

SILENCING SOURCES:

An International Survey of Protections and Threats to Journalists' Sources

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Executive Summary

The protection of journalists' sources is essential to ensure the free flow of information to journalists and the public.

The right to protection of sources is well recognized in international law. It has been specifically recognized by the United Nations, Council of Europe, Organisation of American States, African Union, and the Organization for Security and Co-operation in Europe. The European Court of Human Rights has found in several cases that it is an essential part of freedom of expression.

A significant number of countries now recognize the protection of journalists' sources. Nearly 100 countries have adopted specific legal protections for journalists' sources either in laws or constitutions. In at least 20 countries, those protections are absolute. Many countries also recognize protection of sources in case law as common law or as a part of the constitutional right of free speech.

The recognition of the need for legal protections has been growing. In the past few years, many countries have adopted laws including Belgium, Mexico, Switzerland, New Zealand, Australia, Angola, Luxembourg and El Salvador. The US, Canada, and Ireland stand out as the few established democratic countries that do not automatically respect the right of protection of sources.

In most countries with laws, there appear to be few cases where journalists are required to disclose source information. The right of protection of sources is more threatened in a number of jurisdictions without laws. In the United States, several journalists have been imprisoned for extended periods in recent years. Journalists have also been jailed in the Netherlands and fined in Australia and Canada.

In many jurisdictions, protections are being undermined by the regular use of search warrants on media offices and journalists' homes. Few countries have specific legal protections on searches. This is a continuing problem in Europe even after strong European Court of Human Rights rulings on the subject. Protections are also being undermined in many jurisdictions by the use of legal and illegal surveillance.

National security claims are also threatening protections in many nations. State secrets and Official Secrets Acts are a continuing problem for journalists. There have been numerous cases where journalists have been arrested, prosecuted or harassed for disclosure of information. New Anti-terrorism laws adopted in numerous countries have given authorities extensive powers to demand assistance from journalists, intercept communications, and gather information.

Few countries provide protections for the sources themselves once they have been identified. Over 40 countries have whistleblower protections in their laws but only a handful authorizes disclosures to the media. In a handful of countries, there is a public interest defense to state secrets laws.

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About Privacy International

Privacy International was formed in 1990 as a privacy, human rights and civil liberties watchdog. It has been at the forefront of research and public education on issues ranging from biometrics and identity cards, police systems and national security arrangements, Internet censorship, cybercrime and communications surveillance to freedom of information and media rights. It has organised campaigns and initiatives in more than fifty countries. More information is available at <http://www.privacyinternational.org/>

The Freedom of Information Project of PI has been active in promoting access to information and media freedom globally since 1999. It produces the Global FOIA Survey and has conducted legal analyses of media and information laws and practices in dozens of countries. It has also produced guides for organizations such as the OECD and National Democratic Institute and evaluations, training, and research reports for the Organization for Security and Co-operation in Europe (OSCE), Article XIX and Consumers International. Its web site is <http://www.privacyinternational.org/foi>

Introduction

This report reviews the laws and practices in nations relating to protection of journalists' sources around the world. The situations in over 150 countries were examined in the process of gathering the information. It is hoped that a greater awareness of the laws and practices will lead to increased recognition and protection of journalists and their sources.

Every day, journalists around the world receive information from confidential and anonymous sources. Sometimes they receive documents, other times it is just a quiet word over the telephone or in a public place about something that might be of interest.

The journalists are often given this information in the expectation that they will not identify the sources who could be fired, arrested or harmed if their roles are revealed. The information given has been kept from the public as it is often classified, sensitive or private.

Without this informal flow, a considerable amount of important information will never be public. Corruption, abuse and incompetence in government agencies and private organisations will not be revealed and the public will be kept in the dark.

Journalists also collect information by interviewing a variety of people for information, making notes, recording, and taking photographs or video. This information is collected, collated and put into drafts and eventually articles, reports and books. Generally it is understood by all involved that the journalists are independent parties who are attempting to inform the public about issues that are of a public interest, not acting on behalf of police or other government agencies, collecting the information for the purposes of prosecution.

Journalists have long recognized in their ethical codes the need to protect their sources' identities and their own internal processes for developing stories. A substantial number of countries recognize it in law and practice.

Nevertheless, these legal and ethical protections are challenged in many jurisdictions by police, lawyers and judges who demand that journalists provide information to assist in investigations and proceedings. This regular conflict in many jurisdictions is the inspiration for this report.

The first section of this report discusses by topic the areas of relevance relating to protection of sources and how they are reflected in legislation, starting with international standards and concluding with domestic practices and issues of special concern such as national security, surveillance and defamation ,

The second section examines by region the situation and the challenges that journalists face. Several examples and cases will be presented to illustrate the current situation in the different regions.

Finally, based on the collected information, guidelines based on the best laws and practices are included. These can be used when considering new laws and re-examining and amending existing legislation in countries on the protection of sources.

I. Defining Protection of Journalists' Sources

The Boundaries of Protection of Sources

There are many circumstances where journalists are requested to provide information or materials or face consequences. In the typical case, the journalist receives information from an insider. The identity of the source is requested by authorities or a civil litigant so that the source can be sanctioned for releasing the information.

However, the issues around protection of journalists' sources is not confined only to those cases when there is a confidential source and that person's identity needs to be protected. In many cases, there will be a number of different elements in the same case. The key issue that ties all of the different scenarios together is how the demand for information or sanction affects the free flow of information and freedom of expression.

Some of the common scenarios:

- *The journalist receives material that was unlawfully disclosed.* A journalist has received information that is classified or protected and is asked to name the source by authorities so that the source can be sanctioned.
- *The journalist is a third party witness to a rights violation.* A journalist received information from a source which violates a third person's rights such as defamation or privacy. In the civil case against the organisation for releasing the information, the journalist is asked who provided it to him.
- *The journalist is accused of committing a crime.* The journalist or media organisation is accused of unlawful receipt or possession of state secrets or other confidential information. In some cases, the journalist is accused of assisting directly in the crime either through soliciting the information or committing bribery.
- *The journalist is accused of defamation.* The person suing demands the identity of sources, notes and other journalistic materials to show poor journalistic practice or malice. The journalist wishes to use some of the information to show truth or good faith.
- *The journalist has information about a crime.* The journalist has obtained information through interviews or research. Book writers and documentary makers in Canada and the US are regularly subpoenaed for their notes and other materials. In other cases, the journalist has photographed or recorded an event where an incident may have occurred. Subpoenas for unaired video are also common in the US.
- *The journalist is a witness to a crime.* The journalist was present at an event where a crime might have occurred. He is asked to describe it to police, testify about it before a grand jury or act as a witness at a trial. He can be requested to do so both by the prosecution and the defense.

Why the Protection of Sources is Important for the Media

Disclosures of information by confidential sources are essential for the media's ability to gather information. Sources can provide a variety of important information. Sometimes they can be whistleblowers who provide inside information on wrongdoing inside a government body or corporation. They can be officials who confirm information without being the original sources. They can also be officials who wish to get important information out to the public but without making an official announcement.

Many important stories have been revealed only because knowledgeable insiders made unauthorized disclosures to journalists. These disclosures are often the only means for journalists to receive information where legal regimes such as freedom of information laws are not sufficient.

The quintessential case on protection of sources is of course the Watergate affair in the United States, where reporters revealed the abuses of powers of US President Nixon and his staff which led to his resignation and the imprisonment of many officials. Anonymous sources continue to play an important role in providing information to journalists about abuse, corruption and threats to public health.

Some recent examples:

- In the US, information from whistleblowers allowed for the public revelation of abuses at Abu Ghraib prison, illegal wiretapping of international telecommunications, the monitoring of billions of Americans' phone records by the National Security Agency, and the illegal monitoring of international banking transactions. Others leaks revealed pervasive use of illegal steroids and other drugs by major athletes and led to changes in policy and testing in professional sports.
- In Russia, an anonymous caller into local radio stations informed the public and families about the sinking of the Russian AS-28 mini-submarine while officials were still denying it. The reports forced the government to request help and the crew was saved by the British navy.¹
- In Canada, whistleblowers revealed misspending by the ruling Liberal party to companies with close political ties to the party. The revelations led to the creation of a national inquiry and the defeat of the party in the most recent election.
- In the UK, a whistleblower at the Independent Police Complaints Commission revealed police deception in the aftermath of the shooting death of an innocent man by anti-terrorism police. Other leaks revealed government unwillingness to investigate bribery by a major defense contractor for fear of upsetting the Government of Saudi Arabia.
- In South Africa, a whistleblower leaked bank records which revealed how government bodies gave a substantial contract to a company which then donated most of the money to the ruling ANC party while not fulfilling the contract.

¹ Whistleblower broke secret of Russian sub and 'saved men's lives', AFP, 11 August 2005.

- In China, public health whistleblowers revealed the spread of SARS and bird flu while officials were denying it and ordering doctors not to reveal it. The disclosures allowed international public health officials to take action to prevent greater outbreaks.
- In Peru, the leaking and broadcasting of tapes by military officials showing intelligence head Vladimiro Montesinos bribing politicians led to his fleeing the country and the eventual resignation of President Fujimori.

The Consequences of Lack of Source Protection

In the absence of adequate legal protections, journalists must either disclose their sources or face legal sanctions. This has significant implications on the ability of journalists to be able to access these sources and thereby to perform their watchdog function on behalf of the public.

The “Chilling Effect”

The most significant consequence of forcing journalists to disclose their sources is the effect it will have on their ability to obtain information. Some sources will refuse to talk to them for fear of being revealed. Other sources will not trust them as the journalists’ reputation will be changed from that of an independent gatherer of information into that of an arm of government.

Many courts around the world have recognized the importance of this issue and how it will affect the free flow of information:

The European Court of Human Rights found in 1996 that the public interest in being informed would be undermined:

Without such protection, sources may be deterred from assisting the press in informing the public in 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.²

The UK Court of Appeals, Justice Denning expressed concern about wrongdoing going unrevealed:

[I]f [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.³

The Japanese Supreme Court in 2006 found that journalists would be hindered in informing the public:

² Goodwin v. The United Kingdom - 17488/90 [1996] ECHR 16 (27 March 1996).

³ British Steel Corpn v Granada Television Ltd, [1981] 1 All ER 417. (Lord Denning).

It is generally construed that if a news reporter's news sources are disclosed indiscriminately, such disclosure would undermine the mutual confidence between the news reporter and the persons who provide relevant information as the news source and hinder the news reporter's news gathering activities in the future, seriously affecting the press's activities and making it difficult for the press to perform the activities.⁴

US Supreme Court Justice Stewart in his dissent in the *Branzburg* case was concerned about government power being uncontrolled:

[W]hen governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship." [...] the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsmen. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.⁵

Changes to the practice of journalism

Another significant consequence of the lack of strong source protections is the measures that journalists must take to avoid facing situations where they might be asked to disclose their sources or other information that they gathered.

A common practice in the US and other jurisdictions without protections is the routine deletion of information once a story is completed. In Ireland, two journalists from the *Irish Times* are currently on trial for destroying information that a court of inquiry has demanded that they provide to determine who the source of their information was.

This limits future journalism and history writing as key information is often destroyed to prevent disclosure. As the editor of the *Daily Herald* in Utah commented in a recent discussion on a weak proposed rule on source protection:

[T]he *Daily Herald* has established a policy under which unpublished material is destroyed after a few days. This is an unfortunate but necessary practice to shield ourselves from fishing expeditions. I do not believe the practice to be in the public interest in the long run, and I wish it were avoidable. Unfortunately, it is not [...] Unpublished notes may include information relating to some topic other than the one for which the interview was initially conducted; such information may be useful later. But without some assurance that the unpublished material will be viewed by the courts as confidential, we will continue to destroy it. We recognize that gathering the

⁴ Case 2006 (Kyo) No. 19, Minshu Vol. 60, No. 8, 3 October 2006.

⁵ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

information a second time may be difficult or impossible. A source may no longer be available, for example, or the details of an account may change. History thus becomes a casualty.⁶

In the UK, journalists are cautioned when writing stories to not directly reveal that they have copies of documents and not to send them to colleagues for fear of inviting a request to return them to the organisation. They are often counselled to hold “bonfires” once the story has been written to prevent having to disclose them.

Physical Dangers

The most serious consequence that can result from the lack of source protection is the physical endangerment of the journalist. Many journalists work in areas of extreme danger such as war zones or investigation and reporting on dangerous crime. If a journalist is considered an informant or a spy for the authorities or a future witness in a trial, this may result in their being targeted.

According to the Committee for the Protection of Journalists, in 2006 56 journalists were killed “in the line of duty or were deliberately targeted for assassination because of their reporting or their affiliation with a news organization”.

The United Nations International Criminal Tribunal for Yugoslavia (ICTY) ruled in 2004 that war correspondents have a qualified privilege to not testify because of the possible physical dangers that they might find themselves in if they are perceived to be future witnesses in war crimes trials:

[I]n order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources [...] What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. [...] If war correspondents were to be perceived as potential witnesses for the Prosecution [...] war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.⁷

The Council of Europe recommended in 2007 that journalists not be required to hand over notes, photographs, audio and video in crisis situations to ensure their safety.⁸

⁶ Comments of Randy Wright, Executive Editor, Daily Herald, Provo, UT to Utah Committee, 2006. http://www.utcourts.gov/cgi-bin/mt3/mt-comments.cgi?entry_id=250

⁷ Prosecutor v Radoslav Brdjanin and Momir Talic, Case IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 Dec 2002.

⁸ Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. Adopted by the Committee of Ministers on 26 September 2007 at the 105th meeting of the Ministers' Deputies.

II. International Recognition of Protection of Sources

There is widespread recognition in international agreements, case law and declarations that protection of journalists' sources is a crucial aspect of freedom of expression that should be protected by all nations.

The protections are strongest in Europe where the European Court of Human Rights has specifically found in favour of the right of protection and the Council of Europe has issued detailed guidelines on the protections. There are also significant declarations from the human rights bodies of the United Nations, African Union and the Organisation of American States.

The international instruments agree that the protection of sources is "indispensable", an "essential element", and a "basic condition for press freedom" which is necessary to ensure the free flow of information as recognized in all international human rights agreements. Without it, the media will not be able to effectively gather information and provide the public with information and act as an effective watchdog.

The instruments all begin with the presumption that the identity of confidential sources and the information should not be disclosed except in "exceptional circumstances". The need for the information about the source must be essential and only in cases where there is a "vital interest".

United Nations

The UN has recognized the importance of professional secrecy for journalists from its earliest days. In 1952, the Subcommittee on Freedom of Information and of the Press developed a Draft Code of Ethics⁹ which stated:

Discretion should be observed concerning sources of information. Professional secrecy should be observed in matters revealed in confidence; and this privilege may always be invoked to the furthest limits of law.⁹

Article 19 of the Universal Declaration of Human Rights recognizes the right to free expression. The Commission on Human Rights and the Special Rapporteur on Freedom of Opinion and Expression have long recognized the importance of protection of sources as an aspect of Article 19 through declarations and findings.

The Special Rapporteur noted that the protection of sources has a "primary importance" for journalists to be able to obtain information and that the power to force disclosure should be strictly limited:

[I]n order for journalists to carry out their role as a watchdog in a democratic society, access to information held by public authorities, granted on an equitable and impartial basis, is indispensable. In this connection, the protection of sources assumes primary

⁹ Draft International Code of Ethics, Adopted by the Subcommittee on Freedom of Information and of the Press, March 14, 1952, Document E/CN.4/Sub.1/165, International Organization, Vol. 6, No. 2. (May, 1952), pp. 343-344.

importance for journalists, as a lack of this guarantee may create obstacles to journalists' right to seek and receive information, as sources will no longer disclose information on matters of public interest. Any compulsion to reveal sources should therefore be limited to exceptional circumstances where a vital public or individual interest is at stake.¹⁰

The Special Rapporteur in 1998 called for states to adopt protection of sources laws, noting:

[T]he Special Rapporteur observes that independent and State-owned media contribute most effectively to the realization of the right to information in countries where there is a statutory presumption that journalists are not required to disclose their sources except in the most limited and clearly defined circumstances. Without such protection for both journalists and sources, the media's access to information and their ability to communicate that information to the public are likely to be compromised.¹¹

In 2005, the Commission on Human Rights called for states to respect the right of protection of journalistic sources expressing concern over legal cases and searches of newsrooms.¹²

International Criminal Tribunal

In 2004, the United Nations International Criminal Tribunal for Yugoslavia (ICTY) ruled that war correspondents have a qualified privilege to not testify even where the material has already been published and the sources are identified.

The Appeals Chamber found that “society’s interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents” and that the interest was also protected under Article 19 of the Universal Declaration. It ruled that there was a qualified privilege even in cases of non-confidential sources and published materials because of the need to ensure the free flow of information and the possible physical dangers that war correspondents might find themselves in if they are perceived to be future witnesses in war crimes trials.

The Tribunal made it clear that the decision is limited to only “war correspondents” rather than the broader category of journalists in general. The Chamber defined them as “individuals, who for any period of time, report (or investigate for the purpose of reporting) from a conflict zone on issues relating to the conflict.”

In examining the level of protection needed, the Appeals Chamber found that “the amount of protection that should be given to war correspondents from testifying being the International Tribunal is directly proportional to the harm that it may cause to the newsgathering function.” The Chamber examined the arguments and found that the independence of the newsgathering was crucial to its success:

¹⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted pursuant to Commission resolution 1997/27, Addendum: Report on the mission of the Special Rapporteur to the Republic of Poland. E/CN.4/1998/40/Add.2, 13 January 1998.

¹¹ Promotion and protection of the right to freedom of opinion and expression Report of the Special Rapporteur, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1997/26, E/CN.4/1998/40, 28 January 1998.

¹² Human Rights Resolution 2005/38.

[I]n order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources. These problems remain [...] even if the testimony of war correspondents does not relate to confidential sources.¹³

What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information [...] If war correspondents were to be perceived as potential witnesses for the Prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

In view of the foregoing, the Appeals Chamber is of the view that compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Appeals Chamber will not unnecessarily hamper the work of professions that perform a public interest.

The Chamber ruled that in order to compel the testimony of a journalist, the Trial Chamber must balance the interest of justice with “the public interest in the work of war correspondents, which requires that the newsgathering function be performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern.” A two part test must be satisfied before subpoenas can be issued:

- The petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case.

- The petitioning party must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.

The Tribunal also recognized in 1999 that the International Committee of the Red Cross and its employees had an absolute privilege against testifying or providing any type of information that it gathers in its work in conflict areas as a matter of customary international law under the Geneva Convention.¹⁴ The need for confidentiality is essential for the organisation to be able to have a “relationship of trust” with the nations that it is working with to be able to access the prisons and other facilities it is monitoring.¹⁵ This privilege was later incorporated into the rules for the International Criminal Court.

¹³ Prosecutor v Radoslav Brdjanin and Momir Talic, Case IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 Dec 2002.

¹⁴ Prosecutor v. Simic, Case No IT-95-9-PT, 27 July 1999.

¹⁵ The ICRC takes a position similar to journalists associations on the need for confidentiality: “Persons carrying out activities under the ICRC’s responsibility cannot be compelled to provide information and/or give testimony relating to any situation covered by the Geneva Conventions, namely international or non-international armed conflicts. This would

Council of Europe

The Council of Europe, a treaty-based body of 47 countries, has long been involved in the development of media policy. Since 1949, the Council has issued over 40 declarations and other instruments relating to freedom of expression and the media.¹⁶ Among these, the COE has issued a number of high-level declarations recognizing the need for protection of sources.

In 1994, the European Ministerial Conference on Mass Media Policy called for recognition of sources noting that it “enables journalism to contribute to the maintenance and development of genuine democracy”.¹⁷ This led to the creation of a special committee of experts in 1996 which began work on detailed guidelines.

In 2000, the COE Committee of Ministers adopted a Recommendation with detailed principles on protection of sources that all member states should adopt.¹⁸ It describes the principles as “common European minimum standards concerning the right of journalists not to disclose their sources of information.” The principles broadly apply to “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication” while a source is “any person who provides information to a journalist” and the information protected included the name and personal data of the source and the journalists, the factual circumstances and unpublished materials.

The Recommendation calls for every member state to adopt in their domestic law and practices the following protections:

- *Right of non-disclosure of journalists.* Countries should adopt explicit and clear legal protection giving journalists the right to not disclose their sources;
- *Right of non-disclosure of other persons.* The protections should apply to all those engaged in the journalistic enterprise, including editors, support staff and outside organisations;
- *Limits to the right of non-disclosure.* The protection is only limited in cases where reasonable alternatives have failed, the public interest in disclosure clearly outweighs the need to protect in sufficiently vital and serious cases responding to a “pressing social need” supervised by the ECtHR;
- *Alternative evidence to journalists' sources.* In cases of libel and defamation, courts should review all available evidence and not force the release of information about sources;

jeopardize the accomplishment of the ICRC's humanitarian mission, as defined in those Conventions, for the following reasons: 1) it would violate the ICRC's pledge of confidentiality vis-à-vis both the victims and the parties to conflicts; 2) it would undermine the confidence of the authorities and the victims in the ICRC; 3) it might threaten the confidence of the victims and of ICRC delegates; 4) it might cause the ICRC to be denied access to the victims in present or future circumstances.” Stéphane Jeannet, Recognition of the ICRC's long-standing rule of confidentiality - An important decision by the International Criminal Tribunal for the former Yugoslavia. *International Review of the Red Cross* No. 838, p. 403-425 YEAR.

¹⁶ See COE, A media policy for tomorrow: Historical document on the activities and achievements of the CDMM, 6th European Ministerial Conference on Mass Media Policy, MCM(2000)003 Cracow (Poland), 15-16 June 2000.

¹⁷ 4th European Ministerial Conference on Mass Media Policy, The Media in a Democratic Society, Prague, December 1994, Resolution No. 2 Journalistic Freedoms and Human Rights. DH-MM(2000)004, 4 September 2000.

¹⁸ Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.

- *Conditions concerning disclosure.* Disclosure orders are limited to the involved parties; journalists should be informed about their rights; sanctions should only be imposed by courts following and subject to review by a higher court; courts should impose measures to limit further disclosures of sources;
- *Interception of communication, surveillance and judicial search and seizure.* Searches or surveillance should not be used to bypass protections;
- *Protection against self-incrimination.* No limits on the right against self-incrimination.

The COE has also given special recognition to the need for protection of sources in conflicts and other dangerous circumstances. In 1996, the COE Committee of Ministers called on member states to ensure the confidentiality of sources in “situations of conflict and tension”.¹⁹ The COE reaffirmed the need for protection in these situations in 2005 with a declaration that member states should not undermine protection of sources in the name of fighting terrorism noting that “the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by [Article 10 of the ECHR and Recommendation R (2000) 7]”.²⁰

And recently, the Council of Ministers in September 2007 issued “Guidelines on protecting freedom of expression and information in times of crisis” which recommended that member states adopt the 2000(7) recommendations into law and practice and further recommended that:

With a view, inter alia, to ensuring their safety, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs, audio and video recordings) gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings.²¹

European Court of Human Rights

Article 10 of the European Convention on Human Rights provides for a right to receive and impart information without interference from authorities. The European Court of Human Rights has described the importance of freedom of expression as “one of the essential foundations of a democratic society.” The Court has heard a number of cases on protection of journalists’ sources and has found each time that there is a need for strong protections for journalists’ sources as a part of freedom of expression.

In 1996, in the case of *Goodwin v United Kingdom*, the Court ruled that violation of protection of sources was an interference with freedom of expression.²² The court found that:

¹⁹ Committee of Ministers Recommendation No. R (96) 4 on the Protection of Journalists in Situations of Conflict and Tension, 3 May 1996.

²⁰ Declaration on freedom of expression and information in the media in the context of the fight against terrorism, 2 March 2005.

²¹ Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies.

²² *Goodwin v. The United Kingdom*, - 17488/90 [1996] ECHR 16 (27 March 1996).

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms [...] 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.

The court evaluated the interference based on the case law relating to freedom of expression and found that any restrictions on protection of sources “call for the most careful scrutiny by the Court”.

In 2003, in the case of *Roemen and Schmit v. Luxembourg*, the court found that the searches of journalists’ offices and homes to discover the source of information to a story violated both Article 10 and the journalist’s Article 8 right of privacy.²³ The court found that the violation of Article 10 was even more severe than the violation in the *Goodwin* case:

In the Court’s opinion, there is a fundamental difference between this case and *Goodwin*. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant’s home and workplace. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity. This is because investigators who raid a journalist’s workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that “limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court”. It thus considers that the searches of the first applicant’s home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.

In another 2003 case of *Ernst and Others v. Belgium*, the court found that a search by 160 police officers against the offices and homes of four journalists to identify the confidential sources of their stories about an ongoing criminal investigation again violated Article 10 and Article 8.²⁴ The court ruled that the “massive” simultaneous raids were insufficiently justified and disproportionate compared to the interests under Article 10.

In the 1997 case of *De Haes and Gijssels v. Belgium*, the Court ruled that a judgment against two journalists in a defamation case who refused to disclose their sources violated their fair trial rights under Article 6 of the European Convention on Human Rights.²⁵

²³ *Roemen and Schmit v. Luxembourg* - 51772/99 [2003] ECHR 102 (25 February 2003).

²⁴ *Ernst and Others v. Belgium* - 33400/96 [2003] ECHR 359 (15 July 2003).

²⁵ *De Haes and Gijssels v. Belgium*, [1997] 25 E.H.R.R. 1.

Organization for Security and Co-operation in Europe

The Organization for Security and Co-operation in Europe (OSCE) is a regional security organisation made up of the 56 countries from North America, Europe and Central Asia. It was originally founded in 1975 in Helsinki as the Conference for Security and Co-operation in Europe to promote east-west relations during the Cold War. The organisation has long recognized the importance of journalists and freedom of expression and created a specialized office in 1997 to promote freedom of expression.

In 1986, the participating States meeting in Vienna on “Co-operation in Humanitarian and Other Fields” agreed to principles relating to free expression, including a principle of protection of journalists’ sources:

[The participating States] will ensure that, in pursuing this activity, journalists, 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.²⁶

In 2007, the OSCE Representative of Freedom of the Media released a study of the participating States’ recognition of sources protection.²⁷ The survey found that the protection of sources was generally recognized in OSCE countries and recommended that the States harmonize their laws with the following principles:

- Each participating State should adopt an explicit law on protection of sources to ensure these rights are recognized and protected.
- Journalists should not be required to testify in criminal or civil trials or provide information as a witness unless the need is absolutely essential, the information is not available from any other means and there is no likelihood that doing so would endanger future health or well-being of the journalist or restrict their or others ability to obtain information from similar sources in the future.
- Whistleblowers who disclose secret information of public interest to the media should not be subject to legal, administrative or employment-related sanctions.

Organization for American States

Article 13 of the American Convention on Human Rights provides for the right of free expression. The Inter-American Commission on Human Rights (IACHR) set up under the Convention to promote human rights has consistently found that protection of sources is included in the right of expression. In 2000, the Commission approved the Declaration of

²⁶ Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-Operation in Europe, held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference.

²⁷ Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media, Access to information by the media in the OSCE region: trends and recommendations, Summary of preliminary results of the survey, 30 April 2007.

Principles on Freedom of Expression as a guidance document for interpreting Article 13. Article 8 of the Declaration of Principles on Freedom of Expression states:

Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.²⁸

The Commission has described the protection of sources as an important aspect of freedom of expression. In 2000, it wrote:

The selection of information sources is part of the ethics and responsibilities of journalism, which can in no circumstance be subjected to state scrutiny. The Commission holds that the right to protect confidential sources is an ethical duty inherent to journalistic responsibility. Furthermore, the IACHR states that this issue also involves the interests of the sources, in the sense of being able to rely on confidentiality – when, for example, information is given to the journalist on such conditions. The IACHR holds that revealing sources of information has a negative and intimidating effect on journalistic investigations: seeing that journalists are obliged to reveal the identities of sources who provide them with information in confidence or during the course of an investigation, future sources of information will be less willing to assist reporters. The basic principle on which the right of confidentiality stands is that in their work to provide the public with information, journalists perform an important public service by gathering together and disseminating information that would otherwise not be known. Professional confidentiality has to do with the granting of legal guarantees to ensure anonymity and to avoid potential reprisals that could arise from the dissemination of certain information. Confidentiality is therefore an essential element in journalism and in the task of reporting on matters of public interest with which society has entrusted its journalists.²⁹

In 2002, the Commission reaffirmed the importance of protection of sources and recognized that it is a right given to journalists, rather than a duty imposed upon them:

Freedom of expression is understood as encompassing the right of journalists to maintain the confidentiality of their sources. It is the social communicator's right not to reveal information or documentation that has been received in confidence or in the course of research. Professional confidentiality allows journalists to assure sources that they will remain anonymous, reducing fears they may have of reprisals for disclosing information. As a result, journalists are able to provide the important public service of collecting and disseminating information that would not be made known without protecting the confidentiality of the sources. Confidentiality, therefore, is an essential element of the work of the journalist and of the role society has conferred upon journalists to report on matters of public interest [...] It should be emphasized that this right does not constitute a duty, as the social communicator does not have the obligation to protect the confidentiality of information sources, except for reasons of professional conduct and ethics.³⁰

²⁸ Inter-American Declaration of Principles on Freedom of Expression. Approved by the Inter-American Commission on Human Rights, 108th regular sessions, October 2000.

²⁹ Inter-American Commission on Human Rights, Report on the Situation Of Human Rights in Venezuela OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003.

³⁰ Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002,

African Union

Article 9 of the African Charter of Human Rights gives every person the right to receive information and express and disseminate opinions.³¹ The 2002 Declaration of Principles on Freedom of Expression in Africa released by the African Commission on Human and Peoples' Rights provides detailed guidelines for member states of the AU on protection of sources:

XV Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression;
- and disclosure has been ordered by a court, after a full hearing.³²

<http://www.cidh.org/Terrorism/Eng/part.k.htm>

³¹ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³² African Union, Declaration of Principles on Free Expression. Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002.

III. National Regulations on Protection of Sources

Approximately 100 countries around the world have adopted legal instruments on protection of journalists' sources. Nearly twenty have adopted constitutional protections while around 90 have adopted specific provisions in their national laws including their press laws and criminal and civil procedure codes. There are also sub-national laws in over 30 states in the United States, as well as in Argentina, Mexico, Australia and Germany. In an additional number of other countries, the courts have recognized the protection of sources in other laws or in the common law.

There have been considerable developments in the last few years. A large number of countries have adopted new laws including Mexico, New Zealand, Australia, El Salvador, Switzerland, and Belgium. Efforts to weaken the law in Portugal and to require journalists to disclose in Kenya were rejected by the leaders.

History

This principle of anonymity in publishing has long been recognized in western law. Originally, it emerged in the context of printers publishing anonymous articles and pamphlets. In the American Colonies, publisher John Peter Zenger was tried in 1734 for seditious libel for publishing anonymous columns criticizing the Governor. Colonial authorities also attempted to force future founding father Ben Franklin to identify a source of an article and jailed his brother.

In Sweden, the principle of anonymity of speakers was first recognized in the Ordinance Relating to Freedom of Writing and the Press in 1766.³³ The act required printers to respect an author's wish to remain anonymous and take responsibility for publication:

The printer shall display the name of the author on the title-page, unless the latter wishes to remain anonymous, which should not be denied him, in which case the printer, for his own protection, shall obtain from him a written acknowledgement that he has written the publication; notwithstanding which, whether or not the publication lacks the name of the author, the name of the printer himself and that of the town where the printing has taken place, as well as the date, should always be displayed on it; if the printer neglects to do so, he shall pay a fine of two hundred daler in silver coin.

If the publication lacks the name of the author and the printer, were it to be prosecuted, is demonstrably unwilling to reveal it, he himself shall bear the entire responsibility that the author of the publication should have borne; but if he is willing to name the author, he shall be freed from all responsibility.

In the US, there were a number of important cases starting in the early 19th century where Congress attempted to force journalists to disclose their sources after stories on corruption. In a few cases, the journalists were imprisoned in the Capitol. In all of the cases, the Congress relented. The state of Maryland was the first to adopt a law in 1896 after a *Baltimore Sun*

³³ §4. Translation available in *The World's First Freedom of the Information Act: Anders Chydenius' legacy today* (Chydenius Foundation, Kokkola, Finland 2006).

reporter was imprisoned for refusing to testify before a grand jury and other states followed shortly after. Congress first began consideration of a law in 1929.

Other countries followed suit in the 20th century. Austria adopted protections in its media law in 1921. In the Philippines, protections were adopted in 1946 and strengthened in 1956, and Norway followed course in 1951.

Starting in the late 19th century, British courts adopted the “Newspaper Rule” which allows for newspapers to withhold the identity of their sources in libel cases prior to trial.³⁴ It was adopted in New Zealand as early as 1907.³⁵

Constitutional Rights

Around 20 countries around the world have incorporated the recognition of protection of sources in their national constitutions. This is most common in Latin America where nearly half have some sort of constitutional protection. In Europe, a handful have protections while in Asia and Africa, only a few have adopted them.

The most detailed protection is the Swedish Freedom of the Press Act, which is part of the constitution. Under the Act, anyone who is a source has a fundamental right to anonymity and it is prohibited as a criminal offence for journalists to break this duty of confidentiality. Liability is lodged in the editor rather than the journalist or other employees. The identities of sources are strongly protected from being disclosed except in limited circumstances such as breach of national security. Officials are prohibited from investigating unless it is specifically authorized by the Act. The Fundamental Law on Freedom of Expression, another constitutional instrument, extends the rights to radio, television and other technologies.³⁶

Another useful example is the Constitution of Palau which states:

The government shall take no action to deny or impair the freedom of expression or press. No bona fide reporter may be required by the government to divulge or be jailed for refusal to divulge information obtained in the course of a professional investigation.³⁷

More commonly, the constitutions provide for protection of the right as part of the freedom of expression. Article 74 (3) of the Mozambique Constitution states that “freedom of the press shall include [...] Protection of professional independence and confidentiality.” In Brasil, the Constitution states that “access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity”.³⁸

A few countries in Latin America provide for a qualified right of protection in the right of habeas data. In Argentina, Article 43.3 on Habeas Data of the Federal Constitution provides

³⁴ *Hennessy v. Wright* (1888) 24 QBD 445.

³⁵ *Hall v New Zealand Times Company* (1907) 26 NZLR 1324.

³⁶ The Fundamental Law on Freedom of Expression, SFS nr: 1991:1469.

³⁷ Article IV, §2.

³⁸ Constitution of Brasil, 1988 as amended 1996, Article 5, XIV.

that “The secret nature of the sources of journalistic information shall not be impaired.” After the 1994 amendment of the Federal Constitution, all case law has recognized this privilege expansively.³⁹ A similar provision was added to the Constitution of Honduras in 2006 and Venezuela in 1999.

A constitutional recognition does not necessarily lead to protections. In Spain and Andorra, the Constitutions state that laws should be adopted to protect professional secrecy but neither has adopted a specific law on protection of sources and there have been recent cases in both jurisdictions.

A number of countries have also found that protection of sources is part of the Constitutional freedom of expression right. In Germany, the Constitutional Court ruled in 1966:

[F]reedom of the press also includes a certain degree of protection for the confidential relationships between the press and its private sources of information. Such protection is absolutely essential since the press, while unable to forego privately supplied information, can only expect these sources of information to be productive when the providers of the information can be totally certain that “editorial secrecy” is upheld.⁴⁰

In 2007, the Constitutional Court ruled again that searches of newsrooms in investigations of state secrets cases impaired the right of freedom of the press under the Basic Law and were “constitutionally inadmissible” in preliminary investigations.⁴¹

The Japanese Supreme Court ruled in 2006 that courts must consider Constitutional free speech rights when determining the balancing of interests in determining whether to order the disclosure of sources:

[T]he freedom of reporting facts is protected under Article 21 of the Constitution which stipulates freedom of expression. In order to ensure correct press reports, not only the freedom of reporting news but also the freedom of gathering news should be deemed to fully deserve to be respected in light of the spirit of Article 21 of the Constitution.⁴²

In Canada, the courts have begun to rule that journalists have a qualified privilege under the Charter of Rights and Freedoms which is determined on a case by case basis.⁴³

In the US, the Supreme Court ruled in 1973 that there is no constitutional right of journalists to refuse to testify before a grand jury about their sources of information.⁴⁴ The Court ruled that the government could not institute investigations in bad faith: “official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.” The Court also noted that “grand juries are subject to judicial control and [...] must operate within the limits of the First Amendment”. Since then many federal courts have found a limited privilege based on the

³⁹ In the “Moschini case” the court held that journalist companies and reporters cannot be required to reveal the origin of sources of their information because they are protected under art. 43.3 of the Constitution (CFed.Crim. y Correc., Sala I, “Moschini, Roberto”. LL, Suplemento de Derecho Constitucional del 11/2/98).

⁴⁰ 20 BVerfGE 162 - Spiegel, 5 August 1966.

⁴¹ 1 BvR 538/06; 1 BvR 2045/06 – Cicero, 27 February 2007.

⁴² Case 2006 (Kyo) No. 19, Minshu Vol. 60, No. 8, 2006.10.03.

⁴³ See e.g. *Wasylyshen v. Canadian Broadcasting Corporation*, 2005 ABQB 902.

⁴⁴ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Constitution, common law or the Federal Rules of Evidence but this has not been universally held. In 1978, the Supreme Court ruled that newsrooms could be searched like all other premises and that judges would prevent the abuse of warrants.⁴⁵

Laws with Absolute Protections

About 20 countries have adopted legislation which gives journalists an absolute level of protection for sources. Under these laws, the right of protection of sources is determined to be so fundamental that other interests cannot override it. These laws are most commonly found in Latin America, where many of the constitutions and laws are absolute on their face. They can also be found in some European, Asian and African countries and in dozens of state laws in the United States.

- In Georgia, the 2004 Law on Freedom of Speech and Expression states that “The source of a professional secret shall enjoy absolute protection and no one shall be entitled to demand its disclosure. No person shall be required to disclose the source of confidential information during court proceedings on the restriction of the right to freedom of speech and expression.”⁴⁶
- In Mexico, a new law adopted in 2006 gives absolute protection to the names of sources, telephone records, archives or any other information that could disclose the identity of the source and imposes criminal penalties on officials who violate the right.⁴⁷
- In Indonesia, the Press Act states that “The Right to Refuse is the right owned by journalists as professional to refuse in divulging names and/or other identities from sources to be kept concealed.”⁴⁸
- In France, the Criminal Procedure Code states that “Any journalist heard as a witness in respect of information collected in the course of his activities is free not to disclose its origin.”⁴⁹
- In Turkey, the 2004 Press Law states that “The owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their news sources or to legally testify on this issue.”⁵⁰
- Article 30 (1) of the Mozambique Press Law states that “Journalist shall enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment.”

Some countries have stronger protections for certain types of cases. In Iceland, the right is absolute for civil cases.⁵¹ In Kosovo, the 2006 Law on Defamation and Insult gives an

⁴⁵ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

⁴⁶ Law on Freedom of Speech and Expression § 11.

⁴⁷ Código Penal Federal, 243 Bis inciso III.

⁴⁸ Indonesia 1999 Law No 40 On Press, § 1 (10).

⁴⁹ Code of Criminal Procedure § 109.

⁵⁰ Press Law, No: 5187, §12, 9 June 2004.

⁵¹ Code of Procedure in Private Litigation, No. 91/1991.

absolute right of protecting a source in defamation and insult actions and prohibits any adverse inference from the refusal to disclose.⁵²

Even in countries where the law provides for an absolute right, there may be some instances where it may be overridden by law or practice. In many countries, journalists report that judges and officials still make demands to obtain sources information. Sometimes they are deterred by a showing of the law, while in others they are not. In addition, there are problems relating to sources and surveillance (see sections below) which may undermine the absolute protections in many jurisdictions.

In Lithuania, the Constitutional Court ruled in 2002 that the absolute protection of sources in the Law on the Provision of Information to the Public “violate[d] the values entrenched in the Constitution.”⁵³ It said that the protection could not be absolute in vitally important cases such as to protect the constitutional rights of a person because the harm would be greater than the benefit.

Qualified Laws

More commonly, national laws provide that there is a right of journalist to refuse to disclose their sources which can be overridden in specific cases. Typically, the laws require that certain criteria are met and procedures followed before an order to disclose is issued. The level of protection varies among countries from very strong to very limited.

One of the most comprehensive national laws on protection of sources in the world is found in Belgium.⁵⁴ It was adopted in 2005 following the ruling by the European Court of Human Rights against Belgium and an on-going controversy over the raid of a German journalist’s home and office by Belgian authorities on behalf of the European Union. The law gives broad protection to journalists and people they work with from having to disclose the identity or any documents or information that may reveal their sources, the type of information given to them, the author of texts, or the documents or the content of information. Surveillance or searches cannot be used to bypass the protections and journalists cannot be prosecuted for refusing to testify for receiving stolen goods or breaching professional secrecy. The protections can only be overridden by a judge in cases relating to terrorism or serious threats to the physical integrity of a person, the information is of crucial importance, and it cannot be obtained any other way.

The Philippines also has a strong but qualified law. It was first adopted in 1946 and amended in 1956 to only allow for disclosure in cases of state security:

Without prejudice to his liability under the civil and criminal laws, the publisher, editor columnist or duly accredited reporter of any newspaper, magazine or periodical of general circulation cannot be compelled to reveal the source of any news-report or information appearing in said publication which was related in confidence to such

⁵² Civil Law Against Defamation and Insult, §18.

⁵³ Decision of 23 October 2002.

⁵⁴ Loi du 7 avril 2005 relative à la protection des sources journalistiques.

publisher, editor or reporter unless the Court or a House or committee of Congress finds that such revelation is demanded by the security of the State.⁵⁵

In Armenia, disclosure can only occur in cases where it is:

directly related with a criminal case and only for the sake of clearance of heinous crimes or highly heinous crimes, particularly if the need of public interest defense under criminal law outweighs the public interest in non-disclosure of information source, and there are no more alternative means for defending the public interests.⁵⁶

In Luxembourg, the 2004 Law on the Freedom of Expression in the Media, journalists can be forced to disclose a source where it involves the prevention of crimes against individuals, drug trafficking, money laundering, terrorism or state security.⁵⁷ In Finland, it must involve the violation of a crime punishable by imprisonment of six years or more.⁵⁸

In many countries, there are no procedural limitations and the threshold for overcoming the protections is very low. In Belarus, the Law on Media allows for the court to order disclosure in cases where it “is necessary for the purpose of investigation or consideration of cases under their procedure.”⁵⁹ In Kyrgyzstan, any court or investigating official may require disclosure in civil or criminal cases.⁶⁰ In Cameroon, the 1990 Press Law allows for protection of journalist sources, whilst at the same time allowing for a judge in closed session to repeal the protection.⁶¹ Cote D’Ivoire’s 2004 Press Law is similarly weak, stating that journalists have the right to protect their sources except in cases where the law obliges them to reveal the names.⁶²

In Australia, a 2007 law gives broad discretion to courts to decide on whether to force disclosure of a source based on a balancing of interests to decide whether the harm to be caused by disclosure outweighs the desirability of the evidence being given.⁶³

The Council of Europe’s 2000 guidelines set out a detailed process based on the European Court of Human Rights cases that states should follow before a disclosure can be made:

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

⁵⁵ The Philippines Republic Act No. 53 (amended by RA 1447).

⁵⁶ RA Law "On Dissemination of Mass Information" §5.

⁵⁷ Loi du 8 juin 2004 sur la liberté d’expression dans les medias, §7.

⁵⁸ Act on the Exercise of Freedom of Expression in Mass Media (460/2003) §16.

⁵⁹ Law of the Republic of Belarus On the press and other mass media, §34.

⁶⁰ Law on protection of professional activity of journalists, §§8-9.

⁶¹ Loi No 90/052 du 19 Décembre 1990 sur la Liberté de Communication Sociale, §50.

⁶² Loi No 2004-643 du Decembre 2004 Portant Regime juridique de la Press, §28.

⁶³ Evidence Amendment (Journalists’ Privilege) Act 2007, No 116, 2007.

- b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:
- i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
 - ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
 - an overriding requirement of the need for disclosure is proved,
 - the circumstances are of a sufficiently vital and serious nature,
 - the necessity of the disclosure is identified as responding to a pressing social need, and
 - member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

Duty Not to Disclose

Another facet of the right to protect sources is whether the regulations on protection of sources are a right or duty for the journalist. Is the journalist legally obliged in all cases to not disclose the identity of the source, even if they discover they have been misled or feel that it is important for them to provide the information to authorities?

It is not an infrequent occurrence that a source is attempting to manipulate a journalist. In the US, the cases around CIA agent Valerie Plame started because the White House officials were attempting to discredit her husband, an opponent of the invasion of Iraq. In the UK, newspapers were provided falsified documents about company Interbrew in an attempt to manipulate stock prices. Many newspapers in the US have sharply cut back on quoting anonymous sources in the past few years.⁶⁴

A majority of laws provide that the right remains with the journalist rather than the source.⁶⁵ The OAS Rapporteur notes that, "It should be emphasized that this right does not constitute a duty, as the social communicator does not have the obligation to protect the confidentiality of information sources, except for reasons of professional conduct and ethics."⁶⁶

The ethical obligations of the journalists' societies and media organisations' internal policies typically state that they are not allowed to disclose a confidential source's identity. In August 2007, a reporter with the *Asahi Shimbun* was fired after he secretly recorded a source and provided a copy of the recording to another source.⁶⁷

Some sources laws specifically prohibit the journalists from disclosing the source. In Sweden, the Law on Freedom of the Press, which is part of the Constitution, makes it a criminal offense for journalists to disclose a confidential source. In Latvia, the editor can be

⁶⁴ See Recasting the Anonymous Source as 'Exceptional Event', Poynter Institute, 21 June 2004.

⁶⁵ See laws in France, Indonesia, Mozambique above.

⁶⁶ Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, <http://www.cidh.org/Terrorism/Eng/part.k.htm>

⁶⁷ Asahi news reporter axed for breaching promise with secret source, Japan Times, 7 August 2007.

fined 250 Lats under the Administrative Violations Code for revealing the identity of a source without permission.⁶⁸

In many of the Central Asian states, the press laws prohibit a journalist from disclosing the identity of sources unless ordered by a court rather than give them an affirmative right not to be forced to disclose.⁶⁹

Some courts have ruled that it is a violation of a contractual obligation to release the name of a source after promising not to. The US Supreme Court ruled in *Cohen v. Cowles Media* that under the theory of estoppel, journalists are not allowed to disclose their source if they had given a promise of confidentiality.⁷⁰ This is somewhat curious, given that the same court a few years before refused to acknowledge the right of a journalist not to disclose their source.

What Information is Protected

The need to protect sources is not just limited to protecting the identity of the person who provided information. There are a variety of other situations where the information or testimony comes under the category of protection of sources.

Information that relates to the source or that could identify them

Most laws apply the protections to related information that may identify the source. This includes things such as the content of information received and documents received or other personal information such as phone records.

Journalists are often requested to provide the actual physical materials that were given by the source so that it can be tested for fingerprints, DNA or reviewed for identifying marks. In a case in the UK, the editor of the *Guardian* newspaper Peter Preston handed over leaked classified documents that he received from an anonymous source after a ruling by the Court of Appeals.⁷¹ The documents were easily discovered to be from a Ministry of Defense employee Sarah Tisdale who was convicted under the Official Secrets Act and imprisoned.

Unpublished information

Another common request made to journalists is to provide unpublished materials including notes, draft articles, unedited video and audio tapes. Often this material is not from a secret source but the primary concerns about the potential effects on the free flow to information are the same. While persons may be willing to speak to the media, knowing that that information could be used against them in court is likely to dissuade them from speaking.

In the US and Canada, there have been a number of cases where investigative journalists who are writing books or making documentaries about crimes have been requested to give up their notes, research and interviews with witnesses and often the suspect. In the US, freelance

⁶⁸ Response of Government of Latvia to OSCE Survey, May 2007.

⁶⁹ See Uzbekistan, Law on Mass Media (1997); Law of The Republic of Tajikistan On the Press and Other Mass Media, §29; Turkmenistan SSR Law on the Press, §28 (1991).

⁷⁰ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

⁷¹ See Peter Preston, How not to defend your source, *British Journalism Review* Vol. 16, No. 3, 2005, pages 47-52.

writer Vanessa Leggett spent 168 days in jail in 2001 for refusing to provide to the FBI all her notes and tapes (not even allowing her to keep copies for her research) that she had gathered for a book following a failed Houston murder prosecution. The 5th Circuit Court of Appeals found there was no right for her to refuse to disclose the information. In Canada, Reporter Bill Dunphy from the *Hamilton Spectator* was ordered to hand over transcripts of his interview with a suspected murderer in 2006. The order was set aside in June 2007 by the Ontario Court of Justice finding that the material was privileged and that the criteria for obtaining it had not been provided.

The situation also comes up with video or photographs taken by journalists at important events but which are not published. US Blogger Josh Wolf spent 226 days in jail in 2006-2007 for refusing to provide an unpublished videotape of a demonstration in San Francisco and to testify before the grand jury on what he saw. He was only released when he placed the video online.

In the US, requests for aired and unaired video of public events are very common and media organisations also have concerns about the time and resources needed to provide the information.⁷² Many media organisations are now charging to provide the published video, which has reduced requests considerably.

This type of information may be subject to lesser protections. The European Court rejected an application for a case from Norway on unaired video in 2005.⁷³ The Court found that:

“[T]he Court is not convinced that the degree of protection under Article 10 of the Convention to be applied in a situation like the present one can reach the same level as that afforded to journalists, when it comes to their right to keep their sources confidential, notably because the latter protection is two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest.”

However, more recently, the Council of Europe Ministers recommended in 2007 that journalists not be required to hand over notes, photographs, audio and video in crisis situations to ensure their safety.⁷⁴

Testifying as witnesses

A related area to protection of the identity of sources is whether journalists are required to testify in court as witnesses, especially if they are writing stories about viewing criminal behaviour.

There is a concern that requiring them to testify about what they saw and what people told them would cause their sources not to tell them information. There is also concern that it would undermine their credibility with their sources and the public if they were to be seen as

⁷² Reporters Committee for Freedom of the Press, *Agents of Discovery, A Report on the Incidence of Subpoenas Served on the News Media in 2001* (2003).

⁷³ Nordisk Film & TV A/S - Denmark (N° 40485/02) Decision 8 December 2005.

⁷⁴ Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. Adopted by the Committee of Ministers on 26 September 2007 at the 105th meeting of the Ministers' Deputies.

investigative arms of the police rather than independent gatherers of information. In some cases, this could lead to their endangerment in areas such as war zones.

Many countries apply the same rules for sources to testifying. In Canada, the Supreme Court ruled in 1989 that journalists can be compelled to testify only if it is not shown that the collection would “detrimentally affect journalists’ ability to gather information.”⁷⁵

The International Criminal Tribunal Appeals Court ruled in 2002 that a two-part test must be satisfied before a journalist can be compelled to testify before the Tribunal: “First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.”⁷⁶

Who is a Journalist?

Any common issue in protection of sources cases is defining who is a journalist and is thereby protected. Media is constantly changing and each technical change results in new forms of media being created. Laws are often slow in keeping up with new forms of media and journalists who publish using new technologies are often not protected as their colleagues at more established media.

One of the most comprehensive protections is found in the Belgian law on protection of sources. It defines journalists as “any self-employed or non-self-employed person and any natural person who contributes regularly and directly to the acquisition, editing, production and dissemination of information by way of a medium in the public interest”. The Court of Arbitration ruled in 2006 that the protections should extend to all persons including those who do not write on a regular basis and it was amended by the Parliament.⁷⁷

In the US, several federal Court of Appeals have set out a three-part test to determine who should be covered as a journalist in sources protection cases. To apply, the person must be engaged in investigative reporting, is gathering news, and possesses the intent at the inception of the news gathering process to disseminate the news to the public.⁷⁸

In other countries, the laws only provide for protections for certain types of media. In Bulgaria, the Radio and Television Act provides for protection of sources but it does not apply to print journalists. It is reported that in practice, the courts have recognized the same rights for them. In California, the state Constitution and shield laws apply to “a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication”.

In many countries, the journalist must be officially recognized under the press law before they have protections. This may be a double-edged sword in that it requires journalists into a licensing scheme before they can be protected.

⁷⁵ *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572.

⁷⁶ *Prosecutor v Radoslav Brđjanin and Momir Talic*, Case IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 Dec 2002.

⁷⁷ Arrêt n° 91/2006 du 7 juin 2006.

⁷⁸ In re: Grand Jury Subpoenas, No. 01-20745, n.4 (5th Cir. Aug. 17, 2001).

The Internet has challenged many of the definitions of what is a journalist and thus who should be protected. Most major media organisations have created sites and have dedicated staff who provide content for the sites. Due to the rapidity of electronic publishing, stories often appear on these sites before they appear in printed versions. More interesting are the more informal types of journalism that have emerged. Bloggers, pod-casters, citizen journalists, e-zines and other types of information dissemination have stepped in and now often provide information to more people than the old technologies.

There are a growing number of countries where the laws apply equally to Internet-based media. In Argentina a 1997 decree⁷⁹ and a law adopted in 2005⁸⁰ provide that the protection of a free press also applies to the Internet and electronic media. In the US state of California, an appeals court ruled in 2006 that three Internet web sites that focused on news related to Apple Computer were also protected by the 1974 state shield law even though it did not mention computer technologies.⁸¹ The court stated:

We can think of no reason to doubt that the operator of a public Web site is a “publisher” for purposes of this language; the primary and core meaning of “to publish” is “[t]o make publicly or generally known; to declare or report openly or publicly; to announce; to tell or noise abroad; also, to propagate, disseminate (a creed or system).” [...] News-oriented Web sites like petitioners’ are surely “like” a newspaper or magazine for these purposes.

The Council of Europe guidelines recommend that the laws should protect “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”.

It is also important that other persons in the journalistic process are protected. Most journalists are part of a team that gathers, processes and disseminates the news. Other parts of the team include editors, assistants and printers, and outside parties such as telecommunications, security, equipment and service companies. Each of them may receive information in the course of their business that gives them insight to whom the journalist might be talking to, where they are at a particular time or what information and documents they hold. Therefore, it is important that any protections for journalists also apply to them in their capacity as part of the journalistic enterprise.

In Belgium, the protections apply to the editorial staff or “anyone who directly contributes to the gathering, editing, production or distribution”. In Austria, the protections apply to “media owners, editors, copy editors and employees of a media undertaking or media service”.

Searches

Authorities in many jurisdictions have searched journalists’ offices and homes either to obtain information on the journalists’ sources or as a pretext to impede their work on stories

⁷⁹ Decree 1279/97.

⁸⁰ Law 26.032.

⁸¹ O’Grady v. Superior Court, 139 Cal. App. 4th 1423 (Ct. App. 2006).

that were sensitive to the authorities. They occur even in countries that have strong legal protections for protecting the identity of sources.

- In Hong Kong, the Independent Commission Against Corruption (ICAC) in 2004 obtained 14 search warrants to search seven newspapers and the homes of journalists to identify who had revealed the name of a witness. A suit by reporters against the raids was later dismissed by the Court of Appeal on jurisdictional grounds, which said that the raids were justified.
- In Kenya, armed and masked men, later identified as police officers, raided the offices of *The Standard* newspaper and the *Kenya Television Network* and seized computers, equipment and files in 2006. Staff were detained at gun point, beaten and searched. Thousands of copies of the paper were burned and the station was off the air for several hours. The government later apologized.
- In the UK, two newspapers in Milton Keynes and the home of a journalist were raided and searched in an investigation of leaks from Thames Valley Police in May 2007. The police justified the raid saying that the journalist had bribed a police official.
- In Russia, there have been dozens of reported cases of newsrooms searched and journalistic materials being seized in the last five years. These are often based on claims of national security or failure to pay taxes.
- In Italy, police have searched the offices and journalists' homes in a number of investigations about the leaks of information on pending criminal investigations. Newspapers include *La Repubblica*, *Piccolo*, *Il Giornale*, *Corriere della Sera* and *Il Messaggero*.
- In France, which has a strong protection of sources law, police searches have involved investigations into breaches of professional secrecy. Newspapers recently searched include *Le Point*, *L'Equipe*, and *Midi Libre*. An attempt in May 2007 to search the offices of the satirical newspaper *Le Canard Enchaîné* to identify the source of information regarding the presidential Clear Channel scandal was repelled by journalists in an almost comical standoff between the investigating judge and the journalists who refused to allow him in the office. Minister of Justice Pascal Clément promised in June 2006 to strengthen the law on searching of newspapers.

Searches of newsrooms and journalists' homes to obtain documents, video or other information collected by the journalist raise additional concerns over orders to testify or disclose information. The European Court of Human Rights has described them as a "more drastic measure" than an order to disclose information.

A search potentially allows authorities to access a wide variety of additional information beyond the scope of the initial inquiry. This can include the identity of other sources, journalists' notes, and other leaked documents.

The search can also cause disruption to the newsroom and prevent the journalists from research and writing and even further publications from being produced. As noted by US Supreme Court Justice Stewart: "Policemen occupying a newsroom and searching it

thoroughly for what may be an extended period of time will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing.”⁸²

Legal Protections

Most countries’ legal systems do not provide any special guidance or protections on searches of newsrooms and journalists’ homes. They are typically subject to the same procedures as searches and seizures of other premises where evidence may be available.

A few sources laws specifically provide extra protection. They typically require that searches of newsrooms must follow the same procedures as demanding information from journalists. Some give additional protections in light of the sensitivity of the procedures. In Luxembourg, authorities are prohibited from searching the offices or homes of journalists to bypass sources protections. Information gathered in a search cannot be used as evidence in any other legal action.⁸³

The Swedish constitutional right on “freedom of informants” in the Freedom of the Press Act overrides the Judicial Code and requires that only the Chancellor of Justice can authorize a search where the media is involved. The Belgian Law on Protection of Sources prohibits “any detection measure or investigative measure” unless it is used to prevent a crime against physical integrity and the conditions for disclosure are met. Similar provisions also exist in the Austrian law.

The Council of Europe has recommended to its member states that they include searches in the protection of sources legislation. Principle 6 of the COE Guidelines sets strong protections on the use of searches to bypass protections:

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source: [...] search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

In a handful of countries, there are separate legal protections in their criminal procedure laws on searches which provide additional guidance. In France, the Code of Criminal Procedure specifically limits the use of searches of media offices only if it is ensured that “such investigations do not violate the freedom of exercise of the profession of journalist and do not unjustifiably obstruct or delay the distribution of information.”⁸⁴

In the UK, the Police and Criminal Evidence Act (PACE) sets up a two-tiered system.⁸⁵ Under the first tier, there is an *inter partes* hearing before a judge ordering a journalist to provide the information. The police must show that the information has a substantial value to a serious arrestable offense, other methods have been tried, and it is in the public interest. Under the second tier, in an *ex parte* hearing, a judge can authorize the search of a premises.

⁸² *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), (Justice Stewart dissenting).

⁸³ Law of 8 June 2004 on the Freedom of Expression in the Media, § 2.7

⁸⁴ Code of Criminal Procedure, § 56-2.

⁸⁵ Police and Criminal Evidence Act 1984, Ch 60, Schedule 1.

The request must be made by a senior officer and the judge must find that either a production order has not been complied with or that a request for one would not be practical or would “seriously prejudice” an investigation. A consultation is currently underway that may weaken the protections.

In Hong Kong, the Interpretation and General Clauses Ordinance creates a three-tiered system based on the UK PACE.⁸⁶ Under the first tier, a judge can order a production order in an *inter partes* hearing if they find that the information is of substantial value regarding an arrestable offense and that it is in the public interest to order the release. In the second tier, after an *ex parte* hearing, the judge can order the search of a newsroom if a production order has not been complied with or if requesting one is not practicable or would seriously prejudice the investigation. The material seized is sealed until an *inter partes* hearing over return of the information is heard and the presumption is to return it. Under the third tier, an *ex parte* hearing authorizes seizure of the material and it can be immediately used if it is shown that there would be serious prejudice to the investigation if it is not immediately accessed. In practice, the first tier is never used and the Court of Appeals has suggested it is not necessary to try progressively each level before asking for a more intrusive order.

In the US, there is no law on protection of sources. However, the Privacy Protection Act of 1980 prohibits government officials from searching and seizing journalistic materials in a criminal investigation unless they obtain a court-ordered subpoena.⁸⁷ The official must show probable cause that the journalist is committing a criminal offense or that the documents are protected national security information or child pornography. Merely being in possession of “stolen” documents is not sufficient to justify a search. The journalists must be given an opportunity to oppose the searches in a court hearing except in cases where there is an immediate danger to a person or a likelihood that the materials would be destroyed. Journalists are given the right to sue officials who violate the Act and obtain damages and expenses. There have been few cases since this law was adopted.

In a number of jurisdictions, the courts have found a right against searches to be inherent in the protection of freedom of expression. The most significant of these are two decisions of the European Court of Human Rights. The ECHR has been extremely concerned about the effect of searches on the right of expression. In a 2003 case involving Luxembourg, the court stated:

The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity. This is because investigators who raid a journalist’s workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that “limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court” [...] It thus considers that the searches of the first applicant’s home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.⁸⁸

⁸⁶ Interpretation and General Clauses Ordinance (Cap 1), §§ 82-88.

⁸⁷ Privacy Protection Act of 1980, 42 U.S.C. §2000aa et seq.

⁸⁸ Roemen and Schmit v. Luxembourg (51772/99) [2003] ECHR 102 (25 February 2003).

In another 2003 case, the European Court also found a violation of free expression where the Belgian Government had used 160 police officers to raid newspaper offices and four journalists' homes. The court held that the balance of interests should be towards protection of Article 10 rights to protect free speech and taking into account the interests of freedom of expression and the scale of the raids, they were disproportionate.⁸⁹

Another significant case occurred in Germany in 2007. There, the Constitutional Court ruled in February 2007 that searches of a newsroom violated the Constitutional protections on freedom of the press because it disturbed the editorial work of the magazine and threatened the confidentiality of editorial data.⁹⁰

In Canada, the Supreme Court in 1991 set out a nine point criteria for judges to consider when authorizing the search of a media office:⁹¹

- (1) The requirements of [the provisions regarding searches in] the Criminal Code must be met.
- (2) The justice of the peace should then consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant and
- (3) ensure that a delicate balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. The press is truly an innocent third party; this factor is most important in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.
- (4) The affidavit in support of the application must contain sufficient detail to enable a proper exercise of discretion as to whether or not to issue a search warrant.
- (5) Although not constitutionally required, the affidavit material should ordinarily disclose whether there are alternative sources, and if reasonable and alternative sources exist, whether those sources have been investigated and all reasonable efforts to obtain the information have been exhausted.
- (6) Dissemination of the information by the media in whole or in part will be a factor favouring the issuance of the search warrant.
- (7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation.
- (8) The search warrant may be found to be invalid if, after its issuance, it is found that pertinent information was not disclosed, or
- (9) if the search is unreasonably conducted.

In a recent court case, the Superior Court of Ontario ruled that the law which authorized the searching of the home and office of *Ottawa Citizen* reporter Juliet O'Neill violated the Charter of Rights and Freedoms and that the threat of criminal action against the reporter in order to identify her source was abusive.⁹²

In New Zealand, the Court of Appeals in 1995 set general principles that should be followed

⁸⁹ Ernst and Others v. Belgium (application no. 33400/96).

⁹⁰ Decision BvR 538/06; 1 BvR 2045/06, 27 February 2007.

⁹¹ Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 000; Canadian Broadcasting Corp. v New Brunswick (Attorney General), [1991] 3 S.C.R. 459, 1991.

⁹² Canada (Attorney General) v. O'Neill, 2004 CanLII 41197 (ON S.C.), (2004), 192 C.C.C. (3d) 255.

in any search of a newsroom.⁹³

- In cases where the media is not accused of a crime, the search should not be used for trivial or truly minor cases.
- The warrant should not be granted or executed in a manner which would impair the public dissemination of news.
- When there is a substantial risk that the search will result in the “drying up” of confidential sources of information, the warrant should only be granted in exceptional circumstances where it is truly essential in the interests of justice.
- If seizing a film, it must have a direct and important place in the determination of the issues before the court.
- Courts can add additional requirements but should following the standard form.

Interception of Communications

The interception of communications or other types of surveillance to obtain information about journalists’ sources also undermine legal protections on sources. This technique is typically governed by national law which limits its use to extraordinary cases. Most protection of sources laws and other laws on investigations or interception do not specifically recognize additional rights for journalists.

The use of these techniques raises similar issues to that of searches of newsrooms. Of primary concern is that the techniques can be used to bypass legal protections in national and international law that allow a journalist to remain silent about their sources.

A second issue is that the types of information collected are likely to be greater than those obtained by other legal means. The surveillance is likely to result in the interception of information about other sources, research on pending stories and the personal life of the journalist.

Finally, there is also the additional issue of the surveillance usually being conducted in secret so the journalist is not aware of the intrusion and cannot challenge or limit it. In many cases, the surveillance itself is illegal and is never discovered.

In many countries around the world, the use of surveillance against journalists was a standard practice for many years, especially during the Cold War. In the past few years, its use appears to have been increasing again, both legally and illegally, to obtain journalist source information. There have been a number of recent incidents in countries where protection of sources have been undermined by electronic surveillance.

- In Colombia, the heads of the police and intelligence services were forced to resign in May 2007 after it was discovered that they were illegally wiretapping journalists’ and politicians’ telephones.⁹⁴
- In Greece and Italy, illegal wiretapping rings were discovered in 2006 monitoring the calls of politicians, public figures and journalists.

⁹³ Television New Zealand Ltd v Attorney-General [1995] 2 NZLR 641.

⁹⁴ Colombia Forces Out Police Chief, Associated Press, 15 May 2007.

- In the Netherlands, the government monitored the telephones of *De Telegraaf* journalists who had revealed that a criminal kingpin was obtaining confidential information while still in jail. The tap was approved by an appeals court in September 2006.
- In the UK, police put microphones and a tracking device in the car of local journalist Sally Murrer for months in 2007 to discover her police sources.
- In Latvia, the Financial Police wiretapped the telephones of television reporter Ilze Jaunalksne and then leaked the tapes to the media. The judge who authorized the taps has been removed and charges have been filed against the police officers. The journalist was awarded €42,000 in damages in February 2007.
- In Japan, the chairman of Takefuji Corp was convicted in 2004 of ordering the wiretapping of the homes and office phones of journalists who were critical of his company.
- In the Czech Republic, two journalists were among the many persons wiretapped by police in 2006 in a bid to reveal who had leaked information about organized crime connections with the civil service.
- In Macedonia, 17 journalists were awarded €100,000 in June 2007 for being subjected to illegal surveillance by the former conservative government. The Interior Minister behind the taps was pardoned.

General Legal Rights Against Wiretapping

It is generally recognized around the world that wiretapping is an intrusive technique that invades a persons' privacy and should be limited in its use. Many international agreements on human rights strongly protect the privacy of communications. The European Court of Human Rights has ruled numerous times that countries must have laws that provide for adequate protections on limits to surveillance under Article 8 on the protection of personal life.⁹⁵ Similar legal protections are also found in the American Convention and the International Covenant on Civil and Political Rights and the UN Declaration on Human Rights.

Most countries in the world have rules limiting the use of wiretapping.⁹⁶ A substantial majority of countries' Constitutions specially recognize the right of secrecy of communications except in limited circumstances. Many countries have also adopted laws which set out detailed procedures on how it can be conducted. These typically require that interceptions are limited to those cases involving a serious crime and require the approval of an independent judge prior to it being installed. However, the limitations and protections of these laws vary widely even within European countries.

Under these general rules, journalists and media organisations are protected from unjustified interceptions. Often journalists are involved in key cases. In Ireland, it was a case brought by

⁹⁵ See *Klass and Others v. Germany* - 5029/71 [1978] ECHR 4 (6 September 1978); *Malone v. The United Kingdom* - 8691/79 [1984] ECHR 10 (2 August 1984); *Halford v. The United Kingdom* - 20605/92 [1997] ECHR 32 (25 June 1997); *Amann v. Switzerland* - 27798/95 [2000] ECHR 88 (16 February 2000).

⁹⁶ See EPIC and Privacy International, *Privacy and Human Rights 2005* (EPIC 2006).

journalists who were illegally being wiretapped that led to a Supreme Court judgement recognizing a constitutional right of privacy.⁹⁷ In Argentina, a recent case brought by a journalist established the right of privacy to electronic mail.

However, these legal protections are being eroded by recent laws which allow for greater use of surveillance. In many of these jurisdictions, there is legitimate concern that journalists are likely to be targeted:

- In the Philippines, the Human Security Act of 2007 allows interceptions for broad categories of offences. Justice Secretary Raul Gonzalez told the media in August 2007 that the legislation recognizes the right of journalists to protect their confidential sources but admitted that the journalists may still be intercepted under it.⁹⁸
- In Mexico, the Government has proposed a revision to the Constitution to allow the interception of communications without a court order in cases of “serious” crimes.⁹⁹
- In Zimbabwe, the 2007 Interception of Communications Act allows officials to wiretap any person for public safety, national security or “compelling economic reasons” with only the permission from one of the heads or representatives of the intelligence service, national security, police, or tax authority.

Many countries have also been modifying their laws to make surveillance technically easier. The US adopted the controversial Communications Assistance for Law Enforcement Act in 1994 and has been pressing for world-wide adoption of these requirements through international organisations such as the G-8, and the International Telecommunications Union. The Council of Europe adopted the Cyber-Crime Convention in 2001 which incorporates these into international law.¹⁰⁰

In Zimbabwe, the Interception of Communications Act (based on US and UK legislation) creates a government Monitoring of Interception of Communications Centre (MICC) to allow for the monitoring of all telephone and Internet communications. In Mexico, the government set up a new interception center paid for by the US Government in May 2007.

The new surveillance requirements also create security problems which may allow for greater illegal surveillance. In Greece, it was discovered that the Vodafone mobile phone network had been hacked by unknown persons and the built-in surveillance technologies were used to monitor the communications of the Prime Minister and other officials, and prominent people including journalists.¹⁰¹

Protection of Sources Laws and Interception

Only a few countries specifically limit the use of surveillance to identify sources or other protected materials. The Belgian Law on Protection of Journalists’ Sources prohibits the use of “any detection measure or investigative measure” of any protected media person unless it

⁹⁷ Kennedy and Arnold v. Attorney General, 1987 I.R. 587 (Ireland).

⁹⁸ Gonzalez: Scribes can be bugged under terror law, GMANews, 4 July 2007.

⁹⁹ Mexico to boost tapping of phones and e-mail with U.S. aid, Los Angeles Times, 25 May 2007.

¹⁰⁰ Council of Europe - ETS No. 185 - Convention on Cybercrime.

¹⁰¹ For a detailed review, see Vassilis Prevelakis and Diomidis Spinellis, The Athens Affair, IEEE Spectrum, 44(7):26–33, July 2007. <http://www.spectrum.ieee.org/jul07/5280>

is authorized by a judge under the same restrictions as are required to compel a journalist to reveal his/her source of information. In Georgia, the interception of journalists' communications to violate professional secrets is a criminal offence.¹⁰²

Others only have limited protections. In Germany, the Criminal Code prohibits the use of acoustic surveillance to violate the protection of sources.¹⁰³ However, these protections do not apply to telecommunications.

The Council of Europe Guidelines propose strict limits on the use of surveillance. Principle 6 states:

- a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:
 - i. interception orders or actions concerning communication or correspondence of journalists or their employers,
 - ii. surveillance orders or actions concerning journalists, their contacts or their employers, or
 - iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.
- b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Transactional Information

Related to the issue of interception of communications is the use of transactional information. Telecommunications companies increasingly collect detailed records on users' activities such as emails sent and received (or at least the information on the sender and recipients, subject, the names of attachments and the size of the message), web sites visited, and instant messages. Mobile telephone companies collect information on calls and messages sent and received including the location of the person when they make calls.

Some companies keep it for extended periods for marketing purposes. Search engine company Google retains records of all searches indefinitely, although they recently promised to reduce the period. Their Gmail service automatically searches private email accounts for keywords for ad delivery.

These records are increasingly used by authorities to gather a detailed record of the activities of journalists including who their sources are.

- In China, Yahoo! provided the security police with information from an anonymous reporter's email account which allowed the government to identify him. He was sentenced to ten years imprisonment.

¹⁰² Comments of Tamar Kordzaia, Young Lawyers Association to OSCE survey, May 2007.

¹⁰³ Response of German Government to OSCE survey, May 2007, p161.

- In the UK in 2006, police in Suffolk obtained the phone records of a journalist from the *East Anglian Evening Star* when he telephoned the police to inquiry about a "cold case" to discover the source of his information.
- In Indonesia, PT Telkom in September 2007 gave police the text messaging records of journalist Metta Dharmasaputra after he wrote a story about tax fraud.¹⁰⁴
- *ABC News* reported in May 2006 that government sources told them that their phone records and those of reporters at the *NY Times* and *Washington Post* were accessed to identify leaks relating to their stories revealing the stories on CIA secret prisons in Central Europe and illegal surveillance of American citizens by the intelligence agencies.¹⁰⁵
- In South Africa, a request was made to obtain the records of the online division of the *Mail & Guardian* for its records after it posted excerpts from bank accounts about a controversial transfer of money from a company to the African National Congress before the 2004 elections.

Some sources laws do protect the information. In October 2002, a federal court in Argentina ruled that the Argentine correspondent of the *Financial Times* did not have to turn over his phone records to an investigation over bribery of Senators. The court ordered that the list of telephone calls be destroyed in the presence of the journalist and his lawyers.¹⁰⁶ The new Mexican law on protection of sources specifically includes phone records.¹⁰⁷

More commonly, legal protections for records are often less stringent than for wiretapping. In Germany, the Constitutional Court in 2003 authorized the obtaining of mobile phone records of journalists who were in communication with wanted criminals.¹⁰⁸ The Court found that the protection of sources laws did not apply to documents held by third parties such as telecommunications providers.

In the US, a court of appeals ruled in 2006 that the *New York Times* could be forced to turn over its telephone records to assist an investigation into who leaked information to it about a pending anti-terrorism search.¹⁰⁹ The USA PATRIOT Act expanded the ability of government officials to obtain phone records based on a National Security Letters without a court order. Telecommunications providers are prohibited from revealing that the records have been requested. A senior official told *ABC* that "It used to be very hard and complicated to do this, but it no longer is in the Bush administration". A review by the Justice Department's Inspector General found numerous abuses by the FBI in using NSLs.¹¹⁰

The information is often also available illegally to private parties. In the US, private investigators working for technology company Hewlett-Packard illegally obtained the

¹⁰⁴ Press Council condemns Telkom for releasing journalist's phone logs, *The Jakarta Post*, 15 September 2007.

¹⁰⁵ Federal Source to ABC News: We Know Who You're Calling, *ABC News*, 15 May 2006.

¹⁰⁶ C. Nac. Crim. y Corr. Fed., sala 2ª "Thomas Catan" del 28/10/2002.

¹⁰⁷ Código Penal Federal, 243 Bis inciso III.

¹⁰⁸ Marion Albers and Stefanie Witzke, The End of the "Woodward and Bernstein" Era? The German Constitutional Court and Journalists' Privacy on Mobile Phones, Vol. 04 No. 07, *German Law Journal*, 2003.

¹⁰⁹ *NYT v Gonzales*, 04 Civ. 7677.

¹¹⁰ U. S. Department of Justice, Office of the Inspector General A Review of the Federal Bureau of Investigation's Use of National Security Letters, March 2007.

telephone records of several journalists following stories about HP board meetings. In Finland, the former CEO and other employees of telecommunications company Sonera and several government officials were convicted in 2005 of illegally obtaining the phone records of two journalists from *Helsingin Sanomat* and employees of Sonera to discover who was the source of a leak.

Many countries are now considering laws that require telecommunications providers automatically to collect all information on their users' activities including web sites visited, emails, instant messages, and mobile use and location data. There has been little recognition of the importance of journalistic issues when developing these laws. In 2005, the European Union adopted the Directive on Data Retention that requires telecommunications providers to automatically collect and retain all information on all users' activities. The length of the retention can last up to two years. All EU countries must adopt laws by 2009 implementing the Directive.

In Nigeria, the Computer Security And Critical Information Infrastructure Protection Bill requires that: "Every service provider shall keep all traffic, subscriber information or any specific content on its computer or computer network for such period of time as the President may [...] specify from time to time." The information would be released at the request of any law enforcement agency without a court order.

National Security and Sources

Many journalists receive information and publish stories from sources that are based on information classified as state secrets. These stories often show that state secrets are being used to hide information of a public interest including corruption, abuse of office, torture, illegal wiretapping and other critical stories. There has been a substantial number of journalists prosecuted around the world in the last few years under these laws. The war on terror is one of the major instigators of the leaks and the criminal investigations. Another major category of stories relates to criminal investigations which in many European countries are considered classified information.

There is a growing concern that new laws on anti-terrorism are also being used to undermine protection of sources. Dozens of countries have adopted laws in recent years on anti-terrorism and most give broad powers to search and seize information and to conduct electronic surveillance without recognizing protections for the media.

State Secrets Laws

Most countries around the world have laws that impose criminal liability on unauthorized disclosure, holding or publication of secret information. There is no common definition of state secrets globally and many laws have extremely vague definitions. The laws are often used abusively to cover up corruption, abuses of power and even routine information or are used to punish journalists.

In many countries, journalists are liable for the publication of information that they have received that may be in violation of state secrets acts or criminal codes. A review in 2007 by the Organization for Security and Co-operation in Europe (OSCE) found that nearly half of

its 56 participating States imposed legal liability for journalists who obtained or published classified information.¹¹¹ In Hungary, if a source discloses a state secret (a very broad definition) to a journalist, the journalist must inform the authorities or face criminal penalties themselves. This is also common in Commonwealth countries which have retained colonial-era Official Secrets Act, which broadly classify all information that is not officially released as secrets.

The laws are often used as a pretext to identify journalists' sources to justify raiding newspapers and arresting journalists. Even when the journalists themselves are not being accused of violating the law, they are drawn into criminal investigations and prosecutions of the original sources. Many of the investigations have been severely criticized by the courts of the countries.

- In January 2004, the Royal Canadian Mounted Police (RCMP) placed *Ottawa Citizen* reporter Juliet O'Neil under surveillance and searched her home and office following the publication of an article on the controversial arrest and transfer to Syria of Martian Arar. The Ontario Court of Justice ruled in October 2006 that the Security of Information Act was overbroad and disproportional and violated the Canadian Charter of Rights and Freedoms because it failed to define what was an official secret. The court also found that the investigation was "abusive" because the investigation was "for the purpose of intimidating her into compromising her constitutional right of freedom of the press, namely, to reveal her confidential source or sources of the prohibited information."¹¹²
- In Taiwan, the offices of *Next* magazine and a journalist for the magazine were raided and 160,000 issues were seized in 2002 as the magazine was about to publish a story revealing that the government had set up a secret NT\$3 billion fund outside of the oversight of the Parliament to promote foreign relations and that a senior official of the National Security Bureau had embezzled NT\$92 million. The *China Times Express* was also searched in 2001 over leaks about the fund.
- In the UK, police searched the office and home of the Northern Ireland editor of the *Sunday Times* in 2003 after he published a book that contained transcripts of phone calls illegally intercepted by the security services. The police seized 21 bags of materials including computers and files and broke down the door of the office even though they were offered the key. The editor and his wife were detained for a day and questioned about the source of the material. The Police Ombudsman described the raid as "poorly led and [...] an unprofessional operation" because it was not approved by a judge and as a result the police agreed to pay extensive damages.
- In Russia, armed police searched the offices of *Permsky Obozrevatel* in May and August 2006 and seized computers, notebooks and other equipment, claiming that the newspaper had published classified information.
- In Morocco, police raided the offices of *Al Watan Al An* and seized computers and files after the newspaper published a story on terrorist threats to Morocco based on

¹¹¹ OSCE Representative on Freedom of the Media, Access to information by the media in the OSCE region: trends and recommendations: Summary of preliminary results of the survey, 30 April 2007.

¹¹² Canada (Attorney General) v. O'Neill, 2004 CanLII 41197 (ON S.C.), (2004), 192 C.C.C. (3d) 255.

intelligence agency documents. Journalist Mustapha Hormat Allah was imprisoned for 55 days.

- In Germany, police raided the offices of the magazine *Cicero* in 2005 and charged the editor with violating state secrets. The Constitutional Court ruled in February 2007 that the police search and seizure was unconstitutional.¹¹³ The Court found that the mere publication of a state secret without other evidence is not sufficient to accuse the journalist of violating state secrets protections and that a search to identify a source is not constitutionally permissible. However, in June 2007, prosecutors announced that they had opened new investigations against 17 journalists for violating state secrets.
- In Lithuania, State Security officials raided the offices of *Laisvas Laikrastis* newspaper and detained the editor for possession of a state secret in September 2006 after the newspaper wrote a story about a corruption investigation. 15,000 copies of the newspaper, computers and other equipment were seized.¹¹⁴ The raid was strongly criticized by the President.

In many other cases, the secret laws are also being used to punish journalists for their disclosure of information. These are often used to attempt to intimidate journalists into not publishing information.

- In China, *NY Times* researcher Zhao Yan was charged with violating state secrets for a story on former Premier Jiang Zemin stepping down from the head of the military a few weeks before it was announced. The charge was later dropped but he was imprisoned for three years.
- In Russia, environmental journalist Grigory Pasko was convicted in 2001 after revealing that the Russian Navy had dumped radioactive waste in the Sea of Japan. He served nearly three years in prison. As noted by the European Parliament resolution “[The law] gives the security services wide latitude in prosecuting treason cases, thus providing a formidable instrument of intimidation against courageous journalists such as Mr Pasko and researchers such as Mr Nikitin.”¹¹⁵
- In Denmark, two journalists and the editor of *Berlingske Tidende* were prosecuted under the Criminal Code in November 2006 after publishing material leaked from the Defense Ministry revealing that there were doubts over the existence of weapons of mass destruction in Iraq before the invasion, which the government of Denmark supported. The court found they had acted in the public interest in publishing the information and acquitted them.
- In Peru, journalist Mauricio Aguirre Corvalán was prosecuted for divulging state secrets for broadcasting a video that had already been shown as a presidential campaign advertisement. Prosecutors wanted an eight year sentence. A court ruled in October 2006 that the case was groundless.¹¹⁶

¹¹³ 1 BvR 538/06; 1 BvR 2045/06, 27 February 2007.

¹¹⁴ Committee to Protect Journalists, Newspaper issue seized; editor briefly detained; newsroom, editor's home searched and hard drives confiscated, 11 September 2006.

¹¹⁵ Resolution 1354 (2003) Conviction of Grigory Pasko.

¹¹⁶ Superior court declares "revealing state secrets" charge against journalist to be groundless, IPYS, 04 October 2006.

- In the UK, Neil Garrett of *ITV News* was arrested in October 2005 under the Official Secrets Act after reporting on internal police information on the mistaken shooting of Jean Charles de Menezes. The story revealed that the police had misled the public about de Menezes' actions before he was shot in an effort to deflect criticism. Garrett was cleared in May 2006 after several detentions. In November 2005, the government threatened to charge several newspapers with violating the Official Secrets Act if they published stories based on a leaked transcript of conversations between PM Tony Blair and President George Bush about bombing *Al Jazeera* television.

The European Court of Human Rights has issued a number of decisions on the liability of journalists for obtaining and publishing information. Generally it has ruled that Article 10 of the ECHR does not exempt journalists from liability for violating criminal law. However, the Court has more recently noted that “greatest care” needs to be taken when determining the need to punish journalists who publish material in breach of confidentiality when doing so in the public interest.¹¹⁷ In *Stoll v. Switzerland*, the court found that there was a public interest in publishing excerpts of an inflammatory memorandum from the Swiss Ambassador on the negotiations over assets of Holocaust victims.¹¹⁸ In another Swiss case issued at the same time, the court found that the conviction of a journalist for making a routine inquiry for non-sensitive but confidential information from an official was excessive.¹¹⁹

The UN Human Rights Committee has also expressed the opinion that secrets laws must be limited. It criticized the UK Government's use of the Official Secrets Act in 2001, stating:

The Committee is concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public concern, and to prevent journalists from publishing such matters. The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information.¹²⁰

New Anti-Terrorism Laws

The problems with state security laws and journalists have been expanded by the war on terror. Many nations have adopted new anti-terrorism acts in the past five years. These laws typically give authorities broad powers but do not recognize journalists' rights and the need to protect sources.

- In South Africa, The Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004, makes the awareness of information without informing the authorities a criminal offense and gives broad powers to the authorities to search and seize information including confidential source information. The UN Special Rapporteur on Human Rights and Counter-Terrorism raised concern about the obligations: “The reporting duty set out in section 12 of the law in respect of all

¹¹⁷ *Dupuis and Others v. France* (Requête no 1914/02).

¹¹⁸ *Case of Stoll v Switzerland* (Application no. 69698/01), 25 April 2006.

¹¹⁹ *Dammann v. Switzerland* (Application no. 77551/01), 25 April 2006.

¹²⁰ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 05/11/2001, CCPR/CO/73/UK, CCPR/CO/73/UKOT.

crimes under the Act raises issues related to the freedom of expression generally and, in particular, journalists' ability to protect their sources."¹²¹

- In the Philippines, the Human Security Act of 2007 gives authorities broad new powers to intercept communications. Justice Secretary Raul Gonzalez said in July that journalists could be tapped under the new law if there was a "sufficient basis or if they are being suspected of co-mingling with terror suspects."
- In Uganda, under the Anti-Terrorism Act, 2002, a magistrate may authorize the search of journalists' offices and homes to seize journalistic materials if there is "special reasonable grounds for believing" that the information has "substantial value" and determines that it is in the public interest to obtain it.¹²²
- In the United States, the USA PATRIOT Act and succeeding acts give government officials broad powers to attain information through secret intelligence court orders and National Security Letters (NSL). The Justice Department told Congress in 2002 that newspapers were not exempt from the requirements. *ABC News* reported in May 2006 that their phone records and those of colleagues at the *NY Times* and *Washington Post* were accessed to identify leaks relating to their stories revealing CIA secret prisons in Central Europe and illegal surveillance of American citizens by the intelligence agencies.¹²³ A senior official told *ABC* that "It used to be very hard and complicated to do this, but it no longer is in the Bush administration". A 2007 review by the Justice Department's Inspector General found numerous abuses by the FBI in using NSLs.¹²⁴

The COE Council of Ministers has twice made recommendations on protection of sources in national security situations. The first in 1996 regarding "Situations of Conflict and Tension" stated:

Having regard to the importance of the confidentiality of sources used by journalists in situations of conflict and tension, member states shall ensure that this confidentiality is respected.¹²⁵

More recently, in 2005, the Council of Ministers again addressed the issue to ensure that the basic protections of sources were not undermined by anti-terrorism efforts:

Calls on public authorities in member states: [...] to respect, in accordance with Article 10 of the European Convention on Human Rights and with Recommendation No. R (2000) 7, the right of journalists not to disclose their sources of information; the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by these texts.¹²⁶

¹²¹ UN Special Rapporteur on Human Rights and Counter Terrorism issues preliminary findings on visit to South Africa, 26 April 2007.

¹²² Anti-Terrorism Act, 2002, 3rd Schedule, §8.

¹²³ Federal Source to ABC News: We Know Who You're Calling, ABC News, 15 May 2006.

¹²⁴ U. S. Department of Justice, Office of the Inspector General A Review of the Federal Bureau of Investigation's Use of National Security Letters, March 2007.

¹²⁵ Recommendation No. R (96) 4 of the Committee of Ministers to Member States on the Protection of Journalists in Situations of Conflict and Tension, 3 May 1996.

¹²⁶ Council of Europe, Declaration on freedom of expression and information in the media in the context of the fight against terrorism, 2 March 2005.

Defamation Laws

A common issue that journalists face is demands to disclose the identity of their sources and internal journalistic materials used in defamation cases. In these cases, the journalist can be the defendant or a third party witness.

The tension between protecting their sources and being able to defend their stories creates a basic dilemma for journalists. They must often choose to either follow their ethical obligations or defend themselves from unjust lawsuits and possible financial ruin. The journalist often needs to be able to use the information obtained to prove that the story is true and that they acted properly while still protecting their source. The plaintiffs want the source and internal information to show falsehood, negligence or a lack of internal controls in the journalist's actions. In cases where malice needs to be proven, the plaintiffs want to know the source or other internal journalistic materials to show intent.¹²⁷ Plaintiffs may also want to know the source of the information to be able to include them in the action for the original defamation or subject them to other sanctions.

Judges often see the information as being essential evidence in cases.¹²⁸ But if journalists refuse to name their sources or provide information obtained from the sources after being ordered to do so by a court, their defenses can be severely limited. Some courts have ruled that they will presume that there was no source of information if the privilege is invoked.¹²⁹ They can also be barred from introducing information gathered from sources that can be used to defend the case. A US federal judge ruled in November 2006 that the *New York Times* could not use information from anonymous government sources in its defense of a defamation suit if it refused to disclose the identities of the sources.¹³⁰ In its most severe form, some courts have ruled summarily against the defense based on a failure to provide the source.¹³¹

Journalists also face the typical contempt of court sanctions for refusing to provide the information. In Canada, *Hamilton Spectator* journalist Ken Peters was convicted of contempt of court and ordered to pay more than \$30,000 in 2004 for refusing to reveal a source in a libel case even after the source came forward.

Sources Laws

The dilemma faced by journalists and publishers has long been recognized. In the American colonies, publisher John Peter Zenger was tried in 1734 for seditious libel for publishing anonymous columns criticizing the Governor who offered rewards for identifying the authors.¹³² In the 1766 Swedish Freedom of the Press Act, the first known act to govern

¹²⁷ See e.g. *Herbert v Lando*, 441 U.S. 153 (1979).

¹²⁸ See *Reynolds v. Times Newspapers Limited and Others* [1999] 3 WLR 1010 (UK); *John Fairfax and Sons Ltd and Anor v Cojuanco* (1988) 165 CLR 346, (Australia)

¹²⁹ *In Re Emil [Emiliano] P. Jurado Ex Rel.: Philippine Long Distance Telephone Company [PLDT]* Phil Sup Ct, A. M. No. 93-2-037 SC [6 April 1995].

¹³⁰ Judge's Ruling Bars The Times From Using Sources' Information in Defense Against Suit, *NY Times*, 18 November 2006.

¹³¹ See *Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367, 822 N.E.2d 667 (2005).

¹³² See Charles D. Tobin, *From John Peter Zenger to Paul Branzburg: The Early Development of Journalist's Privilege*, Media Law Resource Center, August 2004.

access to information and protection of sources, a right of anonymity was recognized for authors but liability was applied to the publisher if they refused to identify the author.¹³³

Starting in the late 19th century, British courts adopted the “Newspaper Rule” which allows for newspapers to withhold the identity of their sources in libel cases prior to trial.¹³⁴ Over the years, the rule expanded in its application and has been adopted in many Commonwealth jurisdictions including Canada, New Zealand and Hong Kong.¹³⁵ The rule was rejected in Singapore in 2002, with the court opining that its adoption “will encourage the unseen character assassin and other mischief makers”.¹³⁶

Only a few countries’ laws provide for special rules on protection of sources in the area of libel. In Georgia, the Law on Freedom of Speech and Expression states that “The Court shall not decide against the respondent solely based on the refusal of the respondent to disclose professional secret or his/her source in a case dealing with the restriction of freedom of speech.” In Sweden, the Freedom of the Press Act prohibits the raising of the issue of who is the source of information in cases of libel or affront.¹³⁷

A small number of countries have recently adopted defamation laws which specifically protect the right of protection of sources. In Bosnia, the Law on Protection Against Defamation states:

A journalist, and any other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from a confidential source has the right not to disclose the identity of that source. This right includes the right not to disclose any document or fact which may reveal the identity of the source particularly any oral, written, audio, visual or electronic material. Under no circumstances shall the right not to disclose the identity of a confidential source be limited in proceedings under this Law.¹³⁸

In Kosovo, the 2006 Law on Defamation and Insult gives an absolute right of protecting a source: “No adverse inference shall be drawn from the fact that a defendant in a defamation or an insult action under this law refuses to reveal a confidential source of information.”¹³⁹

A few jurisdictions limit protections in cases of libel. Some US state laws specifically limit either the protection available or the use of information when the sources are not disclosed.¹⁴⁰ In Estonia, the Broadcast Act requires that broadcasters provide information to a court “to establish the truth”.

The European Court of Human Rights and the Council of Europe have both decreed that the invocation of professional secrecy should not be held against a journalist in defamation cases. In the case of *De Haes and Gijssels v. Belgium*, the Court ruled that a judgment against two

¹³³ §4. Translation available in *The World’s First Freedom of the Information Act: Anders Chydenius’ legacy today* (Chydenius Foundation, Kokkola, Finland 2006).

¹³⁴ *Hennessy v. Wright* (1888) 24 QBD 445.

¹³⁵ *Broadcasting Corporation of New Zealand v. Alex Harvey* [1980] 1 NZLR 163, 6 June 1980; *Sham John v. Eastweek* [1995] 1 HKC 264 (Hong Kong); *Wasylyshen v. CBC*, 2005 ABQB 902 (Alberta).

¹³⁶ *KLW Holdings v. Singapore Press* [2002] 4 SLR 417.

¹³⁷ Freedom of the Press Act (1949:105), §3.2.

¹³⁸ Article 9.

¹³⁹ Civil Law Against Defamation and Insult, §18.

¹⁴⁰ Shield statutes and libel lawsuits, *The News Media & The Law*, Spring 2007 (Vol. 31, No. 2).

journalists in a defamation case who refused to disclose their sources violated their fair trial rights under Article 6 of the European Convention on Human Rights.¹⁴¹ The journalists had demanded copies of documents relating to the case from the Crown Council to introduce into evidence rather than submit their own copies in order to protect their sources. The Belgian court ruled that the journalists' decision to base their defense on obtaining the documents from the prosecution rather than present information they had obtained in their research showed a lack of care. The European Court rejected the Belgian court's decision, saying that it "considers that the journalists' concern not to risk compromising their sources of information by lodging the documents in question themselves was legitimate".

A similar approach was recently adopted in Argentina. The Argentine Civil Court of Appeals in September 2006 ruled that when a journalist claims a defense to defamation under the "Campillay principle" (faithfully reporting something told to them), requiring them then to disclose their confidential source "would amount to prior censorship".¹⁴²

In the 2000 (7) recommendations to the member states, the Council of Europe set out a strong level of protection of sources based on the *De Haes* case. Principle 4 on "Alternative evidence to journalists' sources" states:

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Anonymous Internet postings

A related development is raised by Internet speech. The Internet allows individuals, often using pseudonyms, to reach mass audiences directly without a large media organization. Many of the messages are critical of companies, individuals and political parties. The companies or individuals that provide the Internet access, mailing lists, websites, newsgroups and other discussion areas are the de facto publishers who are liable for the messages in most jurisdictions.

In many cases, plaintiffs (often companies) simply send notices to Internet companies to obtain the technical information about the poster which is often enough to identify them. Often, the purpose of the identification is not necessarily to file an action but some other sanction such as termination of employment if the poster was an employee.

There has been an increasing requirement in US cases that the plaintiffs show a prima facie case and balance the free speech interests before the identity of the anonymous poster is disclosed.¹⁴³ In Israel, a District Court in a recent case adopted those criteria, requiring that an evaluation of the public interests must be undertaken and that the case must be filed in good

¹⁴¹ *De Haes and Gijssels v. Belgium*, [1997] 25 E.H.R.R. 1.

¹⁴² Case CNCiv Sala L, AJP v. Productora Cuatro Cabezas, La Ley 7 de septiembre de 2007.

¹⁴³ *Dendrite International, Inc. v. John Doe*, 775 A.2d. 756 (N.J. App. 2001). See Public Citizen Litigation Group, Right to Speak Anonymously page. <http://www.citizen.org/litigation/briefs/IntFreeSpch/cases/articles.cfm?ID=14267>

faith, that the case is likely to prevail, that alternative means of identification have been tried and that a staged process for disclosure is in place/exists.¹⁴⁴

Other countries have gone the opposite direction by limiting anonymity. In Syria, the Ministry of Telecommunications issued regulations in 2007 that require that all authors be identified.¹⁴⁵ Websites that do not identify authors will be blocked. Others such as Korea, China and Japan have also increasingly been adopting "Real Names" laws that require posters to register before they can post on web sites.

Whistleblower Protections

In any discussion of the legal rights of journalists to protect their sources of information, it is important to examine the dangers that the sources who are whistleblowers face and what legal rights they possess.

As the sources of the information, whistleblowers and other sources often face serious consequences if their role is disclosed either through legal processes or more commonly through internal investigations. These include termination or detriment in their jobs, prosecution under civil or criminal laws or even threats to their safety.

There is a symbiotic relationship between whistleblowers and journalists. Strong legal rights for whistleblowers enhance journalists' ability to gather information by encouraging disclosures and strengthening rights of anonymity. Sources may also be more willing to speak publicly to journalists if they believe they are legally protected.

Few protection of sources laws provide legal protections for the sources of information if their identity is disclosed. A growing number of countries have adopted whistleblower protection laws. These prevent employers from sanctioning whistleblowers in certain circumstances. However, most of the laws relate to fighting corruption and do not protect whistleblowers who disclose to the media. Some countries also have expansive free speech rights that protect whistleblowers in government jobs.

Dangers

Whistleblowers face many repercussions as a consequence of their disclosures. The main concern is that retaliation will result from revealing that a person is a source of information. Retaliation can range from minor harassment at the workplace to much more severe consequences. As noted by US Supreme Court Justice Stewart:

An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence

¹⁴⁴ Odia Kagan, Not For Your Eyes Only: Israel Adopts Rules on Online Anonymity, BLS Internet Law, 16 May 2006. Discussing VCM (Haifa) 850/06 Rami Mor v. Yediot Internet, the YNET website editorial board - the forum board (District Court of Haifa, Hon. Yitzhak Amit).

¹⁴⁵ Syria Bans Anonymous Speech Online, 19 August 2007. <http://elijahzarwan.net/blog/?p=395>

to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.¹⁴⁶

The most common threat to the source is the loss of employment. In a jurisdiction with an “at will” employment, the employee can just be fired without justification. In others, labour laws may protect their right to employment but they are often subject to marginalization, loss of clearances, transfers to lesser or distant jobs and other harassments. In the US, CIA analyst Mary McCarthy was fired in 2006 after it was suspected that she was the source of stories on rendition and torture by US authorities.

In many countries, employees can be subject to civil and criminal penalties for revealing internal company information. In Austria, an American engineer concerned about the safety of the new Airbus 380 jet is facing criminal and civil charges levied by his former employer after going public about potential design flaws. A court has fined him \$185,000 for discussing his case publicly.¹⁴⁷

For government officials, the hazards can be more acute. Most countries have criminal laws prohibiting the release of state and military secrets by officials. In most Commonwealth countries, the colonial-era Official Secrets Acts prohibiting the release of any information obtained under government employment still remain on the books. For example, the Pakistan Official Secrets Act, 1923 makes illegal the disclosure of “any information [...] which has been entrusted in confidence to him by any person holding office [...] or which he has obtained or to which he has access owing to his position as a person who holds or has held office [...]”¹⁴⁸ These laws are often used to muzzle sources:

- In Kenya, the whistleblower who revealed the billions of shillings of fraud by officials in the Goldenberg affair was fired and charged under the Official Secrets Act and spent years defending himself.¹⁴⁹
- In Malaysia, opposition leader Mohamed Ezam Mohd Noor was prosecuted in 2000 under the OSA for releasing police reports on high-level corruption by government ministers.¹⁵⁰
- In the UK, a whistleblower who revealed that the London police force had released inaccurate statements about the shooting of an innocent man in a botched anti-terror action was arrested.¹⁵¹ She lost her job and home and had to be treated for depression.
- In Denmark, intelligence official Major Frank Soeholm Grevil was convicted and sentenced to six months imprisonment in November 2004 for revealing documents to journalists stating that the government had no evidence that there were weapons of mass destruction in Iraq. The two journalists were charged in April 2006 with “publishing information illegally obtained by a third party”.

¹⁴⁶ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁴⁷ See *A Sceptic Under Pressure*, *LA Times*, 27 September 2005.

¹⁴⁸ Official Secrets Act, 1923, § 5.

¹⁴⁹ See *Goldenberg hero or villain?* *The Standard*, 31 October 31 2004; *Anatomy of a Mwananchi as Shapeshifter – The Story of a Whistleblower*, *ADILI Issue 66*, May 2005.

¹⁵⁰ See *Keadilan Youth chief freed of OSA charges*, *The Star Online*, 15 April 2004.

¹⁵¹ *The Times*, 25 January 2006

- In the US, an employee of the Drug Enforcement Agency was sentenced to one year in prison for providing information to a UK *Times* reporter under the law on theft of government property.¹⁵²

Libel and defamation laws can also be used to deter whistleblowers from making disclosures.¹⁵³ In Singapore, the National Kidney Foundation suppressed whistleblowers and others from revealing that money was being spent on excessive salaries, first class flights and gold wash taps by using defamation laws to force apologies. The story was finally fully disclosed after the NKF sued a major media company who refused to back down.¹⁵⁴ In the UK, the Shipman inquiry into a doctor who was convicted of murdering 14 patients found that several of his colleagues who were concerned about his activities were afraid that if they spoke out he would sue them for libel.¹⁵⁵

In some cases, the retaliation can be extreme. In India, engineer Satyendra Dubey was murdered after he revealed corruption on a road project.¹⁵⁶ Dr David Kelly in the UK committed suicide after being revealed as the source of a *BBC* report on the manipulation of the government dossier on the case for invading Iraq.

Legal rights

There is increasing recognition internationally of the need to protect whistleblowers. International treaties on anti-corruption developed by the United Nations and the Council of Europe now require countries to adopt laws to protect whistleblowers in the fight against corruption. Many nations have adopted laws on whistleblowers or recognize a right of free speech that covers disclosures of information by officials.

Approximately forty countries around the world have adopted national laws on protection of whistleblowers in one form or another. The types of laws can be roughly divided into two distinct groups - comprehensive and provisional.

To date, only a few countries have adopted comprehensive laws on whistleblowing. The UK, New Zealand, Ghana, and South Africa have the most developed laws that can truly be called comprehensive. The US and Canada have laws that cover the public sector broadly and Japan recently adopted a law covering the private sector. There are also a number of small jurisdictions such as some of the Australian states which have also adopted comprehensive laws.

Many of the comprehensive laws recognize the importance of disclosure to the public including the media. In Canada, the UK and South Africa, the laws allows for disclosures to the media as a last resort if a procedure or series of conditions have been satisfied. This higher threshold is intended to encourage internal disclosures first before going public.

More commonly, countries have adopted sectoral whistleblower protections in a piecemeal fashion. These are often found in a number of different statutes and typically only cover

¹⁵² See DEA Employee Gets Prison Term for Leaking to Reporter, Law.com, 15 January 2003.

¹⁵³ See e.g. Lewis, 'Whistleblowers and the Law of Defamation: Time for Statutory Privilege?' [2005] 3 Web JCLI.

¹⁵⁴ See The CEO blew his own whistle, The Straits Times (Singapore) 21 December 2005.

¹⁵⁵ The Shipman Inquiry, Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future Command Paper Cm 6394, 9 December 2004 at 11.120.

¹⁵⁶ See S. K. Dubey Foundation for Fight Against Corruption in India. <http://www.skdubeyfoundation.org/index.php>

certain types of persons or only certain types of information. These include laws relating to anti-corruption, public servants, labour codes, criminal codes and Freedom of Information Acts.

Only a few of these laws protect both journalists and sources. The Georgian Law on Freedom of Speech and Expression has a very strong protection of sources provisions and also limits liability only to persons who are legally obliged to keep a secret and the disclosure “creates a direct and substantial danger to values protected by law”. They are not liable if the public interest in disclosure is greater than the harm. If their rights are violated, they can demand damages.

Some countries recognize a constitutional right of anonymity as a part of free speech rights. In Sweden, public employees have a constitutional right of anonymity to speak whatever they wish.¹⁵⁷ In Norway, the Governmental Commission on Free Expression specifically suggested that the Constitution be amended to include protections for anonymous speech.¹⁵⁸ However, the US Supreme Court ruled in May 2006 that public employees were not protected by the Constitution when speaking as part of their official duties.¹⁵⁹

¹⁵⁷ Freedom of the Press Act, Chapter 3.

¹⁵⁸ See NOU 1999: 27. <http://odin.dep.no/jd/norsk/publ/utredninger/NOU/012005-020029/index-hov012-b-n-a.html>

¹⁵⁹ *Garcetti v. Ceballos*, No 04-473. 547 U.S. ____ (2006).

Regional Reports

Africa

In Africa, there exists a relatively strong recognition of the right of journalists to protect their sources, at national, sub-regional as well as continental levels. However, and by and large, this recognition has not yet resulted in a critical mass of legal provisions. Only eight countries¹⁶⁰ have explicit and robust laws guaranteeing the protection of journalist sources. A further six countries possess qualified legal or constitutional protections, while in seven others protection is weak or negligible.

In the lion's share of African countries, there is no legal protection of sources whatsoever. In many of the countries that fall under this category, journalists have been subject to criminal and civil sanctions, harassment and torture to force them to reveal their sources. In a few cases, courts have ruled in favour of journalists being prosecuted by governments for refusing to name sources. Yet this jurisprudence, however positive, has not necessarily led to protection laws being put in place.

Francophone countries account for close to two-thirds of the total number of countries with legal protection of sources, while Lusophone countries (Mozambique, Angola) are disproportionately represented in terms of good practice. Countries with legal provisions derived from the English system are conspicuous by the absence of laws, although in most of these countries constitutional guarantees are implied in some shape or form. Only in a handful of cases are legal protections explicitly reflected in constitutions.

By geographic distribution, West and Central Africa account for larger numbers of countries with protection laws in place. By contrast, few countries in Northern, Eastern and Southern Africa have laws in place.

Overall, even where national protections are strong on paper, the tendency in practice is for these laws to be flouted – often by security and intelligence services who intimidate journalists through raiding of newsrooms and surveillance. In a number of countries with protection laws, as well as in those without, national security is routinely invoked to impose criminal sanctions against journalists, often as a means of forcing them to reveal their sources. In a handful of cases, new laws have been promulgated to enable governments to access wiretap and transaction records, usually citing the national interest, cyber crime or the prevention of terrorism as a justification.

Continental Protections

In October 2002, at its 32nd Ordinary Session, the African Commission on Human and People's Rights (ACHPR) adopted a Declaration of Principles on Freedom of Expression in Africa¹⁶¹, hailed by freedom of expression advocates as a major milestone. Clause XV of the

¹⁶⁰ Angola, Benin, Burundi, Chad, Egypt, Mauritania, Mozambique, and Senegal.

¹⁶¹ For the full text go to http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html

Declaration of Principles recommends that journalists “[should] not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes”. The principles also include a number of exceptions¹⁶² to the rule which give fairly comprehensive procedures but – depending on how they are interpreted – could leave room for states to erode the protection intended by the first part of Clause XV.

The ACHPR provides for a Special Rapporteur on Freedom of Expression in Africa, as lead advocate for the take-up of the Declaration of Principles by African Union (AU) member states. However, given that the Declaration is weak on implementation (it urges states parties to the African Charter on Human and Peoples’ Rights to “make every effort to give practical effect to these principles”), there are concerns that its provisions will not be taken seriously at national level.

Legal Protections

With both constitutional and legal provisions, Mozambique leads the handful of countries with strong protections on paper. Article 74 (3) of the 1990 Mozambique Constitution (amended in 2005) states that “freedom of the press shall include [...] protection of professional independence and confidentiality”, making it one of only a handful of constitutions in Africa that provide such significant protection. Added to this, Article 30 (1) of the 1991 Mozambique Press Law reads: “Journalists shall enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment.”

As unequivocal as Mozambique’s laws may be, judges and prosecutors have been known to demand that journalists give up their sources – largely due to ignorance of the law and constitutional provisions. According to the Media Institute of Southern Africa (MISA), journalists have on occasion had to provide the text of the law to judges to convince them to desist from forcing media professionals to disclose a source’s name¹⁶³.

Angola’s 2006 Press Law is also significant, at least on paper. It retains the sources protections of the previous June 2000 law. Article 20 (1) of the new law states that journalists are not obliged to disclose their information sources and that their non-disclosure cannot be subjected to any direct or indirect sanction. MISA notes that the law gives the same right to secrecy to the editors of press houses in the event they happen to know who the sources are.

Furthermore, the Press Law states that press freedom can be limited by “principles, values and constitutional and other legal rules” that “protect and ensure the right to good name, image and word, and the preservation of intimacy of the private life of citizens.” As Human Rights Watch¹⁶⁴ has noted, while on the face of it these limitations do not violate international standards, the practical implementation of this provision – in particular the definition or interpretation of the “principles and values” that may legitimately limit freedom of

¹⁶² The identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence; the information or similar information leading to the same result cannot be obtained elsewhere; the public interest in disclosure outweighs the harm to freedom of expression; and disclosure has been ordered by a court, after a full hearing.

¹⁶³ So this is Democracy? MISA 2005 (p.210).

¹⁶⁴ Still Not Fully Protected: Rights to Freedom of Expression and Information under Angola’s New Press Law, Human Rights Watch, 2006 – <http://www.hrw.org/reports/2006/angola1106/index.htm>

expression – remains a concern in light of the fragile capacity of the judiciary. Linked to this is the Press Law stipulation that journalists cannot obtain information through “disloyal” means, “disloyal” being a term that is sufficiently open to interpretation that it invites abusive criminalization of press speech.

Article 8 of Burundi’s November 2003 Press Law states clearly that journalists are not obliged to reveal their sources. Article 6 of a previous decree from March 1997 limited the right by providing for a judicial authority to force journalists to reveal their sources, but the 2003 law supersedes this clause. While Burundi’s National Communications Council has been vocal in advocating against heavy-handed state action against journalists, and if past cases are to be viewed as constituting a trend, the risk remains considerable that journalists will be sanctioned for refusing to divulge their sources.

Somewhat counter-intuitively, Egypt’s press law is unequivocal about the primacy of source protection. A 1996 decree (press law 96, Article 7) provides for strong protection of sources on paper, stating that media practitioners may not be compelled to disclose their sources. Further, opinions or accurate reports published by the press may not prejudice its security. This strong paper protection is however effectively overridden by the state of emergency in place for more than three decades. The reality is that the long-standing clampdown in Egypt has institutionalized a culture of censorship in the name of national security, with newspapers, broadcasting outlets, film, books and public speaking alike subject to censorship or bans.

Mauritania’s 1991 press law, which explicitly states that journalists have the right to protect their sources, was bolstered when the Interior Minister confirmed at a public meeting that a July 2006 ordinance abolishing censorship also reinforced the right of media not to divulge their sources. Article 19 of Senegal’s 1996 communication law also constitutes good practice, emphasizing as it does the right of journalists and social communication specialists to protect their sources, a right affirmed in Article 323 of the Penal Code. The emphasis on social communicators in such laws is possibly unique to Senegal, providing wider coverage than most laws which are media- or press-specific.

Qualified Laws

A handful of African states fall under the category of countries with qualified protection. Typically, the laws in these cases accord rights of protection but in varying degrees provide for exemptions to the protections. In Burkina Faso, for example, Articles 52 to 55 of the 1993/4 Code de l’Information provide for confidentiality, or ‘le secret professionnel’. But the same articles include several caveats that limit the right – including military or economic secrets, or in cases relating to crimes against minors.

Similarly, Algeria’s 1990 Code de l’Information de l’Algérie provides for ‘le secret professionnel’. However, Articles 37 and 39 include a long list of exceptions to the rule. In both cases, a judicial authority can invoke the exceptions as a means of ordering journalists to reveal their sources. In Djibouti, Article 64 of a 1994 press law codifies protection of sources, but seems to imply that this is contingent on strict adherence to ethics.

In the case of Ethiopia, journalists are in theory well protected from having to divulge their sources. Article 8, Section 4 of the 1992 Press Proclamation states the following: “The

publisher or the editor of any press may not be compelled to disclose the source of any news or information which has been used in the preparation of his press”.

However, the next clause severely constrains this right: “The court may order the publisher or editor of the press to disclose his source of information in the case of a crime committed against the safety of the state or of the administration established in accordance with the Charter or of the national defence force, constituting a clear and present danger, or in the case of proceedings of a serious crime, where such source does not have any alternative and is decisive to the outcome of the case”. A 2004 Draft Proclamation to replace the one from 1992 reaffirms the right of the judiciary to compel Ethiopian journalists to disclose their sources in cases of national security, defence, or serious crimes.

Ethiopian journalists are regularly hauled before the courts, often for refusing to reveal sources. A case in point was the sentencing by Ethiopia’s Supreme Court in August 2005 of Tamrat Serbesa, editor-in-chief of the private Amharic-language weekly *Satanaw* to one month in jail on a contempt charge. In the aftermath of contested elections, Serbesa had refused to identify an unnamed source in a story about a court case involving the National Election Board. Andualem Aylel, the editor-in-chief of another private Amharic-language weekly, *Ethiop*, was also charged after refusing to identify sources critical of the court’s ruling. Aylel was ordered to pay a fine of 2,000 birr (US\$220).

The government may bring also charges under the State Security Act against a journalist who refuses to divulge his or her sources. Conviction on such charges would result in a guaranteed prison sentence. As a result, many independent journalists use pseudonyms to avoid identification by police and the public prosecutor’s office. One private publisher told the Committee to Protect Journalists (CPJ) that in the interest of their safety, he insisted on pseudonyms for reporters covering controversial issues, such as the economy and land lease programs¹⁶⁵.

Weak Laws

Several countries can be categorized as having legal provisions that are sufficiently weak as to barely qualify as viable standards for the protection of journalists’ sources. Even more than the previous category, caveats and exceptions are directive and in some cases draconian. Article 19 of Uganda’s 1995 Press and Journalist Statute, for example, states: “A journalist shall not be compelled to disclose the source of his information except with the consent of the person who gave him the information or on an order of a court of law”.¹⁶⁶ The protection is rendered weak due to the absence of limits as to when the court can and cannot order disclosure.

This applies to laws in several other countries. In Rwanda, Article 65 of a 2002 press law guarantees confidentiality but compels journalists to cooperate with judicial authorities when requested to do so.¹⁶⁷ Article 57 of the same law spells out national security and confidentiality considerations which severely limit the protection. In Botswana, although there are no specific standards relating to source protection, freedom of expression (including media freedom) is guaranteed by Clause 12 (1) of the Constitution and protected by other

¹⁶⁵ <http://www.cpj.org/Briefings/1996-8/ethiopia96/index.html>

¹⁶⁶ The Press and Journalist Statute, 1995, §39.

¹⁶⁷ Law N 18/2002 Of 11/05/2002 Governing the Press.

pieces of legislation. However, this is subject to many exceptions, including on grounds of national security.

In Cameroon, Article 50 of a 1990 Press Law allows for protection of journalist sources, whilst at the same time allowing for a judge in closed session to repeal the protection.¹⁶⁸ Several Cameroonian journalists have been jailed for spreading false news. Typically, they are required to prove the veracity of their reports, necessitating that they reveal their sources as witnesses. *Le Messager* editor-in-chief Pius Njawe was jailed in 1998 precisely because he refused to reveal his sources and could therefore not prove the truth of his statements.

Cote D'Ivoire's 2004 Press Law is similarly weak, stating that journalists have the right to protect their sources except in cases where the law obliges them to reveal the names.¹⁶⁹ Protection afforded under Article 51 of Guinea's 2005 law can be abrogated by order from the Prosecutor (Procureur), or if the journalist opts for voluntary disclosure.¹⁷⁰ Article 20 of the same law obliges journalists to use their real names and imposes draconian fines for use of pseudonyms.

In Sudan, the 2004 Press and Printed Materials Act retains protections of sources from the 1999 Press Act.¹⁷¹ However, a new draft act may undermine those protections.

Countries with No Sources Laws

A fourth category brings together countries with no laws, the vast majority of them Anglophone. Nigeria, home to what is arguably the most strident and vibrant news media on the continent, has no laws to protect confidentiality of sources. What exists is Section 4 of the Nigerian Union of Journalists Code of Ethics, which urges journalists to protect their sources but is of course non-binding. Jurisprudence over the last three decades has been mixed – while some cases have upheld the assumed right of journalists to protect their sources, one Appeal Court judgement ruled against such protection.¹⁷²

No laws exist in Zambia to protect sources. Instead, the Criminal Procedure Code Act, 1933, includes disclosure provisions that impact directly upon the media. Article 143 authorises courts hearing criminal matters to compel witnesses to attend court and to give evidence if it

¹⁶⁸ Loi N°90/052 du 19 Décembre 1990 sur la Liberté de Communication Sociale.

¹⁶⁹ Loi No 2004-643 du Decembre 2004 Portant Regime juridique de la Press, §28.

¹⁷⁰ Loi 91-05 portant sur la liberté de la presse, de la radio, de la télévision et de la communication en general.

¹⁷¹ Press and Printed Materials Act, 2004.

¹⁷² Case 1: In 1981 *Daily Sketch* editor Sola Oyegbemi and reporter Yemi Folarin refused to disclose their sources after being arrested for publishing a story about armed robbery. In his judgement, Lagos High Court Justice A.L. Balogun stated that a journalist cannot be compelled to reveal his sources except in grave circumstances, such as national security. As such the fundamental right derived from the Section 36 of 1999 Constitution is subject to the interest of justice, national security, public order, public morality, welfare of persons or prevention of disorder or crime. Case 2: In April 1981 *Sunday Punch* editor Innocent Adikwu was hauled before the House of Representatives and asked to reveal his sources for a story he wrote accusing legislators of fraud. This time Justice Balogun ruled that "The purpose of Section 36 of the Constitution is not to erect the press into a privileged institution but it is to protect all persons (including the press) to write and print as they will and to gather news for such publication without interference [...] If a newspaper or its editor or reporter can in normal circumstances be required by the courts and legislative committee or other body or tribunal to disclose the sources of information of an article published, that would be tantamount to probing, censoring or interference with press freedom contrary to Section 36 of the Constitution". Case 3: In February 1980 *Daily Times* editor Prince Tony Momoh was asked by the Senate to disclose his sources after an article he wrote implying the Senate was grossly under-performing. Momoh's appeal to the High Court that his fundamental rights were being violated was upheld by Justice Candido Ademola Johnston, but overturned by the Appeal Court which ruled: "The press or any other medium of information cannot claim any right to confidentiality of the source of their information in a proper investigation by a House of Assembly or the Police".

appears that the witnesses are able to give material evidence or if they have documents in their possession that are relevant to the case. Under Article 145, a court may issue a warrant for the arrest of any witness who has been subpoenaed but who does not attend court without a lawful excuse. This legislation could conceivably be used by the courts to force journalists to disclose their confidential sources of information.

Additionally, the Prohibition and Prevention of Money Laundering Act of 2001 imposes an obligation on anyone reasonably expected to know that someone is involved in money laundering to report such person to the authorities. This obligation extends to a journalist who acquires such knowledge in the course of sourcing a story. According to MISA, the Zambian media community has made a submission to the Constitution Review Commission for the legal protection of sources. In 2005, however, the Commission rejected provisions in the draft constitution which would have provided qualified protection for journalists from disclosing their sources. According to the Commission's ruling, journalists are not protected from disclosing their sources of information in court proceedings when directed to do so. They said that this is because the defence of privilege from disclosing sources of information is only accorded to communication between a client and her/his lawyer.

In South Africa, Article 205 of the Criminal Procedure Act 51 of 1997 empowers the courts at the request of the National Director of Public Prosecutions to summon anyone who may have information about an alleged offence to be examined. This article has been used a number of times to compel journalists to reveal the identity of confidential sources. However, a person subpoenaed under Article 205 may, in terms of Article 189, cite "just cause" for a refusal to give evidence. In 1999 the South African National Editors Forum (SANEF) negotiated a Record of Understanding with the authorities in terms of procedures to be followed and negotiations undertaken before a subpoena is issued under Article 205.

The Government is reported to be considering repealing the offending clause, although it was used against the *Weekly Mail & Guardian* in the 'Oilgate' scandal in 2005. The newspaper published an article revealing that the oil company Imvume Management was used to channel money from the state to the ruling ANC party. Imvume claimed the information was obtained illegally and attempted to obtain it from the newspapers' Internet provider and gag the newspaper from publishing further articles. In September 2007, the Cape High Court refused to gag satirical magazine *Noseweek* after it received a list of 100 millionaires accused of being involved in a tax evasion scheme. The court also refused to force the magazine to return their copy of the list.

Clause 52 (1) of Tanzania's 2006 draft Freedom of Information Bill explicitly provides for the right to protect sources, meaning that journalists' sources will be protected for the first time in the East African nation's history. However, this protection is likely to be qualified, since Clause 52 (2) and Clause 53 limit this right in cases relating to serious criminal offences, in defence of a person charged with a criminal offence, and to protect life.

Mali's 2000 Press Law does not pronounce on protection of sources, although Article 6 of the media's voluntary code of practice states clearly that journalists should protect their sources. Similarly, no current law exists in Somalia. However, a draft Media Bill (June 2007) alludes to the protection of sources. Article 22 (1) states that "[t]he journalist should be a competent person free to undertake his profession and should be truthful while disseminating information where he should specifically identify his sources". This implication that

journalists should wherever possible identify their sources is partially contradicted by Clause (4) of the same Article, which states: “The journalist should preserve the dignity, the privacy and the rights and the dignity of the people providing him with the information and he/she should demonstrate admiration”. Whether this amounts to a form of protection is unclear.

In Ghana, while there are no laws, the 1992 Constitution guarantees freedom and independence of the media and forbids censorship. At the same time, the Constitution mandates the state-appointed National Media Commission (NMC) to “take all appropriate measures to ensure the highest journalistic standards”, implying a trade-off between rights and obligations. In 2003 the NMC issued press guidelines¹⁷³ that lean towards the disclosure of sources wherever possible, in the interests of transparency.

In Lesotho, although freedom of expression (including media freedom) is not explicitly referred to, it is presumed to be guaranteed by Section 14 (1) of the Constitution and protected by other pieces of legislation¹⁷⁴. However, it is significantly limited by subsequent clauses in Section 14, pertaining to the interests of defence, public safety, public order, public morality or public health, and so on. There is no legal protection of confidential sources. Non-disclosure of sources in court can lead to imprisonment of seven days. Further non-disclosure is in contempt of court punishable by imprisonment of 21 to 90 days. In practice the media is heavily circumscribed, with many instances of litigation. There is talk of a press law but no concrete steps have been taken by the Government as yet.

Other countries with no laws include:

- Democratic Republic of Congo: In March 2004 a National Press Congress called on the Government to guarantee protection of journalists’ sources. In an environment where the Government has not yet internalised freedom of expression, security services often pressure journalists to reveal sources, and the lack of a culture of protection leaves them vulnerable to attack.
- Liberia: In May 1997, the Press Union of Liberia published a Code of Ethics & Conduct. Article 21 states that “journalists are bound to protect confidential sources of information”. In 2004 National Conference on Media Law and Policy Reform recommended that criminal sanctions against journalists be repealed to fall in line with international standards.
- Malawi: No legislation exists to protect whistle-blowers. However, Section 36 of the Constitution recognises freedom of the press. Media rights advocates believe that this provides for protection of sources, security laws notwithstanding.
- Mauritius: There do not appear to be any protection laws. In 2005 Reporters Sans Frontieres (RSF) recommended that sources protection be enshrined in law.

¹⁷³ The full text of Section 2 of the Guidelines reads: “a. It is important to identify sources as often as is feasible; the public is entitled to as much information as possible on a source’s reliability. b. Whenever confidentiality is required and negotiated journalists must respect the terms. c. Journalists must always question sources’ motives before promising anonymity. Journalists must be wary of sources offering information for favours or money. d. The Press must recognize a special obligation that in nurturing Ghana’s democracy public business must be conducted in the open and journalists must insist that government records are open to inspection”.

¹⁷⁴ MISA 2005.

- Niger: A 2005 recommendation proposes that a clause be added to the 1999 Press Ordinance stating that journalists should not be compelled to reveal their sources. The 1997 Professional Journalists Charter states that journalists should protect sources.
- Togo: Article 8 of the 2004 Press Code of ethics states that journalists must not divulge their sources. The 2004 law constitutes an improvement on its harsh predecessor from 2000, with criminal sanctions for media removed and prison sentences for defamation/insult abolished. But there remain no explicit laws protecting sources.

Attacks on Sources

Kenya constitutes another significant example of a country with no laws to protect sources. Historically, the media has been regulated by laws such as the Public Order Act, Defamation Act, Preservation of Public Security Act, and so on, which all imply punitive sanctions. Journalists themselves have had to rely on the Kenya Union of Journalists code of conduct which exhorts journalists that protecting confidential sources of information constitutes a professional obligation. This is likely to change with the coming into force of the controversial new Media Bill.

During discussion of the draft Bill in Parliament an MP proposed that the following Clause be added: "When a story includes unnamed parties who are not disclosed, and the same becomes the subject of legal tussle as to who is meant, then the editor shall be obligated to disclose the identity of the party or parties referred to". This proposed inclusion sparked a nation-wide outcry, including a protest march by Kenyan journalists in August 2007. Recognising the danger to media freedom, President Mwai Kibaki rejected the draft Bill, sending it back to Parliament for amendment. The new law will now almost certainly provide protection for sources, however qualified.

In The Gambia, the media has been under attack since the APRC Government of President Yahya Jammeh came to power in 1994. Section 15 of the 2003 National Media Commission (NMC) Act provided that whenever the Government or any of its departments or agencies alleged in an action that information was provided to a media practitioner or organisation either without authorisation or in contravention of the Official Secrets Act, the court should require the media practitioner or organisation to disclose the source of the information. Failure to comply with the order within a period specified by the court would result in one of a number of sanctions, including fines and license suspension or revocation. Amid sustained opposition, the NMC Act was repealed in December 2004 – only to be replaced with the Newspaper Amendment Act 2004 & Criminal Code (Amendment) Act, both subsequently used to attack the media.

In Rwanda, during a four-hour state television broadcast in the capital Kigali in September 2007, featuring a panel of government ministers and representatives from the security forces, Interior Minister Sheikh Musa Fazil Harerimana said the government would hold reporters responsible for using leaked documents, according to the state Rwandan News Agency. "If a journalist writes a story quoting a letter smuggled to him, he is equally liable to punishment,"

the pro-government daily *New Times* quoted Harerimana as saying. "He has to tell us who gave him the letter before his case is dropped."¹⁷⁵

In Togo, instances have been reported of journalists being pressured to reveal their sources. The Togolese Association of Private Press Editors reported in 2002 that, "The Togolese authorities do not hesitate to harass and verbally threaten the directors of the independent press, who they sometimes instruct to deny the truth, reveal the sources of their information and, sometimes, force them to ignore ethical rules".¹⁷⁶

Rule of Law Issues

In some countries, abuses of power by state agents can often render the question of whether or not laws exist to protect journalists' sources a moot point. An emblematic case in this regard is the 2006 raid on the premises of the *Standard* newspaper group in Nairobi by armed assailants, later identified as police officers, who damaged a printing press, set fire to thousands of newspapers, beat up staff and took away vital computer and broadcasting equipment. The attack was believed to have been linked to a story published in the *Saturday Standard* which offended Security Minister John Michuki. Known for his tendency to adopt extreme tactics, Michuki made things worse when, admitting that the raid had been carried out by police officers, he said: "The police were doing their job. If you rattle a snake, you must be prepared to be bitten by it".

In The Gambia, the murder of newspaper owner and journalist Deyda Hydera in December 2004 demonstrates how far the Government will go to drive journalists into revealing their sources or self-censorship. Since the APRC Government's ascent to power in 1994, scores of Gambian journalist have been forced into exile rather than reveal their sources. Chief Ebrima Manneh, a journalist on the state-owned *Daily Observer*, was arrested on 7 July 2006 by National Intelligence Agency (NIA) agents on allegations of providing "damaging" information to a foreign journalist prior to the African Union Summit held in Banjul. Manneh is now known to be in NIA custody, but has not been charged.

Systematic harassment of the media including arbitrary arrest and closure of several newspapers has effectively silenced independent journalism in Zimbabwe. According to MISA, the number of media alerts issued on Zimbabwe has fallen from 120 alerts in 2002 to 102 in 2003, and to 47 in 2004. This, says MISA, is effectively because of the vigorous application of the Access to Information and Protection of Privacy Act (AIPPA), Public Order and Security Act (POSA), and Broadcasting Services Act (BSA). The signing into law of the Criminal (Codification and Reform) Bill in June 2005 had made it even more difficult for the few remaining journalists who survived the implementation of AIPPA and POSA to do their jobs¹⁷⁷.

The ZANU-PF government continues to ride roughshod over rule of law. In 2006 Zimbabwe *Independent* and *Standard* publisher Trevor Ncube was stripped of his citizenship in an effort

¹⁷⁵ CPJ Alert.: Rwandan officials threaten to force press to reveal sources, 11 September 2007. <http://www.cpj.org>

¹⁷⁶ Amnesty International, TOGO: QUIET, THERE'S AN ELECTION!, 25 April 2003.

¹⁷⁷ Journalists now risk spending 20 years in jail as the new act introduces harsher penalties than those provided for under POSA and AIPPA. A journalist convicted of contravening Section 31 (a) of the act will be sentenced to jail for a period not exceeding 20 years or to a fine of up to Z\$2,5 million or to both such fine and imprisonment (MISA STID 2005, p.12).

to take control of his newspapers. He later overturned the decision in the High Court. In September 2005 Ncube's *Independent* uncovered a covert government plot to subvert independent newspapers. It revealed that the Central Intelligence Organisation (CIO) had used taxpayers' funds to buy controlling shareholding in three privately owned newspapers.

In other countries, such as DRC, journalists are routinely subjected to harassment, arbitrary arrest and intimidation by security forces in a situation where rule of law is weak.

Terrorism and National Security Laws

In the aftermath of 9/11, a number of African countries have promulgated anti-terror or national security laws that have specific impacts on the protection of sources. Schedule Three of Uganda's 2002 Anti Terrorism Act, for instance, provides for a Magistrate to compel a journalist to hand over documents and other material acquired confidentially.

In Swaziland, the Government has proposed a Secrecy Act that will severely constrain journalists. The proposed act bars journalists and media outlets from publishing information regarded by government officials as top secret. Civil servants found guilty of whistle-blowing face the same 5-year jail term. Media critics say that the new regulations are intended to force journalists and media outlets to reveal their news sources as and when requested by the authorities.

Ministry of Justice and Constitutional Affairs Spokesman David Lukhele explained the Government's intent as follows: "If a journalist is found in possession of confidential government documents, the government will seek a court order forcing that particular journalist or media house to disclose the source of the information. This is a new trend the government has been forced to take." Another cabinet source said, "If a journalist is convicted of contravening the Secrecy Act, he or she faces a minimum [fine] of more than US \$3,000 or five years in jail." He then added, "However, a judge is still at liberty to exercise his or her discretion when delivering the sentence. This will depend on the extent of the damages caused by [the] publication of the confidential information."

In many countries, the existing colonial-era laws on official secrets and anti-sedition remain in force and are used to repress journalists. Clause 10 of Malawi's Public Security Regulations empowers an authorised officer or a police officer to request any person to furnish or produce any information or papers in his/her possession which the officer considers to be necessary in order to preserve public security. According to MISA, the regulations authorise officers to take possession of such information where a request is not adhered to, with negative implications for the protection of confidential sources of information for journalists.

In Nigeria, several cases exemplify the use of national security laws to cow journalists. In November 2006 Shehu Garba, a media adviser to then Vice President and presidential aspirant Atiku Abubakar, was accused of violating the Official Secrets Act and had criminal charges filed against him in Federal High Court. In the same month, state security service (SSS) officials raided PostNet Communications, publishers of *SouthWest Post*, arresting editor-in-chief/ publisher Dupe Ashana and Entertainment Editor Taiwo Obatusin. A month earlier, the Government was obliged to withdraw sedition charges against Daar

Communications Ltd, but retained a sedition charge against *Daily Independent* Aviation Correspondent Rotimi Durojaiye. Again, in January 2007, Some 10 SSS officials raided the Abuja offices of the *Leadership* newspaper and held staff members of the company hostage for one hour. They later arrested the editor of the newspaper, Bashir Bello Akko; the general manager, Abraham Nda-Isaiah; and the Minna correspondent, Abdulazeez Sanni.

In Morocco, *Al Watan al An* reporter Mostafa Hormat Allah was arrested in July 2007 for publishing supposedly confidential information related to Morocco's state of alert. *Al Watan al An* publisher Abderrahim Ariri was sentenced to a suspended 6 months in jail, Hormat Allah to 8 months in jail, and both were fined the equivalent of US\$ 120 each. Hormat Allah was subsequently been released on probation in September 2007 by the Casablanca Appeals Court.

Wiretaps and Transactional Records

As media convergence becomes a reality across Africa, a growing number of governments have sought to either put in place new laws or invoke old legislation to intercept communications and compel Internet service providers (ISPs) and others to hand over electronic source data. This trend is likely to continue as Internet and GSM mobile phone coverage continue to grow exponentially across the continent.

Zimbabwe's 2007 Interceptions of Communications Bill allows intelligence services to intercept postal, Internet and telephone communications on national security grounds, via a state-run communications monitoring centre established by the Bill. It also requires internet service providers (ISPs) and other communications service providers ensure that their systems are "technically capable of supporting lawful interception at all times".

In Nigeria, the 2005 Computer Security and Critical Information Infrastructure Protection Bill includes a similar stipulation to the Zimbabwean Bill. Part I, Section 12 mandates ISPs to provide data to law enforcement agencies. It goes further by requiring telecommunications companies to collect transactional data such as web pages visited routinely.

In South Africa, at the end of September 2005, the Mail and Guardian newspaper had a Section 205 subpoena directed at MWeb, its co-owner and host of its website, *M & G Online*, requiring the company to hand over electronic records relating to the online publication of an excerpt of an Imvume Management bank statement, as part of the "Oilgate" story.

Asia & Pacific

Around half of the 44 countries in the Asia & Pacific region recognize protection of sources through constitutional provisions, laws and judicial decisions. This includes strong protections in Indonesia, Cambodia and The Philippines and more limited protections in a number of other states including Japan, India, and all of the Central Asian states. In the Pacific, both New Zealand and Australia have adopted laws in the past year but few Pacific islands have protections.

A major recent concern in the region is the adoption of new anti-terrorism laws that allow for access to records and oblige assistance. There are also problems in many countries with searches of newsrooms and with broadly defined state secrets acts which criminalize journalists who publish leaked information.

Legal Protections

Around half of the countries in Asia-Pacific have recognized the right of journalists to protect their sources. In most of the countries, this is based on specific provisions in media laws. Another few countries have adopted it in their constitutions while a handful have recognized it as part of the common law.

Constitutional rights

Currently, only the island states of East Timor and Palau have incorporated specific provisions in their constitutions for protection of sources. Article 41 of the East Timor Constitution provides that:

Freedom of the press shall comprise, namely, the freedom of speech and creativity for journalists, the access to information sources, editorial freedom, protection of independence and professional confidentiality.

The Constitution also gives strong rights to private communications and control and access to personal data.

The Constitution of Palau gives even stronger rights to journalists on protecting their sources:

The government shall take no action to deny or impair the freedom of expression or press. No bona fide reporter may be required by the government to divulge or be jailed for refusal to divulge information obtained in the course of a professional investigation.

Absolute protections

Surprisingly, a few of the countries in the region have adopted absolute protections in their media laws. In Indonesia, the Press Act says that “The Right to Refuse is the right owned by

journalists as professional to refuse in divulging names and/or other identities from sources to be kept concealed.”¹⁷⁸

In Cambodia, the 1995 Press Law states that “The Press has rights to maintain the confidentiality of its sources”.¹⁷⁹ However, the editor of the *Khmer Conscience* was fined by a court in 2006 under the previous United Nations Transitional Authority in Cambodia Penal Code for libel after refusing to disclose his source of information for a story on corruption. In 2003, the newspaper *Voice of Khmer Youth* was shut for three days for refusing to disclose its sources after the King said he was insulted by an article in the paper.

Qualified rights

More commonly, countries have adopted laws that provide for a qualified right of protection. These laws vary in strength from almost absolute to those that provide nearly no protection.

The Philippines has one of the strongest qualified laws. It was first adopted in 1946 and amended in 1956 to make it stronger:

Without prejudice to his liability under the civil and criminal laws, the publisher, editor columnist or duly accredited reporter of any newspaper, magazine or periodical of general circulation cannot be compelled to reveal the source of any news-report or information appearing in said publication which was related in confidence to such publisher, editor or reporter unless the Court or a House or committee of Congress finds that such revelation is demanded by the security of the State.¹⁸⁰

Even with this strong protection, there are still challenges. In October 2007, a Senate committee demanded that a Juliet Labog-Javellana from the *Philippine Daily Inquirer* reveal the sources of her article about a closed hearing where the failed National Broadband Network project was discussed and threatened to hold her in contempt for refusing to disclose.

Another strong but qualified act is found in New Zealand, which adopted its law in 2006 following decades of recognition of the right in common law.¹⁸¹ The protections, found in the Evidence Act, incorporates the case law and provides for protection unless a judge finds that “the public interest in the disclosure of evidence of the identity of the informant outweighs (a) any likely adverse effect of the disclosure on the informant or any other person; and (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.”

In Japan, protection of sources has been partially recognized for decades in court decisions. The Japanese Supreme Court strongly affirmed the right in 2006, describing it as an “important social value” which must be considered when determining the balancing of interests:

¹⁷⁸ Indonesia 1999 Law No 40 On Press, Article 1 (10).

¹⁷⁹ Cambodia Press Law 1995.

¹⁸⁰ The Philippines Republic Act No. 53 (amended by RA 1447).

¹⁸¹ Evidence Act 2006, §68.

[T]he freedom of reporting facts is protected under Article 21 of the Constitution which stipulates freedom of expression. In order to ensure correct press reports, not only the freedom of reporting news but also the freedom of gathering news should be deemed to fully deserve to be respected in light of the spirit of Article 21 of the Constitution [...] Taking into consideration the above-mentioned significance of the freedom of news gathering, the secret of the news source should be deemed to have an important social value as something necessary for securing the freedom of news gathering. Consequently, the secret of the news source of a report should be construed to be worthy of protection in the case where the report relates to public interest, there are no special circumstances where the means or method employed for gathering news conflicts with any provision of general criminal law or the person who provided relevant information as a news source of the report has given consent to the disclosure of the secret of the news source, nor are there any circumstances where it is still significantly necessary to realize a fair trial, even when the social value of the secret of the news source is taken into consideration, because the civil case concerned is a serious one that has social significance and impact, and therefore the witness's testimony on the news source is indispensable. In such a case, it is appropriate to construe that the witness may, in principle, refuse to testify about the news source of the report.¹⁸²

Ethics codes are also important in Japan. In August 2007, a reporter with the *Asahi Shimbun* was fired after he secretly recorded a source and provided a copy of the recording to another source.¹⁸³

A number of countries only have weak protections on sources. In Bhutan, a Code of Ethics for Journalists issued under the Information, Communications and Media Act 2006 says that "A journalist shall ordinarily protect the confidentiality of his sources. He may, however, reveal the identity of a source where he has obtained the consent of the source or where the law requires him to do so".¹⁸⁴ In many of the Central Asian states, the press laws prohibit a journalist from disclosing the identity of sources unless ordered by a court rather than give them an affirmative right not to be forced to disclose.¹⁸⁵

One of the weakest laws is found in Australia. It was adopted in 2007 after decades of case law opposing the rights of journalists to protect their sources.¹⁸⁶ Even as it was being promoted by the government, *Melbourne Herald Sun* reporters Gerard McManus and Michael Harvey were fined AUS\$7,000 each after refusing to testify about who had provided them information. The new law gives broad discretion to courts based on a balancing of interests to decide whether the harm to be caused by disclosure outweighs the desirability of the evidence being given.

¹⁸² Case 2006 (Kyo) No. 19, Minshu Vol. 60, No. 8, 2006.10.03.

¹⁸³ Asahi news reporter axed for breaching promise with secret source, Japan Times, 7 August 2007.

¹⁸⁴ The Code of Ethics for Journalists issued under the Bhutan Information, Communications and Media Act 2006.

¹⁸⁵ See e.g. Uzbekistan, Law on Mass Media (1997); Law of The Republic of Tajikistan On the Press and Other Mass Media, §29; Turkmenistan SSR Law on the Press, §28 (1991).

¹⁸⁶ Evidence Amendment (Journalists' Privilege) Act 2007, No 116, 2007.

Court recognized rights

A number of the Commonwealth countries have also adopted the Newspaper Rule on protection of sources. For nearly 100 years, New Zealand recognized the Newspaper Rule in expanded form before it adopted its law in 2006.¹⁸⁷

In Hong Kong, the Court of Appeal in 1994 strongly found for the Newspaper Rule, saying that it must be applied except in special circumstances and that any consideration to overrule it must consider the “well-established and well-recognised public interest in the free flow of information.”¹⁸⁸ In India, the Rule has been recognized at least once and there have been few cases where journalists were required to disclose sources.¹⁸⁹

Courts in Singapore have twice specifically rejected the Newspaper Rule, stating that even though it was widely adopted in common law, it was not the law in Singapore.¹⁹⁰ A court opined that its adoption “will encourage the unseen character assassin and other mischief makers”.¹⁹¹

No laws

A considerable number of countries in the Asia-Pacific region do not have legal recognition for protection of journalists’ sources. While not seemingly needed every day, a number of incidents have occurred in the last few years in these jurisdictions and journalists’ associations are increasingly demanding that the protection of sources is adopted into law.

- In Sri Lanka, journalist Indika Sakalasooriya was questioned by police in September 2007 after he wrote a story on the son of a minister importing an expensive sports car without paying tax and published photos of him driving around Colombo.
- In Taiwan, a court fined *United Daily News* journalist Kao Nien-yi three times for refusing to provide information about his sources in April 2006. The government is now investigating amending the Criminal Procedure Code to extend privilege to journalists.
- In Kiribati, Taberannang Korauaba, a journalist at state-run *Radio Kiribati* was fired in 2006 for refusing an order by the Broadcasting and Publications Authority to disclose the source of a story on corruption in the Auditor General’s Office.

Searches

Few countries in the region provide specific protections limiting searches of newsrooms and journalists’ homes. This has proven to be one of the greater concerns in the region with incidents in many countries, both with and without sources laws.

¹⁸⁷ Hall v New Zealand Times Company (1907) 26 NZLR 1324.

¹⁸⁸ Sham John v Eastweek Publisher Ltd [1995] 1 HKC 264.

¹⁸⁹ NISHI PREMA v. Javed Aktar AIR 1988 Bomb 222.

¹⁹⁰ Tullett Prebon (Singapore) Ltd and Others v Spring Mark Geoffrey and Another [2007] SGHC 71.

¹⁹¹ KLV Holdings v. Singapore Press [2002] 4 SLR 417.

- In Taiwan, the offices of *Next* magazine and a journalist for the magazine were raided and 160,000 issues were seized in 2002 as it was about to publish a story that government had set up a secret NT\$3 billion fund outside of the oversight of the Parliament to promote foreign relations and that a senior official of the National Security Bureau had embezzled NT\$92 million. The *China Times Express* was also searched in 2001 over leaks about the fund.
- In 2003, Malaysian police raided the offices of online newspaper *malaysiakini* and seized 19 computers after the newspaper published an anonymous letter critical of the ruling party and refused to identify the author.
- In Australia, the police raided the offices of the *National Indigenous Times* in 2004 after it published Cabinet documents on changes in welfare policy for Aboriginal communities.
- In Fiji, police raided *Daily Post* reporter Usman Ali's home in April 2002 and threatened arrest if he refused to hand over documents he had received relating to state-owned company Airports Fiji. Police raided Fiji Television in 2005 after it broadcast stories on the statements to the police by a senior military officer about the 2000 coup. The station was forced to hand over the statement but refused to disclose their source.

In Hong Kong, the Interpretation and General Clauses Ordinance creates a three-tiered system for searches.¹⁹² Under the first tier, a judge can order a production order in an *inter partes* hearing if they find that the information is of substantial value regarding an arrestable offense and that it is in the public interest to order the release. In the second tier, after an *ex parte* hearing, the judge can order the search of a newsroom if a production order has not been complied with or if requesting one is not practicable or would seriously prejudice the investigation. The material seized has to be sealed until an *inter partes* hearing over return of the information is heard and the presumption is to return it. Under the third tier, an *ex parte* hearing authorizes seizure of the material and it can be immediately used if it is shown that there would be serious prejudice to the investigation if it is not immediately accessed.

In practice, the first tier is never used and the Court of Appeals has suggested it is not necessary to try progressively each level before asking for a more intrusive order. In 2004, the Independent Commission Against Corruption (ICAC) obtained 14 search warrants to search seven newspapers and the homes of journalists to identify who had revealed the name of a witness to the papers. A suit by a newspaper against the raids found that they were “wrong in fact and in law in seeking the issue of search warrants”. The case was dismissed by the Court of Appeal on jurisdictional grounds, which said that the raids were justified.

In New Zealand, the Court of Appeals in 1995 set general principles that should be followed in any search of a newsroom:¹⁹³

- In cases where the media is not accused of a crime, the search should not be used for trivial or truly minor cases.

¹⁹² Interpretation and General Clauses Ordinance (Cap 1), §§ 82-88.

¹⁹³ Television New Zealand Ltd v Attorney-General [1995] 2 NZLR 641.

- The warrant should not be granted or executed in a manner which would impair the public dissemination of news.
- When there is a substantial risk that the search will result in the “drying up” of confidential sources of information, the warrant should only be granted in exceptional circumstances where it is truly essential in the interests of justice.
- If seizing a film, it must have a direct and important place in the determination of the issues before the court.
- Courts can add additional requirements but should following the standard form.

National Security and Terrorism Laws

Over a dozen countries in the region have adopted new laws on anti-terrorism since 2001. The laws in many countries have raised concerns about protection of sources. Many of the laws authorize the use of intrusive surveillance or require journalists to provide assistance and information without recognizing the importance of protecting sources.

In the Philippines, the Human Security Act of 2007 allows wiretaps for broad categories of offences. Justice Secretary Raul Gonzalez stated in August 2007 that the legislation recognizes the right of journalists to protect their confidential sources but admitted that they may still be intercepted under it.¹⁹⁴ Executive Order 608, based on two executive orders issued under the previous military rule, gags employees from disclosing national security information.¹⁹⁵

In Australia, a series of amendments to the terrorism laws have raised serious concerns. The Anti-Terrorism Act 2005 created a “Notice to Produce” procedure which requires journalists to provide information or face heavy fines, with even larger ones if they disclose that they received the notice. The Telecommunications (Interception) Amendment Act 2006 expanded the use of wiretaps and access to stored communications and data.

In Hong Kong, the government proposed a controversial anti-subversion law in 2003 under Article 23 of the Basic Law.¹⁹⁶ The bill would have expanded state secrets to include information “that relates to any affairs [...] within the responsibility of the Central Authorities” and expanded controls on unauthorized disclosure of information. The bill was withdrawn after mass protests and the security chief resigned.

Not all countries have adopted or retained anti-terrorism laws. In India, the Prevention of Terrorist Activities Act, 2002 required that all persons give assistance. Penalties were three year imprisonment for failing to assist. It was repealed in 2004 by the new government.

Existing laws on state secrets are also a substantial problem in the region. Many countries have laws which vaguely define state secrets and are used by the authorities to punish critical journalists who reveal abuses, corruption and incompetence. In China, dozens of journalists have been arrested and jailed for publishing information which the government claimed are

¹⁹⁴ Gonzalez: Scribes can be bugged under terror law, GMANews, 4 July 2007.

¹⁹⁵ Executive Order No. 608, Establishing a National Security Clearance System for Government Personnel with Access to Classified Matters and for Other Purposes, March 2007.

¹⁹⁶ See Research Project on the Compendium of Submissions on Article 23 of the Basic Law.
<http://hkupop.hku.hk/english/resources/bl23/bl23gp/index.html>

state secrets under the Law on the Protection of State Secrets. In Taiwan, journalist Hung Tsi-cheng was sentenced to a suspended 18 month sentence in 2003 after publishing an article on routine military exercises.

Of particular problem are the antiquated Official Secrets Acts found in nearly all of the Commonwealth countries including India, Malaysia, Bangladesh, and Pakistan. Only New Zealand has repealed their act. These effectively classify all government information unless it has been official released.

- In India, many newspapers and journalists have been charged under the OSA in the past few years. *The Indian Express*, *Gujarat Samachar* and *Sandesh* newspapers were charged in 2005. Kashmiri journalist Iftekar Geelani was detained for 7 months under the act for after the government claimed that he possessed secret military papers that he had downloaded from a Pakistan web site while Pakistan journalist Sajid Bashir was jailed for 15 years. The government has now created a committee to review the act.
- In Pakistan, seven journalists were charged with violations of the OSA in 2005. Their case was dismissed by the Attorney General.
- In Vanuatu, the editor of the *Vanuatu Trading Post* was summarily deported by the government in 2001 for violating state secrets laws after publishing a leaked report in a series of articles he was writing on corruption in the government. He was allowed to return after the Acting Chief Justice ruled that his deportation was unlawful.

Europe

The recognition of protection of journalistic sources is fairly well established in Europe both at the regional and domestic levels. For the most part, the protections seem to be respected by authorities in most cases and direct demands to sources seem more the exception than the common practice.

The European Court of Human Rights and the Council of Europe have taken a leading role in acknowledging that the protection is an essential element of freedom of expression. They have set strong baseline protections that all member states must follow. It has also been recognized by the EU Parliament and the Organization for Security and Co-operation in Europe.

At the domestic level, nearly every country in the region has now adopted at least some specific recognition in law. A few have even raised it to the level of a constitutional protection. In those few countries that do not have specific laws, the courts generally recognize the primacy of the ECtHR case law.

However, there are still significant problems. Many of the national laws are limited in scope or in the types of journalists that they protect. The protections are being bypassed in many countries by the use of searches of newsrooms and through increasing use of surveillance. There has also been an increase in the use of criminal sanctions against journalists, especially under national security grounds for receiving information from sources.

The Importance of International Standards in European Law

In Europe, the role of international standards in the protection of sources is highly significant. The case law of the European Court of Human Rights under the European Convention on Human Rights sets binding standards on all countries that are members of the Council of Europe (all states in Europe except Belarus and the Holy See (Vatican)). The Court has found that protection of sources is an essential right under Article 10 of the European Convention.¹⁹⁷ It has also found that Article 8 on privacy protects journalists from searches of their offices and homes, and from surveillance.

Also of significance are the efforts of the Council of Europe. The COE has issued a number of non-binding but significant resolutions on protection of sources starting in 1996. Detailed guidelines issued by the Committee of Ministers in 2000 set a “baseline” of protections that the leaders of all nations have agreed to follow in their domestic law.¹⁹⁸

The role of the European Union has been mixed. In 1994, the European Parliament issued a declaration on protection of sources.¹⁹⁹ More recently, the EU has assaulted the right of

¹⁹⁷ *Goodwin v. the United Kingdom* - 17488/90 [1996] ECHR 16 (27 March 1996), *Roemen and Schmit v. Luxembourg* (51772/99) [2003] ECHR 102 (25 February 2003), *Ernst and Others v. Belgium* (application no. 33400/96).

¹⁹⁸ Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.

¹⁹⁹ Resolution on confidentiality for journalists' sources and the right of civil servants to disclose information, Official Journal C 044 , 14/02/1994 P. 0034.

protection of sources in its own investigations. In 2004, following an article in *Stern* discussing investigations by the European Anti-Fraud Office (OLAF), OLAF requested that the Belgium and German authorities search the offices of a Brussels-based journalist to discover the sources of the documents quoted in the story. The Belgian authorities detained the journalist, and raided his office and home and seized his files while the German authorities refused. The European Ombudsman found that OLAF was guilty of maladministration by making a false claim that the journalist had paid for the information.²⁰⁰ while the head of the Committee that oversees OLAF told a UK Parliamentary committee that “Any normal person would have to say that somewhere along the line OLAF were probably trying to get back at this man.” The European Court of Justice dismissed a case brought by the reporter, finding that it did not have jurisdiction and that the maladministration was not a “sufficiently serious breach” of rights to find against OLAF.²⁰¹

Legal Protections

Constitutional Rights

A handful of countries in Europe have set the highest recognition of the importance of protection of sources by including it as a constitutional right. The most significant protections are found in Sweden. Under the Freedom of the Press Act, anyone who is a source has a fundamental right to anonymity and it is prohibited as a criminal offense for journalists to break this duty of confidentiality. Officials are prohibited from investigating unless it is specifically authorized by the Act. Liability is lodged in the editor rather than the journalist or other employees. The identities of sources are strongly protected from being disclosed except in limited circumstances such as breach of national security. This principle of anonymity was first recognized in the original 1766 freedom of the press law and has existed in Swedish law since.²⁰² The Fundamental Law on Freedom of Expression, another constitutional instrument, extends the rights to radio, television and other technologies.²⁰³

In Macedonia, Article 16 of the Constitution states “The right to protect a source of information in the mass media is guaranteed.” Article 38 of the Portuguese Constitution defines freedom of the press as including “Journalists’ right, as laid down by law, to gain access to sources of information and to the protection of professional independence and secrecy”.

A constitutional recognition does not guarantee adequate protections in all countries. In Spain, Article 20 of the Constitution states that “The law shall regulate the right to the protection of the clause on conscience and professional secrecy in the exercise of these freedoms” but there is no specific law on protection of sources. Photographers in Catalonia were required in September 2007 to give up photographs of a demonstration where pictures of the King were burned. Andorra is in a similar situation; the Constitution states that the law will regulate professional secrecy however there is no law on protection of sources.

²⁰⁰ Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Anti-Fraud Office in complaint 2485/2004/GG, 12 May 2005.

²⁰¹ Case T-192/04, Tillack v. Commission of the European Communities, Ct of 1st Instance, 4 October 2006.

²⁰² §4. Translation available in *The World’s First Freedom of the Information Act: Anders Chydenius’ legacy today* (Chydenius Foundation, Kokkola, Finland 2006).

²⁰³ The Fundamental Law on Freedom of Expression, SFS nr: 1991:1469.

Some countries have found that protection of sources is part of the Constitutional right to freedom of expression. In Germany, the Constitutional Court first ruled in 1966:

[F]reedom of the press also includes a certain degree of protection for the confidential relationships between the press and its private sources of information. Such protection is absolutely essential since the press, while unable to forego privately supplied information, can only expect these sources of information to be productive when the providers of the information can be totally certain that “editorial secrecy” is upheld.²⁰⁴

In 2007, the Constitutional Court ruled again that searches of newsrooms in investigations of state secrets cases impaired the right of freedom of the press under the Basic Law and were “constitutionally inadmissible” in preliminary investigations.²⁰⁵

Laws

The vast majority of countries in Europe have adopted some form of protection of sources legislation. 40 countries have adopted a provision in their criminal or civil codes, media laws or other laws while others recognize it in their case law.

There has been a steady trend towards adoption of protections into law following the cases in the European Court of Human Rights. In the past few years, new laws have been adopted in many countries including Belgium, Georgia, Luxembourg, Monaco, Switzerland, and Turkey. However, not all countries have improved their legislation. In Portugal, the President vetoed amendments to the Statute of the Journalist which would have weakened the protections, changing the protections from an absolute right to a qualified right.

The most comprehensive law in Europe on protection of sources is found in Belgium.²⁰⁶ The law was adopted after the European Court of Human Rights found in 2003 that the state had violated Article 10 by ordering the raiding of several media houses to identify the source of leaks of information and the controversy over the EU-requested investigation of a German reporter. The law gives broad protection to any person “who directly contributes to editing, gathering, production or distribution of information for the public” from having to disclose the identity or any documents or information that may reveal their sources, the type of information given to them, the author of texts, or the documents or the content of information. The protection was broadened after the Cour d'arbitrage ruled in 2006 that it was not inclusive enough. Surveillance or searches cannot be used to bypass the protections and journalists cannot be prosecuted for refusing to testify for receiving stolen goods or breaching professional secrecy. The protections can only be overridden by a judge in cases relating to terrorism or serious threats to the physical integrity of a person and the information is of crucial importance and cannot be obtained any other way.

Some countries have stronger but less detailed protections than Belgium in their laws. In a number of countries, the right of protection of the identity of sources is absolute. In Georgia, the Law on Freedom of Speech and Expression states that:

²⁰⁴ 20 BVerfGE 162 - Spiegel, 5 August 1966.

²⁰⁵ 1 BvR 538/06; 1 BvR 2045/06 – Cicero, 27 February 2007.

²⁰⁶ Loi du 7 avril 2005 relative à la protection des sources journalistiques.

The source of a professional secret shall enjoy absolute protection and no one shall be entitled to demand its disclosure. No person shall be required to disclose the source of confidential information during court proceedings on the restriction of the right to freedom of speech and expression.

In France, the Code of Criminal Procedure states that “Any journalist heard as a witness in respect of information collected in the course of his activities is free not to disclose its origin.”²⁰⁷ In Turkey, the 2004 Press Law states that “The owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their news sources or to legally testify on this issue.”²⁰⁸ However, as discussed below, these protections may be undermined by other provisions relating to searches or national security.

In other countries, greater protection is available in civil cases. In Iceland, the right is absolute for civil cases. In Bosnia, the Law on Protection Against Defamation states:

A journalist, and any other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from a confidential source has the right not to disclose the identity of that source. This right includes the right not to disclose any document or fact which may reveal the identity of the source particularly any oral, written, audio, visual or electronic material. Under no circumstances shall the right not to disclose the identity of a confidential source be limited in proceedings under this Law.²⁰⁹

In Kosovo, the 2006 Law on Defamation and Insult gives an absolute right of protecting a source and states that “No adverse inference shall be drawn from the fact that a defendant in a defamation or an insult action under this law refuses to reveal a confidential source of information.”²¹⁰

However, even in countries where the law provides for an absolute right, there may be some instances in practice where it can be overridden. In Lithuania, the Law on Provision of Information to the Public provided an absolute protection. However, the Constitutional Court ruled in 2002 the lack of exemptions to protection of sources in the Law on the Provision of Information to the Public “violate[d] the values entrenched in the Constitution.”²¹¹ It said that the protection could not be absolute in vitally important cases such as to protect the constitutional rights of a person because the harm would be greater than the benefit. In Portugal, journalist José Luis Manso Prieto was given a suspended sentence in 2004 after refusing to testify in a case even though the law does not provide for any exemptions for forcing the disclosure of sources.

Qualified Protections

More commonly, the national laws or practices provide for a qualified right where the right to protect the source can be overridden in specific cases. The qualified exemptions usually relate to the severity of the crime. Regardless of the text of the laws, limitations must

²⁰⁷ Code of Criminal Procedure, §109.

²⁰⁸ Press Law, No: 5187, §12, 9 June 2004.

²⁰⁹ Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina, §9.

²¹⁰ Civil Law Against Defamation and Insult, §18.

²¹¹ Decision of 23 October 2002.

conform with the minimum guidelines set down by the European Court of Human Rights in the *Goodwin* case in 1996, which involved a qualified right under UK law.

In Finland, any override of the protection of sources must involve the violation of a crime punishable by imprisonment of six years or more. In Azerbaijan, the Law on the Mass Media allows for a court to force disclosure in cases to protect human life, prevent a serious crime or to protect a person accused of committing a serious crime. In Luxembourg, the 2004 Law on the Freedom of Expression in the Media, journalists can be forced to disclose a source where it involves the prevention of crimes against individuals, drug trafficking, money laundering, terrorism or state security.²¹²

Some laws set out procedures and balancing tests based on the ECHR cases. In Armenia, disclosure can only occur in cases where it is:

directly related with a criminal case and only for the sake of clearance of heinous crimes or highly heinous crimes, particularly if the need of public interest defense under criminal law outweighs the public interest in non-disclosure of information source, and there are no more alternative means for defending the public interests.

In some countries, the threshold for overcoming the protections is very low. In Belarus (which is not subject to the ECHR), the Law on Media allows for a court to order disclosure in cases where it “is necessary for the purpose of investigation or consideration of cases under their procedure.”

There is also the problem in many countries relating to the scope of the law. Many apply only to journalists who are members of the mass media. In Bulgaria, the Radio and Television Act protects broadcast journalists from having to disclose their sources. The law does not specifically apply to print and other journalists but according to legal experts, it has been extended by courts to them.²¹³ Few of the laws are broad enough to apply to Internet journalists.

No Laws

There are currently no specific legal protections in Ireland, the Netherlands, Slovakia and Greece and a number of smaller jurisdictions such as the Holy See and Andorra. In most of these jurisdictions, the courts have at least partially incorporated the ECtHR decisions into practice. In the Netherlands, the Supreme Court in 1996 ruled that it was adopting *Goodwin* into national law.²¹⁴ However, there have been a number of cases in the past five years where the courts have detained journalists for not revealing the sources of classified documents.

The protection of sources is more tenuous in Ireland. According to legal experts, the courts have been more reluctant since the *Goodwin* decision to order disclosures but there has been a series of cases where the courts have explicitly refused to recognize the protection of sources relating to Tribunals of Inquiry.²¹⁵ In a recent case, two journalists for the *Irish Times*

²¹² Loi du 8 juin 2004 sur la liberté d’expression dans les medias, §7.

²¹³ Comments of the Access to Information Programme to OSCE survey on “access to information by the media in the OSCE region”, 30 April 2007.

²¹⁴ Van den Biggelaar v Dohmen/Langenberg, 10 May 1996.

²¹⁵ See McGonagle, *Media Law* (Thomson Round Hall, 2003).

destroyed leaked documents from the Machon Tribunal's nine year investigation into improper payments made to the Prime Minister rather than provide them to the court.²¹⁶

Searches

One of the major challenges to journalists in Europe in the past several years has been the searching of journalists' offices and homes either to obtain information on the journalists' sources or as a pretext to impede their work on stories that were sensitive to the authorities.

- In the UK, two newspapers in Milton Keynes and the home of a journalist were raided and searched in an investigation of leaks from Thames Valley Police in May 2007.
- In Russia, there have been many reported cases in the last five years of newsrooms searched and journalistic materials being seized. Twenty armed police searched the offices of *Permsky Obozrevatel* in August 2006 and seized computers and other equipment, claiming that the newspaper had obtained classified information.
- In Lithuania, State Security officials raided the offices of *Laisvas Laikrastis* newspaper in September 2006 after the newspaper wrote a story about a corruption investigation. 15,000 copies of the newspaper, computers and other equipment were seized.²¹⁷ The raid was strongly criticized by the President.
- In Italy, police searched the offices of *La Repubblica* and the *Piccolo* newspapers and two journalists' homes and seized files following stories about Italy's role in the 2003 kidnapping of Egyptian cleric Osama Moustafa Hassan Nas. In 2003, the police raided *Il Giornale* and seized a reported 7,000 files. In 2004, prosecutors searched the homes and offices of reporters for *Corriere della Sera* and *Il Messaggero* following articles into the investigation of a doctor accused of murder.

As noted before, search of newsrooms to identify sources has been the subject of two decisions of the European Court of Human Rights. In a 2003 case involving Luxembourg, the Court stated that a search to identify a source "is a more drastic measure than an order to divulge the source's identity" because of the other materials the search could reveal.²¹⁸ The Court also ruled in 2003 that Article 10 was violated in a case in Belgium where 160 police officers raided the offices of a newspaper and journalists' homes.²¹⁹ Unlike the protections adopted following *Goodwin*, most countries in Europe have not changed their laws or practices following the two ECtHR decisions on searches. This has led to a number of confrontations between the media and governments in the past few years.

Few source laws specifically include protections. In Austria, the Media Act prohibits searches that are undertaken to circumvent the protections of sources. Similarly, the Swedish constitutional right of "freedom of informants" overrides the Judicial Code and limits the decision to authorize searches to the Chancellor of Justice in media-related media cases. In

²¹⁶ Destroying files 'proper action', Irish Times, 12 July 2007.

²¹⁷ Committee to Protect Journalists, Newspaper issue seized; editor briefly detained; newsroom, editor's home searched and hard drives confiscated, 11 September 2006.

²¹⁸ Roemen and Schmit v. Luxembourg (51772/99) [2003] ECHR 102 (25 February 2003).

²¹⁹ Ernst and Others v. Belgium (33400/96), 15 October 2003.

Germany, the Constitutional Court ruled in February 2007 that searches of a newsroom violated the Constitutional protections on freedom of the press.²²⁰

In France, the Criminal Code specifically limits the use of searches of media offices only if it is ensured that “such investigations do not violate the freedom of exercise of the profession of journalist and do not unjustifiably obstruct or delay the distribution of information.” However, this legal protection has not proven to be sufficient to deter searches in a number of cases. Police searched the offices of *Le Point* and *L’Equipe* and seized computers following the publication of stories about investigations into doping in bicycle racing. The Minister of Justice Pascal Clément promised in June 2006 to strengthen the law protecting journalists. However, in July 2006, police searched the offices of *Midi Libre* following a complaint of breach of professional secrecy. In May 2007, police attempted to search the offices of the satirical newspaper *Le Canard Enchaîné* to identify the source of information regarding the presidential Clear Channel scandal. They were refused entry by the journalists in an almost comical standoff between the investigating judge and the journalists.

Wiretapping

Another issue in many jurisdictions in Europe has been the use of electronic surveillance to bypass sources protection laws. Journalists, like all other persons in Europe are protected by the overall protections on invasions of their personal privacy by governments and others under Article 8 of the European Convention on Human Rights. The ECtHR prohibits wiretapping unless it is legally authorized and subject to restrictions to prevent the “arbitrary interference” of their rights. This includes conversations made in a professional capacity.²²¹

In a few countries, the protection of sources legislation specifically limits the use of surveillance to identify sources or other protected materials. The Belgian Law on Protection of Journalists’ Sources only allows detection or investigative methods when it is authorized by a judge under the same limits as forcing the disclosure of a source. A court ruled in 2007 that journalists have a greater expectation of privacy than average citizens because of the need to protect sources: “The court rules that it is not because she is a journalist that her private life should be more protected than the average citizen, with the exception of protection of confidential sources.”²²² In Georgia, the interception of journalists’ communications to violate professional secrets is a criminal offence.²²³

However, the majority of countries treat electronic surveillance as a separate issue that is not limited by sources laws. This has led to a series of cases where journalists have been legally or illegally tapped by authorities as a means to identify sources of information.

- In the Netherlands, the government monitored the telephones of journalists from the newspaper *De Telegraaf* in 2006 who had revealed that a criminal kingpin was obtaining confidential information while still in jail. The tap was approved by an appeals court in September 2006 which allow for wiretapping journalists when

²²⁰ Decision BvR 538/06; 1 BvR 2045/06, 27 February 2007.

²²¹ See e.g. Halford v. the United Kingdom - 20605/92 [1997] ECHR 32 (25 June 1997).

²²² DE GRAAF and De Morgen vs. Belgian state, Ct of First Instance, Brussels. 18 June 2007. (Unofficial translation provided by OSCE).

²²³ Comments of Tamar Kordzaia, Young Lawyers Association.

“important interests of the state are at stake”.

- In Denmark, police wiretapped journalist Stig Mathiessen from the newspaper *Jyllands-Posten* in 2002 after he wrote a story about a “death list” issued by Islamic fundamentalists and refused to disclose the source to police. A high court ruled in September 2002 that he did not have to disclose the source.
- In Latvia, the Financial Police wiretapped the telephones of television reporter Ilze Jaunalksne and then leaked the tapes to the media. The judge who authorized the taps has been removed and charges have been filed against the police officers. The journalist was awarded €42,000 in damages in February 2007.
- In the Czech Republic, two journalists in 2006 were among the many persons wiretapped in a bid to reveal who had leaked information about organized crime connections with the civil service.
- In Macedonia, 17 journalists were awarded €100,000 in June 2007 for being subjected to illegal surveillance by the former conservative government. The Interior Minister behind the taps was pardoned.

An emerging issue is the collection of transactional information from modern communications technologies to identify sources. These include the traditional billing records from telephone and mobile phones but also new information such as mobile phone locations and Internet usage. There have been a few recent cases where the abuse has been revealed but given the secret nature of the collection of information, and it is likely that there are many more that have not been revealed.

These records often do not have the same level of legal protections as the underlying communications. In Germany, the Constitutional Court in 2003 authorized the obtaining of mobile phone records of journalists who were in communication with wanted criminals.²²⁴ The Court found that the protection of sources laws did not apply to documents held by third parties such as telecommunications providers. In the UK in 2006, police in Suffolk obtained the phone records of a journalist from the *East Anglian Evening Star* when he telephoned the police to inquire about a “cold case” to discover the source of his information.

The collection of information creates opportunities for illegal monitoring of journalists by private organizations. In Finland, the former CEO and other employees of telecommunications company Sonera and several government officials were convicted in 2005 of illegally obtaining the phone records of two journalists from *Helsingin Sanomat* and employees of Sonera to discover who was the source of a leak.

This issue has increased in importance in Europe with adoption the 2006 EU Directive on Data Retention which obliges all member states to adopt laws requiring telecommunications providers to automatically collect and retain all information on all users' activities.²²⁵ There has been little recognition of the importance of journalistic issues when developing these

²²⁴ Marion Albers and Stefanie Witzke, The End of the “Woodward and Bernstein” Era? The German Constitutional Court and Journalists’ Privacy on Mobile Phones, Vol. 04 No. 07 German Law Journal, 2003.

²²⁵ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

laws.

National Security

Another common problem in Europe is the use of overly broad national security laws to investigate and prosecute journalists who receive information from sources. Nearly all countries in Europe have some form of legislation devoted to the protection of state secrets in their criminal code. Many have also adopted laws creating procedural rules on the classification and protection of information. Many have overly broad definitions of “secrets” and are often used to conceal information that is not related to national security – such as “sensitive information” or “office secrets”.

These laws are used as justification to arrest journalists and search and seize documents to both identify sources and to punish the sources and the journalists for disclosing the information. In the past several years, there has been a series of incidents where the laws have been used against journalists and editors who have published information stamped secret but of a public interest.

One of the broadest laws is the UK’s Official Secrets Act. It has been used often to both arrest journalists and to prevent coverage of cases. Neil Garrett of *ITV News* was arrested in October 2005 under the OSA after publishing internal police information on the mistaken shooting of Jean Charles de Menezes. The story revealed that in an effort to deflect criticism, the police had misled the public about de Menezes’ actions before he was shot. Garrett was cleared in May 2006 after several detentions. In November 2005, the government threatened to charge several newspapers with violating the Official Secrets Act if they published stories based on a leaked transcript of conversations between PM Tony Blair and President George Bush about bombing *Al Jazeera* television. The UN Human Rights Committee expressed concern over the broadness of the Act in 2001, stating:

The Committee is concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public concern, and to prevent journalists from publishing such matters. The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information.²²⁶

Other laws require that journalists disclose their sources or be prosecuted. In Hungary, if a source discloses a state secret (a very broad definition) to a journalist, the journalist must inform the authorities or face criminal penalties themselves. There have been a number of recent cases. Rita Csik, a journalist with the *Nepszava* newspaper was charged in November 2004 under the Hungarian Penal Code for writing an article that quoted a police memorandum on an investigation of an MP. She was acquitted in November 2005 by the Budapest municipal court, which said that the document was not legally classified. The decision was affirmed by the Court of Appeals in May 2006. In December 2005, *HVG*

²²⁶ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 05/11/2001. CCPR/CO/73/UK,CCPR/CO/73/UKOT.

magazine reporter Antónia Rádi was charged with disclosing classified information after writing an article on a police investigation of the mafia.

In Germany, two journalists from *Sonntags Blick* were charged under the Criminal Code in March 2006 for quoting a German Criminal Investigation Office (BKA) document. In July 2006, a Potsdam court refused to open proceedings. The Constitutional Court found in February 2007 that the police search and seizure of the offices of *Cicero* because of the publication of the state secret was unconstitutional.²²⁷ However, prosecutors in August 2007 opened criminal investigations against 17 journalists for publishing stories based on a classified parliamentary inquiry.

In Russia, environmental journalist Grigory Pasko was convicted in 2001 after revealing that the Russian Navy had dumped radioactive waste in the Sea of Japan. He served nearly three years in prison. His case is due to come up before the European Court of Human Rights in the near future.

In Switzerland, two *Sonntags Blick* reporters and the editor were prosecuted under the military penal code for publication of an Egyptian government fax confirming the existence of secret prisons run by the US government; it may have been intercepted by the Swiss military. The case was dismissed in 2007. In 2003, the government opened proceedings against the editor of *Sonntags Blick* for publishing photos of an underground military establishment.

Some laws do recognize a public interest. In Denmark, two journalists and the editor of *Berlingske Tidende* were prosecuted under the Criminal Code in November 2006 after publishing material leaked from the Defense Ministry. The court found they had acted in the public interest in publishing the information and acquitted them.

They may also be other laws that impose criminal liability. In Ireland, reporter Mick McCaffrey was arrested in 2006 under the Criminal Justice Act for publishing materials about an inquiry into police arresting and convicting the wrong man in a 1997 murder of a policeman.

²²⁷ 1 BvR 538/06; 1 BvR 2045/06, 27 February 2007.

Latin America

The recognition of protection of journalistic sources is generally respected in Latin America both at the regional and local levels. Most countries have adopted constitutional or legal protections which give a strong level of legal protection. There are also important declarations from the Organization of American States. Few journalists are ever required to testify on the identity of their sources.

However direct demands for sources still occur regularly in many countries, requiring journalists to seek legal recourse in courts. There are also problems with searches of newsrooms and journalists' homes, surveillance and the use of national security laws.

Regional Protections

At the regional level, the OAS has taken a strong stance on protection of sources. The Inter-American Declaration of Principles on Freedom of Expression provides that "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential".²²⁸ The Special Rapporteur on Freedom of Expression has also called on countries to recognize the right. The Inter-American Court of Human Rights has not yet ruled on any case related to reporters' privilege as part of the right of freedom of expression.²²⁹

Also, the IAPA has taken a leading role in promoting the protection of sources as an essential element of freedom of expression. In March 1994, it sponsored the Declaration of Chapultepec (Declaración de Chapultepec) which sets a list of ten principles related to the strong protections of a free press that most of the states have endorsed (although not considered a binding standard). Principle 3 of this Declaration provides "The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector. No journalist may be forced to reveal his or her sources of information".²³⁰ A guide enacted by IAPA explains that "the third principle concludes with a call to public officials, especially judges, not to require journalists to reveal their information sources. This is an essential guarantee for the free exercise of the journalistic profession, because it allows the source to open himself to the journalist, confident that he will not be persecuted either by the subject of his information or by the justice system."

Legal Protections

At the domestic level, nearly every country in the region has now adopted at least some specific recognition in its basic law, its statutes or in a judicial precedent. Many of the

²²⁸ Approved by the Inter-American Commission on Human Rights during its 108 regular session, available at <http://www.cidh.org/Relatoria/showarticle.asp?artID=26&IID=1>.

²²⁹ The Inter-American Commission on Human Rights has appointed since 1997 a Special Rapporteur for Freedom of Expression who provides legal assistance on freedom of expression and produces an annual report on the state of this right in America.

²³⁰ See Declaration of Chapultepec, adopted by the Hemisphere Conference on Free Speech, Mexico City, 11 March 1994, available at <http://www.sipiapa.com/projects/chapul-declaration.cfm>

countries have raised it to the level of a fundamental protection in their constitutions. In those few countries that do not have specific laws, the courts generally recognize the reporters' privilege.

However, the application of general principles of procedural law and criminal law (the duty to cooperate with justice proceedings) may harm this principle if there is no specific exemption for journalists to avoid being compelled to testify about their sources or to have their documents and personal papers seized.

Constitutional Rights

A significant minority of countries in Latin America have established the recognition of the importance of protection of sources by including it as a fundamental constitutional right. Many of the constitutions give a strong right of protection.

- In Brasil, Article 5 of the Constitution provides that "Access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity."
- In Colombia, Article 74 of the National Constitution says that "Professional secrecy is inviolable." Article 73 of the Constitution says that "Journalist activities shall be protected in order to ensure its professional independence and freedom."
- In Paraguay, Article 29 of the Constitution states that "The practice of journalism, in all its forms, is free and is not subject to prior authorization. In performing their duties, journalists of mass communication media organizations will not be forced to act against the dictates of their conscience or to reveal their sources of information".
- In Ecuador, the 1998 Constitution protects the secrecy of sources for journalists and social commentators.
- Article 28-2 of the 1987 Constitution of Haiti states that "Journalists may not be compelled to reveal their sources. However, it is their duty to verify the authenticity and accuracy of information. It is also their obligation to respect the ethics of their profession."
- Article 2.18 of the Peruvian Constitution states that "Every individual has the right: [...] to keep his political, philosophical, religious, or any other type of convictions private and to maintain professional confidentiality."

In 2006, a bill was introduced in Mexico to amend its constitution and provide for protection of sources.²³¹ Similar protections are also being considered in Ecuador.

In some countries, the constitutional right of protection of sources is qualified with the right of Habeas Data but it has been viewed in an expansive manner. In Argentina, Article 43.3 on Habeas Data of the Federal Constitution provides that "The secret nature of the sources of journalistic information shall not be impaired." This provision has been matched with a

²³¹ See "De la Dip. Beatriz Mojica Morga, del Grupo Parlamentario del Partido de la Revolución Democrática, por la que se modifica el Artículo 6 de la Constitución Política de los Estados Unidos Mexicanos".

similar wording in the provincial Constitutions of Jujuy, Tierra del Fuego, Cordoba, City of Buenos Aires, Chaco, Salta; and Santiago del Estero. In the provinces that do not have an express provision in their constitution, the Federal Constitution also applies. After the 1994 amendment of the Federal Constitution all case law has recognized this privilege.²³²

Similarly, in January 2006, the Constitution of Honduras was amended to provide that “This guarantee [Habeas Data] shall not affect the secrecy of the sources of a journalist”.²³³ This amendment is provided only as an exception to Habeas Data but it is likely that this provision shall expand to other situations as has happened in Argentina with the same wording. The 1999 Constitution in Venezuela also provides in its section on Habeas Data that “The foregoing is without prejudice to the confidentiality of sources from which information is received by journalist, or secrecy in other professions as may be determined by law.”²³⁴

Laws

A significant number of countries in Latin America have adopted some form of protection of sources legislation. Ten countries have a provision either in their media law, criminal procedure statute, or criminal code which gives a right of protection of source. In one case the provision was included in the data protection act (Argentina). Most of the laws give strong or absolute protections which commentators have described as “the Latin American model of sources protection” both at the national and international level.

There is a trend towards adoption of protections into law following the Declaration of Chapultepec and comparative case law from the European Court of Human Rights, which is widely known in the region. In the past few years, new laws have been adopted in many countries. However, not all countries have improved their legislation and many of them still have old criminal procedures codes that do not exempt journalist of the obligation to be witnesses for the prosecution creating a contradiction with these laws.

Mexico has one the strongest laws on protections in the region. The laws on protection of sources were adopted in June 2006 by the Federal government and in the Federal District.²³⁵ The federal law provides that every journalist is entitled to preserve the sources of their information. It is not only a right but a duty because the journalist can only provide the source with the source’s consent. They can refuse to testify as witness in a trial or procedure. It also protects their archives and telephone calls. Additionally, the local law creates a criminal sanction of up to six years for a public official who infringes the rights provided to journalists in this law. The Human Rights Commission issued a general recommendation to the government and the prosecutors to avoid asking journalists to testify.²³⁶ Prior to the adoption of the law, Mexico was strongly criticized by the OAS for a series of cases where journalists were subpoenaed to obtain their sources.²³⁷

²³² In the “Moschini case” the court held that media organisations and reporters cannot be required to reveal the origin of sources of their information because they are protected under art. 43.3 of the Constitution (CFed.Crim. y Correc., Sala I, “Moschini, Roberto”. LL, Suplemento de Derecho Constitucional del 11/2/98). journalists’ companies? Media companies?

²³³ Decree 381-2005 of 20/1/2006.

²³⁴ Article 28.

²³⁵ Artículo 243 Bis inciso III del Código Penal Federal, Ley del Secreto Profesional del Periodista en el Distrito Federal. Promulgada el 7 de junio de 2006.

²³⁶ <http://www.cndh.org.mx/recomen/general/007.htm>

²³⁷ See Annual report of the Inter-American Commission on Human Rights, 2003.

Another recently adopted law is found in El Salvador. In 2004, the Criminal Procedure Code was amended to provide protection for journalists. Section 187-A of this Code states that i) a journalist or a person with another profession but who has acted as a journalist, cannot be compelled to act as a witness in a judicial procedure with respect to facts or information gathered in his work as journalist and ii) the same persons have the right to refuse to provide the sources of their information. In 2006 the General Prosecutor promised to the media to enforce this right.²³⁸

Also in 2004, Peru amended its Criminal Procedure Code.²³⁹ Section 165.2 now provides that “The following persons must abstain to testify: a) those related to professional secrecy cannot be compelled to testify for what they know due to their profession, except when they are required to tell it to a judicial authority. These kinds of individuals are priests, notaries, medical doctors, journalists, and other professionals expressly protected by a specific law.”

In Chile, under Section 7 of the Law on the Freedom of Opinion, Information and the Exercise of Journalism, “directors and editors of media, journalist, students of journalism doing training, have the right to maintain the secrecy of their sources”.²⁴⁰ This privilege is extended also to the records and papers in their possession. They cannot be compelled to reveal their sources by a judicial order. This privilege also applies to people who are present with the journalist due to their jobs.

In Brazil, Article 7 of the Press Law of 1967 states, “In the exercise of freedom of expression of thought and of information, anonymity is not permitted. Inter alia, the confidentiality of sources or the origin of news received or gathered by journalists, radio reporters or commentators is guaranteed and respected”.²⁴¹ Under Article 71 of the same law it is provided that “No journalist or radio commentator nor, in general, any person mentioned in Article 25 shall be compelled or required to give the name of his informant or news source, and his silence in this regard may not make him liable directly or indirectly to any kind of punishment.”

In Uruguay, Article 1 of the Press Law provides that a journalist have a right to protect secrecy of their sources.²⁴² Nevertheless, journalist César Casavieja was detained in February 2002 in an effort by a judge to make him reveal his sources. The IPI has also reported a number of libel cases against journalists that demanded the disclosure of sources.

In Venezuela, the 1994 Law for the Journalism provides that the “secrecy for the journalist is a right and a responsibility. No journalist shall be compelled to reveal a source of facts that he has knowledge of through his profession”.²⁴³ However, federal prosecutors in May 2007 demanded that *La Razón* provide journalistic materials and personal information of employees relating to a story on corruption in the state-owned petrol company.

²³⁸ See Fiscal general promise not to call journalist to trial, laprensa.com.sv.

²³⁹ New Criminal Procedure Code, <http://www.minjus.gob.pe/demo/lpext.dll?f=templates&fn=main-h-nuevocodprocpenal.htm>

²⁴⁰ Law 19,733 of June 2001.

²⁴¹ Ley de Prensa N° 5.250 of 1967.

²⁴² Ley N° 16.099 Comunicaciones e Informaciones Dictanse Normas Referentes a Expresión, Opinión y Difusión, Consagradas por la Constitución de la República, §1.3.

²⁴³ Ley del Ejercicio del Periodismo 1994, Gaceta Oficial N° 4.819 de fecha 22 de diciembre de 1994.

In Panama, Article 21 of the Law of Journalism provides that "Journalists shall not be required to reveal sources of information and origins of news, without prejudice of other liabilities they may incur."²⁴⁴

Not all laws are absolute. In Ecuador, the Law of Practice of Professional Journalism provides in Article 34: "Except in cases expressly determined in the law and the criminal code, no professional journalist shall be forced to reveal sources of information."²⁴⁵

In Bolivia, Article 8 of the Press Law enacted in 1925 establishes that "secrecy in matters of the press is inviolable"²⁴⁶ Article 9 provides that an editor or printing company who reveals to a public authority or to a private person the "secrecy of anonymity", without a judicial order is liable as a criminal for a crime against public faith. However, the judge hearing a case may order the director to identify the author of a publication when there is an accusation and an express demand to do so. President Evo Morales demanded in 2006 that journalists reveal the sources of information for stories on his health problems.²⁴⁷

In Argentina, Article 1 of the Data Protection Act states that "in no case shall journalistic information sources or databases be affected". According to the legislative history of the Act, this law provides protection to sources of journalism and also to the databases themselves.²⁴⁸ Several provinces have changed their criminal procedures codes exempting journalists of the duty to testify as witnesses. See criminal procedures laws of the provinces of Santa Fe,²⁴⁹ Entre Rios,²⁵⁰ Tucuman, Santiago del Estero²⁵¹, and Rio Negro.²⁵² Law 3082 of Rio Negro provides that all journalists have this privilege and any time they are required to testify the judge must indicate them and remind them that they have the aforementioned right so they could abstain from testifying. However, In 2004, the government of Argentina's Neuquén province demanded to know the sources of newspaper *Río Negro* article on the investigation of a minister for corruption.²⁵³

Finally, although there are no specific provisions related to digital media, most countries would protect a blogger requesting the privilege of his sources if he is considered a journalist. In Argentina a 1997 decree²⁵⁴ and a law adopted in 2005²⁵⁵ provides that the protection afforded a free press also applies to the Internet and electronic media.

No Laws

There are currently no specific legal protections in Costa Rica, Dominican Republic, Guatemala, Guyana, Honduras, and Nicaragua, nor in any of the Caribbean island states.

²⁴⁴ Law 67 of 1978 (law regulating journalism).

²⁴⁵ Registro Oficial No. 900 de Septiembre 30 de 1975.

²⁴⁶ Ley de Imprenta, approved 19 January 1925.

²⁴⁷ El Presidente quiere que los periodistas revelen Fuentes, La Prensa, 3 March 2006.

²⁴⁸ See Antecedentes Parlamentarios, La Ley, pag. 442, ¶ 144 and 145, opinion of Congressman Torres Molina, 2000.

²⁴⁹ Article 252 of Criminal Procedure Code, law 6740 of the year 2003.

²⁵⁰ Law 9754.

²⁵¹ Law 6270, of 1996.

²⁵² Law 3082 of 1997.

²⁵³ Provincial government actions threaten confidentiality of sources, 24 August 2004.

²⁵⁴ Decree 1279/97.

²⁵⁵ Law 26.032.

In some of these jurisdictions, the courts have at least partially incorporated the idea of privilege for reporters. For example, courts in Guatemala have interpreted that journalists have the right to defend the secrecy of their sources. In several cases, refusals of journalists to reveal their sources have been upheld, including the case of the “Plan Manila” where journalist Hugo Arce refused to testify over his sources or the case of Luis Hurtado Aguilar who published information about corruption in the Supreme Court (1985).²⁵⁶

Searches

As noted before, apart from the demands for journalists to submit the identity of sources or information that they received from the sources, searches of newsrooms and journalists’ offices or homes also occur in many countries. These searches often happen even in jurisdictions with strong sources laws.

- In August 2006, Federal Police in Brazil entered the magazine office of *Hoje*, in Belo Horizonte, and its printing press to confiscate computers, amid accusations by prosecutors that the journal was disseminating information during the elections about bribes and corruption.
- In 2004, Chilean police entered the offices of the online newspaper *El Mostrador* and seized hard drives after the newspaper had received emails from a terrorist group. The computers were returned the next day.²⁵⁷
- In January 2005, Venezuelan police raided the home of columnist Patricia Poleo of the newspaper *El Nuevo País* after she published information about an investigation into the 2004 murder of a prosecutor. She later fled the country.

Often searches are used to pressure journalists to avoid criticizing the governments, like the case of Jose Ruben Zamora in Guatemala²⁵⁸ who complained to the Inter-American Commission on Human Rights which has initiated an investigation. In June 2003, Argentine police raided the offices of *La Nación* and seized financial information after they were accused of money laundering by a rival newspaper.

Wiretapping

Another concern in Latin America is the use of surveillance to monitor the activities of journalists to identify their sources. The rights of the journalists against illegal tapping are legally protected by national laws and regional and international agreements on privacy and human rights. However, it is still not uncommon for it to occur.

- In Colombia, the heads of the police and intelligence services were forced to resign in May 2007 after it was discovered that they were illegally wiretapping journalists’ and politicians’ telephones.²⁵⁹

²⁵⁶ See El derecho a callar, *Prensa Libre*, 24 de Julio de 2005.

²⁵⁷ IPI, 2004 World Press Freedom Review: Chile.

²⁵⁸ Guatemala: Solicitan medidas cautelares para el periodista Rubén Zamora, *Oneworld.net*, Julio 3 de 2003.

²⁵⁹ Colombia Forces Out Police Chief, *Associated Press*, 15 May 2007.

- In May 2006, Daniel Santoro, a reporter with the Buenos Aires, Argentina, newspaper *Clarín*, filed a formal complaint that an off-the-record e-mail exchange he had with a federal judge concerning alleged drug trafficking – information he had been looking into for several months – was stolen and disseminated. The same week it was learned that the e-mail inboxes of journalists Luis Majul of *América TV* and Ernesto Tenenbaum of *Radio Mitre* had also been broken into. In the case of Majul an e-mail said to be from him in which he called for a boycott of *Clarín* was circulated. The message contained details and the passwords of more than 20 journalists, among them Héctor Magneto, president of the Clarín Group, Bartolomé Mitre, editor of Buenos Aires newspaper *La Nación*, and others connected with the news media.

Few sources laws specifically mention surveillance or protection of communications records. Although not expressly mentioned in many laws, it is understood that the protection of sources may limit the use of any record of the journalist, including the seizure of telephone records belonging to the journalist.

There have been a number of cases in Argentina where courts have found for journalists against surveillance of their communications. In the Thomas Catan case, Catan, the Argentine correspondent of the *Financial Times* was ordered in September 2002 by a federal judge to hand over a list of telephone calls he had made. The action followed Catán's refusal to reveal his news sources for allegations by foreign bankers in Argentina that local senators had sought bribes to stall a legislative bill seeking to impose new taxes on banks. In October 2002, a federal court ruled in favor of Catán, overruling the first instance judge's decision. It ordered that the list of telephone calls be destroyed in the presence of the journalist and his lawyers.²⁶⁰ In the 2007 Dragoslav case the federal court held that emails illegally obtained from a journalist cannot be used in the criminal procedure by application of the doctrine of dismissal of evidence because it was illegally obtained (the doctrine of the fruit of the poisonous tree).²⁶¹

In the Peruvian cases of Anel Townsend and Fabián Salazar Olivares the practices of tapping journalists' and political opposition members' telephones and physically intimidating them in order to seek incriminating evidence was repeatedly denounced at the Inter-American human rights system.²⁶² These cases ended up with a friendly settlement.

National Security

The use of state secrets laws is also causing problems in many countries in the region. Many of them have laws or criminal codes left over from the era of military governments. All of the Commonwealth countries in the Caribbean still have Official Secrets Acts. These laws are

²⁶⁰ C. Nac. Crim. y Corr. Fed., sala 2ª "Thomas Catan" del 28/10/2002.

²⁶¹ <http://www.habeasdata.org/caso-Dragoslav-acceso-correo-electronico-sin-autorizacion-ilegal>

²⁶² In this case, the Peruvian journalist and congresswoman, Ana Elena Townsend, and other Peruvian journalists discovered that the Peruvian Servicio de Inteligencia Nacional (SIN) (National Intelligence Services), was systematically intercepting telephone communications of opposing politicians and journalists who were critical of the government during the Fujimori regime. This information was systematically used to scare, pursue and threaten these journalists. See Admissibility Report Num. 1/01 (January 19, 2001) of the IC on Human Rights. See <http://www.cidh.org/annualrep/2000sp/capituloiii/admisible/peru12.085.htm>

used against journalists as a pretext for punishing them for stories that reveal embarrassing information. Often, the courts dismiss the cases as being groundless.

In Peru, journalist Mauricio Aguirre Corvalán was prosecuted for divulging state secrets for broadcasting a video that had already been shown as a presidential campaign advertisement. Prosecutors wanted an 8-year sentence. A court ruled in October 2006 that the case was groundless.²⁶³

The case of *Humberto Palamara Iribarne v. Chile*²⁶⁴ demonstrates how national security can be used to affect freedom of expression. Palamara was a Chilean navy official who wanted to publish a book about intelligence services and ethics. Because he did not seek authorization from the navy, his 1000 copies of the books were seized and his hard drive and the gallery copies were destroyed. In this case, the Court decided not to address the issue of the supposed duty of confidentiality that Palamara Iribarne had with respect to certain information included in his book. The Court indicated that “it was logical that Mr. Palamara Iribarne’s professional and military training and experience would help him write the book, without this implying per se an abuse of the exercise of his freedom of thought and expression.” The Court added that the duty of confidentiality does not cover information regarding the institution or the functions it performs when that information would have been made public anyway. Accordingly, the Court concluded: “[T]he control measures adopted by the State to impede the dissemination of the book ‘Ética y Servicios de Inteligencia’ by Mr. Palamara Iribarne constituted acts of prior censorship incompatible with the standards set forth in the Convention.”

Another interesting case in Argentina is *Ventura v. Argentine Air Force*. Ventura, a journalist for *La Nacion*, sued the Air Force after he learned that ten journalists (including himself) were under surveillance by the Air Force espionage unit. The Air Force wanted to know about the journalist after a series of articles ran about the privatization of air fields under the previous president. The court in July 2007 condemned the Argentine Air Force for spying on the journalists and ordered compensation of AP40,000.²⁶⁵

²⁶³ Superior court declares "revealing state secrets" charge against journalist to be groundless, IPYS, 4 October 2006.

²⁶⁴ Humberto Palamara Iribarne v. Chile (22 November 2005), I/A Court H.R., Humberto Palamara Iribarne Case. Judgment of 22 November 2005. Series C No. 135. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_esp.pdf

²⁶⁵ <http://www.diariojudicial.com/nota.asp?IDNoticia=33266#>

North America

In North America, the situation of protection of sources is constantly in flux and subject to many controversies. Neither the United States nor Canada have adopted national laws on the protection of sources. In both countries, the courts have recognized in many cases that journalists have a qualified protection. However, there have also been many cases, especially in the US, of journalists being sanctioned and even jailed for refusing to disclose their sources or respond to other demands for information. Bills are now pending in both jurisdictions which, if adopted, will significantly improve the situation.

National security issues have also been significant in both countries. Both adopted controversial anti-terrorism laws after September 11 and many of the crucial cases heard by the courts relate to national security issues.

Legal Protections and Controversies

Controversy over protection of sources has existed since before the formation of the US.²⁶⁶ Publisher John Peter Zenger was tried in 1734 for seditious libel for publishing anonymous columns criticizing the Governor. Colonial authorities also attempted to force future founding father Ben Franklin to identify a source of an article and jailed his brother. Congress imprisoned journalists in the 19th century for refusing to reveal their sources.

Currently, in the United States, there is no national law or constitutional recognition of protection of sources at the national level. The Supreme Court ruled in 1973 that there is no constitutional right of journalists to refuse to testify before a grand jury about their sources of information.²⁶⁷ The Court ruled that the government could not institute investigations in bad faith: “official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.” The Court also noted that “grand juries are subject to judicial control and [...] must operate within the limits of the First Amendment”. Since then many federal courts have found a limited privilege based on the Constitution, the common law or the Federal Rules of Evidence but this has not been universally held.

Under non-binding guidelines issued by the Attorney General,²⁶⁸ federal prosecutors are required to obtain the permission of the Attorney General before they can issue a subpoena to a journalist. Prior to any request, prosecutors in most cases must negotiate with the media to see if they are willing to give the information voluntarily and make reasonable attempts to obtain the information from alternative sources. The prosecutor must show in criminal cases that a crime has occurred, and that the information sought is essential to the investigation and not peripheral, nonessential or speculative.

²⁶⁶ See Charles D. Tobin, From John Peter Zenger to Paul Branzburg: The Early Development of Journalist’s Privilege, Media Law Resource Center, August 2004.

²⁶⁷ Branzburg v. Hayes, 408 U.S. 665 (1972).

²⁶⁸ 28 CFR §50.10, Policy with regard to the issuance of subpoenas of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of members of the news media, Order No 916-80, 45 FR 76436, 19 November 1980.

There have been efforts for nearly 80 years to adopt legislation on protection of sources in Congress. The first bill was introduced in October 1929. Since the 1970s, nearly 100 bills have been introduced in Congress. Currently, a number of bi-partisan bills pending provide at least a qualified privilege based on the AG Guidelines. The Free Flow of Information Act was approved in September 2007 by a overwhelming majority of the House of Representatives but it has not been approved by the Senate and President Bush has threatened to veto it if it is sent to him.

Until recently, the jailing of journalists to force them to reveal their sources or testify in court proceedings was relatively rare. However, in the last six years there has been a boom of cases where prosecutors have demanded that journalists disclose their sources or notes. The Justice Department admitted in 2006 that “approximately 65 requests for media subpoenas have been approved by the Attorney General since 2001 “pursuant to the guidelines.”²⁶⁹ In comparison, the Department only issued 88 subpoenas (17 for source information) between 1991 and 2001. A review in 2001 by the Reporters Committee for Freedom of the Press of 319 newspapers nationwide found a total of 823 subpoenas issued at the state and national level for materials including already aired reports, unpublished video or materials, reporters’ notes and requests to testify.²⁷⁰ Only six related to confidential source information.

One of the reasons for the increase has been the demand to crack down on leaks and the increasing opening of legal cases into identifying leaks. The number of times the administration has started leak investigations has also substantially increased. A recent FOIA request by the New York Sun found that 94 investigations of leaks of classified information were started between 2001 and 2006.

In many of the cases, there has been very little point for forcing the disclosure except as a punitive assault on the reporters who published it.²⁷¹ Some recent federal cases:

- Freelance writer Vanessa Leggett spent 168 days in jail in 2001 for refusing to provide to the FBI all her notes and tapes (not even allowing her to keep copies for her research) that she had gathered for a book following a failed Houston murder prosecution. The 5th Circuit Court of Appeals found there was no right for her to refuse to disclose the information. She was finally released when the grand jury's term expired.
- Judith Miller of the *New York Times* spent 85 days in jail for refusing to identify a presidential aide who had told her that the wife of an administration critic was an employee of the CIA. She did not write a story about it. After a lengthy court battle, *Time* handed over its reporter’s notes. The source to the article in another paper which started the investigation was later determined to be a different official.
- Blogger Josh Wolf spent 226 days in jail in 2006-2007 for refusing to provide an unpublished videotape of a demonstration in San Francisco and to testify before the grand jury on what he saw. Federal prosecutors claimed that minor damage to a local police car justified a federal investigation and bypassed the strong California shield law. He was only released when he placed the video online.

²⁶⁹ Reporters and Federal Subpoenas, 12 June 2007. http://www.rcfp.org/shields_and_subpoenas.html

²⁷⁰ RCFP, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001 (2003).

²⁷¹ RCFP, Reporters and Federal Subpoenas. Ibid.

- *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada were sentenced to jail in August 2006 for refusing to reveal the source of information from a grand jury investigation into Bay Area Laboratory Co-operative (BALCO) for providing steroids to many professional baseball players. The stories resulted in Congressional hearings into the problem and the adoption of a new stronger policy by Major League Baseball on testing. The case was only dismissed when the source (one of the defense lawyers) revealed himself.
- Providence, Rhode Island television reporter Jim Taricani was convicted of contempt charges in 2004 and sentenced to six months of house arrest after refusing to reveal the source of a videotape showing a local official taking a bribe, which a federal judge had ordered the parties not to release. He spent 4 months in home confinement. Afterwards, the prosecutor admitted that he was able to identify the source without the testimony of Taricani.

There are legal protections on the searches of newsrooms to obtain journalistic materials. In 1978, the Supreme Court ruled in *Zurcher v. Stanford Daily* that newsrooms could be searched like all other premises and that judges would prevent the abuse of warrants.²⁷² The decision was widely criticized by Congress and the media and in 1980, the Privacy Protection Act was enacted. The law prohibits government officials from searching and seizing journalistic materials in a criminal investigation unless they obtain a court-ordered subpoena. The official must show probable cause that the journalist is committing a criminal offense or that that the documents are protected national security information or child pornography. Merely being in possession of “stolen” documents is not sufficient to justify a search. The journalists must be given an opportunity to oppose the searches in court except in cases where there is an immediate danger to a person or a likelihood that the materials would be destroyed. Journalists are given the right to sue officials who violate the Act and to obtain damages and expenses.

There have been few cases since this law was adopted. In 1990, a court in Texas awarded a games and book publisher \$300,000 in damages, costs, and fees under the Act after the Secret Service raided its offices and seized its online computer service and other materials.²⁷³ In 2002, police in the San Francisco obtained search warrants for three newspapers to obtain information about advertisers. In 2004, US Marshals seized and erased journalists’ tape recordings of a public speech by Supreme Court Justice Scalia. A lawsuit was settled in September 2004 after the Marshals changed their policy and agreed to pay damages and attorney’s fees.

Protection of sources is widely recognized at the state level. The first law recognizing the right was adopted by the Maryland General Assembly in 1896. Currently, 33 states and the District of Columbia have adopted specific shield laws and the courts have found in 16 other states that shield protections are found in the state Constitution, common law or rules of evidence.²⁷⁴ The number is increasing in response to the recent controversies. Many of the state laws provide for an absolute protection.

²⁷² *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

²⁷³ *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F.Supp. 432 (W.D.Tex.1993).

²⁷⁴ Congressional Research Service, *Journalists’ Privilege to Withhold in Judicial and Other Proceedings: State Shield Statutes*, 27 June 2007.

The situation is better but still complex in Canada. Like the US, there is no national law on protection of sources but the courts have been more supportive in finding that journalists have a qualified privilege under the Charter of Rights and Freedoms which is determined on a case by case basis.²⁷⁵ In order to qualify, many courts apply a four part test: 1) the communication had to originate in a confidence; 2) confidence had to be essential to the relationship; 3) the relationship had to be one which should be sedulously fostered in the public good; and 4) interests served by protecting the communication from disclosure had to outweigh the interest in pursuing the truth and disposing of the litigation correctly.²⁷⁶

The Criminal Code was revised in 2004 to authorize the issuance of a “production order” to allow for the searching and seizing of information.²⁷⁷ Journalists’ groups have expressed concerns about its broad applicability to force the disclosure of journalistic materials and it has been used in a number of cases already. Author Derek Finkle was ordered in November 2006 by an Ontario court to hand over his notes on a murder investigation. The decision was overturned by the Ontario Superior Court in June 2007. Reporter Bill Dunphy from the *Hamilton Spectator* was ordered to hand over transcripts of his interview with a suspected murderer in 2006. The order was set aside in June 2007 by the Ontario Court of Justice finding that the material was privileged and that the criteria for obtaining it was not provided.

There have been a number of other cases in the past few years:

- In 2002, an Ontario court authorized the search of the *National Post* to obtain a document received from a confidential source showing that the Prime Minister’s family holding company was owed \$23,000 by the Business Development Bank. The Prime Minister and the Bank claimed that the document was both a forgery and a confidential internal bank document. The warrant was quashed by the Ontario Superior Court of Justice in 2004 but the government has appealed the case.²⁷⁸
- *Hamilton Spectator* journalist Ken Peters was convicted of contempt of court and ordered to pay more than \$30,000 in 2004 for refusing to reveal a source even after the source came forward.
- In June 2007, the Quebec Labour Relations Board refused to order journalist Karine Gagnon to reveal her notes and identify any sources of information after she wrote a story about a dangerous building.

The balancing test also applies to searches of newsrooms. In 1991, the Supreme Court set out a nine point criteria that must be followed to allow the search of a media office.²⁷⁹ Factors that must be considered include “ensur[ing] that a delicate balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination”, if alternative sources have been considered, if the materials have already been published, as well as limits on searches and post-search determination on whether the material was found and if the search was conducted reasonably.

²⁷⁵ See e.g. *Wasylyshen v. Canadian Broadcasting Corporation*, 2005 ABQB 902;

²⁷⁶ *National Post v. Canada*, 236 D.L.R. (4th) 551; 2004.

²⁷⁷ Criminal Code, Section 487.012.

²⁷⁸ *National Post v. Canada*, 236 D.L.R. (4th) 551 (2004).

²⁷⁹ *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 000; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, 1991.

Surveillance of Journalists

Wiretapping in both the US and Canada is generally well regulated by national laws. Both countries have laws that place strict limits on the use of wiretapping in criminal cases and require prior approval by a judge. However, technical limitations on surveillance have been undermined in the US by the adoption of a law in 1994 which requires that all telecommunications providers ensure that their systems are wiretap capable. This was extended recently to many Internet communications. Canada is currently considering similar legislation.

One area of severe weakness in US law is the lack of protections for the telephone records of journalists. Phone records are not uncommonly accessed by authorities and others to identify the sources of information. Under the Attorney General's Guidelines, any request to obtain the telephone records of a journalist must be approved personally by the Attorney General. It must be based on a "reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime", narrowly drawn, and limited in subject matter and in time. As with other subpoenas, notice and negotiations with the journalists and other reasonably alternative steps should have been attempted.

In 1978, the US Court of Appeals for the District of Columbia ruled that prosecutors can issue subpoenas to obtain reporters toll records unless they are done in bad faith or the media can show that there is a clear threat of government misconduct.²⁸⁰ In a more recent case, the US Court of Appeals in New York found there may be a common law privilege to protection of sources which would also apply to the journalists' telecommunications providers also because telephone lines "are a relatively indispensable tool of national and international journalism".²⁸¹ However, it still ordered the release of the telephone records of the *New York Times* to a grand jury investigation because it found that the government had shown a compelling interest. In 2002, federal prosecutors subpoenaed the phone records of a reporter from the *Associated Press* after he wrote a story which revealed an investigation into a US Senator.

The records are potentially available to other parties who are investigating journalists. Until 2007, there was no federal law prohibiting individuals from pretending to be a subscriber ("pretexting") to obtain their phone records. In 2006, private investigators working for technology company Hewlett-Packard illegally obtained the telephone records of several journalists following stories about HP board meetings. The same data brokers also appear to have full access to phone records of most Canadians.²⁸²

There has been a continuing controversy of the surveillance of communications in national security situations where controls are less strict. The war on terror has substantially increased the use of surveillance for national security grounds in the US and many of these taps are being conducted without the authorization of the courts. *The New York Times* revealed in 2005 that President Bush had authorized the National Security Agency to monitor international phone calls without court approval.²⁸³ A case filed by journalists, civil society

²⁸⁰ Reporters Committee for Freedom of the Press v AT&T, 593 F.2d 1030 (D.C. Circuit 1978).

²⁸¹ NY Times v Gonzales, 459 F. 3rd 160, (2nd Circuit 2006).

²⁸² You are exposed, McCleans, 21 November 2005.

²⁸³ Bush Lets U.S. Spy on Callers Without Courts, NY Times, 16 December 2005.

groups and scholars was dismissed by the US Court of Appeals in July 2007 under the State Secrets Privilege, which allows government agencies to stop legal cases, claiming a threat to the national security²⁸⁴. *USA Today* also revealed the existence of a database of billions of phone call records of Americans obtained from telephone companies without a court order in May 2006.²⁸⁵

The US PATRIOT Act expanded the ability of government officials to obtain phone records based on a National Security Letters (NSLs) without a court order. Telecommunications providers are prohibited from revealing that the records have been requested. *ABC News* were warned by government sources that their phone records and those of colleagues at the *NY Times* and *Washington Post* were accessed to identify leaks relating to their stories revealing CIA secret prisons in Central Europe and illegal surveillance of American citizens by the intelligence agencies.²⁸⁶ A senior official told *ABC* that “It used to be very hard and complicated to do this, but it no longer is in the Bush administration”. A review by the Justice Department’s Inspector General found numerous abuses by the FBI in using NSLs.²⁸⁷

National Security and Anti-terrorism

There is no Official Secrets Act in the United States. The closest law is the Espionage Act adopted in 1917 which prohibits the unauthorized disclosure of classified defense information to enemy powers with the intent to harm the United States. When the law was being considered in 1917, the Congress rejected a broader provision on disclosure due to concern over the restrictions on free speech.²⁸⁸ It is generally accepted that the Act does not apply to the publication of state secrets by newspapers and there has never been a case in the history of the law against a newspaper.

There have been few cases in US history where journalists or their sources have faced criminal sanction for publishing classified information. In the *Pentagon Papers* case, the government attempted to prevent the publication of a classified history of the Vietnam war leaked to newspapers.²⁸⁹ The Supreme Court refused to censor the papers, finding that the government had not met the heavy burden of justification in ordering the withholding because that material would not have caused “direct, immediate and irreparable damage to our Nation or its people”. The case against Daniel Ellsberg, the source of the material, failed due to the illegal searches conducted against him. In 1988, Samuel Morison, a navy intelligence analyst, was convicted and sentenced to two years in jail for providing satellite photographs of Soviet installations to *Jane's Defense Weekly* which he worked for part time. He was pardoned by President Clinton in January 2001.

Demands to expand the law to criminalize leaks have increased in the past decade. In 2000, President Bill Clinton vetoed an amendment to the law that would have criminalized any

²⁸⁴ See ACLU, Legal Documents in the Challenge to Illegal NSA Spying <http://www.aclu.org/safefree/nsaspying/26582res20060828.html>

²⁸⁵ Bush says privacy protected; sources tell of 'spider web' use, *USA Today*, 12 May 2006.

²⁸⁶ Federal Source to ABC News: We Know Who You're Calling, *ABC News*, 15 May 2006.

²⁸⁷ U. S. Department of Justice, Office of the Inspector General A Review of the Federal Bureau of Investigation’s Use of National Security Letters, March 2007.

²⁸⁸ Edgar and Schmidt, The Espionage Statutes and Publication of Defense Information, 73 *Columbia L.R.* 929 (1973).

²⁸⁹ *New York Times Co. v. United States*, 403 U.S. 713, (1971).

unauthorized disclosure of classified information saying that the “provision is overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy.”²⁹⁰

In 2002, Attorney General Ashcroft issued a report recommending against adopting new statutes on criminalizing disclosures finding that "current statutes provide a legal basis to prosecute those who engage in unauthorized disclosures, if they can be identified" and called for strong procedures for the identification of government employees who reveal information.²⁹¹

Following the publication of stories on the National Security Agency's warrantless wiretapping of telephone calls, Attorney General Gonzales, some members of Congress, and a few conservative commentators called for the prosecution of the *NY Times* under the Espionage Act.²⁹² In 2006, the bill was reintroduced in the Senate but gained little support and was not voted on before the end of the Congress.²⁹³

In Canada, the 2001 Anti-terrorism Act amended the Official Secrets Act (now the Security of Information Act), which had been in force since 1939.²⁹⁴ The Act criminalizes the unauthorized release, possession or reception of secret information.

In January 2004, the Royal Canadian Mounted Police (RCMP) used the Act to place *Ottawa Citizen* reporter Juliet O'Neil under surveillance and search her home and office by following the publication of an article on the controversial arrest and transfer to Syria of Martian Arar. The Ontario Court of Justice ruled in October 2006 that the SOIA was overbroad and disproportional and violated the Canadian Charter of Rights and Freedoms because it failed to define what was an official secret. The judge also found that the investigation was “abusive” because the investigation was “for the purpose of intimidating her into compromising her constitutional right of freedom of the press, namely, to reveal her confidential source or sources of the prohibited information.” Justice Minister Vic Toews announced in November 2006 that the government was not going to appeal the decision because "it is not in the public interest" and would begin a review of the SOIA.

²⁹¹ Attorney General's Task Force Report on Unauthorized Disclosures of Classified Information, 15 October 2002.

²⁹² See e.g. Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?* Commentary, March 2006.

²⁹³ S. 3774. A bill to amend title 18, United States Code, to prohibit the unauthorized disclosure of classified information; to the Committee on the Judiciary.

²⁹⁴ Security of Information Act, c. O-5.

Proposed Guidelines on Protection of Journalists' Sources

Each nation should adopt an explicit and comprehensive law on protection of journalists' sources to ensure these rights are recognized and adequately protected.

The protections should apply to all persons involved in a journalistic process providing information to the public, including editors, commentators, freelance, part-time and new authors. It should apply no matter the format or medium including print, broadcast, electronic, Internet, and books. The protections should also apply to all those with a professional relationship to journalists including media companies and organizations, editors, printers, distributors, and telecommunications providers.

Journalists should not be required to disclose the identity of their confidential sources, unpublished materials, notes, documents or other materials that may reveal information about their sources or journalistic processes.

Any demand to obtain protected information should be strictly limited to the most serious criminal cases. A request to obtain the information should only be approved by an independent judge in an open hearing and subject to appeal to an impartial judicial body. Disclosure should only be allowed if the government proves to the court's satisfaction that the following criteria are met:

- The information is necessary to prevent imminent serious bodily harm or prove the innocence of a party. In no case should the crime consist of merely the investigation of the disclosure of information to the journalist; and
- The information is absolutely necessary for a central issue in the case relating to guilt or innocence, and the request for such information is limited in scope; and
- The information is unavailable by other means already tried by the government, and the government must prove that it has exhausted all other possible means of obtaining the information; and
- The request is made by the primary party to the case; and
- The judge finds that public interest in disclosure of the source far outweighs the public interest in the free flow of information.

Searches of a journalist's office or home should not be used to bypass protection of sources rules. Such searches should be presumed to be invalid.

Wiretapping or other types of surveillance should not be used to bypass sources' protections. Governments should refrain from enacting laws that require the routine collection or monitoring of all telecommunications information that would infringe journalists' right to protect sources.

In cases involving libel or defamation, the refusal to disclose a source should not limit the right of the defence to introduce evidence or affect presumptions of liability.

Journalists should not be required to testify or provide information as a witness in any proceeding unless a court find that the criteria above have been met and there is no likelihood

that doing so would endanger health or well being of the journalist or restrict their or others ability to obtain information from similar sources in the future.

Sanctions and damages should be available in any case where the protection of journalistic sources has been violated. Any materials or testimony obtained in violation of these principles should not be admissible as evidence in any proceeding.

Criminal and Civil Code prohibitions on disclosure of secret or confidential information should only apply to officials and others who have a specific legal duty to maintain confidentiality. Those outside the government including the media and civil society organizations who receive or further publish secret or confidential information should not be subject to criminal or civil sanctions. Criminal cases should not be instigated as a pretext to discover sources.

Whistleblowers who disclose secret or merely non-public information of public interest to the media, elected representatives, or the public should not be subject to legal, administrative or employment-related sanctions. A comprehensive system with adequate reporting and oversight mechanisms should be enacted in each state to ensure that these rights are protected. Those who harm or threaten to harm the interests of whistleblowers should face sanctions.