



Third Study Commission
Criminal law and procedure

Meeting in Amsterdam (The Netherlands), 22-26 September 1996

Conclusions

THE INTERRELATIONSHIP OF THE MEDIA AND THE CRIMINAL JUSTICE PROCESS

This final report is based on the reports of the following countries: Australia, Austria, Belgium, Brazil, Canada, Estonia, Finland, France, Iceland, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Morocco, The Netherlands, Portugal, Romania, Senegal, Spain, Sweden, Switzerland, Taiwan, United Kingdom, United States of America.

The Vital Function of the Media

Those countries which have a well established recognition of the principle of individual human rights tend equally to recognize the principle of free speech and the freedom of the press; and in most of these countries the two principles are seen to come into conflict. Where individuals are subject to the criminal justice system, whether as victims, witnesses, suspects or defendants, that conflict can be particularly marked. The precise nature of the problems raised depends upon the nature of the criminal process of the individual country. The media poses different problems for those countries where the judiciary or public prosecution is involved in the investigation of crime and those countries where this is carried out by non-judicial organizations. Equally problems posed by media publicity tend to be greater where the criminal process provides for jury trial than when criminals are tried by professional judges. The manner in which the balance has been struck between freedom of information and the rights of the individual, including, in particular, the right to a fair trial, vary from country to country. For example, there is a marked contrast between the United States, where freedom of speech is a paramount right, enshrined in the Constitution by the First Amendment and some of the European countries where the law imposes restrictions on the media to protect established rights of privacy to ensure that the individual receives a fair trial. It is, however, common experience that laws designed in principle to prevent press abuse often fail to achieve this end in practice.

The most important way in which the media assists the administration of criminal justice is best expressed by the maxim "justice must not only be done but must be seen to be done". In administering criminal justice the Police, the prosecuting authorities, the lawyers and the Courts act on behalf of society in seeking to prevent or discourage crime and in exacting the punishment that society considers should be imposed on those who commit criminal acts. It is important that members of the public should understand and have confidence in the criminal justice system.

The media can and should play an important part in educating the public in respect of the working of their criminal justice system, and in informing them of the manner in which the system operates.

At its best the media ought to serve a valuable function in demonstrating to the public that the criminal justice system works fairly - or in provoking public reaction if this is not the case. Representatives of most countries were not, however, impressed by the manner in which the media performs this function. Most have experience of irresponsible and inaccurate reporting and of sensationalism. Such conduct tends to impede rather than assist a proper appreciation of the working of the criminal justice system. Distrust of the manner in which the media performs this part of its role was particularly marked by the attitude to the televising of Court proceedings. While in most countries the President of the Court has a discretion as to whether or not to permit television cameras into Court (although whether it can ever be lawful to ban television from the Court is under challenge before the German Constitutional Court), some two-thirds of the delegates are opposed to the televising of Court proceedings.

The Impact of the Media on the Fairness and Efficacy of the Criminal Process

While media publicity can assist in the investigation of crime by, for instance, encouraging witnesses to come forward, the media can also impede the smooth progress of an investigation. In the more sensational cases the media often carry out a parallel enquiry to that of the police, the public prosecutor or the examining Magistrate, interviewing witnesses, members of the public and sometimes even the accused, and persuading those officially involved in the case to disregard obligations of confidentiality.

Adverse media publicity in relation to a suspect - or even worse the premature condemnation of a suspect by the media, has an obvious tendency to prejudice those responsible for determining the guilt or innocence of the suspect at the trial. The professional Judge should be able to resist media pressure of this type, although in practice this is not always very easy. The position is very different in those countries that have jury trial, where there is an obvious risk of juries being prejudiced by pre-trial media publicity. In the United States a lengthy process of jury screening is often necessary before the trial and juries sometimes have to be sequestered so that they are unaware of the media coverage during the trial. In other common law countries which have trial by jury, appeals have been allowed on the grounds that verdicts have been tainted by media publicity and sometimes Courts have even discharged defendants on the grounds that adverse media publicity has rendered a fair trial impossible.

Concern was also expressed about a tendency on the part of the media to reduce public confidence in the Judges by making criticisms of judgments or sentences on the basis of a misunderstanding or ignorance of the material facts.

Existing Restraints on the Media

In general the civil law of some countries which confers a right of privacy or a right not to be defamed will - at least in theory - provide a degree of deterrence to adverse press publicity about suspects and witnesses. The laws of most countries which have a system of judicial enquiry into crimes impose by law secrecy obligations, subject to penal sanction, on those officials involved, but these are often ineffective against leaks, particularly where the law provides that the press is not required to disclose its sources.

Some common law countries have a law of Contempt of Court which prohibits the media from publishing matters, even if they are true, which are likely to prejudice a fair trial. Infringement of this law is subject to penal sanctions and is quite effective in preventing the media from prejudging the guilt of defendants in criminal cases.

Conclusion

While some expressed the view that legal sanctions against media misconduct should be strengthened, most agreed that this is not politically practicable.

It was agreed, however, that it is both practicable and desirable to improve communications between the judiciary and the media, so that the media can better appreciate the criminal process and the actions of the Judges, so that they can more adequately perform the vital function of ensuring that justice is seen to be done.

The Netherlands have shown the way by appointing "Briefing Prosecutors" and "Briefing Judges" responsible for seeing that the media are adequately and accurately informed about criminal trials.