

Freedom of Expression and the Criticism of Judges

A comparative study of European legal standards

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6 Criticizing Judges in Belgium

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To be accused of bias is the worst possible insult that can be levelled at a magistrate.¹

The freedom of the press to impart – in a way consistent with its duties and responsibilities information and ideas on political questions and on other matters of public interest – undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.²

Introduction

Discussion on the issue of criticizing judges in Belgium is a fairly recent phenomenon. The judgment of the European Court of Human Rights in the case *De Haes and Gijssels v. Belgium*³ has highlighted the polemic nature of the issues which place journalists and judges in antagonistic positions. On the one hand, the media emphasize their freedom of expression, especially the right to critically report judicial affairs, which also includes the right to criticize judgments and hence directly or indirectly criticize judges. On the other hand, the judges, in view of their institutional position within a democracy under the rule of law, tend to draw attention to the responsibility of the media and the restrictions needed on the freedom of expression in order to maintain the authority and impartiality of the judiciary. The media are expected not to undermine public confidence in the administration of justice. In the last few years the media have reported critically on the functioning of the administration of justice in general and criticized some individual judges or magistrates in particular, some of whom have claimed (additional) protection against destructive attacks in the media.⁴

While the (sporadic) case law of the last 10–15 years in Belgium seemed to emphasize the need to protect the reputation of judges and the importance of maintaining the authority of the judiciary against critical attacks in the media, the European judgment in the case of *De Haes and Gijssels* made clear that this jurisprudence risks neglecting, or has even manifestly neglected, the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. The ‘condemnation’ of Belgium for not respecting the freedom of expression in the *De Haes and Gijssels* case was even more revealing because, at the same time, the European Court came to the conclusion that the applicant journalists in their case against four Belgian magistrates did not receive a fair trial. According to the European Court, Article 6 of the Convention was breached because the principle of equality of arms between the plaintiff judges and the defendant journalists was not respected by the Belgian courts.⁵

The criticism of judges has become a central issue in Belgium not only because of the *De Haes and Gijssels* case, but also because, in the last few years, it has become apparent that the judicial system is in crisis. Particularly since the *Dutroux* case,⁶ the judiciary has had to undergo a great deal of criticism, and public confidence has diminished to an unprecedented level. Individual judges investigating magistrates, members of the public prosecutor’s offices and members of the judicial police have also been compromised. During the last few years discussion on the reform of justice has constantly been on the political agenda, and this has fostered the media’s interest in the actual functioning or disfunctioning of the administration of justice. Last but not least, in the context of the commercialisation of the media and the daily battle to win more readers, viewers or listeners, it has been demonstrated that reporting on crime and judicial affairs is an important news category, and judges are becoming more prominent figures in this emerging trend. At the same time, the general public wants the administration of justice to become more transparent, and the members of the judiciary to justify themselves and be responsible for their actions and role in a modern democratic society.⁷

This chapter will focus on the applicable legal provisions and the procedures that can be used to protect the reputation of judges and the authority of the judiciary against destructive attacks in the media. Following this, some recent case law applying this legal framework will be analysed.

Freedom of Expression and Press Freedom

The Constitution

Article 19 of the Belgian Constitution guarantees freedom of expression,⁸ the

scope of which is determined by the competence of parliament to define by law what content or speech is to be considered a criminal offence. It is up to the courts to apply this legislation in the light of the constitutional provision: the courts have the competence to restrict or punish the abuse of the freedom of expression in so far as there is a law which provides such restriction or sanction. Criminal law, for example, punishes incitement to racism and xenophobia, public acts which offend morals and sexuality, libel and defamation.⁹ Similarly, Article 25 of the Constitution also protects freedom of the printed press and explicitly excludes any form of censorship.¹⁰ This implies that prior restraint is unconstitutional, although it is not clear how this is to be interpreted precisely with regard to the possibility of the seizure of publications or the use of injunctions by the president of the court.¹¹

The second paragraph of Article 25 organizes a ‘cascade’ system for criminal complicity in printed press offences. This means that, in principle, only the writer or the author of an article or a book can be held responsible for its criminal content. The publisher, the printer or the distributor cannot be prosecuted in the case where the author is known and has his domicile in Belgium. This ‘cascade’ system was introduced in the Constitution of 1831 as a guarantee against private censorship by the publisher, the printer or the distributor: as they were not responsible for the content, they had no legal arguments to interfere in the content of journalistic articles, books or other writings. In a judgment of 31 May 1996 the Court of Cassation ordered that the ‘cascade’ system also applies for civil liability.¹²

The printed press is also protected in a special way by Article 150 of the Constitution which installs the jury (Assize Court) for printed press offences, as well as for political offences and criminal cases. The exclusive competence of the Assize Court in cases of criminal press offences has resulted, in practice, in fewer prosecutions as, for several reasons, no criminal press cases are brought before this Court.¹³ Instead, procedures are initiated before the civil courts: the courts of first instance.

The Criminal Law

Belgian criminal law complements the constitutional provisions on freedom of expression in so far as the penal code provides what is to be considered a criminal offence and punishes abuse of freedom of expression – for example, in order to protect the reputation of others. However, there is no special protection under the criminal law for judges. In the absence of an offence of contempt of court or any specific provisions to protect the authority of the judiciary, the general provisions of the Criminal Code are to be applied.

In criminal law a distinction is made between several offences that can damage the reputation of others. The crimes, qualified as calumny, defamation

and malicious divulgence, all concern the allegations of precise facts. Allegations which do not refer to concrete facts may be qualified as offences ('injuries'). And in the case of insulting public persons in their presence, the criminal offence of affront (slander, contempt) ('outrage') is applicable. The qualification of these crimes demands an '*animus injurandi*' (malicious intent) which means that good faith avoids criminal liability.¹⁴

Calumny, defamation and malicious divulgence In principle, calumny and defamation towards persons performing a public function, such as judges, or towards public institutions (the so-called 'constituted bodies'), can be prosecuted and punished in the same way as calumny and defamation towards private persons.¹⁵ This principle is enshrined in Article 4 of the Decree on the Press of 20 July 1831 stipulates that:

Calumny or abuse towards public officials, or towards bodies or agents exercising public authority, or towards any other constituent body, will be prosecuted and punished in the same way as calumny or abuse directed against individuals, except for cases detailed in clauses below.¹⁶

A rather similar provision is reflected in Article 446 of the Criminal Code which provides that 'Calumny and defamation towards any constituent body will be punished in the same way as calumny or defamation directed against individuals.'¹⁷ According to the Criminal Code, criminal 'calumny' arises if the alleged fact is not proven. 'Defamation' concerns the allegation of certain facts which are not susceptible of proof. If such allegations that harm the reputation of other persons are made public – for example, by the press – while the alleged fact amounted to defamation or calumny, the responsible persons (that is, the author or the journalist) can be punished following a complaint by the victim. According to Article 443 of the Criminal Code:

Anyone who, in such cases as indicated hereinafter, has maliciously imputed to a person a precise fact that is of a nature to undermine the honour of that person or to expose him to public contempt and that is not proved as required by law is guilty of calumny if the law accepts the proof of the alleged fact, and of defamation if the law does not accept the proof. . . . If this proof is sufficient, the imputation will not give rise to any repressive proceedings.¹⁸

The Criminal Code itself has indicated which legal means can be used as a proof. Facts in relation to the performance of the function of a person exercising public authority can be proven by all legal means. Allegations regarding the private life of an individual, even if he performs a public function, are legally more difficult to prove before the court; in such a case one has to rely on a judgment or an official (authentic) document in order not to be punished.

Article 447 of the Criminal Code provides that:

The person accused of a calumnious offence for having made allegations relating to the functions of either depositories or agents of public authority, or any person who is a public figure, or to any constituent body will be asked to provide by any ordinary means proof of such alleged details. If it is a question of a fact which deals with private life, the author of the allegation cannot use in his defence any proof that does not arise from a judgement or any authentic act.¹⁹

This means that the author of a press article or the person responsible for a radio or TV programme criticizing judges and making specific factual allegations can be prosecuted and punished under these articles of the Criminal Code if:

- the allegations inflict damage on the honour or reputation or expose to public disapproval
- the allegations are not or cannot be proven
- the allegations are made public maliciously, with an *animus injurandi* – that is, with the intention to defame or to harm.

Defamation and calumny are punished by imprisonment of between eight days and one year or by a fine. However, if the allegations can be proven, but they are made public not for the benefit of any private or public interest but solely with the aim of damaging another person's reputation, the Criminal Code punishes such allegations as 'malicious divulgence'. In Article 449, the Criminal Code provides that:

When there is at the time of the crime a legal proof of the alleged details (or facts), if it is established that the accused made the allegations without any public or private interest and solely with the aim to damage the other person's reputation, he will be punished, as guilty of malicious divulgence, with imprisonment of between eight days and two months and with a fine . . .²⁰

Offences Baseless allegations, opinions or value judgments which are considered damaging to another person's honour or reputation are to be qualified as 'offences' under Article 448 of the Criminal Code which provides that:

Anyone who has offended a person either by deeds, written words, images or emblems in one of the circumstances mentioned under Article 444 will be punished by imprisonment of between 8 days and two months and by a fine . . . Also punishable in this way is anyone who, under the circumstances indicated in Article 444, has offended by words anyone in his or her quality as, or as a result of his function as, an agent of public authority or the police or who is a public figure.²¹

In such cases there is no possibility of proving the correctness or truthfulness of the allegations, because no reference is made to precise facts. Article 444 of the Criminal Code is explicitly applicable when the offences dishonour public figures in the exercise of their public function.

Affront The provisions of Articles 275 and 276 of the Criminal Code specifically deal with what could be described as 'insults' towards ministers, members of parliament and other persons exercising public authority, including members of the judiciary. These facts are qualified as 'affront'. The criminal offence of affront applies when the insult relates to the exercise of an official function and when the insults are divulged maliciously in the presence of those persons exercising public authority. These insults according to Article 275, para. 1 can be punished by imprisonment of up to six months or a fine. Article 275, para. 2 provides for more severe sanctions should the insult take place in the courtroom. In such circumstances insults against judges can be punished with an imprisonment of up to two years. These provisions of the Belgian Criminal Code can be compared with 'contempt in the face of the court' when insulting the bench (misconduct in courtroom).²² This kind of contempt however falls outside the scope of criticising judges by the press as it is analysed in this contribution.

Civil Law

As there are no specific provisions for civil liability by the press, the general principle of tortious liability is applicable to the media and journalism. Articles 1382²³ and 1383²⁴ of the Civil Code accordingly provide a basis for civil proceedings for abuse of the freedom of the press and open the possibility for an action for damages against journalists. These articles apply when a 'fault' has been established and if, at the same time, there is damage with a sufficient level of causal connection between the fault and the damage. A publication is regarded as being a fault leading to civil liability when it breaches a criminal provision such as, for example, defamation or calumny.

Apart from any application of a criminal provision, tortious liability arises in the case of dissemination of ill-considered accusations without sufficient evidence or when gratuitously offensive terms or exaggerated expressions are employed. An action for damages on the basis of Articles 1382–1383 is also possible when a press article fails to respect an individual's private life. These elements are clearly developed in Belgian case law. In its judgment of 13 September 1991 the Court of Cassation confirmed the legality of the reasoning of the Brussels Court of Appeal in application of Articles 1382–1383 of the Civil Code. The Court agreed on the fact that:

the Court of Appeal based its decision that the appellants had abused the freedom of expression secured in Article 10 paragraph 1 of the Convention . . . not only on the need to protect the respondents' private life but also on the unchallenged grounds that the accusations made had not been proved; the criticism had been directed towards named judges; the matters relied on were irrelevant to the decisions that had been taken and the accusations had been inspired by a desire to harm the respondents personally and damage their reputation.²⁵

According to the case law of the civil courts, the press can be held liable if journalists are considered not to have been careful, prudent and diligent. Articles which include factually incorrect information, insufficiently checked facts, unnecessarily insulting or aggressive speech, intentionally damaging comments or invasion of privacy can lead to civil liability. It is standard case law that the constitutional freedom of the press does not restrict the principle enshrined in Article 1382 of the Civil Code.²⁶ Press cases on civil liability are handled before the court of first instance, sitting with three professional judges.²⁷

Of course, these civil cases can only lead to civil damages. In many cases, a civil damage of one franc may be ordered, although more substantial damages can be awarded. These damages awards are essentially restitutive. They may not have a punitive character. The highest damages on civil liability by journalists concerned an award of 500 000 francs.²⁸ Another possible type of 'sanction' which is imposed frequently in these civil cases is a publication order of the judgment in one or more journals or magazines. The costs of the publication are to be borne by the culpable journalist.

An often heard criticism is that the decision in cases of civil liability often comes too late, only months or years after the erroneous or defamatory article has been published. The finding of culpability in relation to civil liability is therefore not capable of restoring the damage to the victim's reputation. This explains why, in some cases, procedures have been tried out in order to obtain a court order preventing the distribution of a press article or the broadcasting of a TV programme. An injunction order by the president of a civil court sitting in matters of special urgency²⁹ is to be regarded, however, as a preventive measure in breach of Article 25 of the Belgian Constitution and is otherwise difficult to reconcile with Article 10 of the Convention.³⁰

Finally, just like any other citizens, judges can invoke a right of reply in application of the Law of 23 June 1961 (revised on 4 March 1977). The basic condition for a right of reply is that one's name is mentioned or that an article or broadcast programme implicitly refers to an identifiable person.³¹ If the text of the right of reply meets all the conditions of the law, the newspaper, magazine or broadcasting organization is obliged to publish or communicate the reply in full and without undue delay.

Other Possible Ways of Complaining about Criticizing Judges in the Media*The Flemish Council of Disputes on Radio and Television*

A very specific procedure is available only with regard to radio and television, and only within the Flemish community. In applying Article 79 (Article 116 octies decies) of the Broadcasting Decree after a complaint, the Flemish Council of Disputes on Radio and Television can investigate whether there has been a breach of the journalistic ethics in a litigious radio or TV programme. The Council of Disputes is composed of judges, academics and professional journalists. If the Council establishes that there has been an infringement of journalistic ethics, it can make a declaration to that effect or issue a warning, as well as requiring its decision to be broadcast.³² So far, the Council has not had occasion to adjudicate on matters relating to judicial reporting or criticizing judges.

The Council of Ethics of the AGJPB/AVBB

Similarly, within the organization of professional journalists in Belgium (Association Générale des Journalistes Professionnels de Belgique, AGJPB – Algemene Vereniging van Beroepsjournalisten in Belgique, AVBB) the 'Council of Ethics' can receive complaints concerning the alleged non-application of the professional ethics of journalists. Membership of the AGJPB/AVBB implies that the national and international codes of ethics are to be applied by the member journalists. This means, *inter alia*, that the press must strive to respect for the truth, that it will not be gratuitously offensive and will respect the privacy of individuals.³³ The Council of Ethics is an internal body, within the private organization of professional journalists with competence over its own members of the AGJPB/AVBB. Complainants and respondents before the Council of Ethics have equal rights to be informed of the Council's decision.³⁴ A College of Ethics acts as an appeal chamber.

A summary of the decision is published in the annual report of the Council, and in the AGJPB/AVBB magazine, *Le Journaliste/De Journalist*. The Council's decisions have no juridical effects. The most far-reaching measure that could be taken is that a professional journalist could temporarily or definitively lose his or her membership of the AGJPB/AVBB. In other words, the impact of the Council's decisions is purely moral. Recently, the Council of Ethics decided in a case concerning the defamation of a judge.³⁵ According to the Council, the defendant journalists in some press articles had defamed the public prosecutor of the court of Brussels in a way that breached their professional ethics.

Case Law

The principle that freedom of expression also applies to judicial reporting is clearly recognized and emphasized in Belgian case law. In a recent judgment of the court of first instance of Nijvel, it was considered that:

... the press has notably the right and the duty to indicate abuses and excesses when this is in the public interest; and that among the issues of public interest that the press has a responsibility to report are undoubtedly those which deal with the functioning of the law and the forces of order.³⁶

In a judgment of the Court of Cassation of 5 April 1996 it is recognized that the reporting by the press of cases before the courts is protected by the principle of freedom of expression and information: 'that as far as publicity is concerned, dissemination by the media is a consequence of freedom of expression and communication.'³⁷

The criticizing of judicial decisions by the press is considered as an inherent part of the freedom of judicial reporting:

... that the freedom of the press carries with it the right to exercise control over the judicial work of the magistracy, including judgments which fall in the public domain through their reading in hearings and which can then be the object of appraisal and discussion; that just because a case has been definitively judged does not mean that it can no longer be criticized.³⁸

In the same way, the president of the court of first instance of Brussels in a decision of 1 March 1996 observed:

... a judgment is a public act open to criticism as anyone is free to express himself in the manner which he considers the most effective through any form of media.³⁹

In a 1986 case⁴⁰ the city magazine of Bruges, *Kan't*, published two articles under the title 'Hoe word ik rechter' ('How do I become a judge?'). Both articles described the influence of political parties on the appointment of magistrates in the courts of Bruges. Some concrete examples were given and some names of magistrates were published, with reference to their political background. It was also argued that the political affiliation seemed much more important than the professional skills or legal competence of some recently nominated magistrates. The author of the article, as well as the publisher, were sued under civil law by a substitute public prosecutor (a 'substitute-procurer') who was mentioned explicitly as an example of the latter category. The author and the editor were cited for affecting the good name and reputation

and for potentially damaging the career of the plaintiff by means of the allegations in the article.

In its judgment of 17 April 1989 the court of first instance of Bruges was of the opinion that the defendants were liable for civil offence ('injuries') under Article 1382 of the Civil Code and Article 448, para. 2 of the Criminal Code. According to the judgment, the author and the publisher had undoubtedly committed an offence by directly and personally affecting the integrity and invading the privacy of the substitute-procurer. The court considered, *inter alia*, that the defendants had acted maliciously and that the comments and critics in the article had nothing to do with press freedom or freedom of expression. The allegations with regard to the applicant substitute-procurer were qualified as 'insulting writings' and as a 'flagrant fault' which failed to respect any elementary feeling for journalistic ethics. The court decided that the defendants had to pay 200 000 francs in moral and material damages and ordered the judgment to be published in two newspapers and two regional weekly magazines, as well as in the city magazine itself.

The De Haes and Gijssels Case

There is also the internationally renowned *De Haes and Gijssels* case.⁴¹ In 1986 Leo De Haes was the editor of the weekly magazine, *Humo*, on which Gijssels worked as a journalist. Between June and November 1986 they published five articles in which they firmly criticized the judges of the Antwerp Court of Appeal for having, in a divorce case, awarded custody of the children to the father, Mr X, a notary. The three judges of the Antwerp Court of Appeal, together with the advocate-general were criticized in the articles for not having protected the children and for being biased in favour of notary X.⁴²

The three judges and the advocate-general instituted civil proceedings against Mr De Haes and Gijssels and against *Humo*'s editor, publisher, statutory representative, printer and distributor. On the basis of Articles 1382–1383 of the Civil Code they sought compensation for the damage caused by the statements in the articles in question – statements that were described as very defamatory. The court of first instance of Brussels was asked to order the defendants to pay nominal damages of one franc each in respect of non-pecuniary damage and to publish the judgment in *Humo* and in six daily newspapers at the defendants' expense.

In its judgment of 29 September 1989 the Brussels court positively answered the request, although only the case against the two journalists was withheld because of the 'cascade' system of responsibility. The court was of the opinion that the two journalist defendants 'committed a fault in attacking the plaintiff's honour and reputation by means of irresponsible accusations and offensive insinuations'.

On 5 February 1990 the Brussels Court of Appeal affirmed this judgment, holding, *inter alia*, that the two *Humo* journalists had 'commented on a court case and besmirched the honour of magistrates without being in possession of all the necessary information, and this makes the complete irresponsibility of their malicious attacks even more flagrant'. Furthermore the judgments considered that:

... the words used and the insinuations and imputations made in the articles and passages in question are extremely virulent and dishonouring, since the original plaintiffs, referred to by name, were accused of having been biased as senior magistrates, and it was gratuitously insinuated ... that they came from an extreme-right-wing background and belonged to the circle of friends of the children's father ... all this without any serious and objective evidence whatever being adduced or existing to show the accusations against these magistrates had any factual basis.

It was emphasized that 'false reports of this kind, however, caused the original plaintiffs irreparable damage, since to be accused of bias is the worst possible insult that can be levelled at a magistrate'. The Court also referred to the magistrates' special position:

Given the discretion incumbent upon them by virtue of their office, magistrates cannot defend themselves in the same way as, for example, politicians, if certain newspapers, apparently hungry for lucrative sensational stories, attack them and drag them through the mud.

Mr De Haes and Gijssels applied to the Court of Cassation, which dismissed their appeal on 13 September 1991. Hence the liability of De Haes and Gijssels was confirmed. For lack of due care (Article 1382 of the Civil Code) they were ordered to pay one symbolic franc of damages and to bear the cost of the publication of the judgment.

In its judgment of 27 February 1997 the European Court of Human Rights was of the opinion, however, that these judgments amounted to an interference with the journalists' exercise of freedom of expression in breach of Article 10 of the European Convention on Human Rights.⁴³ According to the European Court, the articles were indeed based on a mass of detailed information which itself was based on thorough research. The Court also took into consideration the fact that Mr De Haes' and Mr Gijssels' comments were undoubtedly severely critical, but that they nevertheless appeared proportionate to the stir and indignation caused by the matters alleged in their articles.

The Doutrèwe Case

The Doutrèwe judgment of 16 December 1997 of the court of first instance of

Brussels was brought by Mme Doutrève (an investigating magistrate) against Philippe Brewaeys/*Le Soir Illustré*.⁴⁴ In January 1997 *Le Soir Illustré* published an article focusing on the investigative judge Martine Doutrève of Liège in the *Dutroux* case, involving the killing of two little girls, Julie Lejeune and Melissa Russo, whose dead bodies were found in August 1996. Mme Doutrève was heard several times by the parliamentary commission investigating the disfunctioning of justice in this case. Some questions were raised on the way Mme Doutrève handled the case of the missing children. While the hearings of the parliamentary commission were taking place, the weekly magazine, *Le Soir Illustré*, published an article on Mme Doutrève under the title 'Une demoiselle sur une balançoire' ('A young lady on the swings'), accompanied by a photograph of Mme Doutrève in a bathing suit taken at the holiday villa of a certain Mr Schevenels, in the south of France. Part of the article focused on the relationship between the Doutrève and the Schevenels families. At the time of the article's publication Mr Schevenels and Mme Doutrève's husband, Mr Guy Wolf, were inculpated for fraud in the *Comuele* case.

With regard to the revelations on the relationship between the Doutrève family and Mr Schevenels, the Court was of the opinion that this information was relevant and factual. It was argued that this information in the article was protected by the right of the journalist to criticize and comment on actual matters of public interest and on the administration of justice. The judgment recognized that 'a person involved in a judicial case in the news can be the object of more criticism and comments from journalists than the man in the street'.⁴⁵

With regard to the publication of the photograph and to some other allegations and commentary, the Court, however, came to the conclusion that there was an infringement of Mme Doutrève's right to privacy. The Court considered, *inter alia*, that:

This was not a topical photo where the plaintiff might, for instance, have been photographed carrying out her function as investigative judge in a media case or at the time of her testimony to the 'Dutroux' commission; that the fact that Mme Doutrève has been subjected to the glare of the media as a result of her office in the case in point is immaterial because it is precisely and undoubtedly a private photograph.

That if journalists can reveal matters relevant to the private life of individuals who, as here, are in the news momentarily, it goes without saying that these matters must be superfluous and must fit the public's need for information; that in this case the publication of the photograph in question does not fit with the need for information in the article. . . .

Given that, on top of this, the invasion of the right of her image ('*droit à l'image*') is coupled with an incorrect attack on her private life. . . .

The link between the plaintiff's holidays and her professional activity made by the journalist in his comments with regard to the photo was wrong; that in fact the nature of the comments suggested, without any proof to back it up, that the manner in which she conducted the investigation entrusted to her was affected by these holidays taken beforehand.⁴⁶

The defendant journalist was ordered to pay 500 000 francs in moral damages to Mme Doutrève, while at the same time an order was made to publish the judgment in two newspapers (*Le Soir* and *La Libre Belgique*), as well as in *Le Soir Illustré* itself.

The Court of Appeal of Brussels, in a judgment of 5 February 1999,⁴⁷ confirmed that the publication of the photograph of Doutrève neglected the right of her image and was an intrusion of her privacy. With regard to the content of the litigious article the Court noted that the article as such, and some of the information it referred to, was not problematic. As a matter of fact, the journalist was reporting on the functioning of the administration of justice and of individual judges. The Court emphasized that 'il s'agit d'informations exactes que la presse peut divulguer parce qu'elle sont nécessaires à l'information du public quant au fonctionnement de la justice et à la personnalité des magistrats qui la rendent'. The Court, on the other hand, was of the opinion that the journalist had not sufficiently proven the truthfulness or correctness of some allegations against Doutrève. According to the Court, the journalist has acted with 'une légèreté coupable'. Nevertheless, the Court considered this 'light fault' was not a sufficient basis to apply civil liability of the journalists in relation to the content of the litigious article. With regard to the publication of the photograph that neglected the investigating judge's right of image and right of privacy, the Court decided to reduce the award of damages to one symbolic franc, emphasizing that civil awards of damages for a victim 'doivent toutefois réparer son préjudice et non punir l'auteur de l'atteinte'. At the same time, it confirmed the order to publish the judgment in two newspapers and a weekly magazine.

In a case against the journalist C. Moniquet, Judge Doutrève complained of damage to her honour, reputation and right of privacy. Shortly after she appeared before the parliamentary commission on the Dutroux case, her personal notes made in preparation for the commission hearing were published, without her consent, in the weekly magazine *Ciné-Télé-Revue*. The Brussels court, in a judgment of 23 March 1999, was of the opinion that the publication of these personal notes was a violation of the right of privacy while the critical comments added by the journalist overstepped the freedom of expression principle.⁴⁸ The Court ordered an award of damages of 500 000 francs and the publication of the judgment in the magazine *Ciné-Télé-Revue*.

The journalist M. Bouffieux, in another case, was not found liable with regard to an article that contained some criticism towards Judge Doutrève.

The judgment of the court of first instance of Brussels of 23 March 1999 refers, *inter alia*, to some considerations of the Strasbourg Court in the *De Haes and Gijssels* case. The court also emphasized that the journalist's aim was to inform the public on a matter of general interest, while he had acted in due care and diligence.⁴⁹

In a judgment by the court of first instance of Brussels of 23 December 1999 another journalist was considered liable in terms of defamatory comments towards the investigating judge, Mme Doutrève. Steve Polus, the editor-in-chief of *Le Soir Illustré* had criticized the judgment of 16 December 1997 in which his journalist colleague, Philippe Brewaeys, was held liable for the infringement of Mme Doutrève's privacy and for damaging her reputation without sufficient proof of the allegations.⁵⁰ In his article, Mr Polus repeated some of the allegations which were originally published in the Philippe Brewaeys article. In its judgment of 23 December 1999 the Brussels court concluded that:

Under the pretext of what he describes as a criticism of the judgment of 16 December 1997, the journalist widely spread insidious considerations about the applicant; this leads one to believe that the journalist's actual aim was to discredit the applicant's professional life.⁵¹

The judgment also emphasized that Mme Doutrève, who had become a public figure because of the *Dutroux* case, had had her professional reputation as a judge especially damaged by Mr Polus's litigious article in which Mme Doutrève was presented as incapable of guaranteeing fair justice. In the words of the court:

That the applicant [who] became a public figure when the facts [of this case] attracted the attention of an entire country is because of the insinuations and the lies set out in the attacked article, which harmed her in her private life as well as in her professional life being presented as unable to guarantee fair justice.⁵²

The court also stressed that the defendant journalist in his article did not merely analyse the principles under discussion in a judgment and that the right of criticism by the media is to be exercised within the limits of a certain correctness.⁵³

After considering the fact that Mr Polus had repeated some of the allegations published earlier by Mr Brewaeys, although he had been warned by the judgment of 16 December 1997 that these allegations were defamatory towards Judge Doutrève, the court decided that the editor-in-chief of *Le Soir Illustré* 'went over the threshold of acceptable criticism within the context of the freedom of expression; his aim is to belittle the applicant with an insulting article'.⁵⁴ As a consequence of this reasoning, the court ordered an award of

moral damages of 750 000 francs. The court explicitly disagreed with the Brussels Court of Appeal which had earlier decided, in its judgment of 5 February 1999, that moral damage can only lead to an award of one symbolic franc.⁵⁵ In the view of the court of first instance of Brussels:

Compensation given to a victim whose honour is damaged does not amount to punishing the author of the harm. [Monetary] damages are meant to repair the harm in the most complete manner.⁵⁶

Finally the defendant journalist was also ordered to publish the full text of the judgment in two newspapers (*Le Soir* and *La Libre Belgique*) and in the magazine *Le Soir Illustré* itself.⁵⁷

A recent decision of the Council of Ethics concerns a complaint by the public prosecutor (*Procureur-des-Konings*) at the court of Brussels, Benoit Dejemeppe. The magistrate complained about three articles published in *De Morgen* with titles such as 'Dejemeppe linked to prostitution' and 'Public prosecutor leads a brothel'. The articles are to be situated in a broader context in which the public prosecutor of Brussels was encountering a great deal of criticism because of his alleged responsibility in the case of Loubna Benaïssa, the young girl, who disappeared some years ago and whose dead body was found in 1997. Based on the information from only one source *De Morgen* had revealed that Dejemeppe and his family had contact with the prostitution business in Brussels. This allegation led to a complaint by Mr Dejemeppe at the Council of Ethics of the AGJPB/AVBB.

After a hearing with Ludwig Verduyn (the journalist) and Yves Desmet (the editor-in-chief of *De Morgen*), the Council of Ethics came to the conclusion that *De Morgen* could not rely on sufficiently trustworthy information to publish the allegations on Dejemeppe. The allegation published in *De Morgen*, according to which Dejemeppe and his family had contact with the prostitution business in Brussels, seemed to be based on only one source which was not very reliable. The Council concluded:

1. The accusations made by *De Morgen* against the prosecutor Dejemeppe are very serious. Even after a careful reading of the text, the message remains that there are links between the highest magistrate in the Brussels Public Prosecutor's office and the world of prostitution.
2. The chief editor and the journalist maintain that other elements support the accusations. That is what they say should come out of the confidential documents that they have given to the Council of Ethics. The Council has examined the documents but can only record that they can be interpreted in different ways. In any case, they do not confirm the accusations against Benoit Dejemeppe that he was maintaining links with the world of prostitution.⁵⁸

The Council also took into consideration that *De Morgen*, in the days following publication, made no reference to the fact that Dejemepe had written a letter protesting against the content of the articles.

In its conclusion the Council decided that *De Morgen* acted inaccurately by publishing such serious allegations against the public prosecutor. According to the Council the grievous accusations seriously compromised the dignity of the public prosecutor and his family:

4. The Council of Ethics is consequently of the opinion that *De Morgen* has acted in a negligent manner in this affair. The newspaper has published extremely serious accusations against the public prosecutor and this in a sensational and unilateral manner (notably on the front page and in the editorial). The accusations undermine the dignity of the prosecutor and that of his family.⁵⁹

This case demonstrates that magistrates can complain about inaccurate or harmful information published by the media and that the Council of Ethics is taking its moral competence seriously in evaluating the application or non-application of professional ethics by its members.

Furthermore, it must be emphasized that the decision of the Council of Ethics in the *De Morgen* case was published together with an editorial in which the editor apologized because of the erroneous information *De Morgen* had published and which compromised the Brussels' public prosecutor. This voluntary publication of the decision by *De Morgen* in full, the fact that *De Morgen* explicitly confirmed the moral authority of the Council's decision, together with the apologies offered to the public prosecutor in the editorial, made clear that the self-disciplinary instrument of the Council of Ethics can also be an important tool in finding a balance between the freedom of the press and critical judicial reporting on the one hand, and responsible and accurate journalism, with respect for the rights of others, on the other.

Conclusions

It has been indicated how general provisions in the criminal law (calumny, defamation, malicious divulgence, offence by the press) and in civil law (Articles 1382–1383 of the Civil Code) can be the legal basis, in Belgium, for action against media criticism of judges. For many decades criminal prosecution against the press did not take place in Belgium. The exclusive competence of the Assize Court in cases of criminal press offences has resulted in a factual criminal impunity as no criminal press cases were brought before the Court of Assizes. Instead, as is illustrated by reference to some case law, procedures are initiated before the civil courts. This means,

however, that press cases are deliberated by professional judges of the civil courts and not by the lay judges of the Assize Court jury. As professional magistrates have to decide on the conflicts between journalists and judges in some cases, the media (and the public) may have the impression that the courts will pay more attention to the need for protection against destructive attacks on members of the judiciary than on the principle of freedom of expression and information.

A solution might be to bring these cases before the Assize Court. In such a procedure, the infringement in the media's freedom of expression is not dependent on a judgment by professional judges, but on a verdict by the jury. The procedure before the Assize Court is to be reformed, however, in order to open a realistic perspective for such kind of a criminal procedure in cases of press offences.

Another way of avoiding a decision by professional judges, as the case *Dejemepe v. De Morgen* made clear, is to complain to the Council of Ethics. Such a procedure has the advantage that a judge is not complaining before a court in which fellow judges have to decide on an issue in which the judges institutionally are involved, or at least concerned. The disadvantage, however, is that the plaintiff judge also might not have much confidence in bringing his case before the Council of Ethics, as this Council is exclusively composed of professional journalists. In the (near) future, however, the Council of Ethics might be replaced by a Council of Journalists with a mixed composition of journalists, editors and publishers under the presidency of a magistrate and completed with other members or experts who are not journalists (for example, university professors in ethics, philosophy, communication sciences or law).⁶⁰ The Flemish Council of Disputes on Radio and Television already has such a mixed composition.

Anyway, it should be stressed that, in a procedure before the civil courts, the professional judges considering the civil liability of a journalist, have to take into account the perspective of Article 10 of the European Convention and have to apply the Strasbourg case law. This means that the Belgian civil courts, more as they did in the past, have to give more weight to freedom of expression and information in so far as there is a sufficient factual basis for the allegations against, or criticisms of, judges published by the media. Journalists, for their part, must be aware that criticizing judges requires accurate and correct reporting and that allegations should be based on sufficient and pertinent facts, taking into account also the general context of a court case.

In a modern democracy the courts cannot operate in a vacuum; this means that critical reporting, discussion and disputes on pending court cases, including the criticizing of judges, must be tolerated.

Notes

- 1 Court of Appeal, Brussels, 5 February 1990, *Rechtskundig Weekblad* (1989–90), p. 1464.
- 2 *Prager and Oberschlick v. Austria* (1995) Eur. Ct. HR, Series A.313; (1996) 21 EHRR 1, para. 34.
- 3 (1997) 25 EHRR, 1
- 4 See, for example, J. Delva, 'De onafhankelijkheid van de Belgische rechter ten aanzien van de uitvoerende macht', *Tijdschrift voor Bestuurswetenschappen en Publiek Recht* (1988), pp. 242–43 and J. Velu, 'Beschouwingen over de Europese regelgeving inzake betrekkingen tussen gerecht en pers', *Rechtskundig Weekblad* (1995–96), pp. 273–308. On this issue, see also P. Deltour, *Man bijt hond. Over pers, politiek en gerecht*, (Antwerp: Icarus, 1996) and J. Clement and M. Van de Putte, 'De vierde macht', *De gespannen driehoeksverhouding tussen media, gerecht en politiek* (Groot-Bijgaarden: Globe, 1996).
- 5 The Brussels Court of Appeal rejected the journalists' request to admit in evidence the documents referred to in the impugned articles or to hear some witnesses. The Strasbourg Court was of the opinion that the rejection of this request had put the journalists at a substantial disadvantage *vis-à-vis* the plaintiff judges and that therefore there was a breach of the principle of equality of arms.
- 6 This was a shocking case in which minors were sexually abused and murdered. A parliamentary commission investigated the failures of the judiciary system. Over 300 000 people demonstrated in the streets of Brussels in October 1996 against the lack of action by the police and the judiciary in this case. See also F. Tanghe, *Het spaghetti-arrest. Recht en Democratie* (Antwerp/Baarn, Hadewijch, 1997).
- 7 See D. Voorhoof, *De relatie tussen Media en Justitie* (Brussels: Koning Boudewijnstichting, 1998).
- 8 'Freedom of worship and its public exercise, together with the freedom to manifest opinions on all subjects, are guaranteed, save for the punishment of offences perpetrated in exercising those freedoms.'
- 9 See J. Velaers, *De beperkingen van de vrijheid van meningsuiting* (Antwerp/Apeldoorn: Maklu Uitgevers, 1991) and D. Voorhoof, *Actuele vraagstukken van mediarecht. Doctrine en jurisprudentie* (Antwerp: Kluwer Rechtswetenschappen, 1992).
- 10 'The press shall be free; there shall never be any censorship; no security can be demanded of writers, publishers or printers.'
- 11 See J. Velaers, 'De actuele toepassing van de grondwettelijke waarborgen inzake de vrijheid van de media', *ICM-Jaarboek Mensenrechten 1995–1996*, (1996), pp. 83–98; M. Hanotiau, 'La censure de la presse écrite par le juge des référés', *Auteurs & Media*, (1997), pp. 203–12 and D. Voorhoof, 'De doorwerking van publiekrechtelijke beginselen in de civielrechtelijke aansprakelijkheid voor informatie via (multi-)media', *Publiekrecht. Doorwerking van het publiekrecht in het privaatrecht. Referaten van de Postuniversitaire Cyclus Willy Delva 1996/1997* (Ghent: Mys & Breesch, 1997), pp. 485–523. See also D. Voorhoof, 'Interdiction de diffusion d'un livre sur l'affaire Dutroux: censure illicite ou mesure nécessaire?', *Auteurs & Media*, 2 (1999), pp. 250–59.
- 12 Court of Cassation, 31 May 1996, *Recente Arresten van het Hof van Cassatie*, 1996/9, 389, note D. Voorhoof.
- 13 D. Voorhoof, 'Drukpersmisdrijven en de bevoegdheid van het Hof van Assisen' (note under Court of Cassation, 7 February 1995), *Algemeen Juridisch Tijdschrift*, (1995–96), pp. 249–50. Offences which do not include a punishable opinion, however, do not enjoy the application of Article 150 of the Constitution: for example, the reporting of the hearing in a divorce case, which infringes Article 1270 of the Code of Procedure; the disclosure of the identity of victims of certain sexual offences, which infringes Article 378 *bis* of the

Criminal Code; the reporting on hearings before the youth court, in breach of Article 80 of the Act of 30 April 1965 concerning the protection of the youth. Press publications infringing these provisions can be prosecuted in the criminal court, sitting with professional judges. Due to a revision of Article 150 of the Constitution on 7 May 1999, printed press offences which are inspired by racism or xenophobia are explicitly exempted and can also be prosecuted now in a criminal court, sitting with professional judges. See D. Voorhoof, 'Vacature met racistische inhoud en de kwalificatie "drukpersmisdrijf"', *Algemeen Juridisch Tijdschrift* (1999–2000), pp. 6–7; and also E. Francis, 'Bedenkingen bij de "correctionalisering" van racistisch geïnspireerde drukpersmisdrijven', *Rechtskundig Weekblad* (1999–2000), pp. 377–94.

- 14 For a general overview, see P. Arnou, 'Aanranding van de eer en goede naam van personen', in *Om deze redenen. Liber Amicorum A. Vandeplas* (Ghent: Mys & Breesch, 1994), pp. 49–90.
- 15 The constituted bodies are installed and organized by law and perform a public service. Through their members but not through the institutions themselves they can claim their rights in court.
- 16 'La calomnie ou l'injure envers des fonctionnaires publics, ou envers des corps dépositaires ou agents de l'autorité publique, ou envers tout autre corps constitué, sera poursuivie et punie de la même manière que la calomnie ou l'injure dirigée contre les particuliers, sauf ce qui est statué à cet égard dans les dispositions suivantes.'
- 17 'La calomnie et la diffamation envers tout corps constitué seront punies de la même manière que la calomnie ou la diffamation dirigée contre les individus.'
- 18 Article 443 reads as follows:

Celui qui, dans les cas ci-après indiqués, a méchamment imputé à une personne un fait précis qui est de nature à porter atteinte à l'honneur de cette personne ou à l'exposer au mépris public, et dont la preuve légale n'est pas rapportée, est coupable de calomnie lorsque la loi admet la preuve du fait imputé, et de diffamation lorsque la loi n'admet pas cette preuve . . . Si cette preuve est rapportée en insuffisance, l'imputation ne donnera lieu . . . à aucune poursuite répressive.

- 19 Article 447 of the Criminal Code which provides:

Le prévenu d'un délit de calomnie pour imputations dirigées, à raison des faits relatifs à leurs fonctions, soit contre les dépositaires ou agents de l'autorité ou contre toute personne ayant un caractère public, soit contre tout corps constitué, sera admis de faire, par toutes les voies ordinaires, la preuve des faits imputés. S'il s'agit d'un fait qui rentre dans la vie privée, l'auteur de l'imputation ne pourra faire valoir, pour sa défense, aucune preuve que celle qui résulte d'un jugement ou de tout autre acte authentique.

- 20 Article 449 of the Criminal Code provides:

Lorsqu'il existe au moment du délit une preuve légale des faits imputés, s'il est établi que le prévenu a fait l'imputation sans aucun motif d'intérêt public ou privé et dans l'unique but de nuire, il sera puni, comme coupable de divulgation méchante, d'un emprisonnement de huit jours à deux mois et d'une amende . . .

- 21 Article 448 of the Criminal Code provides:

Quiconque aura injurié une personne soit par des faits, soit par des écrits, images ou emblèmes, dans l'une des circonstances indiquées à l'article 444, sera puni d'un emprisonnement de huit jours à deux mois et d'une amende . . . sera puni des mêmes

108 *Freedom of Expression and the Criticism of Judges*

peines, quiconque, dans l'une des circonstances indiquées à l'article 444, aura injurié par paroles, en sa qualité ou en raison de ces fonctions, une personne dépositaire de l'autorité ou de la force publique, ou ayant un caractère public.

- 22 See, for example, Article 759–763 of the Code of Procedure. See also Article 452 of the Criminal Code:

Ne donneront lieu à aucune poursuite répressive les discours prononcés ou les écrits produits devant les tribunaux, lorsque ces discours ou ces écrits sont relatifs à la cause ou aux parties. Les imputations calomnieuses, injurieuses ou diffamatoires étrangères à la cause ou aux parties pourront donner lieu soit à l'action publique, soit à l'action civile des parties ou des tiers.

- 23 'Any act committed by a person that causes damage to another shall render the person whose fault the damage was caused liable to make reparation for it.'
- 24 'Everyone shall be liable for damage he has caused not only through his own act but also through his failure to act or his negligence.'
- 25 Court of Cassation, 13 September 1991, *Rechtskundig Weekblad* (1991–92), p. 464 and *Arresten van het Hof van Cassatie* (1991–92), p. 46. See also D. Voorhoof, *Actuele vraagstukken*, op. cit., p. 276 et seq.; J. Velaers, 'Schrijven over rechters. Enkele beschouwingen over de grenzen aan de gerechtsverslaggeving', in X., *Liber Amicorum Alfons Vandeuren* (Ghent: Mys & Breesch, 1995), pp. 307–28 and D. Voorhoof, 'De grenzen aan de kritiek op (leden van) de rechterlijke macht', *Recht en Kritiek* (1989), pp. 280–301.
- 26 For a general introduction on the civil liability of the press, see J. Milquet, 'La responsabilité, aquilienne de la presse', *Annales de Droit de Louvain*, 1 (1989), pp. 33–86; H. Vandenberghe, 'Over persaansprakelijkheid', *Tijdschrift voor Privaat Recht* (1993), pp. 843–83; and D. Voorhoof, 'De rechtsbescherming in geval van misbruik van de persvrijheid: overzicht van rechtspraak (eerste deel)', *Droit de la Consommation/Consumentenrecht*, 19 (1992–93), pp. 199–243.
- 27 Article 92, para. 1, s.2 of the Code of Procedure.
- 28 See also F. Jongen, 'Responsabilité, de la presse: la fin du symbolisme?' (note under Court of first instance of Brussels, 16 December 1997), *Journal des Procès*, 341 (1998), p. 30. More recently, higher amounts of damages were awarded by the Brussels court of first instance. Two journalists were sentenced to pay damages of 2 200 000 francs for criticizing, in a defamatory way, some members of the police: Court of first instance of Brussels, 16 November 1999, *Auteurs & Media*, 1–2 (2000), p. 117. See also P. Deltour, 'De X-files. Justitie houdt lelijk huis onder gerechtsjournalisten', *De Journalist*, 5 (1999), pp. 8–9; and S.P. de Coster, 'Les jugements Bouffioux-Van Heeswijck et Brewaeys-Deliège', *Auteurs & Media*, 1–2 (2000), pp. 123–29.
- 29 'Référé/kort geding' (summary proceedings): Article 18, s.584 of the Code of Procedure.
- 30 M. Hanotiau and M. Kadaner, 'Le référé dans la presse écrite et dans l'audiovisuel', *Revue de Droit de l'ULB* (1993), pp. 147–92; D. Voorhoof, 'Beperkingen op de expressievrijheid via de kortgedingrechter: een omstreden rechtsmiddel', *Auteurs & Media* (1997), pp. 168–71 and J. Velaers, 'De actuele toepassing', op. cit., pp. 86–98. For some recent applications, see President of the court of first instance of Brussels, 9 January 1997, *Auteurs & Media*, 2 (1997), p. 197; Brussels Court of Appeal, 12 June 1997; *Jurisprudence de Liège, Mons et Bruxelles* (1998), p. 764; and Brussels Court of Appeal, 27 June 1997; ibid., p. 768.
- 31 See D. Voorhoof, 'Het recht van antwoord', *Mediagids/Mediarecht*, 3 (1995), pp. 27–36.
- 32 See also D. Voorhoof, 'De Vlaamse Geschillenraad voor radio en televisie', *Mediagids/Mediarecht*, 8 (1997), pp. 69–76.
- 33 P. Juusela, *Journalistic Codes of Ethics in the CSCE Countries*, (Tampere: University of

Tampere, 1991). See also the 4th European Ministerial Conference on Mass Media Policy, *The Media in a Democratic Society*, Resolution no. 2, Journalistic freedoms and human rights, MCM, 20 (94), 7–8 December 1994 and Steering Committee on the Mass Media, *Journalistic Freedoms and Human Rights in the Member States of the Council of Europe: Information Submitted by Experts* (Strasbourg, 1994), MM-S-JF (94), p. 13.

- 34 See also D. Voorhoof, 'De titel van beroepsjournalist en de bewaking van de journalistieke deontologie door de AVBB', *Mediagids/Mediarecht*, 9 (1997), pp. 59–70.
- 35 Raad voor Deontologie, 11 February 1998, *Auteurs & Media*, 2 (1998), p. 160.
- 36 '... que la presse a notamment le droit et le devoir de signaler les abus et les excès dans l'intérêt général; que parmi les thèmes d'intérêt général sur lesquels il incombe à la presse de communiquer des informations et des idées figurent sans nul doute ceux qui concernent le fonctionnement de la justice et les forces de police'. See court of first instance of Nijvel, 11 September 1997, *Auteurs & Media*, 2 (1998), pp. 157. See also Brussels Court of Appeal, 3 December 1997, *Auteurs & Media*, 3 (1998), pp. 255.
- 37 'Qu'en ce qui concerne la publicité... la diffusion par les médias constitue un corollaire de la liberté d'expression et de communication.' See Court of Cassation, 5 April 1996, *ICM-Jaarboek Mensenrechten 1995–96* (1996), p. 429.
- 38 'Que la liberté de la presse emporte le droit d'exercer son contrôle sur l'oeuvre juridique de la magistrature, en ce compris des jugements, tombés dans le domaine public par suite de leur lecture à l'audience, et qui peuvent faire l'objet d'une appréciation et d'une discussion; qu'il ne suffit pas qu'une cause soit définitivement jugée pour qu'elle ne puisse plus être critiquée.' See court of first instance of Brussels, 29 June 1987, *Journal des Tribunaux*, 1987, p. 685.
- 39 'Un jugement est un acte public ouvert à critique, chacun étant libre de s'exprimer de la manière qu'il estime la plus adéquate, par la voie de n'importe quelle media.' See president of the court of first instance of Brussels, 1 March 1996, unpublished, no. 95/1992/C, *SA Sierra 21 v. RTBF*.
- 40 D. Voorhoof, *Actuele vraagstukken van mediarecht*, op. cit., p. 253.
- 41 Court of first instance of Brussels, 29 September 1989, 'W, X, Y and Z v. De Morgen and Humo', *Recht en Kritiek* (1989), p. 302; Court of Appeal of Brussels, 5 February 1990, *Rechtskundig Weekblad* (1989–90), p. 1464 and Court of Cassation, 13 September 1991, *Arresten van het Hof van Cassatie* (1991–92), p. 46. See also D. Voorhoof, 'Die grenzen aan de kritiek op (leden van) de rechterlijke macht', *Recht en Kritiek* (1989), pp. 280–301.
- 42 Articles with an analogue content at that time also were published in the newspaper, *De Morgen*. The editor-in-chief, as well as the journalists, were held liable for lack of due care, just as in the case against De Haes and Gijssels. The journalists of *De Morgen*, however, did not complain in Strasbourg.
- 43 See D. Voorhoof, 'Het Humo-arrest: scherpe kritiek op rechters geoorloofd', *Mediaforum*, 4 (1997), pp. 68–69.
- 44 Court of first instance of Brussels, 16 December 1997, *Journal des Procès*, 341 (1998), p. 24.
- 45 '... une personne mêlée à l'actualité judiciaire puisse faire l'objet de plus de critiques ou de commentaires de la part du journaliste que le premier venu.' See also court of first instance of Brussels, 29 June 1987, *Journal des Tribunaux* (1987), p. 625.
- 46 'Qu'il ne s'agit pas d'une photo d'actualité où la demanderesse aurait, par exemple, été photographiée dans l'exercice de ses fonctions de juge d'instruction dans le cadre d'une affaire médiatique ou lors de son témoignage devant la commission "Dutroux"; que le fait que Madame Dutroux ait été, de par sa fonction, projetée sous les feux de l'actualité est en l'espèce indifférent dans la mesure où il s'agit précisément et indubitablement d'une photographie privée...'

'Que si les journalistes peuvent révéler des éléments relatifs à la vie privée des individus qui comme c'est le cas en l'espèce accèdent momentanément à l'actualité il va de soi que ces éléments ne doivent pas être superflus et doivent être nécessaires aux besoins de l'information; qu'en espèce, la publication de la photographie litigieuse n'est pas nécessaire aux besoins des informations diffusées dans l'article . . . '

'Attendu que, surabondamment, l'atteinte au droit à l'image se double d'une atteinte fautive au respect de la vie privée . . . '

'L'amalgame fait par le journaliste dans le cadre des commentaires figurant en regard de la photo entre les vacances de la demanderesse et son activité professionnelle est fautif; qu'en effet la nature des commentaires laisse entendre sans qu'aucun élément ne soit apporté à l'appui de cette thèse que la manière dont elle aurait instruit le dossier d'instruction qui lui fut confié aurait été affectée par ces "vacances" prises antérieurement.'

- 47 Court of Appeal of Brussels, 5 February 1999, *Auteurs & Media*, 2 (1999), pp. 274 (with note by F. Ringelheim, pp. 278-80). Other recent case law applies and develops the principles of civil liability of journalists while criticizing members of the police or judicial inquiries: Court of first instance of Brussels, 30 March 1999, *P. De Baets and A. Bille v. S. Jourdain*, *Auteurs & Media*, 1-2 (2000), p. 102; 'Court of first instance of Liège, 21 September 1999, *R. Brose v. J.F. Delière, R. Hurbain, SA Rossel & Cie and Ph. Brewaeys*, *Auteurs & Media*, 1-2 (2000), p. 155; Court of first instance of Brussels, 28 October 1999, *J.L. Duterme v. M. Bouffloux, M.J. Van Heeswijck and SA Mediaxis*, *Auteurs & Media*, 1-2 (2000), p. 113 and Court of first instance of Brussels, 16 November 1999, *P. De Baets, A. Bille and others v. Ph. Brewaeys and J.F. Delière*, *Auteurs & Media*, 1-2 (2000), p. 117.
- 48 Court of first instance of Brussels, 23 March 1999, *M. Doutrèwe v. C. Moniquet*, *Algemeen Juridisch Tijdschrift*, (1998-99), pp. 1004. The Court considered:

'Que le journaliste par la présentation et les commentaires outrageantes de cet article a dépassé son droit à la liberté d'information correcte du public; que par la divulgation des notes personnelles, par le titre tapageur et les commentaires inopportuns et superflus l'équilibre entre le respect de la liberté d'expression et le respect des droits d'autrui est compromis.'

- 49 Court of first instance of Brussels, 23 March 1999, *M. Doutrèwe v. M. Bouffloux*, *Algemeen Juridisch Tijdschrift*, (1998-99), pp. 1001. The Court considered:

Attendu que le but du défendeur apparaît avoir été d'informer sur une question d'intérêt général le citoyen qui se devait d'être éclairé sur cette douloureuse affaire qui est devenu un fait majeur de société . . . Que l'article litigieux ne vise pas à jeter le doute sur l'honorabilité de la demanderesse mais à montrer aux citoyens les défaillances constatées à l'occasion de l'affaire dit Julie et Melissa et la volonté des autorités d'analyser des dysfonctionnements d'y remédier; que le journaliste a fait preuve de sérieux dans ses commentaires élaborés dans l'article litigieux; qu'il ne peut être reproché aucune faute au défendeur qui a agi comme un journaliste normalement avisé et prudent et a assumé de manière adéquate son rôle d'informateur.

- 50 Court of first instance of Brussels, 23 December 1999, *La Libre Belgique* (21 January 2000), p. 9.
- 51 '... sous le couvert de ce qu'il qualifie de critique du jugement du 16 décembre 1997, le journaliste se répand en considérations gravement insidieuses à l'égard de la demanderesse; que tout porte à croire que le véritable dessein du journaliste fut de jeter le discrédit sur la vie professionnelle de la demanderesse.'

- 52 '... que la demanderesse, devenu personnage public lors de faits qui ont retenu l'attention de tout un pays est, par les insinuations et les allégations mensongères figurant dans l'article incriminé, atteinte non seulement dans sa vie privée mais dans sa vie professionnelle puisqu'elle est présentée comme n'étant plus garante d'une bonne justice.'
- 53 '... que l'article incriminée ne se borne pas à analyser les principes en jeu dans une décision de justice; que le droit de critique doit s'exercer dans les limites d'une certaine correction.'
- 54 '... a dépassé le domaine de la critique admissible dans le cadre de la liberté d'expression; qu'il poursuit le but de déconsidérer la demanderesse par son article injurieux.'
- 55 See Court of Appeal of Brussels, 5 February 1999, *Auteurs & Media*, 2 (1999), p. 274.
- 56 '... si les dommages et intérêts alloués à une victime d'atteinte à son honorabilité ne doivent pas punir l'auteur de l'atteinte, ceux-ci doivent cependant réparer le dommage moral de la manière la plus complète.'
- 57 Court of first instance of Brussels, 23 December 1999, *La Libre Belgique* (21 January 2000), p. 9.
- 58 '1. Les accusations portées par De Morgen à l'encontre du procureur Dejemepe sont très lourdes. Même après une lecture attentive du texte des articles, le message reste qu'il existe des liens entre le plus haut magistrat du parquet de Bruxelles et le milieu de la prostitution . . .
2. Le rédacteur en chef et le journaliste affirment que d'autres éléments viennent soutenir les accusations. C'est ce qui doit ressortir des documents confidentiels qu'ils ont fournis au Conseil de déontologie. Ce dernier a examiné les documents mais ne peut que constater qu'ils peuvent être interprétés de différentes manières. En tout cas, ils ne confortent pas les accusations à l'encontre de Benoit Dejemepe, à savoir qu'il entretiendrait des liens avec le milieu de la prostitution.'
- 59 '4. Le Conseil de déontologie est dès lors d'avis que De Morgen a agi de manière négligente dans cette affaire. Le journal a publié des accusations extrêmement graves à l'encontre du procureur et ce, de manière unilatérale et avec grand fracas (notamment la première page et le commentaire). Les accusations portent gravement atteinte à la dignité du procureur et à celle de sa famille . . .'; Raad voor Deontologie, 11 February 1998, *Auteurs & Media*, 2 (1998), p. 160.
- 60 See D. Voorhoof, 'Naar een Raad voor de Journalistiek?', *Samenleving en Politiek*, 4 (1998), pp. 22-26 and 'Journalisten Zonder Grenzen?', *Auteurs & Media*, 1-2 (2000), pp. 36-48.