

Briefing Paper on Protection of Journalists' Sources

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1.Introduction

A free press depends on the free flow of information from the media to the people and from the people to the media. Journalists¹ worldwide, whether working for local or national newspapers, or national or international television companies, routinely depend on non-journalists for the supply of information on issues of public interest. Some individuals (referred to hereafter as sources) come forward with secret or sensitive information, relying upon the reporter to convey it to a regional, national or international audience in order to achieve publicity and stimulate public debate. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist; this may be motivated by fear of repercussions which might adversely affect their physical safety or job security. In the circumstances, journalists have long argued that they should be entitled to refuse to divulge both the names of their sources and the nature of the information conveyed to them in confidence. The argument is used in relation not only to written information, but also to other documents and materials, including photographic images, published or unpublished. Journalists argue that without means to protect their confidential sources, their ability, for example, to lay bare corruption of public officials would be seriously impaired.

So strong is the need to protect their sources, that many journalists are bound by professional codes of ethics from revealing them. Many have depended upon such codes in courts of law, when faced with orders to reveal the identity of their sources. Despite the clear advantages of ensuring that journalists protect the anonymity of their sources, situations arise when the interests of journalists clash with other powerful interests and rights. Often, the clash relates to the administration of justice, commonly where information is relevant to a criminal or civil proceeding.

This paper examines the extent to which journalists have a special privilege to refuse to disclose the identity of confidential sources in a number of jurisdictions. It looks first at the jurisprudence of the European Court of Human Rights, and then at various principles established within the framework of the Council of Europe, the European Union and the Organisation of Security and Co-operation. Next, the paper looks at domestic law provisions inside and outside Europe in a number of select common and civil law countries.

2. EUROPE

Introduction

The legal protection of journalists' sources has received considerable attention within Europe. It was the subject of an important judgment by the European Court of Human Rights (ECtHR) in

¹ In this paper, the term journalist refers to anyone engaged in the process of newsgathering and reporting for the written or broadcast media.

1996, *Goodwin v. United Kingdom*.² and has also been the subject of a number of European “soft law” standards and recommendations. At the national level, many European countries have developed important rules safeguarding the secrecy of sources. This section looks first at the relevant jurisprudence of the ECtHR, then at the developing European “soft law” and finally at national law in six jurisdictions in Western Europe; Austria, France, Germany, the Netherlands, Norway and Sweden.³

2.1 ECHR

In *Goodwin v. United Kingdom*,⁴ the European Court of Human Rights ruled by a vote of eleven to seven that an attempt to force a journalist to reveal his source for a news story violated Article 10⁵ of the European Convention on Human Rights.

This landmark decision concerned a journalist, Mr. Goodwin, who in 1989 attempted to publish a story based on confidential information he received by a previously reliable source, concerning the financial difficulties of a particular company. The information was derived from the company's confidential financial plan, and was presumably stolen. Fearing a loss of confidence on the part of the company's creditors, suppliers and customers, the company obtained an injunction restraining publication and an order under section 10 of the Contempt of Court Act 1981 for disclosure of the anonymous source "in the interests of justice". The company claimed that it wished to take legal action against the source.

The disclosure order was upheld by the English Court of Appeal and the House of Lords. Before the European Court, Mr. Goodwin and the Commission argued that under the Convention, a journalist may only be forced to reveal his sources in "exceptional" circumstances where "vital" public or individual interests were at stake. Noting that an injunction was in force preventing

² Judgement of 27 March 1996, 22 EHRR 123.

³ The United Kingdom is reviewed in the Common Law section.

⁴ Interights and Article 19 submitted third party comments in this case.

⁵ Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

publication, Mr. Goodwin and the Commission argued that no such circumstances existed here.

In the Government's view, the information at issue did not possess a public interest content which justified interference with the rights of a private company, and despite the injunction, the company remained at risk of damage due to the possibility of dissemination of the information to the business community. The Government also argued that a journalist's privilege does not extend to the protection of a source that has conducted itself in bad faith, or at least irresponsibly, in order to allow him to pass on such information with impunity.

In finding for the applicant, the Court emphasised the importance of affording safeguards to the press generally and to the journalists' sources in particular. It said:

Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁶

The Court found no such "overriding" public interest here in light of the injunction in force against all national newspapers and relevant journals. The Court was of the view that the purpose of a disclosure order was to a large extent the same as that which was being achieved by the injunction, namely, the preventing of the dissemination of the confidential information. In so far as the disclosure order would merely reinforce the injunction, the additional restriction on free expression was not justified. The Court was of the view that the company's interest in acting against the source was insufficient to outweigh the vital public interest in the protection of the applicant's source.⁷

Goodwin is an important judgment both because of its strong recognition of the importance the safeguarding of sources has for a free press and because it sets a standard that must be adhered to by all of the states party to the ECHR. Moreover, *Goodwin* is the only case decided by an

⁶ *Goodwin* at para 39.

⁷ But see *BBC v. the UK*, Application No 25798/94, 18 January 1996, ruled inadmissible by the Commission, where the BBC argued that a court order to produce transmitted or untransmitted material relating to the Broadwater Farm riot, and in that connection, relating to criminal proceedings against two police officers, violated, *inter alia*, Article 10. The Commission rejected the BBC's argument that the obligation to disclose untransmitted material increases the risk to film crews (because, the BBC argued, they will be associated with law enforcement agencies) and distinguished the application from *Goodwin* by noting that there the applicant received information on a confidential basis, whereas here, the information was merely the recording of a public event with no duty of confidentiality attached.

international tribunal specifically on the protection of journalists' sources and for that reason it is likely to have influence beyond its European borders.

2.2 SOFT LAW STANDARDS AND RECOMMENDATIONS

A number of European inter-governmental bodies have developed standards and recommendations seeking to strengthen the commitment to the protection of journalists' sources across Europe. For example, In December 1994, the 4th European Ministerial Conference on Mass Media Policy of the Council of Europe adopted a *Resolution on Journalistic Freedoms and Human Rights*.⁸ Principle 3(d) provides that the protection of the confidentiality of journalists' sources enables journalists to contribute to the maintenance and development of genuine democracy.

Principle 4 recalls the wording of Article 10 of the ECHR and goes on to note that any interference with journalism must be necessary in a democratic society, respond to a pressing social need, be laid down by law, be formulated in clear and precise terms, be narrowly interpreted and be proportionate to the aim pursued.

Principle 7(e) notes that one implication of journalism in a genuine democracy, reflected in many professional codes of conduct, is "observing professional secrecy with regard to the sources of information." Principle 8 provides that public authorities should exercise self-restraint in addressing the considerations in Principle 7 and should recognise the right of journalists to elaborate self-regulatory standards - for example, in the form of codes of conduct - to reconcile these rights with other rights, freedoms and interests with which they may come into conflict.

Whilst not formally binding, this Resolution represents the understanding of participating states as to the implications of the guarantee of freedom of expression found at Article 10 of the ECHR. Clearly, the protection of journalists' sources is generally seen as an aspect of the right to freedom of expression.

Likewise, the European Parliament (EP) passed an important resolution on protection of journalists' sources in 1993. The *Resolution of the European Parliament on Confidentiality of Journalists' Sources and the Right of Civil Servants to Disclose Information*⁹ stated that the EP:

[B]elieves that the right of confidentiality for journalists' sources is an important factor in improving and increasing the supply of information to the public, and that this right in practice also increases the transparency of decision-making procedure, strengthening the democratization of the Community institutions and governmental bodies in the member States, and is inextricably linked to the freedom of information and the freedom of the press in the broadest sense,

⁸ DH-MM (95) 4.

⁹ Adopted in 1993, A3-0434/93, reported in The Official Journal of the European Communities on 18 January 1994, No. C 44/34.

lending substance to the fundamental right to freedom of expression, as defined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰

The Resolution also expressed concern over attacks on journalists' professional secrecy at the domestic level, facilitated by the absence of adequate legislation, and called on Member States to rectify this problem.¹¹

The Organisation for Security and Co-operation in Europe (OSCE) (first established in the early 1970s as the Conference on Security and Co-operation in Europe) has also addressed the question of the protection of journalists sources. For example, its Concluding Document of its 1986 Vienna Meeting says that in accordance with the provisions of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights the participating States agreed to:

[E]nsure that individuals can freely choose their sources of information and ... allow rights, including copyright, to obtain, possess, reproduce and distribute information and material of all kinds.

In order to give effect to this undertaking, the participating States emphasised the need to ensure that:

[J]ournalists including those representing media from other participating States, are free to seek access to and maintain contacts with, public and private sources of information and that their need for professional confidentiality is respected.

2.3 National European Law

In the six jurisdictions covered in this section, Austria, France, Germany, the Netherlands, Norway and Sweden, courts have rarely compelled journalists to identify confidential sources. The media tends to be afforded greater protection than are private individuals because they are seen to play an instrumental and crucial role in safeguarding the right of the public to information and ideas on matters of public interest.

2.3.1 Austria¹²

¹⁰ *Ibid*, at para. 1

¹¹ Paras. 2 and 3.

¹² Information in this section is drawn from Berka, W., "Austria" in ARTICLE 19, *Press Law and Practice, op cit.*, updated by letter in October 1997. Professor Berka teaches Constitutional and Administrative Law at the University of Salzburg.

Article 31 of the Media Act 1981 provides strong protection for the confidentiality of journalists' sources. Publishers, editors, journalists and other employees of a media enterprise who are called as witnesses before a court or administrative authority, have the right to refuse to answer questions referring to the author, contributor or source of information, or to the contents of information disclosed to them in regard to their professional activities. There is, however, no important case law on Article 31. It could be argued that this shows the provision is respected by the authorities. Also, since the Media Act allows claims for libel and invasion of privacy to be brought directly against media enterprises, there is no need to identify others who have contributed to an allegedly defamatory article. Austrian law is very effective in protecting the confidentiality of journalists' sources, in both law and practice.

2.3.2 France¹³

Prior to 1993, the duty of professional secrecy did not apply to journalists, who could be questioned regarding their confidential sources of information.¹⁴ However, in practice, at least in criminal case, very few courts or investigative *magistrats* went so far as to require journalists to disclose their sources. Journalists are not entitled to any special protection in civil proceedings; the same law applies to all witnesses. In the few instances where disclosure was ordered, journalists generally declined to answer, invoking professional custom; the courts generally refrained from ordering sanctions. Journalists were sanctioned in only one or two cases in the decade leading up to 1993 when the criminal law was substantially revised.

In 1993 the Code of Criminal Procedure was amended, bringing legislation into line with accepted practice, at least as far as criminal proceedings are concerned.¹⁵ Article 109(2) now provides:

Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source.

Several points are worth noting. First, the right not to reveal sources is absolute, not qualified. Second, the law applies only to journalists called as witnesses; accused persons always have an unqualified right to refuse to testify. Third, the Act defines neither a journalist nor journalistic activity.¹⁶

¹³ Information in this section is drawn from Errera, R., "France" in ARTICLE 19, *Press Law and Practice*, *op cit.*, updated by letter in August 1997.

¹⁴ See Warenbourg-Auque, F., "Reflexions sur le secret professionnel en droit francais", in *Travaux de l'Association H Capitant*, 23 *Le Secret et le droit*(Paris, 1974); see also Decheix, B., *Un Droit de l'homme mis a mal: le secret professionnel* (1983).

¹⁵ Criminal Procedure Act, 4 January 1993.

¹⁶ The Labour Code defines a professional journalist at Article L, L. 761-2, para 1. (Statute of July 4, 1974) as follows: "A professional journalist whose main, regular and paid occupation is the exercise of his profession in one or several daily or periodical publications or in one or

In 1993, following the recommendation of the Committee of Enquiry in the Press and Judiciary of 1984, the protection of journalists' sources was further indirectly reinforced by a new clause relating to searches and seizures in media premises. Article 56.2 of the Code of Criminal Procedure now provides that the investigating judge or State prosecutor must be present to ensure that investigations, "do not encroach on the free exercise of the journalist's profession." To date there has been no case law concerning this provision so its scope remains unclear.

French law offers considerable protection to journalists' sources. More significant than the letter of the law, perhaps, is the reluctance of the courts to sanction journalists who refuse to comply with an order to disclose their sources. This judicial rectitude perhaps reflects a wider consensus in the public at large that journalists should not be forced to divulge such information.

2.3.3 Germany¹⁷

Regulation of the press in Germany is a matter in the first instance for the *Lander* (states). The press laws of most *Lander* include a provision granting journalists a right to refuse to divulge the identity of their confidential sources. Paragraph 24(1) of North Rhine Westphalia's Press Law is typical.¹⁸ It provides:

Editors, journalists, publishers, printers and others involved in the production or publication of periodical literature in a professional capacity can refuse to give evidence as to the person of the author, sender or confidant of an item published in the editorial section of the paper or communication intended wholly or partly for such publication or about its contents.

This paragraph provides absolute privilege, admitting of no exceptions. Sub-paragraphs (2), (3) and (4) render evidence inadmissible in court if obtained via confiscation of materials or a search of premises unless:

[The party to whom the evidence belongs] is urgently suspected of being the perpetrator of or participant in a criminal offence.

The fact that these exceptions do not qualify sub-paragraph (1) implies that journalists cannot be forced to divulge their source even where they are suspected of having been involved in a

several press agencies, and whose main income derives from it."

¹⁷ Information in this section is drawn from Karpen, U., "Germany" in ARTICLE 19, *Press Law and Practice*, *op cit*. Professor Karpen teaches Constitutional and Administrative Law at the University of Hamburg.

¹⁸ North Rhine Westphalia Press Law, 24 May 1966, in Pamphlet on the Press Law of Germany, issued by the Ministry of Information (1989), p. 14.

criminal offence.

Federal law also provides strong protection for the protection of confidentiality of sources, especially in civil cases. Section 383 of the Civil Procedure Code acknowledges that when facts are confided to persons because of their profession, including journalism, these persons are entitled to refuse to give testimony on these facts unless their source consents to disclosure. Section 53 of the Criminal Procedure Code authorises radio and print journalists to refuse to testify concerning the content or source of information given in confidence.

In the *Speigel* case, the Federal Constitutional Court (FCC) affirmed that the general right to refuse to give evidence about the sources and contents of information was essential enable the press to fulfil its public functions. However, this right may be overridden by other pressing considerations, such as the interest in law enforcement.¹⁹ In another decision, in 1969, the FCC held that a reporter was required to answer questions regarding the identity of suspects who had claimed to him that they had been promised sums of money by law enforcement officials. The Court decided that the State interest in exposing corruption by public officials outweighed the interest in protecting the confidentiality of journalists' sources.²⁰

In a 1983 decision, however, the FCC implied that it might decide the 1969 case differently now, reasoning that the primary reason for protecting confidential sources was to assist the press in its efforts to expose government abuse; in the 1969 case, the FCC had seen the two interests as being in conflict. The claim for non-disclosure was rejected in the 1983 case, however, as the FCC the source related to an advertisement and did not touch on public affairs at all.²¹

2.3.4 The Netherlands²²

The Dutch Press Council²³ has long maintained that journalists are entitled to withhold information, provided that they can prove that they exercise prudence in their use of sources.²⁴ The Supreme Court, however, has held that "the position that a journalist has a right to protect

¹⁹ 20 FCC 162 (1966).

²⁰ 25 FCC 296 (1969) *Pressezeugnisverweisungsrecht*.

²¹ 64 FCC 108 (1983).

²² Information in this section is drawn from van Lenthe, F., and Boerefijn, I., "The Netherlands" in ARTICLE 19, *Press Law and Practice, op cit.*, updated by letters from Ms. Boerefijn, Legal Researcher at the Netherlands Institute of Human Rights (SIM), in February 1995 and October 1997 and Peter Baehr, Director of SIM, in November 1994.

²³ An independent body established in 1960 by the Dutch Association of Journalists, the Association of Editors, the broadcasting companies and the publishing houses.

²⁴ See Doomen, J., *Opinies over journalistiek gedrag. de uitspraken van de Raad voor de journalistiek, 1960-87* (Arnhem, Gouda Quint bv, 1987), p. 112.

his sources (*verschoningsrecht*) cannot be accepted as a general rule".²⁵ Failure to obey an order to reveal such information may be sanctioned by ordering payment of a *dwangsom* (a daily fine for failure to perform an obligation) or imprisonment.

A 1994 decision of the Court of Appeals reflects a more positive attitude towards allowing journalists to protect their sources, absent a compelling need for disclosure.²⁶ A local mayor claimed that media coverage alleging corruption on his part was defamatory and involved a breach of confidence by police officers. The Court, noting the drafting history of Article 10 of the European Convention, held that the journalists could refuse to answer questions at a pre-trial hearing regarding their sources. It examined the role of journalists in a democratic society and stated:

In a democratic society it is of great importance that social evils are brought to public attention through newsgathering by the media. It goes without saying that this interest is well served by the fact that a journalist, in various circumstances, does not have to reveal the identity of his sources of information so as to prevent his sources from drying up.²⁷

The case involved what the Court labelled "a serious structural social evil that touches the heart of the credibility and reliability of the administration." Given that public figures are required to tolerate a greater degree of criticism than private citizens, the interests of the mayor were outweighed by the interests in protecting the ability of the press to engage in investigative reporting.

A 1996 case, *Van den Biggelaar et al. v. Dohmen and Langenberg*,²⁸ involved journalists who had published an article on corruption in a regional daily. They refused to reveal their sources in a civil hearing, despite a claim by the plaintiff that the information, obtained during the course of a criminal investigation, had been illegally leaked by either the police or the prosecutor's office. The plaintiff, who also claimed the article constituted an interference with his private life, sought the information from the journalists so as to identify the source of the leak.

The Supreme Court first summarised the ECHR judgement in *Goodwin*, holding that this judgment required it to review the position laid down earlier in the KGB judgment (see above). According to the Supreme Court, *Goodwin* stood for the proposition that protection of sources

²⁵ *Hoogendijk v. Van der Lek* (the so-called KGB judgment), Judgment of the Supreme Court, 11 November 1977, NJ 1978, 399.

²⁶ *Johannes Joseph Adrainus Slats v. Hendrikuis Willem Riem*, Court of Appeal in the Hague, (First Chamber) decision of 24 November 1994, Case No 0293 H 94, NJ 1996/59. This case arises out of the same events as the *Van den Biggelaar* case, discussed below.

²⁷ Para. 9.

²⁸ *A.H.W. en J.H.A. Van den Biggelaar en Van den Biggelaar Verenigde Bedrijven BV v J.H.J.P.M. Dohmen en H.J. Langenberg*, Judgment of 10 May 1996, NJ 1996/578.

was covered by the guarantee of freedom of expression in the European Convention so that any disclosure order must meet the test for restrictions established by the ECHR. In particular, a disclosure order would only be acceptable if it were necessary in a democratic society to safeguard one of the interests mentioned in Article 10(2). The onus of proving this lay of the person seeking disclosure.²⁹ Relevant circumstances in this case included the facts that the leaked information related to a criminal investigation into official corruption, that the information had already been made public and that the plaintiff had sued the journal for compensation. The Court held that the plaintiff's interest in identifying the source of the leak was to sue the State and any officials involved for financial compensation and to prevent further leaks. Relying on *Goodwin*, it held that this interest was in itself insufficient to outweigh the public interest in the protection of journalists' sources.

Dutch law accords a high degree of protection for journalists sources. Even before *Goodwin*, there was a presumption in favour of protection journalists' sources. That presumption has now been strengthened by requiring interested parties to demonstrate a compelling need for disclosure.

2.3.5 Norway³⁰

Journalists and editors in Norway have a qualified right not to answer questions concerning the identity of their sources. Courts may only order disclosure where the information is of particular importance and they must take into consideration the conflicting interests at stake, the character of the case and the need for the information. Where the information can be obtained by other means, courts are extremely unlikely to order disclosure.

Although potentially editors and journalists risk imprisonment and large fines, including continuing fines, for refusing to obey orders to disclose sources, in practice they rarely do so. Imprisonment has not been ordered for at least several decades and fines, if ordered at all, are modest.³¹

Two recent judgments of the Supreme Court have made great strides in securing in jurisprudence the protection of sources that has long been observed in practice. In the *Edderkopp* case,³² the Supreme Court stated: "In some cases ... the more important the violated interest is, the more important it will be to protect the sources." The case involved journalists

²⁹ *Ibid.*, para. 3.4 of the judgement.

³⁰ Information in this section is drawn from Wolland, S., "Norway" in ARTICLE 19, *Press Law and Practice, op cit.*, updated by letter in October 1997. Mr. Wolland is a Norwegian media lawyer.

³¹ For instance, in a typical case in 1992, an editor was fined NK 20,000 (US\$ 3,200) for refusing to reveal a source.

³² *Retstidende* 1992, p. 39.

who had written a book about the activities of a businessman who had secretly taped telephone conversations with noted politicians. The book discussed links between the Labour Party and the intelligence agency. A parliamentary oversight body sought the source of the information in order to determine whether it had been illegally provided by an agency employee. The Court ruled that the authors had a right to protect their sources.

In 1992, a local newspaper *Aura Avis* published a series of articles about a wolf that had allegedly killed numerous sheep in the area. There was some debate about whether it had been a dog or a wolf since only in the latter case could farmers claim compensation from the government. Mr Ekren, a journalist, was later informed that the wolf had been killed and the skin and body were delivered to him as proof. Wolves are an endangered species in Norway and killing one is an offence under the Criminal Act. *Aura Avis* published pictures of the skin and arranged for an expert to verify that it was a wolf.

The Chief of Police of Nordmore asked the court of enforcement, *Nordmore Forhorsrett*, to order Mr. Ekren to name his source and also to name the person who had killed the wolf, arguing that he had not been acting as a journalist but rather as a go-between for the wolf-killer and that he had destroyed evidence by removing the wrapping before giving the skin to the police. Mr. Ekren argued that he had a right to protect his source from identification, even to the extent of removing the wrapping. The Supreme Court agreed, concluding that his actions had been motivated by legitimate professional interests.

2.3.6 Sweden³³

Chapter 3, Article 1 of the Freedom of the Press Act (FPA), which has constitutional status, provides broadly for protection of journalists sources, subject to a number of exceptions, noted below. A journalist who reveals his or her source without consent may be prosecuted at the behest of the source.³⁴ There have been no prosecutions in recent years. These constitutional protections extend to state and municipal employees, who may thus give information to the press without fear of legal repercussions or intimidation.

The FPA closely regulates executive action regarding the media. Government officials may only make enquiries regarding media sources where this is explicitly allowed by the FPA.³⁵ Generally this is only where the authorities have reasonable grounds to believe that the source has committed treason, espionage or a similar crime, listed in Chapter 7, Article 3 of the FPA. Since the editor is responsible for all crimes committed in publishing the newspaper, the police have little justification for searches to identify sources.

³³ Information in this section is drawn primarily from Axberger, H-G., "Sweden" in ARTICLE 19, *Press Law and Practice*, *op cit*. Mr. Axberger is a former Press Ombudsman for the General Public and currently Assistant Professor of Criminal Law at the University of Stockholm.

³⁴ FPA, Chapter 3, Article 5.

³⁵ FPA, Chapter 3, Articles 4 and 5.

Courts may order source disclosure in criminal cases where the information is needed to protect state security or where freedom of the press (including libel) is not the central issue and disclosure is justified by an overriding public or private interest.³⁶ The interest of an accused person in obtaining information relevant to establishing his or her innocence and the interest of the police in obtaining evidence about crime are examples of such overriding interests.

Protection of news sources, considered to be part of “messenger freedom”, is a deeply rooted and highly valued legal tradition in Sweden which even public officials and persons representing powerful institutions rarely try to challenge. This was demonstrated in 1988 when a court ordered a reporter working for *Dagens Nyheter*, the largest morning paper, to reveal *when* certain conversations with a *known* source had taken place. Outraged journalists argued that this was unconstitutional and the Chancellor of Justice, who was responsible for prosecuting the case, eventually withdrew the question.

3. COMMON LAW JURISDICTIONS

The jurisdictions examined in this section are the United States, Australia, Canada, and the United Kingdom. None of these jurisdictions provide explicit constitutional protection for the confidentiality of journalists’ sources but the issue has received some judicial or legislative attention in all of them.

3.1 United States³⁷

In the leading case on this issue, the US Supreme Court held that the First Amendment of the US Constitution’s protection of free speech does not grant journalists the privilege to refuse to divulge names of confidential sources in the context of a grand jury trial. However, laws providing protection for journalist confidentiality have been adopted by a large number of states. This section looks first at the Supreme Court case and then at a number of the state laws, known as press-shield laws.

Branzburg v. Hayes

The leading US Supreme Court case on protection of journalists’ sources is *Branzburg v. Hayes*.³⁸ This case was a consolidation of three separate cases, all involving journalists who had been eyewitnesses to alleged criminal activities. They not only refused to reveal their confidential sources but also refused to appear before grand juries in response to subpoenas, asserting a qualified privilege under the First Amendment.³⁹ The Supreme Court held that

³⁶ FPA, Chapter 3, Article 3(5).

³⁷ This section was written with assistance from Greg Jowdy.

³⁸ 408 US 665 (1972).

³⁹ The three journalists had, respectively, been investigating the Black Panthers, witnessed the making of hashish and been present in a Black Panther meeting hall during a period of rioting in

journalists could be compelled to appear and testify before grand juries investigating serious crimes, in part because the evidence adduced to show that the privilege was necessary to protect the flow of information to journalists was inconclusive. In addition, the Court was not convinced that the interest in protection of confidentiality outweighed the public interest in the investigation and prosecution of crimes and in deterring the commission of such crimes in the future.

Six points serve to limit the impact of this case. First, the holding is limited to testifying before a grand jury and is not determinative of the issue in relation, for example, to civil proceedings or administrative hearings. Second, in each instance the journalist was a direct eyewitness to the alleged criminal activities. The result might have been different if the reporters had simply been given the information by sources. Third, all three journalists asserted a blanket right to refuse to appear before the court, notwithstanding subpoenas to that effect. Fourth, Justice White, giving the majority judgment, suggested that if a grand jury investigation were conducted in bad faith, the subpoenas would amount to official harassment and would have no justification. Fifth, the judgment clearly leaves it open to states to enact statutory privileges or construe their own constitutions so as to recognise journalists' privilege.⁴⁰ Sixth, the Court was divided, with four of the nine justices dissenting. It was the separate concurring opinion by Justice Powell that created a majority and it is this opinion that many judges appear to have relied upon in holding that *Branzburg* created a qualified privilege for reporters to protect their sources.⁴¹ His opinion is somewhat confusing and ambiguous and although he ultimately voted with the majority, a large part of his opinion "appears to agree with the dissenting opinion...."⁴²

Immediately following the *Branzburg* decision, various courts held that the First Amendment afforded no protection for journalists' sources. Subsequently, however, courts began drawing from the minority opinion, along with Justice Powell's separate concurring opinion, in concluding that a qualified privilege was permitted in some cases. By early 1996, nine of the twelve circuits had established a qualified First Amendment privilege for journalists against compelled disclosure. Only one circuit had specifically rejected qualified privilege and two had yet to address the question.⁴³ Significantly, the privilege has been applied to both civil and criminal proceedings.⁴⁴

Massachusetts.

⁴⁰ This was explicitly noted by the Court, at p. 406.

⁴¹ See Marcus, P., "The Reporter's Privilege: An Analysis of the Common Law, *Branzburg v. Hayes*, and Recent Statutory Developments" (1984) 24 *Arizona Law Review* 815, p. 831.

⁴² *Ibid.*, p. 829.

⁴³ See Baum, K., "The Journalists' Privilege: Ensuring that Compelled Disclosure is the Exception Not the Rule: *Shoen v. Shoen*" (1996) 3 *Villanova Sports and Entertainment Law Journal* 557.

⁴⁴ See Warren, L., "A Critique of an Illegal Conduct Limitation on the Reporters' Privilege Not to Testify" (1994) 46 *Federal Communications Law Journal* 549, p. 553.

These courts have balanced the freedom of expression interest against the interests of those seeking disclosure. The balancing tests tend to resemble the three-part test proposed by Justice Stewart in his *Branzburg* dissent. This test requires the party seeking disclosure to show (i) that there is probable cause to believe that the reporter has information that is clearly relevant, (ii) that the information cannot be obtained by alternative means less destructive of first amendment rights, and (iii) that there is a compelling and overriding interest in the information. There is, therefore, considerable doubt as to whether journalists may be compelled to disclose confidential sources under the First Amendment.

Press-shield Laws

Partly in response to *Branzburg*, a number of states passed press-shield laws, statutes granting journalists a privilege to protect the confidentiality of their sources.⁴⁵ Although the basic goal of the various shield laws is the same, they differ in important respects. First, the privilege may be either absolute or qualified. Absolute privilege cannot not be taken away irrespective of any competing interests whereas qualified privilege must be balanced against competing rights or interests. Pennsylvania's law, for example, provides that no newsgatherers: "[S]hall be required to disclose the source of any information procured or obtained ... in any legal proceeding, trial or investigation before any government unit."⁴⁶

The California shield law also appears to create an absolute privilege.⁴⁷ A Californian court held recently, however, that the provision only provides immunity from contempt charges; it is not a general privilege regarding disclosure and hence does not preclude other sanctions for non-disclosure.⁴⁸ Courts have generally interpreted this provision as providing a strong privilege in civil proceedings but yielding to the defendant's due process rights in criminal trials where the information sought was key to a fair hearing.⁴⁹ Factors such as alternative sources of information and the importance of the information to the defendant may be taken into account.⁵⁰ It is arguable that all purportedly absolute shield laws will occasionally be defeated by a defendant's right to a fair trial.⁵¹ The shield law of Illinois provides for qualified privilege,

⁴⁵ By 1994, 27 states had enacted such laws. See Warren, *ibid*. See also Asner, M., "Starting From Scratch: The First Amendment Reporter-Source Privilege and the Doctrine of Incidental" (1993) 26 *University of Michigan Journal L. Ref.* 592.

⁴⁶ 42 Pa. C.S.A., Para. 5942(a).

⁴⁷ CAL EVID CODE, Para. 1070(a) (West, 1995).

⁴⁸ See *SCI-Sacramento Inc. v. Superior Court (People)* (App 3 Dist. 1997 62 Cal. Rptr. 2d 868, 54 Cal App. 4th 654).

⁴⁹ See *In re Willon*, (App. 6 Dist. 1996) 55 Cal Rptr. 2d 245, 47.

⁵⁰ See, for example, *Delaney v. Superior Court (Kopetman)*, 268 Cal. Rptr. 753 (Cal 1990).

⁵¹ This has also happened in Pennsylvania.

protecting non-disclosure unless "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."⁵²

Second, statutes vary as to who benefits from the protection.⁵³ For example, the Illinois shield law defines a reporter as "any person regularly engaged in the business of collecting, writing, or editing news for publication through a news medium" while "news medium" includes, among many other examples, "any newspaper or other periodical...a news service...a radio station; a television station...."⁵⁴ The more limited statutes exclude some writers, for example in the case of Alabama, magazine reporters.⁵⁵ New Jersey's shield law only covers radio and television stations which maintain exact recordings or transcripts of their broadcasts for at least one year.⁵⁶ Most statutes do not require publication of the information before the privilege is extended.

Third, some statutes exempt certain legal procedures from their purview while others, like the California law, do not.⁵⁷ The Illinois statute, for example, does not cover the defendant in libel or slander actions.⁵⁸

Fourth, some statutes cover both confidential sources and information.⁵⁹ Others statutes extend protection only to the source.⁶⁰

Fifth, some shield laws, for example that of New York, distinguish between confidential and non-confidential information. In that case, the former is protected by an absolute privilege while the latter attracts only qualified privilege.⁶¹ Although the Californian statute does not mention confidentiality, courts have interpreted it as extending protection to non-confidential

⁵² ILL. ANN. STAT., ch 110, para. 8-907(2) (1983).

⁵³ See Marcus, *op cit.*

⁵⁴ ILL ANN STAT Ch 110 para 8-907(2) (1983).

⁵⁵ ALA CODE para 12-21-142 (West, 1986).

⁵⁶ NJ STAT ANN para. 2A:84-A-21 (West, 1994).

⁵⁷ CAL EVID CODE ANNO Para. 901 (1995).

⁵⁸ ILL ANN STAT ch 110, 8-901 (1983).

⁵⁹ For example, the New York statute states that the journalist cannot be required to disclose "any such news...or the identity of the source of any such news...." NY CIV. RIGHTS LAW para 79-h(b) (and 1997 supplement).

⁶⁰ See, for example, the Alabama statute, at ALA CODE para. 12-21-142 (1976 and Supp 1993) and IND CODE ANN para 34-3-5-1 (1983).

⁶¹ NY CIV. RIGHTS LAW sec 79-h(b)-(c) (McKinney Supp. Jan. 1997 update).

information.⁶²

Sixth, it is unclear whether a newsgatherer's personal observations are covered by the privilege in all jurisdictions even where these would not reveal the identity of a source. The Supreme Court of California has held that the California shield law, which refers to "information" rather than "sources", does protect such observations. The Court reasoned that "information" included "a newsperson's non-confidential, eyewitness observations of an occurrence in a public place."⁶³ It is far from certain that the same conclusion would be reached in respect of all shield laws.

Summary of US law

Some constitutional protection for journalistic privilege regarding sources is provided by both the federal and state constitutions. more importantly, a number of state shield laws provide journalists with a privilege against compelled disclosure of their sources.

3.2 Australia⁶⁴

The law regarding the protection of journalists' sources in Australia is derived from the common law. There are currently no controlling federal or state statutory provisions. There is also no recognition of privilege or immunity for journalists. Nevertheless, Australian law does provide some protection for journalists sources, for example through the relevance requirement contained in the law of evidence.⁶⁵ Likewise, Australian courts have followed the English Court of Appeal in *Attorney-General v Mulholland*⁶⁶ in accepting that the public interest in the protection of sources may allow the exclusion of such evidence, even where relevant, if it is not also "necessary" or where the judge concluded "that more harm than good would result from compelling a disclosure or punishing a refusal to answer."⁶⁷ In *John Fairfax & Sons v Cojuango*, the High Court of Australia accepted that it should not require disclosure of sources,

⁶² See, for example, *In Re Willon* 55 Cal. Rptr.2d.245 (1996).

⁶³ *Delaney v. Superior Court of Los Angeles*, 268 Cal. Rptr. 753 (Cal. 1990).

⁶⁴ Wendy Harris assisted in the compilation of this section.

⁶⁵ See for example *DPP v. Luders*, Commonwealth Law Bulletin April 1993 at 604, (unreported) District Court of Western Australia, No. 177 of 1990 and *Independent Corruption Commission Against Corruption v. Cornwall*, (1993) 116 ALR 97 (Supreme Court of New South Wales), paras. 35-40.

⁶⁶ [1963] 2 QB 477 (CA).

⁶⁷ See, for example, *McGuinness, Nicolls v Director of Public Prosecutions* [1993] 61 SASR 31 (FC, South Australia Supreme Court).

unless it was "necessary in the interests of justice."⁶⁸

A further protection is offered in limited circumstances through the "newspaper rule", which allows journalists to refuse to disclose their sources at the interlocutory stage of defamation actions unless disclosure is necessary to do justice between the parties.⁶⁹ The newspaper rule has, however, been narrowly construed in a case involving protection of sources.⁷⁰

In some states, courts will make a preliminary or interlocutory order to a third-party to disclose information or documents only after the plaintiff has made reasonable unsuccessful inquiries and only where it appears that the third party has relevant information regarding the identity of a possible defendant.⁷¹ In a case where disclosure of a journalist's source was sought, the court held that the applicant must show that an order compelling disclosure "is necessary to provide him with an effective remedy"⁷²

3.3 Canada⁷³

There is no statutory right of journalists to protect the confidentiality of their sources in Canada.⁷⁴ Any right to protect journalists' sources must therefore find its basis either in the common law or the constitutional guarantee of freedom of expression.

The Common Law

A weak privilege not to disclose the identity of sources at the discovery stage of a libel action, known as the "newspaper rule" as in Australia, has been recognised by courts in some jurisdictions but rejected in others. For example, a case in Ontario, *Reid v. Telegram Publishing Co.*, clearly established that courts had a discretionary power, depending on all the circumstances, to refuse a request for disclosure during discovery, even where the evidence would otherwise be relevant.⁷⁵ In another case from Ontario, *White v. MacLean Hunter Ltd.*,

⁶⁸ (1988) 165 CLR 347 (High Court of Australia).

⁶⁹ *John Fairfax v. Cojuango*, *ibid.*, p. 354.

⁷⁰ *Ibid.*, p. 350.

⁷¹ See, for example, Rule 32.03 of the Supreme Court of Victoria.

⁷² *The Herald & Weekly Times Limited & Others v. The Guide Dog Owners and Friends Assoc. & Another* (Victoria), Commonwealth Law Bulletin 91/102, (1990) VR 451.

⁷³ This section was written by Toby Mendel, Head of Law Programme, ARTICLE 19.

⁷⁴ ARTICLE 19, *op cit.*, p. 51.

⁷⁵ 28 DLR (2d) 6 (HC), p. 10. Some standard of relevance is always applicable to evidence.

however, disclosure was ordered in the context of a highly uncomplimentary and admittedly false statement by the defendant about the plaintiff, a senior member of the Prime Minister's staff.⁷⁶ The newspaper rule has been completely rejected in some provinces. The British Columbia Court of Appeal, for example, held that the liberal discovery rules in that province were inconsistent with such a privilege.⁷⁷

A limited privilege not to testify at a trial has also been recognised as part of the law of evidence. In *Slavutych v. Baker*, the Supreme Court of Canada (SCC) held that courts might recognise a qualified privilege not to testify where four criteria were satisfied:

- 1) The communication must originate in a confidence of non-disclosure;
- 2) This confidentiality must be essential to the ongoing relationship between the parties;
- 3) The relationship must be one which ought to be fostered; and
- 4) The injury to the relationship from disclosure must be greater than the benefit it would bring to the litigation.⁷⁸

These criteria are applicable to all confidential relationships and hence might assist journalists wishing to protect the identity of their sources. The relationship between journalists and confidential sources would generally satisfy the first three conditions but satisfaction of the fourth would obviously turn on the circumstances of the case. In a subsequent case, *Moysa v. Alberta (Labour Relations Board)*, the SCC held that the appellant, a journalist, did not come within the *Slavutych* criteria in respect of her claim of a privilege not to testify regarding information she had given to certain individuals.⁷⁹ The fact that the information sought had passed from the journalist to the "source" rather than vice versa was clearly relevant as disclosure would not have affected any expectation of confidentiality.

Judges may also have a general overriding discretion to exclude otherwise relevant evidence. In *Crown Trust Co. v. Rosenberg*, Saunders J. refused to force a journalist to disclose the identity of a source, requiring only disclosure of the substance of the communication. He based this holding on the public interest in preserving the confidentiality of sources and the fact that it might be possible to obtain the information in other ways.⁸⁰

The Canadian Charter of Rights and Freedoms

The question of whether the Charter guarantee of freedom of expression, at section 2(b),

⁷⁶ (1990) Ontario Court of Justice, No. 32666/88.

⁷⁷ *Wismer v. MacLean-Hunter Publishing Co. (No. 2)* [1954] 1 DLR 501.

⁷⁸ [1976] 1 SCR 254 (SC), p. 260.

⁷⁹ [1989] 1 SCR 1572 (SC).

⁸⁰ (1983) 38 CPC 109 (Ont. HCJ), pp. 117-8.

protects journalists from being forced to reveal their sources has not yet been directly addressed in the case law. In *Moysa*, the SCC declined to apply the Charter to the question of whether a journalist might be compelled to testify, primarily because the information sought had not originated in the source and disclosure could not therefore be expected to have a deleterious effect on the flow of information to journalists. The Court held that it would not be appropriate to deal with questions relating to rights in the abstract.⁸¹

Two Supreme Court cases, *Canadian Broadcasting Corp. v. Lessard*⁸² and *Canadian Broadcasting Corp. v. New Brunswick (AG)*,⁸³ established that the media do not have any special rights against search and seizure above those afforded to ordinary citizens. The issue in these judgements was confidentiality of **material** as opposed to **sources**. The majority focused primarily on privacy rights and placed great reliance on the fact that the media had already broadcast a portion of the videotape sought. In a concurring judgement in *Lessard*, La Forest J. specifically noted the potentially negative impact mandatory source disclosure could have on media efforts to gather information. He went on to distinguish between the harmful effect of forcing disclosure of "films and photographs", on the one hand, and "personal notes, recordings of interviews and source 'contact lists'," on the other.⁸⁴ This suggests the Charter may protect journalists against forced disclosure of the identity of their sources. La Forest J. also emphasised that mandatory disclosure of sources or materials should not be ordered where the information sought might be obtained in other ways.

Summary of Canadian Law

Some protection against forcing journalists to reveal the identity of their sources may be found in both the common law and under the Charter guarantee of freedom of expression. The former provides only limited protection and in practice has rarely been applied in cases involving journalists. The extent to which the Charter prevents judges from ordering journalists to disclose the identity of their sources remains unclear. Cases involving journalists, however, suggest that there may be a difference between information relating to the identity of a source and other sorts of information; the former, if not the latter, may find some protection against disclosure under the Charter.

3.4. The United Kingdom

British law offers statutory protection to writers who do not wish to divulge confidential sources. Section 10 of the Contempt of Court Act 1981 provides:

⁸¹ *Op cit.*

⁸² (1991) 7 CRR (2d) 244 (SC).

⁸³ (1991) 7 CRR (2d) 270 (SC).

⁸⁴ *Ibid.*, p. 256.

No court may require a person to disclose, nor is the person guilty of contempt of court for refusing to disclose the source information contained in the publication for which he is responsible, unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Three points may be noted. First, the Court must determine whether disclosure is sought for one of the four specified grounds. An order to disclose for other reasons, for example, to protect public health, is not allowed. Second, the Court must determine whether the information is really "necessary". "[P]roof that revelation is merely 'convenient' or 'expedient' [is insufficient]. The name must be 'really needed'."⁸⁵ The Court must weigh the importance of the specified ground against the "journalist's undertaking of confidence."⁸⁶ Third, the court retains a discretion to refuse to order disclosure even when the conditions for an exception are met.⁸⁷

Prior to the ECHR decision in *Goodwin*, this provision had been interpreted broadly by the UK courts, which frequently ordered disclosure.⁸⁸ Since that judgment, English courts have again had the opportunity to examine the question of the protection of journalists' sources. *Camelot v. Centaur Communications*⁸⁹ involved very similar facts to *Goodwin*. A journalist received a copy of the financial accounts of the plaintiff company from a confidential source and published an article based on that information some six days before the plaintiff was due to release it themselves. The plaintiff obtained an order restraining the defendant from using the accounts in question and from publishing or distributing the confidential information. The defendant was also ordered to deliver the accounts to the plaintiff as this was expected to identify the source of the leak who was suspected of operating at a high level.

On appeal, the plaintiff argued that the existence of a person prepared to leak confidential information operating at such a high level was damaging to the company. The Court of Appeal, upholding the disclosure order, referred in some detail to both the ECHR and House of Lords judgments in *Goodwin*.⁹⁰

The Court of Appeal distinguished the facts in *Camelot v. Centaur*, from those of *Goodwin*, holding that while in the latter the courts were concerned with further disclosure of the same

⁸⁵ Robertson, G., & Nicol, A., *Media Law; The Rights of Journalists & Broadcasters* (1990), at 155.

⁸⁶ See ARTICLE 19, *Press Law and Practice* (London, 1993), p. 187. See also Robertson, *et al.*, *op. cit.*, p. 155.

⁸⁷ Robertson, *et al.*, *op. cit.*, p. 158.

⁸⁸ ARTICLE 19, *op. cit.*, p. 187.

⁸⁹ As yet unreported.

⁹⁰ The House of Lords decision was *X. Ltd v. Morgan Grampian (Publishers) Ltd.* [1991] 1 AC 1.

information, in the former the concern was with the possibility of future disclosure of other information since further dissemination of the draft accounts posed no further threat as the company had itself released that information. However, it could be argued that this is a distinction without a difference. At stake in each case was a company's desire to identify the source, and take action against him or her, in order to prevent further damage to the company in the future.

Unlike the ECHR in *Goodwin*, the Court of Appeal focused on the particular source rather than the general importance of sources to journalists. It took the view that the public interest in protecting some sources was greater than in protecting other sources. In this case, the source was not worth protecting. It seems clear that potential sources will not be in a position evaluate the public interest in protecting themselves and will, under the *Camelot* rule, err on the side of caution by not revealing the information in the first place. This would undermine the main goal of protecting sources.

This case certainly weakens the impact of *Goodwin*, at least in the short term. However, the ECHR is about to be incorporated into domestic law, so that Article 10 of the European Convention and the jurisprudence of the ECHR will play a much greater role in the interpretation of statutes. It is possible that cases like *Camelot* will be decided differently in the future.

4. Conclusion

This paper demonstrates ways in which intergovernmental bodies within Europe as well as a number of domestic jurisdictions inside and outside of Europe have sought to provide legal protection to anonymous journalists' sources. All of these jurisdictions have recognised that the right of the public to receive information is to a large extent dependent upon journalists who in turn rely on individuals to supply them with information, often on a confidential basis.

Notwithstanding the importance of protecting source confidentiality, all the jurisdictions surveyed here recognise, to a greater or lesser degree, that source confidentiality may be overridden in certain circumstances. Among the jurisdictions surveyed, four countervailing interests are of particular relevance: the right of an accused person to a full defence, the interest of litigants in a civil trial to obtain evidence, prevention of crime and safeguarding public order or national security.

In most jurisdictions, the party seeking disclosure will have to demonstrate not only the presence of a countervailing interest but also that the information sought is of sufficient importance to warrant a disclosure order. In many jurisdictions this means that the courts will weigh the harm of disclosure to freedom of expression against the countervailing interest. Given the importance of the former, the latter is only occasionally deemed dominant. In addition, in a number of jurisdictions, if the information may be obtained by other means, or if the goal served by disclosure has substantially been satisfied in another way, courts will not order disclosure. This careful balance, reflected in both international and national law standards, is necessary to protect a free press and hence the fundamental democratic right to right to freedom of expression.