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**COUNTRY REPORT THE NETHERLANDS**
**CASE STUDY (II) ON FREEDOM OF EXPRESSION IN THE CONTEXT OF THE MEDIA**

Task 7.3 (iii)

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## QUESTIONS

### 1) BLOGGERS AND BLOG EDITORS

**1.1 Is there any legal (statutory, case law, judicial interpretation) definition for 'blogger' (or 'blog') in your country?**
A search on wetten.overheid.nl shows that there is no legal definition for 'blogger' or 'blog' in the Netherlands and that these words do not appear in any law or regulation. The word "weblog" is used in only two Dutch regulations:

- The "Aanwijzing Opsporingsberichtgeving" [Guideline Investigation Notifications] mentions using a "weblog" to disseminate an investigation notification, but it does not define "weblog".[1]

- The "Richtsnoeren publicatie van persoonsgegevens op Internet"[2] refers to "weblogs" as a way in which people use the Internet. It does not define "weblog", but this word is used in the context of keeping an online diary and "personal commentary on everyday events" [transl. PP]. Furthermore, in Chapter IV of the Richtsnoeren an exception to the privacy obligation is discussed when the online publication can be considered to be a journalistic publication. The Richtsnoeren explain that the test is not whether the author is paid for his or her publication, but that the public interest of the weblog is important, as well as the date and frequency of publications. It argues that a weblog

[1] http://wetten.overheid.nl/BWBR0032929/geldigheidsdatum_21-01-2016
[2] Guidelines published by the College Bescherming Persoonsgegevens in the Staatscourant of 11 December 2007, explaining how the College supervises and enforces the Dutch Data Protection Act [Wet bescherming Persoonsgegevens] on the Internet. Available at: http://wetten.overheid.nl/BWBR0033229/geldigheidsdatum_10-01-2014

with only a few out-dated entries would not qualify easily for the journalistic exception.[3]

**1.2 Do blogs have to be registered or licensed, or do bloggers need to identify themselves in any particular way?**

There is no legal requirement to register a blog or obtain a license, nor is there any legal requirement for bloggers to identify themselves. Registration and operating a blog is subject to the general terms and conditions of the blog's hosting provider. Hosting providers or other Internet Service Providers (hereafter: ISPs) may, however, be required to make the identity of a blogger known to an injured third party under strict circumstances, as will be discussed below.

**1.3 What is the legal status of bloggers? How does it relate to the legal status of journalists? How does it differ? Please explain the extent to which bloggers or blog editors do - or do not - fall under similar legal regimes as journalists, and expose similarities and specificities, as they result from legislation, case law, practices, etc. To what extent is bloggers' freedom of expression protected? What are the limits? What judicial and non-judicial proceedings can be brought against bloggers for violations of rules limiting free speech? What penalties or sanctions do they risk? Have there been any reported cases?**

Given the overlap under Dutch law between the answers to these questions, I have decided to answer them together. Since the Dutch legal system is strongly case law-based, I integrate both legislation and case law in my answer.

Bloggers and journalists

As stated before, there is no legal definition of "blog" or "blogger" in the Netherlands, so the activity of blogging does not have a specific legal status. The legal status depends on the specific circumstances and context of the blogging activity in questions. This brings us to the distinction, or overlap, between blogging and/or other online activities, and journalism.

In the Netherlands there is no definition of 'journalist', it is a free profession, so anyone can, in principle, be a journalist. The Dutch Council of State [Raad van State] refers to the fact that there are no professional qualifications required by law for the access to the profession of journalism, there is no compulsory membership of a professional journalists' association nor official disciplinary law.[4] Furthermore, the Dutch Supreme Court [Hoge Raad] has held that the rise of the Internet makes it increasingly difficult to define what constitutes "the press" or

[3] The main Dutch dictionary, Van Dale, defines 'weblog' as meaning "actuele website waarop regelmatig korte stukjes, foto's, filmpjes enz. verschijnen, al dan niet uit de persoonlijke sfeer" [up-to-date website on which short entries, photo's, video footage etc. are regularly published, whether relating to the publisher's personal life or not]. In lack of a legal definition, most lawyers and judges would tend to turn to the literal, common meaning of a word as given in such a dictionary.

[4] Dutch Council of State Advies W04.13.0151/I of 30 August 2013 on the legislative proposal for journalistic source protection in criminal cases.

"real journalism", since the Internet offers a myriad of ways to address the general public outside of the traditional news media.[5]

For legal purposes, the relevant element is the character of the activities pursued, not strictly speaking the professional or occupational status of the author. The Arnhem Court of Appeal has, for instance, ruled that everyone who publishes information of public interest, such as the enforcement activities of the police, must enjoy a high level of protection. This protection is, according the Arnhem Court of Appeal, not limited to journalists of newspapers, radio and television, but should also extend to whomever publishes new items, opinions and photos on a suitable and publicly known Internet website, with the objective of informing the public.[6] Like the ECtHR, Dutch courts also refer to journalists as performing an important "public watchdog" function.[7]

It can therefore be concluded that under Dutch law, it is not so much the legal status of a blog or bloggers or of journalists that counts, but rather the activity in question. The activity of publishing any kind of information or opinion on the Internet, whether it amounts to proper 'journalism' or not, is protected under the freedom of expression.

The freedom of expression

In the Netherlands, the freedom of expression is enshrined in Art. 7 of the Dutch Constitution [Grondwet, hereafter: Gw], which reads:[8]

*1. No one shall require prior permission to publish thoughts or opinions 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.*

Dutch courts generally directly apply the corresponding Art. 10 ECHR on the freedom of expression and follow the ECtHR's case law on the requirements for a justification of a restriction of this freedom under Art. 10(2) ECHR. The limits to the freedom of expression are formed by "the responsibility of every person under the law" (Art. 7(1) Gw), and must be "prescribed by law and necessary in a democratic society (art. 10(2) ECHR). Such further

[5] ECLI:NL:HR:2008:BB3210, Dutch Supreme Court, 18 Janaury 2008, pt. 3.7
[6] ECLI:NL:GHARN:2005:AT0895, Arnhem Court of Appeal 15 March 2005 pt. 4.5.
[7] ECLI:NL:RBNHO:2015:2320, District Court of North-Holland, 23 March 2015, pt. 3.3.
[8] English translation of the Dutch Constitution available at: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008

(formal) law is contained in the Dutch Penal Code [Wetboek van Strafrecht, hereafter: Sr], the Dutch Copyright Act, and by other (fundamental) rights.

Generally, the freedom of expression of any individual, be it a blogger or a journalist, is scrutinized in either criminal or civil procedures, which shall be discussed in more detail.

In specific cases, online conduct may come within the scope of application of the Dutch Data Protection Act [Wet bescherming persoonsgegevens],[9] which is supervised and enforced by the Dutch Data Protection Authority.[10] The Data Protection Acts contains a general prohibition to publish information on the Internet about another person without his or her prior consent. There is an exception to this prohibition for the publication of information on a (partially) private social media page, and there is also an exception for journalistic publications. The Dutch Data Protection Authority assesses publications on a case-by-case basis, and has held that a publication may constitute a journalistic publication if: a) the publication is aimed at (objective) information gathering and dissemination, b) the person who publishes does regularly, c) the publication aims to bring a public issue to the attention, and d) the publication allows a right to respond and/or rectification.[11]

The Dutch Data Protection Authority can undertake investigations, and if necessary, impose fines. The Dutch Data Protection Act can also be relied upon by individuals before the Dutch civil courts.[12]

A further regulatory body is the Netherlands Institute for Human Rights [College voor de Rechten van de Mens, hereafter: NIHR], which absorbed on 2 October 2012 the former Dutch Commission for Equal Treatment [Commissie Gelijke Behandeling]. Anyone who feels that he or she suffered from unequal treatment can lodge a complaint at the NIHR (without needing a lawyer), which will conduct an independent investigation and render a non-binding assessment.[13] Occasionally, the NIHR hears cases concerning the freedom of expression on the Internet when it is related to discrimination. An example of such a case will be discussed under the heading "Online comments", para. 3.5.[14]

Lastly, the Netherlands Press Council is a specific regulatory body for the press with its own non-judicial proceedings. It will be described below under para. 1.6.

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[9] Based on the European Privacy Directive: 95/46/EC.
[10] https://autoriteitpersoonsgegevens.nl/en/node/1930
[11] Data Protection Guidelines: https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/rs/rs_20071211_persoonsgegevens_op_internet_definitief.pdf
[12] ECLI:NL:RBAMS:2013:BZ5860, District Court of Amsterdam, 8 March 2013; ECLI:NL:GHSHE:2011:BP3921, Den Bosch Court of Appeal, 1 February 2011.
[13] https://mensenrechten.nl/what-can-institute-do-you
[14] Commissie Gelijke Behandeling, Opinion 2011/69 of 28 April 2011. See also: http://www.mediareport.nl/persrecht/28042011/cgb-redactionele-vrijheid-elsevier-omvat-recht-reageerders-te-discrimineren-op-politieke-voorkeur/

Freedom of expression in civil law

Art. 6:162 Dutch Civil Code [Burgerlijk Wetboek, hereafter: BW] constitutes the general provision on Dutch tort law. It states that the party who commits a tort towards another is obligated to compensate the losses that the other party suffers as a result. An action based on Art. 6:162 BW must meet the requirements of unlawfulness, attributability, loss, causality and relativity. The law distinguishes between three types of unlawful acts: the infringement of a right, an action or failure to act in contravention of a statutory duty and an action or failure to act in contravention of generally accepted (unwritten) norms. Examples of infringements of a right include infringements of intellectual property rights and the right to privacy. However, not every infringement automatically constitutes an unlawful act warranting payment of damages; some level of nuisance must be tolerated.

The Dutch courts take a casuistic approach to Internet publications and the freedom of expression: in each case all relevant facts and circumstances have to be taken into account, and all the relevant interests have to be weighed. The legal standards that are applied in the balance of interests do not radically change when the author is a journalist or not.

The approach of the Dutch Courts can be summarized as follows:

The right to freedom of expression can, according to Art. 10 ECHR, be restricted only if prescribed by law and if the restriction is necessary in a democratic society, for instance for the protection of the rights of others such as the right to privacy under Art. 8 ECHR. A restriction can be justified if the expression is unlawful in the meaning of Art. 6:162 BW. The Dutch courts regularly emphasize that there is no hierarchy between the different fundamental rights: Art. 10 ECHR does not, as a rule, trump Art. 8 ECHR or vice versa, but they have to be truly weighed against each other, and all the relevant interests. The interest of the person who published the expression, may lie in the possibility to express him or herself in public in a critical, informative, opinion-forming and warning manner about wrongdoings. The interest of the person who is affected by the publication may lie in the fact that he or she should not be lightly or unnecessarily exposed to accusations or violations of his or her privacy or damages his or her reputation. In this weighing of interests, all relevant facts and circumstances must be taken into account.

Factors that Dutch courts regularly take into account as relevant are:

a. the character of the expression of an accusation, and the consequences that can be reasonably be expected to occur for the person who is accused;

b. the severity – also in a societal sense – of the wrongdoing that the expression aims to expose;

c. the level in which the accusations have reasonable factual or evidentiary support at the time of the expression/publication;

d. the context of the expression;

e. the possibility that the public interest could have been achieved in ways that are less harmful for the accused and the fact that the information would have found a way into the press without the expression at issue;

f. whether the principle of *audi et alteram partem* was respected, i.e. whether the accused person was put in the position to react to the accusations before publication;

g. the authority that third parties would lend to the person who made the statements;
h. The public position and behaviour of the person about whom the statements are made.[15]

This is basically the legal framework for all civil cases in which the freedom of expression is subject to review. There is no distinct legal regime for journalists or bloggers. However, within the parameters of the review summarized above, sometimes a larger responsibility of due care is put on professional journalists.

The Supreme Court has ruled in the so-called "Parool"-judgment (1995), a case concerning a professional journalist of the traditional media (a national newspaper), that his accusatory statements should meet a high level of due care, such as having sufficient evidentiary support and allowing the persons about whom he was writing to comment and/or offer exonerating evidence or attenuating circumstances. The journalists accused a third person in the newspaper article of killing a Jewish person who had been hiding in his house in Amsterdam during the Second World War for financial reasons ("a common robbery and murder"), instead of for the higher interests of the resistance. The accusations were deemed unlawful by the Supreme Court since they did not meet the aforementioned high level of due care for investigative journalism.[16]

However, in a more recent (2008) case involving similar (implicit) accusations of the same person as in the "Parool"-judgment by another journalist, the statements were ruled to be not unlawful. The difference lay in the fact that the (implicit) accusations were published on a personal website of the journalist in the form of an "open letter". The Supreme Court found that the open letter (on the personal website) could be regarded as a "press publication" since the rise of the Internet has made the concept of the "press" hard to define. However, the open letter resembled a 'column', which do not necessarily need to comply with the high standards of investigative journalism as set in the aforementioned "Parool"-judgment of 1995. According to the Supreme Court, a column and the open letter at issue have in common that they are both not necessarily or predominantly factual, but present an opinion in a provocative way. The Supreme Court has furthermore explained that if it is clear to the targeted audience that the statement concerns the presentation of an opinion, different standards for the legality of these statements apply than if it were a factual statement.[17]

In a more recent case (2010), the Amsterdam Court of Appeal ruled that although there is an important public interest in having a free press (free news gathering and dissemination) - and the Court of Appeal added that the term 'free press' has become outdated with the rise of the

[15] See for a very clear summary ECLI:NL:GHAMS:2013:3723, Amsterdam Court of Appeal, 29 October 2013, para. 3.6; see also ECLI:NL:HR:1995:ZC1602 (NJ 1995, 422) Dutch Supreme Court, 1 June 1995, para 5.8.3.2 ; ECLI:NL:GHAMS:2015:119, Amsterdam Court of Appeal, 20 January 2015, para. 3.3; ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, paras. 4.1-4.3; ECLI:NL:RBNHO:2013:11696, District Court of North-Holland, 5 December 2013, para. 4.6; ECLI:NL:RBAMS:2013:8660, District Court of Amsterdam,18 December 2013, para. 4.1.
[16] ECLI:NL:HR:1995:ZC1602 (NJ 1995, 422), Dutch Supreme Court, 1 June 1995, para. 5.12.4.
[17] ECLI:NL:HR:2008:BB3210, Dutch Supreme Court, 18 January 2008, para. 3.4.1, 3.7, 3.8, 3.10, and 3.13.

Internet -, journalists should be aware of their special responsibility for the content and presentation of their publications. Journalists often bring together and contextualize certain data about a person, and they bring this data to the attention of a large, general public. Journalists should also be aware of the fact that a part of the general public will not often doubt the veracity of their statements if published by a (traditional) news medium.[18]

It may therefore be no surprise that that same Amsterdam Court of Appeal attached less importance to a publication on a personal blog – instead of a wider dissemination in the well-known traditional newsmedia such as radio, TV or newspapers - in a case in 2013. In those circumstances, the Amsterdam Court of Appeal found that the blogger's freedom of expression outweighed the right to privacy of the person who was subject of the accusations in the statements at issue.[19]

Another case which illustrates the Dutch case-by-case approach concerned the publication of several statements by a journalist on his personal websites. In these publications he expressed his anger and frustration with a specific customer services employee of a large telephone company. He mentioned her full name several time, and also commented that it was exactly his intention that her name would be findable on Google, so as to hamper her future career opportunities. The District Court of The Hague did not afford him a special status as a journalist, but followed the general scheme summarized above. His publications were qualified as "Internet columns", which – however strong-worded and provocative - in principle enjoy protection under the freedom of expression, but this protection finds its limit in the rights of others, such as the employee's right to privacy. In this case, the District Court found that the employee's right to privacy was disproportionately violated, especially with a view to the mentioning of her full name and the consequences for her future career or private life. With regard to the special character of columns, the District Court held when third parties search for the employee's name on Google and encounter the negative publications, they may not always be able to place the strong-worded and/or exaggerated statements in the right, nuanced, context.[20]

This approach to Internet columns on a personal website or blog can be contrasted with a column or open letter in the "Opinion" section of more traditional news media such as a student newspaper. In such a section, the readers can easily recognize the emotional, exaggerated or strong-worded statements as opinion-forming, and place them in the right, nuanced context.[21]

It seems therefore that when journalists (or bloggers) write about other private persons, they may, under certain circumstances, have a higher responsibility of care.

[18] ECLI:NL:GHAMS:2010:BO5417, Amsterdam Court of Appeal, 30 November 2010, para. 3.6.
[19] ECLI:NL:GHAMS:2013:3723, Amsterdam Court of Appeal, 29 October 2013, para. 3.9 and 3.12.
[20] ECLI:NL:RBSGR:2007:BB8427, District Court of The Hague, 21 Nvoember 2007, para. 4.2-4.5.
[21] ECLI:NL:RBAMS:2008:BD1695 LJN BD1695, District Court of Amsterdam, 15 May 2008, para. 4.9.

However, when it comes to a more vertical relation, i.e., a citizen (blogger/journalist/other) vis-a-vis the public authorities such as the police, they enjoy, in principle the same protection. The Arnhem Court of Appeal has ruled that anyone who publishes information that has a public interest, such as speed checks by the police, enjoys, in principle a high level of protection. In this case, the appellant, a private person (not a professional journalist) took photographs of police officers who were performing speed checks, announcing that he would place these pictures on a publicly known website dedicated to reporting speed checks, while making the faces of the police officers blurred and anonymous. The police officers objected to such publication and seized his photo camera and memory card. The Dutch Public Prosecutor had demanded that the appellant sign a statement that he would not publish the pictures, which he rejected. Subsequently, the appellant reported these events on the website on speed checks, and mentioned the full names of the police officers who apprehended him. Many people reacted online to his publication.
With a civil law suit based on Art. 6:162 BW and Art. 21 Copyright Act (personal likeness/ portrait right), the police officers try to force the appellant to destroy the memory card, or, alternatively, prevent the photographs from being published. The Arnhem Court of Appeal emphasized that the high level of protection under Art. 10 ECHR extends not only to journalists of the traditional news media, but also to anyone who publishes such messages, opinions and pictures on websites that are known to the interested public and suitable for informing the public about this topic. Police officers are public figures, which, on the one hand, are and should be more easily exposed to public scrutiny, but, on the other hand, should also be able to perform their duties in a way that is conducive to a level of public trust and support.
In a careful examination of all the interests and circumstances, the Court of Appeal concludes that although the appellant has a (journalistic) interest in (critically) reporting on acts of government agents and civil servants, this interest is not necessarily best served when the full names and identity of the persons in question are exposed. The Court of Appeal concluded that the destruction of the memory card would be a disproportionate interference with the appellant's freedom of expression and newsgathering, but ordered that the pictures at issue may not be published with the faces and names of the police officers.[22]

Types of civil law claims

Civil law claimants may request a civil court various orders or injunctions. The following list is of the most common claims, but it is not exhaustive:

- Remove the specific unlawful publication from the Internet and refrain from reposting the unlawful statement;[23]
- Remove the (full) names or recognizable photos from the publication on the Internet and refrain from mentioning the (full) names or publishing recognizable photos again;[24]

[22] ECLI:NL:GHARN:2005:AT0895, Arnhem Court of Appeal, 15 March 2005 para. 4.5 – 4.8.
[23] See for instance ECLI:NL:RBAMS:2014:1680, Distrit Court of Amsterdam, 4 April 2014, para 5.1; ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.

- Refrain from making any other unlawful comments online about the injured party;[25]
- (All of the above: under penalty of a fine for every new breach or every day that the breach continues;[26]
- Request the hosting provider/ISP to remove the unlawful publications from their cache/archive;[27]
- Publish a rectification of the earlier unlawful message;[28]
- Compensation of any material or immaterial damages.

Freedom of expression in criminal law

The Dutch Penal Code contains the following provisions that are may limit a person's freedom of expression:

Arts. 111-113 Sr: insulting the King (varying offenses, punishments varying from 1 to 5 years imprisonment, and fines up to € 20.250,-)
Arts. 131 Sr: prohibition of inciting violence and/or criminal behaviour (maximum 5 years imprisonment or a fine up to € 20.250,-)
Art. 132 Sr: prohibition of publishing or otherwise disseminating statements that incite to violence (maximum 3 years imprisonment and a fine up to € 20.250,-)
Article 137c, 137d, 137e Sr: anti-discrimination laws (punishments from 6 months to a year imprisonment, fines up to € 20.250,-)
Art. 147 Sr: smalende godslastering (blasphemy) [repealed in 2013]
Art. 261 (1) Sr: Smaad (not exactly the same as the Anglo-Saxon concept of "slander". Smaad consists of defamatory statements/accusations that are not necessarily untrue, but are stated publicly with the intention of damaging the other person's reputation. Punishments up to 6 months imprisonment or a fine up to € 8.100,- )
Art. 261(2) Sr: Smaadschrift [statements or images that constitute "smaad", which are published is a heavier offense, punished with max. 1 year imprisonment or fine up to € 8.100,]
Art. 262 Sr: laster [not exactly the same as "libel": laster are defamatory statements that the person knows are untrue] (imprisonment of maximum 2 years and a fine up to € 20.250,-)
Art. 266 Sr : eenvoudige belediging ["simple" insult] [3 months imprisonment or a fine up to € 4.050,- ]
Art. 267 Sr increases the maximum punishments with a third, when the defamatory statements under Arts. 261, 262 or 266 Sr were addressed to a public authority/body, an officer/civil servant on duty, a statesperson of a befriended nation.
Art. 285b Sr: stalking (punishable with an imprisonment of maximum 3 years, or a fine up to € 20.250,-)

[24] See for instance ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, para 5.2; ECLI:NL:GHARN:2005:AT0895, Arnhem Court of Appeal, 15 March 2005, para. 5; ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.
[25] See for instance ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, para 5.3
[26] See for instance ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, para 5.4
[27] ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.
[28] ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.

Persons who find that they are harmed under the latter provisions (various forms of defamation and stalking) can file a complaint with the police, upon which the public prosecutor will decide whether the alleged perpetrator will be prosecuted. The police will not usually investigate or prosecute these offenses of their own motion, which is why they are called "complaint offenses" [klachtdelicten].

The way in which online speech and the freedom of expression is reviewed in criminal cases does not differ very much from the way in which the substantive assessment takes place in civil cases. Generally speaking, the threshold for criminal liability is higher than civil liability: a statement that is unlawful in a civil liability sense, may not always constitute criminal defamation. Furthermore, without – however - having performed an exhaustive empirical analysis, the researcher notes that it seems as though online speech is more often subject to civil lawsuits than criminal prosecution.[29]

The following recent case before the District Court of North-Holland is illustrative of the usual approach by Dutch courts in criminal cases.
In the criminal case at hand a journalist published articles about the acts and policies of local politicians regarding local cultural activities. He compared the current cultural policies to the cultural policies of the Nazi regime. Upon complaints of the politicians, the journalist was indicted with defamation. The District Court of North-Holland referred to Art. 10 ECHR, and emphasized that the freedom of expression is not absolute but should be weighed against the rights of others. The District Court refers to ECtHR case law in which it is generally held that journalists who contribute to a public debate, should not be curtailed too easily in their activities, since the press plays an important role as public watchdog. The District Court reminds of the fact that Article 10 ECHR not only protects the right to publish ideas or opinions, but also to offend, insult or shock. Furthermore, the District Court reiterates that feeling insulted is a subjective experience. In a criminal case, this experience thus requires a certain level of objectification. Under Dutch law, the judge will review first whether the expression at issue is in itself insulting, i.e., whether the expression is suitable to violate a person's dignity. Secondly, the judge will review whether the context of the expression will detract from or add to its insulting character. Lastly, the judge will check whether the expression is not unnecessarily offensive.
It is noteworthy, that in the case at hand, the District Court concluded that the publications were not criminally defamatory. It regarded the fact that the articles were published on a blog as less conducive to criminal defamation, without explaining why a publication on a personal blog is less harmful.[30]

Combating Terrorism

Since the terrorist attacks in the US on 11 September 2001, the jurisdictional reach and the substantive scope of certain provisions (and their respective maximum punishments) of the Dutch Penal Code has been widened in order to prevent terrorism more effectively. The

[29] See the Freedom of the Press Report 2015 for the Netherlands of Freedom House, under "Political Environment" https://freedomhouse.org/report/freedom-press/2015/netherlands
[30] ECLI:NL:RBNHO:2015:2320, District Court of North-Holland, 23 March 2015 , pt .3.3.

Netherlands implemented the EU's Framework Decision of 13 June 2002 on combating terrorism[31] by way of the Dutch Crimes of Terrorism Act [Wet terroristische misdrijven].[32] A new article 83 and 83a were added to the Penal Code defining terrorism: crimes constitute terrorist crimes when they have been committed with a terrorist aim (art. 83 Sr), which is the aim to seriously intimidate the population or part of the population of a country, and/or to unlawfully force a government or international organization into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economical or social structure of a country or international organization (art. 83a Sr).

Provisions that have been added or amended and that are relevant for the protection of online speech are, for instance, conspiracy to commit, and preparation of a terrorist crime (96 Sr), financial and/or material leadership or support of a terrorist organization (134a Sr), membership of a terrorist organization (140a Sr), recruitment for armed combat (205 Sr), inciting to commit a terrorist crime and dissemination of such inciting materials. In later legislative amendments, the Dutch Penal Code was extended by prohibiting the participation to and facilitating of training for terrorist acts, and the financing of terrorism.

Furthermore, the competences of the police to monitor and investigate suspected terrorism were extended by the Act on the authority to collect data [Wet bevoegdheden vorderen gegevens],[33] and by the Act on expanding the scope for investigating and prosecuting terrorist crimes (Wet ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven).[34] Where in ordinary cases the police needs a concrete and reasonable suspicion of a criminal act before they may uses their special investigative powers, in case of terrorism it suffices if there are "indications" that a terrorist crime is being prepared.

In recent times, particularly since the civil war in Syria, the rise of ISIS and the increasing efforts of terrorist organizations like ISIS and Al-Nusra to recruit western Muslims to join the jihad, the aforementioned legislative changes have played a role in assessing the online behaviour of persons suspected of any kind of involvement with terrorism. The Internet and social media form an important means of communication and dissemination of propaganda, and there is an increasing number of cases in which Dutch court have to judge online activities for any alleged terrorist intent.

In a very recent case of December 2015, which will be discussed in further detail under "Social Media", the District Court of The Hague elaborately explained the scheme of reasoning in a case concerning publications that allegedly incited to terrorist violence.

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[31] Council Framework Decision of 13 June 2002 on combating terrorism, OJ 2002 L 164/3.
[32] Law of 10 August 2004, Stb. 2004, 290. For a full overview of the legislative changes, see the report of the Dutch Section of the International Commission of Jurists NJCM: "Terrorism, Counter-terrorism measures and human rights in the Netherlands" July 2007, available at: http://njcm.nl/site/uploads/download/210
[33] Law of 16 July 2005, Stb. 2005, 390.
[34] Law of 1 February 2007, Stb. 2006, 580.

The District Court provided a general outline of the factors that should be taken into account: 1) the (literal) content of the publication or utterance; 2) the context of the publication/utterance; 3) the place or occasion where the publication/utterance was made; 4) the intended audience and 5) the apparent intention of the publication/utterance
As to the (literal) content of the publications in question, the District Court held that the mere glorification or condoning of (terrorist) crimes, or the spreading of propaganda, - although shocking and morally abject - is not in itself inciting of violence. The District Court subsequently assessed the context of the utterances, which was not specifically religious (meriting protection under Art. 9 ECHR), but rather more general. It reminded of the fact that statements made in the context of a public or political debates, especially criticism of the government or public wrongdoings, enjoy a relatively high level of protection under Art. 10 ECHR. Participants to the public debate may use rhetoric and stylistic forms such as exaggeration, provocation, satire in order to draw attention to their vision on a public issue. Moreover, the press has an important role in the public debate, and journalistic publications enjoy a large scope of protection. However, an important factor in assessing the limits of this protection is the requirement of journalistic due care.
The District Court goes on to note that the exchange of messages and information on social media such as Facebook and Twitter is fairly fleeting. However, this does not mean that this is a licence to publish any kind of incendiary speech. The activities on social media are usually formed by short messages, often joined by a hyperlink or a picture. The messages are consumed at a high pace, often after only a superficial reading. Although this puts the impression that such a message may leave into perspective, the District Court argues that it also places a greater responsibility on the sender of the message, since only the superficial meaning of the message will sink in. If a large amount of messages with the same tenor is send in a short amount of time, this will usually reinforce the message.[35]

Furthermore, in this case the cumulation of actual activities such as organizing meetings and legally registering an association, and their online activities, such as activity on Facebook and Twitter accounts, but also the editing and hosting of a website, constituted as membership to a criminal organization with a terrorist aim.[36]

### 1.4 Press Cards

In the Netherlands, press cards are in principle unregulated. A press card is something that anyone can make for himself or herself, like a business card. Furthermore, many (privately organized) events such as sports matches or concerts require a press card as proof of accreditation as a journalist, and establish their own procedures for reviewing the credibility of the journalist in question. An important factor in such a review is usually whether the journalist publishes regularly, in what kind of medium and for which audience.
The Dutch Association for Journalists [Nederlandse Vereniging voor Journalisten] issues a widely accepted press card in cooperation with the International Federation for Journalists,

[35] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, para. 11.16-11.21, 12.4
[36] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, para. 18.27-18.34.

which proves membership to the NVJ. In order to get this membership and the accompanying press card, one must prove that he or she is a journalist by 'main occupation', i.e., that he or she earns at least 50% of his or her income from journalistic activities, and that he or she spends at least 50% of his or her time on these activities, for publication in a variety of media. The NVJ also has a special student membership (discounted membership fee) and accompanying student press card.[37]

The NVJ also issues the special police press card, which gives access to areas that are restricted for the public by the police, such as demonstrations, riots and disaster areas. The police press card is issued to persons who are journalists by main occupation, publish in a mass medium, and who need a police press card for their work (proof provided by employer or client/principal).[38]

There is also a press card issued by the National Sports Press Association [Nationale Sport Pers Service], which can be issued to persons who are either employed as professional journalists/photographers or who work fulltime as freelance sportsjournalist/photographer, earns at least 75% of his income from these activities, and who can prove that he/she has at least two clients. In the particular case of online publications, the NSPA demands that the sportsjournalists are employed by the website on a permanent basis, that the website is independent, has (preferably) editors' regulations (redactiestatuut), and is not a fansite.[39] The NSPA press card gives access to all main sports events, except for events that have their own, separate press accreditation procedure.

The Second Chamber of the Dutch Parliament has its own accreditation procedure to give journalists more access to its building and meetings. A journalist who can show (by a letter from his employer) that he needs to be in Parliament on a (near) daily basis, can get a press card for two years. Journalists who report only incidentally on the Parliament can register for a short-term press card, which is only valid for a day, when they show a valid ID and a 'valid press card', or an official letter from a client/principal on official letterhead paper.[40]
Furthermore, the Ministry for Foreign Affairs requires a valid ID and the NVJ press card.[41] Other ministries have press officers who are only available for journalists (without defining who is a journalist and how they will check their credentials).[42]

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[37] https://www.nvj.nl/onze-diensten/perskaarten/nvj-perskaart and https://www.nvj.nl/onze-diensten/perskaarten/studentenperskaart
[38] https://www.nvj.nl/onze-diensten/perskaarten/politieperskaart
[39] http://www.nsp.nl/registreren/ http://www.nsp.nl/over-de-nsp/nsp-kaart/
[40] http://www.tweedekamer.nl/over_de_tweede_kamer/persinformatie
[41] https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/inhoud/contact/huisregels-bezoek
[42] See for instance the Ministry for Health and Sports: https://www.rijksoverheid.nl/ministeries/ministerie-van-volksgezondheid-welzijn-en-sport/inhoud/contact/media

The practice of requiring press cards or similar accreditation procedures seems to draw a relatively strong line between professional journalists and citizens who also report on public issues but do not earn their income with their journalistic activities.

### 1.5 Bloggers' source protection

The protection of journalists' sources is an important issue in the Netherlands. Since 2007, the ECtHR has rendered three judgments that were critical of the lack of a formal legal regime for journalistic source protection.[43] In response to these judgments, two legislative proposals were published in September 2014 regarding source protection. The first provides the possibility for journalists and 'publicists' (persons who structurally and frequently, but not for remuneration, contribute to the public debate) to refuse to reveal the identity of their source when they (i.e., the journalists/publicists) are heard as a witness in a criminal case (Wet bronbescherming in strafzaken).[44] The second proposes an amendment of the Intelligence and Security services Act 2002 [Wet inlichtingen en veiligheidsdiensten 2002] (Wiv 2002), according to which a preventive judicial review must be performed before special investigative powers of intelligence services can be deployed against journalists, aimed at identifying their sources.

In its Advisory reports on the two legislative proposals on source protection of August 2013 (which were disclosed at the same time of the publication of the final legislative proposals in September 2014), the Council of State criticizes the fact that they have different standards of protection: the source protection in criminal cases extends to 'publicists' as well as journalists, whereas the protection vis-à-vis special investigative powers is limited to professional journalists in the traditional sense.[45] Such a difference in treatment does not find support in the case law of the ECtHR, and it found the term 'publicist' too vague to define in a concrete case, according to the Dutch Council of State. It therefore advised to limit the source protection in both legislative proposals to journalists: "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,"[46] who, furthermore, comply with professional ethical standards such as the principles of careful, truthful, objective and balanced reporting.[47]

With regard to the proposal for journalistic source protection in criminal cases, the Council of State questioned the need to give journalists and publicists a general legal privilege, rather than a narrower procedural safeguard of getting prior judicial leave to investigate. The Council of State notes that the proposal goes further than the case law of the ECtHR requires.

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[43] 22 november 2007, nr. 64752/01, (Voskuil/ Nederland), ECtHR 14 September 2010, nr. 38224/03 (Sanoma/Nederland), and ECtHR 22 November 2012, nr. 39315/06, (De Telegraaf/Nederland).

[44] https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2014/09/22/wetsvoorstel-bronbescherming-in-strafzaken/cwv-verschjourn14-11-13-aangepast-door-anita-12092014.pdf

[45] See also the summary of the Dutch Council of State: https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=267

[46] Raad van State (Dutch Council of State) Advise W04.13.0151/I of 30 August 2013 on source protection, published on 22 september 2014, referring to CoE Recommendation of 8 March 2000, nr. R(2000)7 on the right of journalists not to disclose their sources of information, definition "a".

[47] ECtHR 22 November 2012, nr. 39315/06, (De Telegraaf/Nederland)

Moreover, the Council of State advised the legislator to amend the proposal on the Intelligence and Security services Act 2002 to include a definition of "sources", i.e., the same definition it uses in the proposal on the source protection in criminal cases.

The legislator partially amended its proposal on the Intelligence and Security services Act 2002 in the light of the Council of State's advisory report on the requirement of remuneration (alternative compensation is accepted), professional ethics (the explanatory memorandum for the proposals pay more attention to ethics and refer to the Netherlands Press Council), and the definition of 'source'. However, the legislator rejected the suggestion of the Council of State to include a legal definition of 'journalists', since it undesirable to provide a strict definition of such a free profession.[48] Furthermore, the legislator decided not to amend the proposal for journalistic source protection in criminal cases on the issue of the extension of journalists' legal privilege to 'publicists', since the two laws cover different stages of national intelligence gathering and criminal procedure, respectively, and thus require different procedural safeguards. Furthermore, the legislator added that recent changes in the press and media landscape warrant a broader scope of protection than just journalists.[49]

The press and media sector reacted to the legislative proposal with a lot of criticism, among others relating to the definition of "source", the inclusion of 'publicists', the lack of procedural guarantees such as the sealing of information and the lack of judicial appeal.[50]

There has been no progress in the legislative process since a last minor amendment in August 2015; it is still being discussed in the Second Chamber of the Dutch Parliament.[51] This means that the 'old' regime continues to apply, in which the violation of source protection is subject to judicial review ex post facto.

To the knowledge of the researcher, there have been no cases regarding the source protection of bloggers (as distinct from professional journalists). Should such a case occur (before the adoption of the two legislative proposals), then I expect that the Dutch courts will decide in conformity with the ECtHR case law on this issue. In this case law, the protection is usually limited to professional journalists of the traditional media because of their 'public watchdog' function and safeguards such as ethical standards for careful and objective reporting. It seems as if the ECtHR is still rather conservative when it comes to the personal scope of source protection, so it remains uncertain whether Dutch courts would be willing to extend protection

[48] Further report of 9 September 2014, https://zoek.officielebekendmakingen.nl/kst-34027-4.html
[49] Further report of 10 September 2014, https://zoek.officielebekendmakingen.nl/kst-34032-4.html
[50] See, among others Arend Joustra, "Journalisten stappen in valkuil met wet voor bescherming bronnen", Elsevier, available at: http://www.elsevier.nl/Cultuur--Televisie/blogs/2014/9/Journalisten-stappen-in-valkuil-met-wet-voor-bescherming-bronnen-1006013W/ ; Folkert Jensma, "Waaraan kun je een journalist herkennen?" on the website of the Netherlands Press Council on 22 December 2015 http://www.rvdj.nl/weblog/waaraan-kun-je-een-journalist-herkennen; Otto Volgenant, "Journalistieke bronbescherming blijft een aandachtspunt": https://www.villamedia.nl/artikel/journalistieke-bronbescherming-blijft-een-aandachtspunt ; Wicher Wedzinga,"Wet op bronbescherming lijkt goed, maar andere wet gooit roet in het eten", 2 oktober 2014, http://www.denieuwereporter.nl/2014/10/wet-op-bronbescherming-lijkt-goed-maar-een-andere-wet-gooit-roet-in-het-eten/
[51] https://www.eerstekamer.nl/wetsvoorstel/34032_bronbescherming_in

to bloggers who are not professional journalists. The protection of bloggers' sources is more likely when the blogger has closer ties with the traditional media, or more closely resembles a traditional, professional journalist and abides by professional (ethical) standards.[52]

**1.6 Must bloggers or blog editors abide by the rules on responsible journalism (e.g. as stated in the press law or the Code of Ethics for Journalists, etc.)?**

The Netherlands Press Council [Raad voor de Journalistiek, the Dutch self-regulatory body for journalism] has a code of conduct for journalists, the so-called Guidebook for journalistic behaviour [Leidraad]. In its Articles of Association [Statuten] the Council does not define the activity of journalism, but it refers to persons who engage in journalistic activities as a professional, i.e. with journalism as their main occupation, or at least as an activity which they engage in regularly and for remuneration. [53]

The Guidebook for journalistic behaviour has been reviewed and amended in 2014-2015 in particular with a view to the influence of digital media.[54] The Guidebook states that "[p]roper journalism is *truthful and accurate, impartial and fair, verifiable and sound*." The supervision by the Netherlands Press Council is voluntary, so there is no obligation for neither journalists, nor bloggers to abide by its Guidebook. However, bloggers and other Internet publicists are not who are not journalists by main occupation are invited by the Press Council to abide by their code of conduct.[55]

The Press Council examines complaints against violations of good journalistic practice, after the complainant has first addressed the medium or journalist in question. The complaint must concern a specific journalistic practice of either a professional journalist or someone who, on a regular basis and for remuneration, collaborates on the editorial content of a mass medium. The Press Council cannot review standards of good taste or general complaints against the press. The Press Council is not a disciplinary body, but only a 'council of opinion', so it cannot impose a sanction on a journalist, nor award financial compensation. The Press Council gives its opinion on a complaint and publishes its decision on its website and in several other media.[56] This supervision mechanism of the Press Council is voluntary, i.e., if the medium at issue refuse to cooperate with the Press Council and refuses to subject itself to its 'jurisdiction', the complaint shall not be reviewed, unless there is a pressing social need for such review (Art. 9(5) of the Press Council Regulations).

**1.7 Are blog editors/hosts responsible for publications or comments posted on their blog? If yes, under which circumstances and conditions (e.g. 'notice-and-take down'?**

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[52] See for an extensive academic article on this subject: M. Oosterveld and M. Oosterveen, "Van 'public watchdog' naar 'public watchblog': het EHRM en journalistieke weblogs", in *Mediaforum* 2013-6, pp. 146 – 153.

[53] Article 4 of the Articles of Association of the Netherlands Press Council, available at: http://www.rvdj.nl/over-de-raad/statuten-stichting-raad-voor-de-journalistiek

[54] http://www.rvdj.nl/uploads/fckconnector/f60f0e13-cfde-43b7-9ea3-d3d49e012c78

[55] http://www.rvdj.nl/weblog/blog-leidraad-2015

[56] http://www.rvdj.nl/english

**Criminal, civil liability? etc.) What proceedings can be brought against them? What types of sanctions can be imposed? Have there been reported cases?**

A blog editor must be distinguished from the hosting provider of a blog, given the more active involvement by an editor in the publication process. The general rule under both Dutch civil and criminal law is that the author of a publication or comment is responsible for his or her own utterances. However, a blog editor may, under certain circumstances, be held liable for facilitating the publication and/or the dissemination of unlawful or statements, or even be prosecuted under criminal law for inciting to (terrorist) violence or disseminating inciting publications if he publishes such content without reservations.[57]

Given the recurrence of the question about the liability or punishability of ISPs (hereafter: ISPs) or hosting providers throughout this questionnaire, and the overlap between the answers to these questions, I shall give a detailed description of the legal regime at this point under the heading of "Bloggers/Blog Editors", and I will provide more specific answers or examples form case law in the other sections on "Social Media" and "Online Comments".

Property rights

In principle, an ISP or hosting provider has exclusive property rights and can determine how his server is used.[58] In order to regulate the use of their property, most ISPs use a so-called End User License Agreement or General Terms & Conditions in which they set out "house rules" about the use of their services, such as e-mailserver, a weblog or forum. In those house rules, ISPs can determine if and how the users of the service should register, and how their use of the service will be monitored and, if necessary, sanctioned. ISPs may remove potentially unlawful statements of their own motion, and may even, under certain circumstances, (temporarily) ban users from their service.[59] However, a ban may be unlawful to the user when it was automatic, without hearing the user or without sufficient evidentiary support.[60]

Exemption from liability of ISPs: Article 6:196c BW

The specific (exoneration from) liability of ISPs is regulated in Art. 6:196c BW[61], which implements the European E-commerce directive.[62] An ISP only transmits the online information and does not control the content. Under strict conditions, Art. 6:196c BW exonerates ISPs from being liable for unlawful behaviour by third parties.[63]

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[57] ECLI:NL:RBDHA:2015:14365, District Court of The Hague, 10 December 2015, para. 12.26 and 12.47.

[58] ECLI:NL:HR:2004:AN8483, Dutch Supreme Court, 12 maart 2004.

[59] See for instance Google's General Terms and Conditions for blogger.com: https://www.google.com/intl/en/policies/terms/

[60] ECLI:NL:GHARN:2006:AV0168, Arnhem Court of Appeal, 17 January 2006.

[61] Law of 30 June 2004, Stb. 2004, 285.

[62] Directive 2000/31/EC .

[63] See for a more elaborate discussion of Art. 6:169c BW A.P. de Wit, "De civielrechtelijke aansprakelijkheid van internetproviders (Deel I en Deel II), *Tijdschrift voor Internetrecht* 2009 nr. 2, pp. 37-42 and nr. 3, pp. 72-76.

Art. 6:196c (1) BW exempts ISPs from liability when they merely transmit information from third parties or give them access to a communication network, i.e. so-called "mere conduit". Such ISPs who facilitate mere conduit are also referred to as "access providers". The ISP is not liable for unlawful conduct of the third party if he: a) did not take the initiative for transmitting the information, b) is not the addressee of the information transmitted, and c) if he has not selected or amended the transmitted information. Art. 6:196c (2) BW extends the exception of paragraph 1 to the automated, temporary storage of data, provided that the storage of information only occurs for the transmitting of the information and the duration of the storage is limited to what is necessary for the transmission.
The second form of exemption from liability (Art. 6:196c(3) BW) is when the aforementioned automated, temporary storage of data happens in order to make the transmission of information more effective, i.e. so-called "caching" of data. The ISP is not liable for the data temporarily stored, when a) he does not change the data, b) he takes the conditions for access to the data into account, c) he complies with the usual and accepted rules of the industry relating to the effects of the data, d) he does not change the usual and accepted technology for the gaining information on the use of the data, and e) he promptly takes the necessary measures to remove the data from the original location or makes access impossible. These first two exemptions from liability of ISPs relate to the passive role they have in the technical, automated processes of mere conduit and caching of data.

The third exemption provided by Art. 6:196c(4) BW, according to which the ISP is not liable when he stores data on request of a third party (webhosting services like online fora and weblog hosting, and such an ISP is often referred to as a "hosting provider"), if he a) does not know or does not reasonably has to know that the activity or information is unlawful, and b) when he knows or reasonably should know about the unlawful character of the activity or information, promptly removes it or makes access to it impossible.
Lastly, Art. 6:196c(5) BW provides that these specific exemptions do not detract from the possibility of getting a court order/injunction on any other grounds. Therefore, ISPs and other (more active) hosting providers who may not fall under the strict conditions of Art. 6:196c BW, can still be liable under the more general liability rules of Art. 6:162 BW.[64]

General (residual) liability under Art. 6:162 BW

The strict conditions of Art. 6:196c BW, but also the general duty of care under Art. 6:162 BW leave ISPs and other hosting providers in a rather difficult position: they cannot escape liability if they know or should reasonable know when the data is unlawful. A mere complaint by the alleged hurt party is not sufficient, the ISP should not have a reasonable doubt about the alleged unlawfulness of the data, or that the information is manifestly unlawful.[65] However, it remains hard to assess how and when such knowledge is sufficiently present, and Dutch courts perform detailed case-by-case analyses.

[64] More actively involve website owners/hosting providers cannot rely on Art. 6:196c BW to escape liability: ECLI:NL:RBSHE:2006:AU9504, District Court of Den Bosch, 11 January 2006.
[65] Memorie van Toelichting, Kamerstukken II 2001/02, 28 197, nr. 3, p. 49. See also Dutch Supreme Court in Lycos/Pessers, 25 november 2005, ECLI:NL:HR:2005:AU4019.

Self-regulation: Code of conduct on Notice-and-Take-Down

In 2008 a code of conduct on Notice-and-Take-Down (NTD) was adopted in the context of a public private partnership that brings together stakeholders to collaborate in the fight against cybercrime [Nationale Infrastructuur Cyber Crime (National Infrastructure against Cybercrime - NICC)]. The partnership included broadband providers, cable providers and Dutch government authorities, and several ministries, IP-rightsholders representatives and companies like eBay participated in the drafting process. The code establishes a procedure for Internet intermediaries for online content that is punishable or unlawful, and it is based on an inventory of the existing Notice-and-Take-Down practices exercised in the sector, and seems to be largely in conformity with standard Dutch case law on this issue. Compliance to the code of conduct is voluntary and cannot be formally enforced.

In case of "unequivocally" unlawful or punishable content, the intermediary must remove the content immediately. However, when the unlawfulness or punishability is not "unequivocal", there is not such obligation of removal. When the lawfulness of the content cannot be clearly evaluated, the author and the notifier must either come to an agreement, or the notifier can make an official report to the police or start civil proceedings. The code of conduct states that, under certain strict circumstances as set out in Dutch case law (see the aforementioned Lycos, Google and Facebook cases), the ISP may be required to hand over data identifying the content provider.[66]

Dutch courts seem to demand more effort of ISP's and other hosting providers to detect and take down statements or data that violate a third party's right to privacy and dignity,[67] than to detect infringements of a company's intellectual property rights.[68]

The Pirate Bay

There is an ongoing dispute about the violation of intellectual property rights by a website. In early 2012, the District Court of The Hague ordered both ISP's XS4ALL and Ziggo to prevent Dutch Internet users from accessing the torrent file sharing website The Pirate Bay.[69] The ISP's complied with the order, but appealed the decision. After various other court rulings, several other providers also blocked The Pirate Bay.

The Hague Court of Appeal 2014 that blocking The Pirate Bay's website did not lead to a reduction in unauthorized file sharing. It determined the ISP's could reopen connection to The

[66] https://ecp.nl/werkgroep-notice-and-takedown; https://ecp.nl/bijlagen/3721/ntd-gedragscode-engels.pdf

[67] ECLI:NL:RBAMS:2007:BB6926, District Court of Amsterdam, 1 November 2007. This was a very specific case concerning the online forum of the Vereniging Martijn, an association for paedophiles. A picture of the young Dutch Princess Amalia was posted on the forum. The Amsterdam District Court held that, especially with a view to the special interest of the (now banned) association, the hosting provider of the forum should moderate the content of the forum more intensively.

[68] ECLI:NL:RBZLY:2006:AW6288, District Court of Zwolle Lelystad, 3 May 2006 (Stokke/Marktplaats)

[69] ECLI:NL:RBSGR:2012:BV0549, District Court of The Hague, 11 January 2012.

Pirate Bay. In cassation, the Supreme Court criticized the Court of Appeal's reasoning about the effectiveness of the blockade. The Supreme Court suspended the national proceedings and referred preliminary questions to the Court of Justice of the European Union. The Supreme Court asks whether The Pirate Bay is violating Europe's copyright directive by sharing torrent files and if ordering ISP's to block The Pirate Bay is allowed under the copyright directive's enforcement provision.[70]

**1.8 Is anonymous blogging considered protected speech?**

As stated before, there is no obligation to identify yourself or to register as a blogger, anonymous blogging is not prohibited. The freedom of expression may thus also extend to anonymous blogs. However, there is no right to remain anonymous when the statements published on the blog are unlawful towards another person or if they are punishable under criminal law. ISPs may be forced (during or after a Notice-and-Take-down procedure) to reveal the blogger's name and address.

In the Lycos case, the hosting provider Lycos was ordered to reveal the identity of a person who was anonymously publishing defamatory statements on his personal website. The Dutch Supreme Court ruled that since ISPs were not members of the press, they do not enjoy a legal privilege to refuse access to their clients' personal information.[71]

In another case, Google was ordered under the "notice-and-takedown" principle to remove blogs that contained unlawful statements, with a reference to Art. 6:196c BW, (to be discussed further below under "Online comments"). The Appeals Court of Den Bosch recognized a rather far-reaching duty to remove unlawful blogs, but made a careful review of the duty to reveal the blogger's name and address and the proportionality and necessity of such a limitation of the freedom of expression. The Appeals Court noted that if it is sufficiently clear that a statement on a blog is unlawful towards a third party and causes damage to her/him, it may be undesirable to prevent this third party from having any real possibility of suing the anonymous perpetrator. The refusal of the ISP to disclose the name and address of the blogger may be unlawful towards the third party when a) it is sufficiently plausible that the publication is unlawful towards the third party, b) the third party has a real interest in obtaining the name and address of the blogger, c) there are no less invasive ways to obtain his name and address, and d) the weighing of the interests of the third party, the ISP and the blogger (as far as the interests can be known) results in the prevailing of the interests of the third party.[72]

**1.9 What are the circumstances under which a blog can be closed down or access to it blocked (e.g. apology of terrorism in France)? Do you know of particular instances? Was the measure challenged? How? On which basis?**

[70] ECLI:NL:HR:2015:3307, Dutch Supreme Court, 13 November 2015.
[71] ECLI:NL:HR:2005:AU4019, Dutch Supreme Court, 25 November 2005, para. 5.3.5 and 5.3.7.
[72] ECLI:NL:GHSHE:2015:3904, Den Bosch Court of Appeal, para. 3.10-3.12.

The framework for deciding whether a blog can be closed down or access to it blocked, is formed by the general civil liability and criminal punishability as set out above, and it is supplemented by the liability of hosting providers or ISPs.

The closing or blocking of an entire website or blog is a rather extreme measure, and such a claim will only be awarded in rare cases. When determining the claims to be awarded to the injured party, a civil law judge will usually take into account whether the harm can be repaired by the simple removal of the unlawful comment, and an order to refrain from further unlawful publications.

As is clear from the description of the NTD procedure under para. 1.7 if an injured third party is unable to contact the author of the unlawful content or if he is unwilling to take it down, he can start a NTD procedure. Next up the "chain" from the author/publisher of the content, is the provider of the website, then the firm that hosts the website, the provider of the internet access, and lastly, and only as a last resort, the SIDN, the Dutch registrar that registers and manages all .nl domain names, may be requested to make a specific .nl domain inaccessible.[73] The SIDN received 18 such requests in 2014, 9 requests in 2013 but decided not to make the domain names unreachable in any of these cases, because for instance the content was not unmistakably unlawful, or another party was already taking sufficient action.[74] In 2012, the SIDN received 11 requests, and made a domain name unreachable in only one case.[75]

**1.10 Has there been any issues regarding cross-border aspects which (could) affect bloggers' freedom of expression?**
Not that I have found.

**1.11 Are you aware of any threats of law suits against bloggers or any other types of pressure exercised on bloggers to intimidate them and prevent them from reporting on delicate issues (e.g. death threats, withdrawal of financial support/advertising revenue, pressure on family members, online harassment through comments, etc)?**
As the NGO Freedom House states in its 2015 Freedom of the Press report on the Netherlands, government interference in media content is rare.[76] In my research, I have not come across cases in which there seems to be any threats or other kind of pressure by the government on a blogger.
I have only come across one instance in which a wealthy businessman started a rather aggressive lawsuit against a journalist who published articles on the Internet accusing him of sexual abuse of minors in Ghana, Africa. The hearing judge at the District Court reportedly even commented that the claims were unusually high, and inquired after the real reasons for

[73] https://www.sidn.nl/a/nl-domain-name/complaining-about-the-content-of-a-website?language_id=2
[74] http://jaarverslag.sidn.nl/jaarverslag2014/en/dot-nl ; https://www.sidn.nl/annualreport2013/dot-nl
[75] https://www.sidn.nl/annualreport2012/dot-nl
[76] See https://freedomhouse.org/report/freedom-press/2015/netherlands, under the heading "Political environment".

the high claims.[77] The District Court dismissed the businessman's claims and the Appellate Court of Amsterdam confirmed this judgment.[78]

## 2) SOCIAL MEDIA USERS

**2.1 What is the legal framework for the protection of the freedom of expression of users of social media? Are different contexts or situations covered by different legal regimes? Is online speech subject to a different legal regime (e.g. aggravating circumstances)?**
The same legal framework applies as described for bloggers: every person enjoys the freedom of expression, with the limitations provided for by Art. 10 (2) ECHR, and, specifically in Dutch law, in Art. 6:162 BW (for civil liability) and the Criminal Code.

The particular character of social media has brought further nuances in the Dutch courts' regular approach in Art. 10 ECHR cases.
The District Court of Amsterdam considers Facebook and Twitter to be media on which people share their opinions, and not always in a nuanced way. Although this does not mean that every opinion can be lawfully shared on Facebook, it does mean that individuals enjoy a large amount of freedom in their statements on such social websites. Only if a statement lacks factual basis/evidentiary support and damages the other person's reputation, can it considered to be unlawful and can the freedom of expression be restricted.[79] Furthermore, the Dutch courts have held that the exchange of messages and information on social media such as Facebook and Twitter is fairly fleeting. The often short messages do not lend themselves for a deep analysis of their background and context. A superficial reading of the message will determine how the tenor of the utterances is interpreted and how it will be remembered by the audience.[80]

With regard to negative and accusatory statements about a third party on the social network Hyves, the Amsterdam Court of Appeal considered that the readers of the messages on the personal Hyves-pages would understand from its context that the content should be "taken with a grain of salt" and that they largely contained subjective value-judgements.[81]

However, the Supreme Court has concluded that the publication of accusatory statements on a Hyves pages which is visible to 20-25 other persons, is sufficiently public to constitute defamation (smaad, art. 261 Sr). The publication of such a statement on easily and continuously accessible social media is different from making such a statement in the seclusion of one's living room to a limited number of people.[82]

[77] http://www.ftm.nl/exclusive/rechter-haalt-intimidatie-journaliste-terlingen-vastgoedmiljonair-paes/
[78] ECLI:NL:GHAMS:2015:119, Amsterdam Court of Appeal, 20 January 2015.
[79] ECLI:NL:RBAMS:2014:8364, District Court of Amsterdam, 1 December 2014.
[80] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, para. 11.16-11.21, 12.4, 12.53, 12.74, 12.83.
[81] ECLI:NL:GHAMS:2010:BL6050, Amsterdam Court of Appeal, 23 February 2010, para 4.7.
[82] ECLI:NL:HR:2011:BQ2009, Dutch Supreme Court, 5 July 2011, para. 2.5

Terrorism and social media

As stated above in para 1.3, the Internet and social media are playing increasingly important roles in the dissemination of extremist ideas and the recruitment of jihadi combatants. There is a growing number of criminal cases in which the suspect's online activities are subject of review.

In a case of a jihad-fighter who returned to the Netherlands from Syria, the District Court of The Hague concluded that he was guilty of preparatory activities for committing a terrorist crime, and disseminating publications that incite to the commitment of terrorist crimes. His terrorist intentions were, among others and apart from his actual joining the armed fight in Syria, deduced from his statements on Facebook in which he glorified the jihadist ideas and martyrdom.[83]

In another case the Hague Appeal Court convicted a person for several (preparatory) terrorist crimes, as the evidence showed, among others, that the suspect had searched on the Internet for instructions to fabricate an explosive, and he had purchased the necessary materials online. Furthermore, he had posted statements, photo's and video's on Facebook, Twitter and/or Youtube that showed his aversion of the Netherlands and of the USA, and his willingness/intention to join the jihad in Syria. Moreover, on an online forum the suspect had called upon the readers to join the jihad. As an additional relevant fact, the Court of Appeal noted that the suspect used the name of a well-known jihadist suicide bomber as his Facebook and Twitter names. The cumulative effect of all these online activities is that the Court of Appeal concluded that the requirement of "terrorist intention" was fulfilled.[84]

In the most recent case of 10 December 2015, the District Court of The Hague rendered judgment in a series of joined criminal cases regarding jihadism.[85] It concerned nine suspects: eight men and one woman. Six of the men were convicted of membership to a criminal organization with a terrorist aim. They were punished with prison sentences ranging from three to 6 years. Two other men were, according to the District Court, followers. One of them was convicted for inciting to terrorist violence and punished with a prison sentence of 43 days and 2 months on probation. The other man had taken part in a Syrian training camp for a short period of time, and was punished with a prison sentence of 55 days, and 6 months probation. The woman was convicted for a re-tweet that incited to terrorist violence, and was sentenced to 7 days in prison.

In an elaborately reasoned judgment, the District Court of The Hague first starts with preliminary remarks on the importance of the freedom of religion and the freedom of expression in a democratic, pluralist society like the Netherlands. It stressed that thoughts and beliefs cannot be criminally punishable, only concrete acts and behaviours. The Court reminded of the standard case law according to which the freedom of expression encompasses

[83] ECLI:NL:RBDHA:2014:14652, District Court of The Hague, 1 December 2014.
[84] ECLI:NL:GHDHA:2015:83, The Hague Court of Appeal, 27 January 2015
[85] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015.

the freedom to shock, insult or distress, but also that the freedom is not absolute but can be limited in accordance with the requirements of art. 10(2) ECHR.

The District Court described Facebook as a social network on the Internet. Users of Facebook can put information (messages, photo's and video's) about themselves on their personal pages. Users can also share the information published by other users of Facebook. The District Court noted that the information that is published on a (partially) public Facebook-page, could be consulted by the general public, even without having a Facebook-account. The information on a (partially) private Facebook-page is only accessible for persons who also have a Facebook-account and whom the owner of the Facebook-page has accepted as 'friends'.[86]

The District Court described Twitter as a communication medium on the Internet, on which users can publish a message ('tweet') of a maximum of 140 signs. They can also share (re-tweet) other messages. The District Court noted that the entirety of the tweets and re-tweets on a persons' Twitter-page amounts to a kind of 'mini-blog'. Twitter pages are accessible to anyone; it is not necessary to have a Twitter account. The District Court furthermore recognized that on Twitter a "*retweet is not endorsement"*, and that such a retweet without further comments is not inciting to violence under Art. 131 Sr. However, a retweet does full within the scope of disseminating publications that incite to violence under Art. 132 Sr. The same holds, according to the District Court, for the sharing of a hyperlink on social media. [87]

An issue in the criminal procedure was the fact that the police created two fake Facebook accounts under two fictive Muslim names, and sent several of the suspects friendship requests, which some of them accepted. Furthermore, one of the fake accounts was invited by one of the suspects to a private Facebook group. These special investigative activities were undertaken in a period for which there was no official approval of the public prosecutor, thus amounting to a procedural error. However, the District Court decided that the procedural error needed no legal consequences, since the infringement was not grave and did not substantively affect the (defence) interests of the suspects. In order to reach this conclusion, the District Court took into account the fact that most Facebook pages were public, so anyone could have easily accessed the information published thereon; there was no actual need for (approved) special investigative powers. Furthermore, the Court considered that, had the police asked for such approval, the public prosecutor would have readily given it.[88]

The District Court states that although thoughts and ideas are not punishable, the information about the thoughts and ideas that the suspects held, as evident, among other, from their behaviour on social media, are relevant in order to determine the context and the intentions with their concrete (and punishable) acts.[89]

[86] Idem, para. 5.1.
[87] Idem, para. 5.3, 11.22.
[88] Idem, para. 5.34.
[89] Idem, para. 10.1.

**2.2 Can privacy settings increase or decrease exposure to law suits for particular type of illegal speech (eg defamation)?**

It can be concluded from a (civil) case before the Amsterdam Court of Appeal concerning the social network Hyves, that the fact that only a limited circle of people consisting of friends and friends-of-friends could access and read the messages posted on the Hyves-page, was a reason to conclude that the negative statements were not unlawful.[90]

As can be concluded from the recent criminal case concerning jihadism, the investigative powers of the police are different, and require more safeguards, when a social media account is not (entirely) public, since for most of the prohibitions in the Dutch Penal Code listed above, it is required that the statement was made publicly.[91]

**2.3 Does the operation of social media groups (e.g Facebook open/closed groups, Google groups etc) pose particular problems for the protection freedom of expression?**

To the contrary, statements posted on private, closed social media groups, will in principle not amount to criminally punishable inciting to (terrorist) violence, since the Dutch Penal Code requires the statements to be done publicly.[92]

Furthermore, a defamatory statement made in a private social media group will probably be considered less harmful and thus not immediately unlawful, since the circle of people who will be able to read the statement could be very limited.

**2.4 Who is responsible for illegal speech on social media? Are there any obligations imposed on social networks to prevent/sanction illegal speech?**

For an overview of the general legal regime, see para. 1.3 and 1.7.

In a recent case concerning 'revenge porn' on Facebook, the District Court of Amsterdam concluded that the ISP, in this case, Facebook, can, under certain circumstances, be under a legal obligation to provide the name and address of one of its users (see also the Lycos-case and Google-case discussed above under "Blogging"). The District Court held that this legal obligation may be even stronger in case of a provider of so-called User Generated Content such as Facebook, who exercises a certain influence on what is disseminated through its medium by, among others, publishing guidelines, setting requirements to persons who register for an account and the fact that it intervenes when inappropriate or offensive content is published. In such a case, the UGC provider must disclose the name and address of one of its anonymous or untraceable users when it is plausible that this person has published unlawful statements or other content on the provider's medium, and that the injured third party can only remedy this unlawfulness by the disclosure of the user's identity. When Facebook submitted (without further substantiation, however) that it had deleted the complete account of the user after a notice-and-take-down, and did not have the name and address of the perpetrator, the District Court held that this amounted to a violation of its duty of care towards the injured

[90] ECLI:NL:GHAMS:2010:BL6050, Amsterdam Court of Appeal, 23 February 2010, para. 4.7

[91] ECLI:NL:RBDHA:2015:14365, District Court of The Hague, 10 December 2015, para. 5.34.

[92] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, paras. 12.91-12.92; 12.133-12.134.

third party. It held that Facebook can be required to make all reasonable efforts to see if the name and address can be located, and that, if necessary, an independent investigation should take place to verify the veracity of Facebook's statements in this regard.[93]

**2.5 Are social media users' expressive activities hampered by the legal framework or its application to social media (eg mandatory blocking or deletion, etc.)?**

There has been one case in which a person was ordered to remove all of his social media accounts, and prohibited from opening any new social media accounts for the duration of one year. Furthermore, the injured third party would get a judicial approval to order any ISPs to remove the social media accounts in case the person still refused to remove his accounts. It has to be emphasized that this person had been held liable for unlawful statements on social media before, and had refused to comply with this previous judgment.[94]

It can therefore be concluded that, yes, the expressive activities of social media users in the Netherlands are affected by the legal framework, but not gravely or disproportionately.

**2.6 Has there been any legal case involving social media users or social networks? Are problems which affect freedom of expression on online media reported in the press, forums, etc?**

There seems to be no restriction in the reporting on cases in the press, or online. As stated before, there is very little government interference in the content of the media.[95] If a case is news-worthy, it is likely that interested news media or private persons on fora will freely report about it.

**2.7 Has there been any issues concerning cross-border aspects of social media?**

There have been jurisdictional issues concerning content placed on social media (Facebook) from Turkey. In that case, while the content was placed from Turkey, it was placed on the Facebook page of a driving school registered in the Netherlands, with Dutch as the main language of both the Facebook page and also of the video that was uploaded. The District Court of Amsterdam therefore concluded that the content was aimed at a Dutch audience, and so assumed jurisdiction.[96]

**2.8 Are you aware of any threats of law suits against online users or any other types of pressure exercised on them to intimidate them and prevent them from reporting or commenting on particular delicate issues (e.g. death threats, pressure on family members, online harassment through comments, etc)?**

Not really. However, Dutch newspaper NRC Handelsblad of 23 January 2016, reports that the police have started a new practice: individuals who have placed messages on social media such as Twitter that incite to protests (for instance protesting against the setting up of a

[93] ECLI:NL:RBAMS:2015:3984, District Court of Amsterdam, 25 June 2015, paras. 4.3, 4.4, 4.10.
[94] ECLI:NL:RBAMS:2012:BY9149, District Court of Amsterdam, 4 December 2012, para. 4.2 and 4.3.
[95] https://freedomhouse.org/report/freedom-press/2015/netherlands
[96] ECLI:NL:RBAMS:2014:7728, District Court of Amsterdam, 19 November 2014, para. 3.3.

refugee centre in the municipality), have been getting "housecalls": the police have monitored their Tweets, and show up at their house, and these persons are warned to "watch their tone". The police have responded that it is similar to their public monitoring duties, i.e., when they are walking in the streets, and someone has bad behaviour, they can also warn that person. However, critics have called this intimidation and limiting freedom of speech.[97]

## 3) ON-LINE COMMENTS

**3.1 What is the legal status of persons posting online comments? What are the scope and limits of freedom of expression of commenters? Are there different approaches depending on the nature of the host? (newspaper website, blog, or forum?)**

In the Netherlands, there is no specific legal status of persons posting online comments. The scope and limits of the freedom of expression of online commenters are determined in a case-by-case review that follows the structure and elements of the scheme summarized above. In some cases, the courts even follow the general scheme set out in para. 1.3 without dedicating special attention to the character of Internet fora as a medium.[98]

The District Court of Amsterdam has given a judgment (2009) in a case which concerned an online forum. It emphasised the fact that online fora often exist to discuss issues of public concern, such as wrong-doings in the financial sector. Participants to a discussion on such an online forum who accuse other individuals of wrongdoings, enjoy protection of their freedom of expression, but they do have a certain responsibility of due care. Elements that the District Court found relevant were the status of the person who wrote the accusation and the authority that the audience may attach to his statements, whether the statements we made in a longer discussion or if the person started the discussion thread himself. Furthermore, even strong-worded opinions, which are common on online fora and of which most readers know that they should not always be taken seriously, must have some evidentiary support if they contain serious accusations. In the end, the writer of the accusations was held liable for two unlawful comments, since they contained serious accusations of fraud, which were unnecessarily offensive, and lacked the necessary evidentiary support.[99]

**3.2 How different is it from the status of those publishing comments or reactions in the traditional media?**

As stated above, the Dutch Supreme Court has refused to give a narrow definition of "the press", since the rise of the Internet allows individuals to address the general public without using the traditional news media.[100]

[97] NRC Handelsblad, 23 & 24 January 2016, p. 8-9, "Angst voor twitterend rapalje" and "Zo'n huisbezoek is niet zo onschuldig als het lijkt".
[98] ECLI:NL:GHAMS:2013:BZ7310 LJN BZ7310, Amsterdam Court of Appeal, 2 April 2013.
[99] ECLI:NL:RBAMS:2009:BL3549 LJN BL3549, District Court of Amsterdam, 4 November 2009, para. 4.1-4.5.
[100] ECLI:NL:HR:2008:BB3210, Dutch Supreme Court, 18 January 2008, para. 3.7

However, in a case concerning particularly negative statements online about a person, mentioning her full name, the court considered that the subsequent appearance in Google search results may not allow Google users to place those statements in the appropriate, nuanced, context.[101] Although the court did not expressly draw this comparison, it may be safe to conclude that this decontextualising effect of Internet search engine results like Google's, is less present in the traditional news media which usually offer a clearer distinction between factual and opinion-forming publications.[102]

**3.3 Do the most important media outlets have a comment platform?**

[There are no parameters to establish which media outlets should – for the purpose of this research – be considered as "most important". I have taken the question to relate to the largest news papers and television networks of the Netherlands. I have selected a few, but the list is not exhaustive, nor representative.]

NRC Handelsblad www.nrc.nl (Dutch newspaper) – yes, but only in the "Opinion" section
Volkskrant www.volkskrant.nl (Dutch newspaper) - yes, but only in the "Opinion" section
De Telegraaf www.telegraaf.nl (Dutch newspaper) – yes, but not under every article
Het Parool www.parool.nl (Dutch newspaper) - yes, but only in the "Opinion" section
AD www.ad.nl (Dutch newspaper) - yes
Het Financieel Dagblad www.fd.nl - yes
Nu.nl (news website) – has a special version of the website to allow reactions: www.nujij.nl
Geenstijl.nl (popular website/blog/forum, describes itself as "tendentious, unfounded, and unnecessarily offensive) – yes
Fok.nl (popular website/forum which publishes daily news and opinions) - yes
NOS.nl (news website of the public broadcasters) - no
RTLnieuws.nl (news website of commercial broadcaster RTL) - yes
De Correspondent www.decorrespondent.nl (online news medium) - yes
Elsevier.nl (opinion-forming magazine and news website) - yes

**3.4 Who is responsible for illegal comments and in what way? ('notice-and-take-down',? Criminal, civil liability? etc.) Is there any incentive for ISPs to close down or moderate comment platforms? Check specifically whether recent ECtHR jurisprudence in this regard (ie. Delfi v. Estonia) has had an impact in your legal system**.

The same regime applies to the liability of the website host or ISP of a forum or any other platform for online comments, as described above in para. 1.7.

In a specific case concerning online comments on a forum, the District Court of Zutphen has held that the owner of a website, the ISP, nor the forum moderator, cannot be held liable for (facilitating the publication of) online comments of (anonymous) third parties, unless they

[101] ECLI:NL:RBSGR:2007:BB8427, District Court of The Hague, 21 November 2007, para. 4.2-4.5.
[102] ECLI:NL:RBAMS:2008:BD1695, District Court of Amsterdam, 15 May 2008, para. 4.9.

knew or could have known that the comments were incorrect or unlawful. The burden of proof of such knowledge, rests on the complainant. Furthermore, the District Court took into account the fact that the website had several security measures in place to prevent unlawful comments, such as a registration procedure, a requirement in the house rules that negative comments must be supported by arguments, a practice that persons who post negative comments were contacted for further explanations, and bundled messages generated from the same IP-address, threats or calls to action were deleted from the forum.[103]

In a case concerning a website/online forum aimed at exposing web shop fraud, the website host was not liable for the continuation of the discussion thread on a different website since the relocation and continuation of the discussion thread was done by independently operating online moderators. There was no hierarchical relationship between the website host and the moderators.[104]

With regard to the particular question concerning the ECtHR's Delfi judgment, it may be concluded that the interplay between the strict conditions for the exemption of liability under Art. 6:196c BW, and the general liability regime of 6:162 BW as already apparent from the line of case law before the Dutch courts, seem to fit with the ECtHR's judgment in Delfi: the more actively involved a website host/ISP, the higher his duty of care is; in case of manifestly unlawful comments, they should be taken down promptly. However, there have been no cases before the Dutch courts involving a concrete application of the Delfi-judgment yet.

### 3.5 What types of proceedings can be brought and against who? What types of sanctions or penalties can be imposed, and on who? Have there been any important cases or proceedings involving online comments?

As stated before in para. 1.3 and 1.7, the person who wrote the comment (if the identity is known) is the first person to hold liable, or prosecute. It is only under the strict circumstances outlined above that the website owner, hosting provider or even ISP can be held liable.

The ISP may be ordered to remove the unlawful comments, or block/remove the accounts of the person who wrote the comments. If the person commented anonymously, the ISP may be ordered to reveal his/her name and address in order to provide the injured third party effective judicial protection. See the Google and Lycos judgments discussed above under para. 1.7.

In a rare case, the issue of banning a person from an online forum has been reviewed by the Commissie Gelijke Behandeling [Equal treatment committee; now the Netherlands Institute for Human Rights]. The case concerned the website of weekly opinion-forming magazine Elsevier (www.elsevier.nl) which has a rather clear liberal/right-wing preference. The website moderators removed the complainant's online comments because of a different (more left-wing) political preference and strong, offensive wording. The Equal Treatment Committee

[103] ECLI:NL:RBZUT:2007:AZ8634, District Court of Zutphen, 8 February 2007, para. 4.3- 4.8.
[104] ECLI:NL:RBAMS:2009:BJ1669, District Court of Amsterdam, 2 July 2009.

stated that such removal was – in the light of the freedom of the press and the value of having a pluriform press (including clear choices for certain political issues) – not unlawful.[105]

Recently, a local newspaper has removed the possibility to comment online on articles concerning the refugee crisis, because of too many disrespectful and insulting comments.[106]

**3.6 Has there been any issues involving cross-border aspects in relation to online comments?**
Not that I found in my research.

## 4) WIKI

**4.1 What legal regime applies to Wiki contributors? Is the freedom of expression of Wiki contributors limited? In what way? Who is responsible for illegal statement on Wiki contributions? What proceedings can be taken against Wiki contributors? What sanctions or penalties do they risk?**
Wiki contributors fall under the same general regime as outlined at the start of this report. The interest of wiki contributors, such as the free dissemination of knowledge, and the character and aim of a wiki website, will have to be weighed against the rights and interests of others.
In principle, only the authors are responsible for their statements. Although the general terms of Wikipedia exclude liability,[107] a NTD procedure (as described above) can be started, and the injured party can move "up the chain" of suing the author, the website host, the hosting provider, and the internet provider, respectively.

The general terms of Wikipedia clearly state that it is the Wikimedia Foundation, Inc. in the USA that has the final responsibility, and not the local chapters such as Wikimedia Nederland. This was confirmed by the District Court of Utrecht, in which the claims of an injured party directed against Wikimedia Nederland were dismissed. The District Court of Utrecht concluded that Wikimedia Nederland did not have control over the content and the registered user data (in order to disclose the identity of the author).[108]
The research has shown that to date, there have been no other legal cases against wiki contributors or a wiki website.

**4.2 Have there been cases or controversies in which the freedom of expressions of wiki contributors have been at stake?**

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[105] Commissie Gelijke Behandeling, Opinion 2011/69 of 28 April 2011. See also: http://www.mediareport.nl/persrecht/28042011/cgb-redactionele-vrijheid-elsevier-omvat-recht-reageerders-te-discrimineren-op-politieke-voorkeur/
[106] http://www.gelderlander.nl/regio/geen-reacties-meer-onder-berichten-over-vluchtelingen-1.5567883
[107] https://nl.wikipedia.org/wiki/Wikipedia:Vrijwaringsclausule
[108] ECLI:NL:RBUTR:2008:BG6388 District Court of Utrecht, 10 December 2008.

No, on the contrary, King Willem Alexander has presented the Erasmus-prize to Wikipedia. The Erasmus Prize is an annual award (a cash prize of € 150,000) and it is given to a person or institution that has made an exceptional contribution to culture, society or social science, in Europe and beyond. [109]

**4.3 Has there been any issues regarding cross-border aspects which (could) affect wiki contributors' freedom of expression?**
No.

## 5) OTHERS TYPES OF 'CITIZEN-JOURNALISM'

**If not covered by the previous answers, please describe here the concept, status, legal framework, judicial interpretation etc. on any other type of person engaged in what could be considered 'citizen-journalism' and any problems and barriers to freedom of expression and information which may result in your country. Please pay particular attention to situations involving cross-border dimensions**.
The term 'burgerjournalist' [citizen-journalist] has been used recently when Ms. Rianne Schuurman, not a professional journalist, reported on a bomb threat live through livestreaming service Periscope (owned by Twitter) on 6 June 2015. Apparently, she was even supported by professional journalists from RTV Noord, who provided extra battery power when her smartphone battery life almost expired and provided her with a press card. The police initially did not allow Rianne in the press area, but decided to let her in later on. The public news broadcasting service NOS used Rianne's livestream to report on the issue.[110] It seems as though her reporting was not hampered in any way.

## 6) INSTITUTIONAL CONTEXT OF CITIZEN JOURNALISM

**Discuss here whether there are any specific problems with the institutional context of citizen journalism in your country. In particular, this includes checking whether the media authority is independent, whether the courts are able to provide adequate protection to citizen-journalists, whether citizen-journalists are subject to pressures (eg frequent audits, investigations on other grounds, etc)**
[NB: the normative framework for 'adequate' protection of citizen-journalists is not set out in the questionnaire]

Dutch Media Authority

[109] http://www.erasmusprijs.org/?lang=en&page=Erasmusprijs ; https://www.wikimedia.nl/nieuwsbericht/koning-willem-alexander-reikt-woensdag-erasmusprijs-uit-aan-wikipedia-vrijwilligers
[110] https://www.linkedin.com/pulse/van-ramptoerisme-naar-burgerjournalistiek-met-erik-jan

The Dutch Media Authority [Commissariaat voor de Media] independently[111] supervises and enforces the Dutch Media Act [Mediawet] as well as the regulations based on this act, such as the Media Decree [Media Besluit] and the Media Regulation [Media Regeling]. The Dutch Media Authority supervises audiovisual content and distribution matters,[112] as it grants licences to broadcasters, registers Video-on-Demand services and systematically monitors compliance with the rules on quotas, advertising and protection of minors. The Dutch Media Authority supervises the three main, and several thematic, public broadcasting TV channels, approximately 300 local public broadcasting TV channels, almost 250 commercial licensed TV programs (including around 10 main national private channels, many satellite channels and text TV services), providers of Video-on-Demand services, radio channels (both public and private service providers) and secondary activities of public broadcast services. The Dutch Media Authority can issue warnings, impose fines and suspend or revoke a licence. If a sanction decision is not complied with, the Media Authority can impose additional penalties. The budget of the Media Authority consists for approx. three quarters of state funding and one quarter of surveillance fees paid by market players. Fines are transferred to the state budget, but these funds have to be used for purposes of media policy. The Board of Commissioners consists of Prof. dr. Madeleine de Cock Buning, drs. Eric Eljon and Jan Buné RA.

The Dutch Media Act and related regulations are still largely focused upon the traditional media such as (cable or satellite) television and radio. However, in 2009 the Dutch Media Act was adapted to conform with the European Audiovisual Media Services Directive, in such a way that the Media Act is now "technology-neutral", i.e., the definition of a media service is not related to the distribution platform or the distribution technology, bringing Internet media services within its scope of application. The Dutch Media Act regulates on the one hand the state-funded public audiovisual broadcasting networks, and on the other hand the commercial audiovisual broadcasting networks, but these latter networks are only supervised when it comes to the maximum frequency and duration of advertisements and product placements.

It is unclear whether the Dutch Media Act applies to media content placed on the Internet by parties that do not fall under the definition of public or private/commercial broadcasting service, such as UGC platforms like Youtube.com or Vimeo.com. In that respect, the Dutch Media Act does not fully correspond the recital 21 of the EU's Audiovisual Media Services Directive, which defines 'audiovisual media services' as "mass media (…) which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public." According to the Directive, such audiovisual media services "should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or

[111] http://medialaws.ceu.hu/netherlands1_more.html

[112] It guarantees the plurality and diversity of the (public) media, without, however, interfering with the actual content of the broadcasts. This is set out in article 7 of the Dutch Constitution and in the Dutch Media Act.

distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest".[113]

A proposal to amend the Dutch Media Act is currently being discussed in the Dutch Parliament. The main amendments will, however, concern the position of the public broadcasting services, and have been met with considerable criticism.[114]

Netherlands Press Council [Raad voor de Journalistiek]
See para. 1.6 for further information about the Raad voor de Journalistiek.

Netherlands Association of Journalists [Nederlandse Vereniging van Journalisten]
The Netherlands Association of Journalists is a combination between a professional organization and a trade union, and it has over 7.500 members. The Netherlands Association of Journalists has 11 subdirectorates, which represent each of the different professions within the area of journalism, including "Internet".[115]
As stated before, the Netherlands Association of Journalists issues highly respected press cards. They negotiate collective labour agreements for journalists, provide legal counseling, training and career services.
Furthermore, in 2007 the Netherlands Association of Journalists together with the Netherlands Society of Chief-Editors set up the Press Freedom Fund, a foundation that promotes the freedom of the press. It can start and financially support legal proceedings with a fundamental character for the freedom of the press.[116]

Netherlands Society of Chief-Editors [Nederlands Genootschap van Hoofdredacteuren]
The Netherlands Society of Chief-Editors is a professional organization for editors of newspapers and radio- and tv-programmes. Similar to the Raad voor de Journalistiek, it has published a code of conduct for journalists in 2008. This code of conduct is voluntary, i.e., not legally binding and there is no enforcement mechanism.

Miscellaneous
Reporters covering the Dutch Parliament in The Hague can join the Parliamentary Press Association [Parlementaire Pers Vereniging].[117] Foreign correspondents can become a member of the Foreign Press Association of the Netherlands [Buitenlandse Persvereniging in Nederland].[118] Since 2012, there is an association for online journalists [Vereniging voor

[113] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
[114] http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2015Z14958&dossier=34264 ; https://www.villamedia.nl/artikel/mediawet-passeert-tweede-kamer ; https://www.villamedia.nl/artikel/italiaanse-toestanden-door-nieuwe-mediawet ; http://www.volkskrant.nl/opinie/programmamaker-betaalt-rekening-nieuwe-mediawet~a4158113/
[115] https://www.nvj.nl/over-nvj/wie-is-wie/sectiebesturen/
[116] http://www.persvrijheidsfonds.nl
[117] http://www.tweedekamer.nl/over_de_tweede_kamer/persinformatie
[118] http://www.bpv-fpa.nl/wordpress/

Online Journalisten]. Membership is also open to bloggers whose blog has a (semi-) professional character.[119]
There is also a Dutch Publishers Association [Nederlands Uitgeversverbond], which organizes publishers of books, daily newspapers, magazines, and professional and scientific journals.[120] Furthermore, there is a separate Dutch Association of local newspapers [Nederlandse Nieuwsbladpers], which brings together publishers of weekly and bi-weekly local newspapers and cable news.[121]
The Professional Association of Film and Television Workers (Beroepsvereniging van Film- en Televisiemakers) represents professionals working in the film and television industry,[122] and production companies in this sector are organised in the Dutch Trade Association of Independent Television Producers [Onafhankelijke Televisie Producenten].[123] Local and regional media are united in the Dutch Federation of Local Public Broadcasters [Organisatie van Lokale Omroepen in Nederland].[124]
Lastly, Bits of Freedom is a Dutch NGO focusing on digital rights, focusing on privacy and communications freedom in the digital age.[125]

Conclusion

The freedom of expression and freedom and diversity of the press are quite well protected in the Netherlands, as Freedom House also concludes.[126] Any publication, irrespective of its specific qualification as ("citizen-")journalism is protected in a case-by-case, nuanced way.

## 7) FUNDING

**How is citizen journalism funded? Are there any NGOs promoting citizen journalism? What about local or central government, universities, businesses etc.? As far as possible, try to gather information on the business models of blogs, institutional hosts, etc. Play particular attention to blogs or other types of citizen-journalism which exercise a close scrutiny of government, business practice, and controversial policy areas (e.g. immigration, refugees, etc).**

Many of the traditional news media now have a "blog" section on their websites. Consequently, it becomes increasingly hard to distinguish blogs from more formal journalistic websites. Many blogs and other (news) websites get their revenues from online advertisements on a pageview basis.

Funding of blogs

[119] www.vojn.nl
[120] http://www.nuv.nl
[121] http://www.nnp.nl
[122] http://www.nbf.nl
[123] http://www.otpnederland.nl/Home
[124] http://www.olon.nl
[125] www.bof.nl
[126] https://freedomhouse.org/report/freedom-press/2015/netherlands

The popular right-wing, strong-worded blog GeenStijl.nl which started in 2003, is owned by Telegraaf Media Group.

The progressive blog Sargasso.nl, started in 2002, received a single subsidy from the Dutch Journalism Fund in 2011, but now operates on donations and revenue generated by advertisements.[127]
Dagelijksestandaard.nl is a right-wing blog, but founded and run by experienced, professional journalists.[128] There is very little information about the funding of Dagelijksestandaard.nl, although it is mainly funded by advertisements.[129]

Jalta.nl is the right-wing, conservative answer to the popular progressive online news- and opinion platform Decorrespondent.nl. Both websites strive for innovative journalism, and are predominantly funded via subscriptions.[130]
In 2013, De Correspondent received a 450.000 euro subsidy from the Foundation for Democracy and Media (Stichting Democratie en Media). For its innovative research into education, De Correspondent received a grant of 100.00 euros from the Dutch Journalism Fund. De Correspondent received a 150.000 euro subsidy from the European Journalism Centre to report about the UN Climate Change Summit in Paris in 2015.[131]

Funding of journalism
Through the Dutch Journalism Fund [Stimuleringsfonds Journalistiek], the Dutch government supports the innovation, quality, diversity and independence of journalism in The Netherlands. The fund provides grants to innovative projects, research and it stimulates knowledge sharing across the industry. The fund receives approx. € 2 million annually from the Ministry of Education, Culture and Science.

The Dutch Cultural Media Fund [Stimuleringsfonds Nederlandse Culturele Mediaproducties] promotes the development and production of high-quality artistic programmes by the national and regional public broadcasting corporations. The fund provides more than 16 million euros in subsidies annually for radio- and television programmes in the following fields: drama, documentary, feature film, youth, new media and performing arts. The fund also stimulates new genres, like video clips and games in collaboration with other organizations and funds.[132]

The Fund for Special Journalistic Projects [Fonds Bijzondere Journalistieke Projecten] gives

[127] http://sargasso.nl/over-sargasso/
[128] http://www.dagelijksestandaard.nl/over/
[129] http://nieuwejournalistiek.nl/startup-jalta/2015/03/02/een-ouderwets-opiniemagazine-voor-het-smartphonetijdperk/
[130] https://decorrespondent.nl/en
[131] https://www.svdj.nl/nieuws/innovatiesubsidie-voor-zeven-projecten/ https://decorrespondent.nl/398/Stichting-Democratie-en-Media-steunt-De-Correspondent/38550636608-6a8acddd http://www.elsevier.nl/Cultuur--Televisie/achtergrond/2015/11/De-Correspondent-krijgt-150000-euro-aan-groene-subsidie-2723286W/
[132] http://www.mediafonds.nl/english

financial support to journalists who undertake a special, lengthy investigation in a certain topic.[133]

## 8) OTHER OBSTACLES

**Please provide here any other information which you deem relevant to assessing the freedom of expression of citizen-journalists, or their impact on the freedom of information or expression of citizens in general (e.g. issues regarding the quality or objectivity of information coming from citizen-journalists)**

Freedom of Information Act

In principle, Dutch government information should always be public, unless there are valid, legal reasons to withhold certain information. The public, and thus also journalists and/or other publicists such as bloggers, can obtain access to government information under the Dutch Public Access to Government Information Act (*Wet openbaarheid van bestuur, WOB*). A request based on this Act is referred to as a 'Wob' request. A Wob-request may be declined if a) security is compromised by making the information public; b) it concerns confidential data related to people or companies or c)other interests carry more weight than making the data public.

The government body that provides the document may only charge costs for the photocopies of documents. Furthermore, the deadline for deciding on a Wob-request is four weeks, which may be extended with another four weeks.

In 2009, the Dutch legislator adopted a law on penalty payments for not rendering a decision in time [Wet dwangsom en beroep bij niet tijdig beslissen]. Under this law, the citizen who made the request and has not received a decision in time, can declare the government body in default. If there is still no decision after two weeks, the citizen can claim a penalty payment of 20 euro per day for the first fourteen days, 30 euros per day for the next fourteen days, and 40 euros for the remaining day until a decision, with a total maximum of 1260 euros.[134] The aim of this law was to speed up the general decision making by governmental bodies. However, since this new law offers a lucrative way of getting money, there has been a growing practice of "professional wob-bers", i.e, persons who submit numerous Wob-requests, not for the information, but hoping that the government body will not decide in time, and that they can claim the penalty payments.[135] These bogus Wob-requests clog the system, and have caused the decision-making process on Wob-request to slow, hampering the information-gathering by serious citizens and journalists. The government is looking into ways to make the system more effective. There have been proposals to stop the system of penalty payments in order to remove the incentive for bogus requests, but this proposal has met with severe criticism from, among others, the Netherlands Association for Journalists. Without the penalty payments, journalists would have no way to pressure government bodies to decide in time.[136]

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[133] http://www.fondsbjp.nl/over/

[134] https://zoek.officielebekendmakingen.nl/stcrt-2014-30255.html

[135] https://www.nvj.nl/nieuws/voorstellen-voor-betere-werking-wob

[136] http://www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/uitstel-schrappen-dwangsom-wob.9480698.lynkx ; https://www.nvj.nl/nieuws/voorstellen-voor-betere-werking-wob

Drones

Since 1 juli 2015, it is unlawful to make photos and video recordings with drones for professional (journalistic) purposes without an official license. Citizens, however, are free to may make such recordings for private use. The rules for drone use by professional journalists are similar to those applied to flying with helicopters. Professional journalistic use of drones without a appropriate license is punishable with maximum 6 months imprisonment or a fine of an amount up to 7.800 euros. In 2015, the Netherlands Assocation for Journalists started a law suit against the Dutch government to challenge the validity of this law.[137]

Legislative Proposal: Cybercrime Act III

On December 22, 2015, the Dutch government submitted a legislative proposal to the Dutch Parliament for extending the investigative powers relating to cybercrime.[138] If this proposal is accepted, the police will get very extensive investigative powers, such as the power to hack computers/servers which are suspected to carry illegal data, and remotely accessing (turning on) webcams and microphones. It's not immediately relevant for citizen-journalism, but since the private and professional use of the Internet is so intertwined, it may be relevant for citizens' right to freedom of expression and privacy. The legislative proposal was done with two main spearheads: combating online childporn, but also curbing radicalisation/recruitment for jihadist combat.

## 9) THE CONCEPT OF 'CITIZEN-JOURNALIST'

**Based on the above, would you suggest that there is such a concept as citizen-journalist in your country? If not, are they equivalent? (Please, specify it in the original language version.) Do (different type of) citizen-journalists have a particular legal status? If yes, who does this status cover (eg bloggers, authors of on-line comments, forum or wiki contributors or social media users, others?) If not, are citizen-journalists treated as 'ordinary citizens' or 'ordinary journalists'?**

Based on my research, I conclude that there is such a concept like citizen-journalist in the Netherlands. There are no clear, distinct definitions of 'journalists', 'publicists' or 'bloggers'. The case law of the Dutch courts is sufficiently nuanced to protect (in an ex post facto review) the freedom of expression of any person who reports on issues that are relevant to the public debate.

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137 https://www.villamedia.nl/opinie/bericht/er-is-niets-tegen-een-journalist-met-een-drone ; https://www.rijksoverheid.nl/onderwerpen/drone/vraag-en-antwoord/regels-drone-zakelijk-gebruik

138 https://www.rijksoverheid.nl/actueel/nieuws/2015/12/22/wetsvoorstel-computercriminaliteit-bij-tweede-kamer-ingediend; https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/12/23/wetsvoorstel-computercriminaliteit-iii/wijziging-van-het-wetboek-van-strafrecht-en-het-wetboek-van-strafvordering-in-verband-met-de-verbetering-en-versterking-van-de-opsporing-en-vervolging-van-computercriminaliteit-computercriminaliteit-iii.pdf ; see also https://oerlemansblog.weblog.leidenuniv.nl/2015/10/

There are still remnants of the more traditional identification of professional journalists when it comes to press accreditation through press cards, and the new legislative proposals on source protection. Although this practice is somewhat exclusionary of 'citizen-journalists' and other forms of freedom of expression, it relates to an exceptional position that is afforded to the journalist in question. In the light of that exceptional status, it is logical that certain qualitative conditions are imposed.

Although Dutch law seems to sufficiently protect the freedom of speech of users of digital media in general, it has to be noted that there is a growing concern about the investigative and monitoring powers of the authorities in case of suspicions of cybercrime and/or links with terrorism. Also, the very heated and polarized debate among Dutch people about the refugee crisis show that on the one hand, Internet users are stretching the boundaries between acceptable speech and illegal (offensive or defamatory) statements, and on the other hand, both government authorities and media platforms seem to intervene more often in online speech, for instance, closing down online comments sections.