The Role of Communication in the French Judicial System

By Emmanuel Jeuland and Anastasia Sotiropoulou

1. Introduction

Communication has recently acquired a central role in the French judicial system. Being an integral part of the management of courts[1], it is crucial in building the image of justice, as it can affect procedural principles, in particular, the principles of impartiality and of reasonable time. A good image of justice promotes the appearance of efficiency and impartiality. Justice has not only to be fair, but also to be seen as such, according to the well-known proverb.

The role of communication was not necessarily understood ten years ago, when communication with respect to legal cases was very limited. Both judges and prosecutors were prohibited from expressing themselves publicly on pending cases. At the same time, the courts did not disseminate their judicial policies and lawyers were not accustomed to addressing the media in a professional way. However, cases involving illegal funding of political parties and, most importantly, the Outreau case represented a turning point on the issue. The latter landmark case dating from 2001 dealt with the claims of several children that had suffered sexual abuse by several adults. The investigating judge (*juge d'instruction*) in charge of the case, Mr. Burgaud, decided, after two years of thorough investigations, to bring charges against 18 people, including the parents of the children. The first instance court convicted 10 people, the majority of whom had claimed to be innocent, to 15-20 years in prison. In 2005, one of the plaintiffs admitted that she had lied, which resulted in the conviction being overturned by the Court of Appeal. The media had actually taken an active role, which went beyond simply disseminating information, reaching sensationalism and, thus, compromising the presumption of innocence. A combination of mass media, public pressure, expert psychologists, manipulating parties and inexperienced judges led to this "judicial Chernobyl" (see F. Aubenas). The miscarriage of justice in this case led to the appointment of a parliamentary commission whose task was to determine what went wrong and to make proposals for reform.

The Outreau case seriously damaged the image of justice and the reputation of the parties involved. This case has demonstrated for the first time the importance of communication in legal cases and the need to handle it properly.

Communication has many meanings. It may refer to the communication to the public (external), or to the communication between judges or with other judicial professions (internal)[2]. There is a dialectic relationship between internal and external communication. Good internal communication has an impact on external communication, and conversely, communication to the public may also affect the members of the judicial system[3]. This article is essentially an attempt to examine the functioning of these types of communication in the French judicial system and to assess their impact on procedural rules. To this respect, some examples of case law will be developed. Our hypothesis is that communication may have an impact on the due process of law, in particular on presumption of innocence, investigative secrecy, impartiality of judges and reasonable time. It is a new kind of judicial rhetoric which could tend to replace due process one day. Part I will examine the external communication to the public and Part II the internal communication between judicial professions.

2. External Communication to the Public

We will focus on the role of the parties and the judges in the process of communication to the public, leaving outside its scope the role of the media. In particular, we will address the impact of their communication on procedural guarantees such as impartiality, publicity, the presumption of innocence and the obligation to give reasons in judgments. It should be noted from the outset that the judge handling a pending case cannot communicate on that particular case but rather on general policies and other judgments, while the parties may communicate during the proceedings under certain conditions.

2.1 Communication by the Parties

A distinction can be made between communication by the prosecutor as a public party, and the one made by private parties.

Communication by the Public Prosecutor

The public prosecutor is the only person who can legally communicate on a pending case. The statute of June 15th, 2000, provides that he may disclose some objective elements of the case. Before the enactment of this statute, it was the police that used to inform the public in order to prevent the dissemination of misleading information. Nevertheless, under French

[1] The Council of Europe strongly recommends considering the aspect of communication in court administration (rec. 2003-13, advice n°7 2005 by European judges and advice n°4 2009 by European prosecutors).
[2] The communication of documents between parties will be left out of the scope of this article.
[3] We visited a tribunal in the suburb of Paris in order to understand internal and external communication.

procedural law, the authority to lead an investigation is entrusted to the public prosecutor. Thus, communication on the part of the police is illegitimate and inappropriate.

The more sensitive the case, the more likely it is to attract public attention and media turmoil, and the more the public prosecutor is expected to be familiar with his new function as a "communications officer"[4]. There are even instances where public prosecutors meet journalists on a day-to-day basis. An illustrative example in this respect is the Dominique Strauss Kahn (DSK)case, where a French journalist, Mrs. Banon accused DSK of rape, an accusation which was ultimately dismissed by the public prosecutor on the basis of the statute of limitations. Given the high risk of public misunderstanding, the public prosecutor released a statement explaining that the time limit set for prosecution had passed.

However, public prosecutors communication risk to infringe well established principles of procedural law, such as confidentiality over investigative facts and presumption of innocence. This explains why public prosecutors are only allowed to reveal objective facts without expressing their own personal appreciation of these facts. In this respect, one of the recommendations given to the public prosecutor in the Guide elaborated by the Ministry of Justice is to consider an act of communication as a procedural act that can be invoked by a party in the proceedings. This particular recommendation is interesting since it reveals the strong link between communication and procedure.

Communication by Private Parties

Traditionally, lawyers have been the only persons who were able to communicate to the media. They are open to questions from journalists especially after the hearing. However, a new actor has recently emerged, especially in sensitive cases: the communications agent. His/her role is to design and put in place a communication strategy whose objective is to improve the image of his/her client. Evidently, communications agents are not lawyers, but experts in communication, the direct equivalent of a spin doctor who is well versed in politics. They are not involved in the case and do not disseminate information about it; rather, they present a good image of their clients as a safeguard of the presumption of innocence. Therefore, their role is closely linked with the respect of this procedural principle. For example, in the Kerviel case, a trader was accused of entering into financial transactions resulting in a loss of 5 billion Euros for the French bank Société Générale and seriously jeopardizing the stability of the institution itself and of the French financial system as a whole. In this particular case, the communications agent sought to present Kerviel as a mere victim, whereas the bank claimed that they were unaware of his transactions. The communications agent advised his client to avoid any public statements given the risk of being treated by the media as an arrogant trader. The communication strategy was quite successful until Kerviel disregarded the advice of his communications agent to remain silent, and decided to publish a book just before the public hearing of his case. This publication worked against him, as the judges considered it as an attempt to influence them under the pretext of informing the public.

Communication by the Judge

In order to prevent any interference with pending litigation and avoid accusations of partiality, judges are not allowed to communicate on pending cases. This prohibition is stipulated in Article 11 of the French Criminal Procedure Code which guarantees investigative secrecy and allows only the above-mentioned exception in the case of the public prosecutor. However, both general communication and communication on specific cases are developing before the courts.

Communication on General Policy

The Ministerial Office of Information and Communication created, in 2003, a new position in each Court of Appeal of a judge specialized in communication ("*magistrat délégué à la communication*" MDC). His role is not to comment on individual cases but to enhance the image and the credibility of the judiciary.

A typical example of the role of such a judge is the initiative of the *magistrat délégué à la communication* of the Court of Appeal of Aix-en-Provence to organize, from 2008, breakfast meetings with the regional media allowing him to present the general policy of the tribunals. This gave him the possibility, for example, to warn of the intended severity of tribunals' policies with respect to arson and forest fires (which are frequent in this region of France during summer). His aim was to stress the priority given by the tribunal to these cases and, thus, to act as a deterrence. These particular judges are in charge of preparing sensitive and mediatized cases[5]. They have to decide on the number and places reserved to journalists in the courtroom and to organize meetings with them. Despite the fact that their role is limited to the practical aspects of the case (organizing access to the courtroom by journalists) and has nothing to do with its substance, their

[4] Since 2002, the Ministry of Justice has introduced media training courses in the curriculum of the National School of the Judiciary (see Chapelotte p.65). Initially perceived as an infringement on the independence of the judiciary, this initiative was not welcome and even led to a strike organized by the younger magistrates (see Carole Richard).

[5] See Guide méthodologique sur l'organisation d'un procès sensible, Ministère de la justice, janvier 2011.

decisions may prove important for achieving smooth proceedings during the trial. This special treatment of sensitive cases has also been applied in the *Tunnel du Mont Blanc* case, which concerned a fire in this tunnel having caused the death of around 40 people. In this case, a special provisional courtroom was set up with room for the families of the victims and journalists: it therefore created a trial environment where unnecessary tensions were avoided.

In short, judges are allowed to communicate only on general policies of their tribunals and not on pending cases. They can, however, communicate on judgments of a particular relevance.

Communication on Judgments

The traditional structure of French judgments leaves little room for explanation and argument. A judgment of the Court of Cassation or the Council of State may indeed be very elliptical and brief. A reason for this may be that the pre-revolution judgments did not have any motivation whatsoever since the judges who represented the King could not know what he might have thought of the case. French Supreme courts only present the ruling with few reasons for judgment perhaps echoing this tradition. Even nowadays, a judgment of the Court of Cassation includes little if no argument in a few condensed lines. This tradition is, however, no longer tolerated by public opinion since the meaning of a judgment can be difficult to interpret.

This is the reason why, for the last decade, all French supreme courts, namely, the Court of Cassation, the Council of State and the Constitutional Council publish a special report ("communiqué") explaining the meaning of their judgments. This practice may prove problematic[6] since sometimes the *communiqué* may either add information to the judgment, or explain the judgment in a different way. Instead of clarifying the essence of the judgment, it may be the source of additional difficulties in its interpretation. Therefore, it becomes a new source of law often creating confusion. In this case, communication serves a substitute for the motivation of judgments but, in order to avoid confusion, it would be much preferable to improve the judgments themselves.

3. Internal Communication

Internal communication certainly refers to the communication between judges or between judges and clerks inside a tribunal. A question arises as to whether communication between police and judges is considered internal or external. The availability of a broad definition of judicial work along with the assumption that the work of the police and of lawyers contributes to the adoption of the final decision, leads to the conclusion that communication between all these professionals may be considered as internal or at least quasi-internal. We can thus draw a line between strict internal communication between judges and clerks (1) and broad internal communication between judges and other judicial professionals such as police, lawyers and experts (2). In all these forms of internal communication, the procedural principle that is at stake is the principle of reasonable time[7].

3.1 Strict Internal Communication between Judges

The way that internal communication functions will be illustrated through the experience of a visit to the office of the President of a Civil High Court, in the suburb of Paris.

During the visit the president explained that internal communication was conducted by means of two large screens on his desk which were interconnected and allowed him to be informed about every event in his tribunal. On the left screen, there was the timetable of the day with all the hearings and the names of the judges, clerks and lawyers, which could be changed at any time. On the right screen he could read his e-mails. He explained that there are three e-mail boxes, not on the internet but on the judicial intranet (private network of justice). There is a functional e-mail box as a President of the tribunal, where he receives all the official messages coming from the Ministry of Justice. There is a nominal box (with his name in the address) for individual relationships with the judges of his tribunal and what he calls a communication box where he sends every day to all the judges legal news: new supreme court case law, new regulations, statutes etc. There is also on the left screen an internal communications record, where each judge registers his/her decision. The clerk checks the arrival of new decisions and may print them and send them to the lawyers. The president has an overview of the work done by each judge. It could be possible that judges work entirely on computer without seeing each other. In reality, according to the president, there is no loss of communication since the judges visit each other in their office all the time. So, it seems that vertical and horizontal communication is working well in the tribunal we visited. However, it remains doubtful whether this is true for other tribunals and a further research on internal communication should be carried on a wider scale.

[6] See P. Deumier, Les communiqués de la Cour de cassation : d'une source d'information à une source d'interprétation, *RTD civ.*, 2006, p. 510.

[7] It can also be defended that managerial principles are also at stake, such as the efficiency principle (see English CPR).

Nevertheless, internal communication is not only conducted electronically but also physically. The internal communication between judges traditionally takes place during the first annual meeting of the tribunals and the Courts of Appeal ("rentrée solennelle"), an event which, however, seems by now outdated and increasingly formalistic[8]. The president of the tribunal is in charge of this internal communication. He organizes special meetings among the judges where the organization of sections is discussed and a rotation order is established. Usually, there is no conflict about this order. But the president may impose unilaterally this order and there is no recourse against this decision. In the Clearstream case, the president of the tribunal declared to the media that he had decided to set up a special section to try this case and the former Prime Minister Mr. Villepin. This decision was not respectful of the rotation order and the principle of natural or legal judge, which does not really exist in French law, even though it is imposed by the Council of Europe and the European Court of Human Rights.

3.2 Broad Internal Communication between Judicial Professions

The internal communication between judicial professions is conducted electronically.

In civil justice, the software WinCi TGI is used to organize the management of cases. This software allows communication between the case management judge, lawyers, clerks and even the bailiff. For each case, all the events appear on the computer screen: the first meeting with the president of the section, the communication of a document or of pleas, the closing of a case management period etc. Even the first meeting with the president is not a real meeting; it takes the form of a series of emails sent by the president who proposes a calendar for the case management and by the parties who comment on it. This software communicates with the intranet of lawyers and bailiff (the first writ may now be sent online). In this respect, it is noteworthy to mention that a protocol was ratified in 2012 between the Melun bar and the tribunal which makes this software the only means to manage the case. The written goals of the protocol were the acceleration and the transparency of the proceedings (article 1). For example, the lawyer messages must comply with a certain model and the protocol provides that the message which does not comply with the model will be rejected (article 7).

In criminal justice, the software "Cassiopée" is the communication platform between the examining judge and the police (for criminal cases where more than 3 years of imprisonment are possible) or the public prosecutor and the police (for the offences condemned with less than 3 years of imprisonment). Every event of the examining period is registered by the police, the judge or the public prosecutor, so that information about the accused person is available through this software. Therefore, Cassiopée allows for automatic investigation and cross referencing of information of several possible offenders and is even connected to the software used in prisons called APPI. On June 4th, 2012 Cassiopée had registered over 20 million cases.

The French judicial software system is not public. That means that the judicial intranet which is connected with the lawyer intranet is not accessible either to the parties or the public in general (recently a software bug resulted in a 24 hours system downtime). Even the lawyers cannot have any access to the judicial intranet, except for sending a message. Consequently, they cannot follow the state of their cases, as it is possible in administrative proceedings.

These civil and criminal pieces of software give statistical information to another software package called Pharos, which calculates the performance of each tribunal and makes comparisons with tribunals having an equivalent number of judges and cases. A benchmark table is drawn-up for the management meeting with the Court of Appeal. Another software package called Corus specializes in accountability. The forecast for the budget is calculated on the basis of the results of the management meeting with the Court of appeal[9]. This system should have led to an allocation of resources according to the needs of each tribunal, as stated in the general review of public policy scheme (RGPP). Nevertheless, the constraints imposed on the budget of the ministry of justice did not allow for this evolution.

Lastly, there is a software package called Pilote, which calculates the tribunal's case load and the approximate total time that the judges and clerks of the tribunal need to deal with cases. Each judge indicates the time spent per case and on the basis of this declaration, an assessment interview is conducted with the president of the tribunal. Thus, internal communication starts with the case management software which provides statistics, and ends with the personal assessment of judges by the president of the tribunal which leads to setting new objectives for the subsequent year. However, the quantitative indicators are not sufficient to assess the work of judges. This is the reason why some presidents prefer to read some of the decisions rendered by their tribunal in order to assess the quality of this work.

[8] It could be replaced in the future by a small meeting of coordination organized by the judge specialized in communication (see rapport Cadiet).
[9] There is another management dialog meeting between the court of appeal and the ministry of justice.

The interconnection of judicial, prison and the police software could help avoid communication problems between judicial professionals, as those occurred in the Pornic case. In this case, a man raped and killed a young girl. The man had been arrested for a small offense, but not properly supervised after being released because of the work overload of the probation officer. At the same time a complaint for an attempt of rape was not investigated by the police due to lack of sufficient resources/personnel. Former President Nicolas Sarkozy stated that the guilty judges will be punished before any investigation was conducted. The Union of judges decided to go on strike because they could not accept being considered guilty by the media without proof and a judgment. At the end of the day, the investigation report concluded that there had been a failure of the judicial system but no fault. The interconnection of the different types of software could have avoided this kind of failure. Conversely, it would allow making the judge more clearly accountable and in certain occasions liable. However, French rules only provide for the liability of the French State in case of judicial failure. Judges are not personally liable. They are only exposed to disciplinary sanctions (the heaviest sanction which is very rare in practice is the forced retirement).

New technology in internal communication has an impact on the delay of the proceedings. Time is better managed and efficiency can be achieved. It is possible though that, as physical communication is restricted, the litigation in itself is avoided and that parties bring an appeal because they are not satisfied with the judgment. However, this hypothesis is not confirmed.

4. Conclusion

To conclude, external communication may have an impact on the presumption of innocence, investigative secrecy and even the impartiality of judges. Internal communication has an impact on the principle of reasonable time. The functioning of external and internal communication in French judicial system after the Outreau case seems that it has not caused serious infringements of these principles. But, considering that communication has become, over the past decade, a new aspect of court administration in France and that this aspect remains mainly unexplored by French literature (except for the abovementioned case of the *communiqué*), some general theoretical questions should be raised as to the impact of communication on procedure: Is communication compatible with the fact that litigation presupposes an absence of communication between parties? Is there not a temptation to communicate what cannot be communicated, meaning the core of the issues, which is essentially contrary to well established legal principles? What can the relationship be between the classical judicial rhetoric and this new extra judicial rhetoric? Is the ideology of transparency that often underlies communication, compatible in all cases with the presumption of innocence and investigative secrecy? Is the influential aspect of communication compatible with the objectivity of judicial information? What is the risk, if any, of communication serving to avoid or evade the litigation? External communication is reassuring public opinion via the media whilst investigation is led through the police, lawyers, and judicial software that helps them communicate without the presence of the parties. If this hypothesis were true, it would mean that communication starts replacing procedural rules. In this context, a case would be solved without real confrontation or an actual hearing, merely by the “magical” use of communication technology. In other words, and in a more provocative way, would it be possible for communication to replace due process one day? For example, the Outreau case led to a reform bill providing for the suppression of the investigative judge. The suppression was never adopted and only a few minor points were modified. As a matter of fact, the project of reform and the new statute were mere communication, which may imply that communication could be, in certain cases, a substitute for law and justice. But if this statement seems hypothetical, one conclusion remains rather obvious: legal academics should learn from the science of communication in order to better understand the effects of communication on procedural law.

BIBLIOGRAPHY

F. Aubenas, *La méprise: l’affaire Outreau*, 2005, Seuil, 2010, Points.

D. Bougnoux, *Introduction aux sciences de la communication,* La découverte, 2002.

P. Chapelotte, *De Kerviel à Clearstream, l'art de communiquer lors des grands procès*, Eyrolles, 2012.

P. Deumier, Les communiqués de la Cour de cassation : d'une source d'information à une source d'interprétation, *RTCiv*, 2006, p. 510.

E. M. Falcon, Comunicacion y proceso, *Revista de Processo*, Brazil, Março 2008, pp. 103-128.

J.M. Ferry, L’éthique de la communication, PUF, 1987.B. Frydman et M. Meyer (dir.), Chaïm Perelman, *De la nouvelle rhétorique à la logique juridique,* PUF, 2012.

J. Lenoble, *Droit et communication*, Humanités, Cerf, 1994.

C. Perelman et L. Olbrechts-Tyteca, *Traité de l'argumentation, la nouvelle rhétorique, Bruxelles, éd. de l'université de Bruxelles*, 1970.

L. Sfez, *la communication*, Que sais-je ? PUF, 2011.

C. Thomas, La communication par le bas au ministère de la justice*, Revue Communication et organisation*, n°35, 2009,http://communicationorganisation.revues.org/810

M.H. Westphalen, *Communicator*, 5° éd. 2009, Dunod.

Avis n°7 (2005) du conseil consultatif des juges européens sur justice et société (Conseil de l'Europe).

Avis n°4 (2009) du conseil consultatif de procureurs européens sur "juges et procureurs dans une société démocratique" (Conseil de l'Europe).

Communication judiciaire et relations presse, Guide pratique pour les magistrats, DSJ, Ministère de la justice, 2011.

Recommandation du Conseil de l'Europe sur la diffusion d'informations par les médias en relation avec les procédures pénales, Rec. (2003) 13.