The inaugural International Media Law, Policy & Practice Conference
Report by Rachel Wouda

Introduction

The aim of this conference was to explore several developments in the field of international media law, policy and practice, and to identify and analyze key issues and solutions related to these new developments. Students following the course were invited to discuss these topics with experts in the field during two panel sessions. Throughout the day, various subjects were discussed, ranging from the legal and practical obstacles to protecting whistleblowers, freedom of speech and defamation, the prevention of violence against female journalists and the protection of the communication rights of minors online.

A moot court competition was organized in-between the two panel discussions. The case at hand centred on legal issues regarding freedom of speech, incitement to hatred and journalistic privileges such as source protection.

However, I would like to focus my remarks on the two panel discussions. The first panel discussion explored the issue of whistleblowing, the rights and duties of the parties involved, and the external and internal channels that exist for whistleblowers to disclose information in the public interest. The second panel discussion focused on the challenge of regulating current and future media, and applying 'old' legal frameworks to new technological developments. It gave detailed consideration to the growing importance of soft law as a form of regulation and the impact of globalization and digitalization.

This report deals with the three key overarching issues discussed by the panels. The first issue discussed is that of the duties and responsibilities of journalists and new media actors. Secondly, problems regarding the practice of whistleblowing are explored. The last overarching theme concerns the various bottlenecks that arise in the application of current regulatory frameworks to new technological developments.

New media actors

The increase in use and importance of social media and online news websites has led to a broadening of the field of journalism. Many intermediaries such as internet service providers and search engines have started to act as news portals. Media content is disseminated not just by traditional journalists, but also more frequently by other media actors such as bloggers. Further, traditional media are no longer essential in order to disseminate information. Anyone can go online and reach a relevant public directly. As the Council of Europe's Committee of Ministers has stated in its Recommendation 'A New Notion of Media', "traditional media are being changed into digital, convergent media".[1]

The journalistic press plays an important role as a public watchdog. It has been described as functioning as a 'fourth estate' to the three branches of government.[2] The European Court of Human Rights (hereafter, the ECtHR) has recognized that the press has certain rights and privileges in order to be able to adequately perform this function. The first case in which the role of public watchdog was explicitly mentioned was the *Barthold v. Germany* case.[3] In that case, the ECtHR concluded that the restriction on a veterinary surgeon from making certain statements in interviews that had the effect of giving publicity to his own business could have a chilling effect, stating that "application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog".[4]

[1] Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media of 21 September 2011.
[2] S.S. Coronel, 'The Media as Watchdog', *Harvard-World Bank Workshop* 2008, http://hvrd.me/iDExp9.
[3] ECtHR 25 March 1985, no. 8734/79 (*Barthold/Federal Republic of Germany*).
[4] *Ibid.*, para. 58.

One of the most important journalistic privileges is the right to source protection. The ECtHR stated in the *Goodwin* case[5] that protection of journalistic sources is one of the basic conditions for press freedom. An order to disclose a source could have a chilling effect on sources' willingness to come forward and assist the press by disseminating information. This privilege is especially important when it comes to the vital public watchdog function of the press of informing the public on matters of public interest. Without this protection of journalistic sources, it would be much harder for the press to gather reliable and trustworthy information. In the opinion of the Court, "such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest." [6] Otherwise, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected.

The Council of Europe's Committee of Ministers has defined a journalist as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication".[7] In some legal systems, requirements such as income as a professional journalist or national registration as a journalist are used to limit the field of journalism. However, Thomas Bruning argued that journalism should remain an open trade, and that therefore the aforementioned criteria are not well-suited to justify whether or not to award someone journalistic privileges. The internet has allowed many more players to enter the field of journalism. This means that the dissemination of news and other information is not just limited to professional journalism. How are the new media actors to be assessed in light of journalistic privileges? Should they enjoy the same legal protections as those given to journalists?

The ECtHR has broadened the definition from public watchdog to social watchdog in several cases, allowing for the protection of the watchdog function to be attributed to other actors than the journalistic press. The ECtHR first used the term 'social watchdog' in the *TASZ* case.[8] The ECtHR has shown that these actors, and in particular NGOs, play an important role when it comes to raising issues in the public debate.[9] However, it is still unclear to what extent the scope of journalistic safeguards applies to new media actors.[10]

Svetlana Yakovleva explained that new media actors are very likely to enjoy the enhanced protection typically awarded to traditional journalists by the ECtHR, if they perform the functions of a public "watchdog". However, the privileges awarded to journalists also bring some duties and responsibilities. Journalists should always act in good faith and adhere to the ethical and legal standards.[11] As The International Federation of Journalists' Declaration of Principles on the Conduct of Journalists states: "Respect for truth and for the right of the public to truth is the first duty of the journalist. (…) The journalist shall report only in accordance with facts of which he/she knows the origin."[12]

The emergence of many new media actors may make it difficult for consumers to identify reliable information. Thus, additional trust is placed with journalists to identify reliable sources. Yakovleva concluded that attention must be paid to the fact that new media actors do not have this gate-keeper function and often have less resources for fact checking and legal aid.

[5] ECtHR 11 July 2002, no. 28957/95 (*Goodwin/United Kingdom*).
[6] ECtHR 11 July 2002, no. 28957/95 (*Goodwin/United Kingdom*), para. 39.
[7] Recommendation no. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information of 8 March 2000.
[8] ECtHR 14 April 2009, nr. 37374/05 (*Társaság a Szabadságjogokért/Hungary*), para. 36.
[9] ECtHR 15 February 2005, no. 68416/01 (*Steel and Morris/United Kingdom*).
[10] ECtHR 14 April 2009, nr. 37374/05 (*Társaság a Szabadságjogokért/Hungary*).
[11] An example of how the ECtHR assesses these duties can be seen in: ECtHR 20 May 1999, no. 21980/93 (*Bladet Tromso and Stensaas/Norway*).
[12] http://www.ifj.org/about-ifj/ifj-code-of-principles/

An example of how NGOs apply the criteria for good journalism to their own practices, Teulings explained, was seen in the Trafigura case concerning collaboration between journalists and NGOs to expose toxic waste dumping by the company Trafigura in the Ivory Coast.[13] In this case, a three-year investigation by Amnesty International and Greenpeace, followed by publication of the results in *The Guardian*, led to an official investigation of the waste dumping. *The Guardian* had published e-mails written by employees of Trafigura, which provided the bulk of the evidence. The e-mails had been collected from various countries with the aid of the NGOs and then shared with *The Guardian*.

Whistleblowers and chilling effect

The anonymous sources in the aforementioned Trafigura case were whistleblowers: without the information they provided, the case could not have been brought before the court. The democratic necessity of incentivizing and allowing for clear channels for whistleblowing has been widely recognized. The ECtHR has recognized that "in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed".[14] However, there is still a clear lack of protection for whistleblowers in many states in Europe.[15]

As Bruning mentioned, there may be a chilling effect that stems from the very likely scenario that there will be repercussions for the whistleblower, especially with regard to his employment. However, this effect may be countered by providing for financial compensation. Yet, as Martijn Lindeman noted, this option could lead to a negative incentive for whistleblowers to come forward and financial compensation could raise questions regarding their good faith.

Another cause of a chilling effect is the possibility of undermining the protection of journalistic sources by applying datamining techniques in order to unveil the sources. The Dutch Supreme Court ruled in the *Telegraaf* case[16] that the intelligence (phone-tapping and using computer data) was used as evidence to convict the source and concluded that these practices can have a chilling effect on sources' willingness to come forward with information. However, the Supreme Court decided that there was no violation of human rights, because the conviction was necessary in light of national security. The Court of Appeals had previously stated that no law forbids the use of intelligence to ascertain someone's identity.[17]

Bruning stated that the Belgian law on source protection should be an example for the rest of Europe on how to approach the definition of journalists. In his opinion, the privilege of source protection should not be limited to professional journalists. The Belgian Act on the Protection of Journalistic Sources,[18] adopted in 2005, protects journalists from investigative measures (such as the interception of communication, surveillance and judicial home search and seizure) if this could breach the secrecy of their sources.

The recent Recommendation on the protection of whistleblowers[19] by the Council of Europe's Committee of Ministers to member states, requesting them to take action for stimulating, facilitating and protecting whistleblowing, aims to encourage the establishment of such a framework. It looks to achieve a higher threshold of protection for public interest whistleblowing, and recommends that "clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures".[20]

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[13] See for more information www.greenpeace.org/international/en/publications/Campaign-reports/Toxics-reports/The-Toxic-Truth.
[14] ECtHR 22 November 2007, no. 64752/01 (*Voskuil/ The Netherlands*), para. 70.
[15] See for instance the recent case ECtHR 21 October 2014, no. 73571/10 (*Matúz/Hungary*).
[16] Dutch Supreme Court 31 March 2015, ECLI:NL:HR:2015:768, para. 2.8.
[17] Court of Appeals The Hague 21 February 2013, ECLI:NL:GHDHA:2013:BZ1878.
[18] Wet van 7 april 2005 tot bescherming van de journalistieke bronnen.
[19] Recommendation CM/Rec(2014)7 of 30 April 2014 of the Committee of Ministers on the protection of whistleblowers.
[20] *Ibid.,* principe 13.

The Recommendation distinguishes between internal and external channels for whistleblowing. External whistleblowing can be divided into two categories, namely whistleblowing to the public authority and whistleblowing to other parties such as journalists, media and NGOs. Lindeman argued that states should safeguard an external channel for whistleblowing. A high level of protection of sources can enable and protect whistleblowing. A clear legal framework for whistleblower's rights and responsibilities is needed.

Old regulation and new technological developments

Two key issues were highlighted in the discussion regarding the problems that lie in applying old regulation to new technological developments.

First, as pointed out by Sam van Velze, regulation tends to fall behind new technologies, because it is often unable to foresee the developments and how to react to them. She gave examples of the difficulty of adapting traditional defamation laws to a digital, networked communications environment. The sometimes difficult assessment of new technological developments and social media can be seen in the UK court case *McAlpine*,[21] in which the emoticons used in defamatory tweets were also attributed a certain meaning. The use of the words "innocent face" revealed that the question was "ironical", according to the High Court judge. Van Velze concluded that there should be a high threshold for what constitutes a defamatory statement. In her preference, the EU defamation regulation would be modelled on the UK Defamation Act.

Eva Lievens noted a second problem in applying old regulation to new technological developments. The application of the old regulation is often not assessed, making it difficult to draw conclusions regarding its application. She explored the protection of minors' fundamental communicative rights in an online environment. Lievens mentioned the *Handyside* case[22] in this regard, the first ECtHR case in which the protection of the rights of children was a legitimate aim. She explained the difficulty of applying current laws to new technological developments, using the example of sexting. Cybercrime laws may be applied to sexting. However, a risk in the online environment does not always lead to harm, for instance in the case of minors who sext consensually and for their own private use. Due to a new tendency to look at the practical circumstances of the case, consensual sexting between minors has now been excluded from the scope of cybercrime.

What can be done with regard to new technological developments? Self- and co-regulation mechanisms may be encouraged. Moreover, the internet service providers could play a role in monitoring and possibly removing harmful content. With regard to issues relating to minors on the internet, Lievens proposes a multi-stakeholder approach, including all players in the field and the minors themselves. Media literacy may play an important role, by empowering the minors and their parents. Finally, as Tarlach McGonagle stated, media literacy needs to be operationalized; it must not remain merely a soundbite.

[21] High Court of London 24 May 2013, [2013] EWHC 1342 (QB) (*McAlpine/Bercow*).
[22] ECtHR 7 December 1976, no. 5493/72 (*Handyside/United Kingdom*).