The press magistrate

Introduction

Clear communication with citizens through the press is essential in our democratic system. Justice can no longer remain deaf and dumb or be perceived as being in an ivory tower. Information must be provided on legal procedures to ensure that those involved are informed of all aspects of the administration of justice. The press judges, together with the spokesmen of the public prosecution service and the courts, therefore play a key role. Precise and accurate information and a simple, clear explanation of how justice is administered is in everyone's interests.

The term "press magistrate" covers both the spokesmen for the public prosecution service and the press judges. Unlike the prosecution service spokesmen, press judges do not have any legal status.

1 – Historical background

Since 1953, the procedure for providing information on court cases has been regulated by three circulars issued by the Ministers of Justice.

A circular issued on 24 July 1953 by Justice Minister Du Bus de Warnaffe set out for the first time the conditions under which "*passive information*" can be provided by the public prosecution service. "Passive information" is information supplied at the request of the press and press releases issued to provide information on and explanations of criminal cases that arouse strong public interest.

This circular stipulated that both the police and the public prosecution service were authorised to provide information to the press subject to certain conditions, except in cases in which professional secrecy in the strict sense of the term was required: defence rights had to be respected, no personal opinion could be given, and information on a case currently being examined could only be provided if authorised by the magistrate in charge of the case, and then only if justified on the grounds of the public interest.

A circular issued on 9 April 1965 by Justice Minister Vermeylen sought to create a climate of mutual trust between the press and the courts and introduced public prosecution spokesmen.

A circular issued on 15 June 1984 by Justice Minister Gol once again underlined the need for both judges and prosecutors to exercise caution and discretion. No statement of any kind could be made to the press without first being expressly approved by the officer's superior and/or the examining magistrate in a legal proceeding.

Without prejudice to the circulars applicable at the time, in March 1993 the presiding judges issued a common circular containing guidelines for "*active information*", i.e. participating in a radio or television debate or granting interviews to the press. "Active information" could not be given without the approval of the officer's superior, who had a right of veto.

A change was introduced when legal practitioners signed a declaration of intent on 29 February 1996. The then Minister for Justice, Stefaan De Clerck, gave priority to improving communication and the public perception of the administration of justice. The task force set up for this purpose drew up a consensual text establishing the function of press judge in addition to press magistrate for the public prosecution and spokesman for the bar. This text was submitted to the presiding judges of the courts of appeal at the beginning of August 1996 with a request to them to seek judges to perform this function on a "*voluntary*" basis in order to "*specifically implement the initiative*" from September 1996.

"*Press judge*" meant a judge acting as the press spokesman, preferably on a voluntary basis and preferably someone with several years' experience in different fields of law, willing to perform additional duties "not within fixed working hours" and in a position of authority (preferably not the presiding judge himself), assisted by an administrative assistant (a post that has not yet been created) and a court press clerk.

Apart from passive information provided at the request and on the initiative of the media (information on the progress of hearings of certain cases, communication of decisions consisting simply of the necessary objective information (e.g. possible means of appeal) without additional comment, communication of certain actions taken by magistrates while safeguarding the privacy of the parties concerned and observing all the relevant legal provisions, and the entering into of agreements regarding photos and/or recordings in the courtrooms), scope is also left for own initiative.

"*Own initiative*" meant providing general information on the court (e.g. on the roles of the different players and on court procedures and rules), rectifying incorrect, inaccurate or incomplete information, liaising with other press spokesmen and protecting the magistrates in charge of a particular case.

The function of press judge was to be introduced "*spontaneously and gradually*".

With the passing of the Franchimont Law on 12 March 1998 on the improvement of the investigation and examination stages of criminal proceedings, public prosecutors were required to provide information to the press during preliminary investigations, inquiries or examinations. A legal status was immediately established for public prosecution spokesmen.

The legal framework, nature, content and form of the communications to be provided by the press spokesmen of both the public prosecution service and the police were stipulated in joint circular 7/99 issued by the Minister of Justice and the Public Prosecutors' Association on 30 April 1999.

2 – The Belgian legal framework for the function of press magistrate

These guidelines apply to preliminary investigations, held as part of a judicial inquiry or examination, conducted to investigate infringements and the perpetrators thereof, gather evidence and do everything necessary to initiate criminal proceedings.

In accordance with Articles 28(d)(3) and 57(3) of the Criminal Procedure Code, the public prosecution service is responsible for providing information on criminal investigations. However, subject to certain conditions, it can delegate the function of spokesman to the police. In certain cases, particularly sex cases, in principle this function cannot be delegated. In judicial examinations, the authorisation of the examining magistrate is always required.

Under Belgian law, during a judicial examination the task of providing information falls not to the examining magistrate himself, but to the public prosecutor subject to the approval of the examining magistrate.

The examining magistrate is in charge of the investigation, which means that no information can be divulged on the investigation without his agreement.

The public prosecutor can designate one or more members of the public prosecution service as substitutes to act as permanent or temporary press spokesmen. These spokesmen are press magistrates, as are the magistrates in charge of relations with the press during legal proceedings. Nowadays all public prosecution services in Belgium have spokesmen. Some of them also hold daily press conferences.

Public prosecutors on duty at night or at the weekend may also brief the press, as may those who are personally in charge of an investigation that is being covered in the media. The Criminal Procedure Code stipulates that the public prosecution service or, if duly authorised, the police, can brief the press on criminal investigations "*if it is in the public interest*". In doing so, the spokesman must ensure that "*the presumption of innocence, the defence rights of the defendant, the suspect, the victims and third parties, privacy and human dignity are respected. As far as possible, the identity of the persons named in the case must not be revealed.*"

The circular of 30 April 1999 describes these obligations in more detail. Some of the main stipulations are set out below.

2.2.1. The spokesman must ensure that the interests of the investigation are not damaged. He must also ensure that the rights of the suspects, the victims and the witnesses are respected in any communication to the press.

2.2.2. The spokesman must ensure that the right to information is respected subject to the limitations stipulated in point 2.2.1. Correct observance of the procedure for providing information may also be in the interests of the investigation.

2.2.3. Appropriate communication of information increases citizens' confidence in the legal institutions.

7.1. Basic principles

The task of the public prosecutor and of the duly authorised police spokesman is to provide the press with correct and objective information, taking into account the nature of the medium in question. A refusal to provide information may lead to the publication of false information which is difficult to correct. Also, the investigation may be weakened by the publication of erroneous information. In view of the legal requirements mentioned in point 6, when providing any information on court proceedings it is advisable to exercise discretion and reserve, to be careful as to the exact language used and to avoid making personal judgements.

As regards the victim and their family, no details may be provided that might lead to secondary victimisation. In the spirit of Article 3 of the law on the function of the police referred to in point 6.4, their right to privacy must be guaranteed.

As far as possible, care should be taken to prevent them from learning directly from the press certain sensitive facts or matters relating to the case in which they are involved. If the press appears to know the victim's identity, it can be asked not to reveal it until the immediate family members are informed by the court or administrative authorities.

The only information that can be provided to the press without authorisation is the sex, age and, in some cases, the place of residence of the persons involved in the case (see point 7.2), bearing in mind that no information should be provided that could enable them to be identified. Personal data such as ethnic origin, nationality and sexual orientation may not be provided unless they are relevant.

(…)
Comments on Article 7

To ensure that the presumption of innocence is respected, it is advisable always to state that the person concerned is only suspected of committing a particular act. If the accused denies the charge or puts forward grounds for excuse or justification, this should be specified.

Article 3a of the preliminary title of the Criminal Procedure Code requires the legal authorities to "treat victims of infringements and their families properly and conscientiously, in particular by providing them with the necessary information". If those involved in a case learn important information (not protected by the secrecy requirements for investigations) through the press, this may do additional harm and lead to an irreparable breakdown of trust. A good way of avoiding this can be to impose an information embargo or black-out. It is not always possible to guarantee the anonymity of those involved in a case, particularly if the person in question plays an important part in society or is a public figure. However, as far as possible identity should remain secret."

The 1999 circular also provides guidelines on whether or not the press should be briefed on criminal investigations. Thus, the public prosecutor "*may decide to make statements if a particular criminal offence has aroused strong public interest and/or if it is preferable to inform the public of the policy adopted in such cases"* (point 7.2).

3 – Who information can be given to

In principle, information on court proceedings is provided only to professional journalists and trainee journalists recognised by the Belgian journalists' union (AGJPB). Only information on cases relating to driving, housebreaking, the discovery of illegal immigrants and any other case that does not fall within the province of the specialised criminal investigation police may be given to non-professional journalists provided they are associated with one of the media. Foreign journalists can only be given this information if they hold an official press card.

In their general relations with the press, however, spokesmen treat all journalists on an equal footing. Exceptions to this are, for example, where a particular journalist claims exclusive rights, provided the general right to information is respected.

4 – The ways in which information is provided

It is up to the public prosecutor or the authorised police spokesman to decide which communication technique it is appropriate to use, depending on the case in question and the different interests to be taken into account.

The communication techniques used can be classified as follows:

- "*on the record*" communication: the spokesman can be officially cited;

- "*off the record*" communication: the information can be used but the spokesman cannot be cited. The information provided must enable the journalist to correctly reproduce the information provided on the record.

- background information: this concerns information which cannot be published by the journalist and is given to him solely in order to extend his frame of reference and understanding of the case;

- embargo: a temporary silence regarding certain information, i.e. an agreement to postpone making it public; the public prosecutor or spokesman can, in exceptional circumstances and on reasoned grounds, specify the conditions for an embargo, either on an individual basis with a particular journalist in possession of exclusive information or collectively with all the media;

- black-out: temporary silence on all information; in very exceptional cases, the public prosecutor or police spokesman may announce a temporary complete black-out.

The circular stipulates that if a journalist fails to respect these conventions, the public prosecutor or police spokesman may report this fact to the Belgian journalists' union (AGJPB) so that the case can be examined by its ethics committee and by the editor of the press organisation concerned.

5 – The public's right to information

The question arises whether journalists can publish information at any time on the progress of a legal investigation or court case, i.e. whether the public has the right to be informed at all times, at the risk of influencing the investigation or the court case if the information published has any bearings on them.

Since the *Sunday Times v the United Kingdom* judgment handed down by the European Court of Human Rights (ECHR) on 26 April 1979, it has been accepted that the press can and indeed should disclose information on court cases subject to certain conditions, in particular respect for the presumption of innocence.

The ECHR judgment states that "*There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.*" In this judgment, the ECHR states that Article 10 of the European Convention on Human Rights and Fundamental Freedoms guarantees not only the right to inform the public but also the right of the public to be properly informed. It would not be realistic to expect the media to wait for the outcome of a court case that is arousing strong public feeling before reporting on it. It therefore seems disproportionate to apply to the press the concept of "contempt of court" existing in English law, aimed at protecting the administration of justice when articles are published on a court case.

But the judicial authorities sometimes ask the media temporarily to refrain from publishing certain information in order to protect the interests of an investigation or of one or more persons. This is known as an embargo.

This concept is defined in the joint circular issued by the Minister of Justice and the chief public prosecutors on 30 April 1999 as "*a temporary silence, i.e. an agreement to postpone publication of certain information*".

According to AGJPB's Ethics Committee, a request for an embargo must be respected provided that:

- it has been made in the appropriate way;
- the request is a reasoned one with precise content;
- it applies to the media as a whole, i.e. editors have reached agreement on the request for an embargo;
- it is for a limited time period.

6 – The right to anonymity

Certain categories of person are protected by the right to anonymity, in particular victims of sex scandals, minors under youth protection rules and persons involved in divorce or legal separation proceedings.

7 – Specific precautions regarding certain persons

Certain persons, while not protected by the right to anonymity, should nevertheless be treated with some discretion by the press. They are victims of crime, accidents or catastrophes, parties to civil proceedings, suicides, foreigners, suspects, accused persons and convicted persons.

8 – Suspects and accused persons

With some exceptions, legal proceedings are public, meaning that in principle the names of accused persons are made public. Usually the media cite in full the names of accused persons, except for minors and victims of sex crimes, while procedures vary for suspects waiting to appear in court.

Both suspects and accused persons have the right to be presumed innocent.

9 – Presumption of innocence

Strictly speaking, there is no legislation requiring the press to respect the presumption of innocence principle for accused or convicted persons. Only public authorities are subject to this obligation. Magistrates and the police, in particular, must consider an indicted or accused person to be innocent until convicted.

However, case law requires the media to observe the presumption of innocence principle. In the landmark *Worm v Austria* judgment of 29 August 1997, the European Court of Human Rights (ECHR) confirmed that journalists must also respect the presumption of innocence, as defined in Article 6 of the European Convention on Human Rights, even for public figures and politicians. In this case, an Austrian journalist had published articles attacking a former finance minister who was tried by a magistrates' court comprised of two lay and two professional judges. By doing so, the journalist considerably reduced the politician's chances of having a fair trial and conducted a kind of pseudo-trial in the media, which, according to the ECHR, threatened to undermine public trust in the role of the courts in administering justice in criminal law cases.

The civil courts require the press to respect the presumption of innocence as required by Article 1382 of the Belgian Civil Code. A charge that is dismissed as unfounded may be considered an injury for which damages can be claimed. In cases of this kind, judges therefore take into account the tone of the information, any confusion between facts and comments, the headlines and sub-headlines used and the illustrations published.

10 – Slander, defamation, insults and other similar accusations

Articles 443 et seq of the Belgian Criminal Code define certain specific offences against a person's reputation or honour which violate the right to privacy. The said offences are slander, defamation, insults, malicious prosecution and malicious disclosure.

a – Slander

Slander means maliciously imputing to a particular person a precise fact that is of a nature to undermine that person's honour or to expose them to public contempt, in cases in which evidence can legally be provided. For example, a person is accused of having committed a tax fraud but no evidence is provided to back this up.

b – Defamation

Defamation means maliciously imputing to a particular person a precise fact that is of a nature to damage that person's honour or expose them to public contempt, in cases in which evidence cannot legally be provided. For example, someone is accused of having committed an offence but legal evidence cannot be supplied because the statute of limitations period has expired.

c – Insult

An insult is the disclosure of an imprecise fact damaging to another person's honour.

d – Malicious prosecution

Malicious prosecution is slander in the form of a statement made to the authorities.

e – Malicious disclosure

Malicious disclosure means making a true fact known to the public at large solely with the aim of damaging another person.

When the press is guilty of such offences, they are said to constitute criminal declarations of opinion by the press or, more simply, press offences. Article 150 of the Belgian Constitution provides for a privilege of jurisdiction for these press offences. They can only be tried in an assize court, except for press offences of a

racist or xenophobic nature, which come under the jurisdiction of the magistrates' courts. Under current case law, only criminal declarations of opinion in the press in the strict sense of the word, rather than in the audiovisual media, fall within this category.

Press offences coming under the jurisdiction of the assize courts are rarely, if ever, tried. However, legal proceedings based on Articles 1382 and 1383 of the Belgian Civil Code can be brought against journalists who have committed such infringements.

Conclusion

Belgian legislation on the function of the press magistrate seeks to establish a harmonious relationship between the Belgian judiciary authorities and the press as regards the communication of information on court cases. The advisability of providing such information and the content of the information given must in all cases be assessed in the light of the public interest. And the public interest in this context must be the result of a balance, necessarily established by the public prosecutor, between ensuring that justice is properly administered and that accurate and reliable information is transmitted.

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