[NL] Dutch Court Allows Media Bugging by Intelligence Service in Special Circumstances

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In January 2006, reporters of the Dutch daily newspaper *De Telegraaf* received confidential information from an anonymous source about a drugs dealer. This information was leaked by a Dutch intelligence service (AIVD) insider to the underworld. Prior to publishing the story, the reporters informed the AIVD about the leak. Subsequently, the AIVD decided to spy on the reporters by tapping their phones and internet connections.

In the court case that followed, *De Telegraaf* asked the judge to order the State to cease the tapping and to delete every record and every copy concerning the reporters. The court of first instance ruled that the government had no right to spy on the journalists and ordered the AIVD to stop the tapping. The Minister of Internal Affairs challenged the ruling stating that journalists must not break the law in the course of their professional activities and are not shielded from investigation by the AIVD.

On 31 August 2006, the Court of Appeal in the Hague overruled part of the decision of the lower court. It stated that under certain circumstances the AIVD is allowed to use its powers not only on individuals who are labelled as targets, but also on those that have a connection to these targets. The judges acknowledged that spying on someone infringes the right to privacy (Art. 8 ECHR) and freedom of speech (Art. 10 ECHR), but said that this is allowed when this infringement is based on law and necessary in a democratic society, provided the principles of subsidiarity and proportionality are observed. The Court is of the opinion that the infringement by the AIVD of Article 10 of the European Convention on Human Rights is justified because the leak concerned national security and therefore important interests of the State.

Not long after the tapping began, the AIVD traced the identity of another person who could be linked to the leaks. According to the Court of Appeal, the principles of proportionality and subsidiarity demand that from that point on the AIVD should have stopped using its powers in regard to the journalists. Instead, it should have turned its full attention to this newly identified person.

Because the Court considered that it could not judge which data was obtained in an unlawful manner and would thus have to be destroyed, it ruled a special Commission, created by law, must make those judgments. As long as the

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Commission has not decided about the legality of the data, the Court has explicitly prohibited the use of it by the AIVD for purposes of further investigation.

Gerechtshof 's-Gravenhage, 31 August 2006, Staat der Nederlanden vs. De Telegraaf c.s., LJ number AY7004

http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY7004&u_ljn=AY7004

Court of Appeal in the Hague, 31 August 2006, Dutch State v. De Telegraaf c.s., LJ number AY7004

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