] Vranken 2011, p. 113.
[507] Van Hoecke 2011.
[508] Van Hoecke 2011.
[509] Van Hoecke 2011.
[510] Van Hoecke 2011.
[511] The example that Brems gives is on point: only using a small sample of ECtHR case law that prove the point of the researcher while ignoring those that disprove it are detrimental to ethical research.

universally present in legal doctrinal research.[512] In this study, we aimed to use the full sample of available laws and legal sources for the Dutch Framework. With regard to the European framework, we used the most recent Recommendations and Declarations on specific subjects in order to obtain the most contemporary opinions of the Committee of Ministers. For the relevant ECtHR case law, we looked at the background documents of Recommendation (2016) 4 on the protection of journalism and safety of journalists, as mentioned in the agenda of the 3rd meeting of the committee of experts in preparation of this Recommendation.[513] These include the publication of Philip Leach,[514] the book 'Journalism at Risk', edited by Onur Andreotti,[515] and the publication of the European Audiovisual Observatory on freedom of expression case law, written by Voorhoof, McGonagle and Van Loon.[516] Additionally, recent cases at the ECtHR were used to check whether the case law referenced in the background documents also reflect the current stand-point of the Court.

Comparative legal research
'They search for explanations of whether, how, and why nations behave in compliance with international law. Therefore, each view of the increasingly penetrating role of an international law, institution, or process in a traditionally national ambit of authority relies on a comparison.'[517]

Top-down comparative research - internalisation
Morimov and Fourie state that legal comparison is not only comparison between states and other entities of equal weight. It can also be vertical, top-down. In this regard, they refer to the internalisation of international norms into national legal orders, where these international norms become embedded into a national legal system.[518] Comparativists can examine international law as an object of comparison, making it possible to analyse similarities and differences between the international norm and the legal system of a country.[519]

The work of Darren Rosenblum on the internalisation of international gender norms gives insight in the way top-down comparison can strengthen this study. A synergy between the theories of internalisation of international political theory and comparative legal research form the basis of his research. the theory of internalisation states that State compliance with international norms can be found in the internalisation of those norms to their national law. This internalisation may come with discrepancies, as it places international norms in a domestic legal and cultural context.[520]

Important to note is that the internalisation theory relies on the assumption that the obligation to obey an international norm becomes a domestic legal obligation when it has been interpreted and internalised in the domestic legal system.[521] Within Dutch legal framework, international norms can

[512] Brems 2009 p. 89.
[513] Committee of Experts on the protection of journalism and safety of journalists 3 March 2015.
[514] Leach 2013.
[515] Andreotti 2015.
[516] McGonagle, Voorhoof & Van Loon 2015.
[517] Chodosh 1999, p. 1038.
[518] Morimov & Fourie 2009, p. 295.
[519] Rosenblum 2007, p. 784.
[520] Rosenblum 2007, p. 762 and 776.
[521] Rosenblum 2007, p. 772

be directly applied by the judiciary when certain preconditions are met.[522] However, this does not mean that Dutch law does not internalise these norms. At the very least, internalisation takes place at the moment that a judge applies an international norm within a domestic case, placing it within the framework of domestic law. This, in a sense, is what Downs and Trento call the 'process by which norms established at the international level are internalized at the domestic level and become indistinguishable from domestic norms.'[523]

Another element of importance for this comparative research is the link between law and social context as discussed in the work of Oderkerk. She states that while the methodological issue of what should be included in the comparative project is only sparsely discussed, some have considered that social context in which the rules are embedded should be taken into account.[524] Rosenblum calls this one of the central advantages of comparative research in internalisation theory: the ability to see internalisation in a cultural context as exemplified by legal idiosyncrasies.[525] The semi-structured interviews, which will be further discussed below, give such a social context. A societal frame gives further substance to the assessment of the Dutch compliance.

Functionalism

'Comparative knowledge complicates the simplicity of the internalization model - the interpretation of the global norm must necessarily go through a translation process, which is both linguistic and substantive for most States. Local actors must interpret a global norm to incorporate it into their State laws, either directly or indirectly, through socialization. The process of internalization thus entails the revision of global norms.'[526]

The principle of functionalism states that solutions in legal systems should be seen outside of their conceptual context, so that they can be seen in the light of their function.[527] To avoid strange legal language and misinterpretation, functionalism helps find rules that are functionally in accordance to the object the legal system is being compared to.[528] In this regard, the legal framework and practice of the Netherlands can be described as (solutions to) concrete social problems instead of formal legal enumerations.[529] Functionalism is therefore important in our comparison between the normative standards of the CoE and the Dutch legal framework and practice. The *Tertrium Comparationis* obtained from the functional explanation of CoE standards and Dutch legal framework and practice enables us to make meaningful account of Dutch compliance to European standards.

Language

Language issues and the notion of functionalism in comparative legal research are linked. Husa even argues that, on a general level, they are the same thing.[530] Legal translation is a necessity for

[522] See our chapter on the Dutch constitutional framework (Chapter 2.4) for more on these preconditions.
[523] Downs & Trento 2004, p. 30.
[524] Oderkerk 2015, p. 614.
[525] Rosenblum 2007, p. 779.
[526] Rosenblum 2007, p. 780.
[527] Zweigert & Kötz p. 44.
[528] Zweigert & Kötz, p. 36
[529] Morimov & Fourie 2009, p. 298.
[530] Husa 2011.

functionalist comparative research. According to Husa, translation is the search for situational equivalence: looking for legal institutions or rules that has the same function in a similar context.[531]

An important issue with the translation of legal terms is that the target language often does not have an exact equivalent. Oderkerk argues that translation, even in cases of (near) equivalents, could lead to the impression that concepts are similar, which is not necessarily the case.[532] Ristikivi states in this regard that 'legal language is integrally connected to traditions, history and culture. Its changes are reflected in society and in the development of law'.[533] Rosenblum gives some practical insight in translation. He argues that there is no one right way, but that there is a requirement to be faithful to the target language and at the same time assert the original language.[534]

The added value of group discussions and interviewing
While a legal text has high authoritative value within (doctrinal) legal research, it is still a document. Therefore its value is limited. As has already been discussed in the paragraph on case studies, documentation gives a limited account of the social phenomenon in fact. Triangulation through other sources will be needed to get a true picture of the phenomenon. With regard to comparative legal research, Rabel argued that 'texts on their own are like the skeleton without muscles, practice, and nerves, i.e. the prevailing understanding of the doctrinal study of law'.[535] Sano and Thelle argue that legal research on human rights are predominantly conducted using legal sources, institutional and administrative reports and secondary literature. According to them, what seems to be missing are data sources that show the actual, real-life problems of human rights implementation.[536]

Following these considerations, there is a need to reinforce the statements in a (legal) text with other sources of data.[537] In this study, it is accomplished through a group discussion and in-depth, semi-structured interviews with informants - key persons who can supply information on the phenomena and give further depth to the practice underlying black-letter law.[538] Participants were selected for an ideographic understanding of the position of journalists and journalism. The selection needed to be diverse in order to obtain a reliable view on the underlying practice.

The choice for semi-structured interviews has multiple advantages. The flexibility of these interviews allows the informants to direct the interview to a certain extend.[539] This can lay bare the most prominent issues in practice. Furthermore, the flexibility may bring issues to light which could not be elucidated through doctrinal legal analysis. On the other hand, the structural component of the interview can give sufficient direction, making it possible to address the specific issues that have been found in the doctrinal-comparative element of the research preceding the interviews. This

[531] Husa 2011, p. 224.
[532] Oderkerk 2015, p. 616-617.
[533] Ristikivi 2014, p. 142.
[534] Rosenblum 2007, p. 781.
[535] Husa 2011.
[536] Sano & Thelle 2009, p. 108-109.
[537] Bryman 2015, p. 561.
[538] Swanborn 2010, p. 74; as opposed to interviews with respondents, the interviewing of informants is more exploratory in nature, seeking an inductive approach to the interview.
[539] Bryman 2015, p. 466-467.

structure has the added value of cross-case comparability between informants.[540] Concurring opinions between, for example, a representative of a NGO and the government gives a more reliable view of the true protection of journalism.

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[540] Bryman 2015, p. 469.

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