



Central Asian Pocketbook on Freedom of Expression

XI 

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

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6.1.6. Protection of sources

The media depend to a large extent on members of the public for the supply of information of public interest. Most of the time, these sources are more than happy to be quoted in the newspaper or on the television. But occasionally, citizens come forward with information of a secret or highly sensitive nature – relating for example to corruption, misgovernment or the activities of organised criminals – which they believe should be made known to the general public, to expose wrongdoing or to stimulate public debate on the subject. When this happens, anonymity is often a precondition for the source's willingness to speak, out of fear for retaliation if his or her name were made public.

There is little dispute that named sources are on the whole preferable to anonymous ones. If the source is known, it is easier to assess his or her credibility, motives and, indeed, existence. It is also less difficult for those affected by a wrongful disclosure (such as a malicious attack on a person's reputation or the publication of a business secret) to clear their name or to seek compensation. Nevertheless, international courts and mechanisms have been mindful that much important information would never reach the public if journalists were unable to guarantee confidentiality to their sources. This has led to the development of a right, based on the right to free expression, commonly referred to as "the protection of sources."

⁸⁶ Article 31. See also Article 10 the *Law on the Professional Activity of Journalists* and Article 22 of the *Law on Mass Media* of Kazakhstan; Article 33 of Tajikistan's *Law on the Press and Other Mass Media*; and Article 11 of the *Law on the Professional Activity of Journalists* of Uzbekistan.



It may be noted that although it is normally journalists who claim the right, it is really the right of everyone to receive information and ideas that is being protected. Indeed, this is at the heart of the right.

6.1.6.1. *International standards on the protection of sources*

In the seminal case of *Goodwin v. United Kingdom*,⁸⁷ the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his right to receive and impart information, and hence the right to freedom of expression. It considered that orders to disclose sources reduce the flow of information, to the detriment of democracy and are, therefore, only justifiable in very exceptional cases:

Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁸⁸

The right of journalists to protect the confidentiality of their sources has also been widely recognised by other international bodies, including the European Parliament,⁸⁹ the Committee of Ministers of the Council

⁸⁷ *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights), available through the link in note 23.

⁸⁸ *Id.*, para. 39.

⁸⁹ Report No. A3-0434/93, published 18 January 1994, OJ C 44, p. 34.

⁹⁰ 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, adopted 8 March 2000. To access this document, see the link at note 26.

⁹¹ Inter-American Declaration of Principles on Freedom of Expression, Principle 8; see note 76.

of Europe,⁹⁰ the Inter-American Commission on Human Rights⁹¹ and the African Commission on Human and Peoples' Rights.⁹² The OSCE Member States stated, in the Concluding Document of their 1986-1989 Vienna Follow-Up Meeting:

[J]ournalists ... 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.⁹³

In sum, the basic principle that journalists have a right to protect their sources is well-established in international law. Many States, including Kazakhstan⁹⁴ and Uzbekistan,⁹⁵ have adopted legislation with the purpose of implementing the right. Often, however, such legislation falls short of international standards in this area, because it is either too narrow in its understanding of who is a "journalist" or too broad in its definition of exceptions to the right.

6.1.6.2. *Persons entitled to invoke the right*

The right to preserve the confidentiality of sources is usually referred to, both in international and domestic law, as a right of journalists. Nevertheless, it can sometimes be validly invoked by persons who would not normally identify themselves, or be identified by the general public, as journalists.

As the ruling in the *Goodwin* case (discussed above) illustrates, the purpose of the right is to ensure that sources are not deterred from conveying important information to the public through a 'middleman'. It is the middleman who is entitled to invoke the right to protect his or her sources. In most cases, this role is played by a 'traditional' journalist

⁹² See note 29, Principle XV.

⁹³ Conference for Security and Co-operation in Europe, Follow-up Meeting 1986-1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document, para. 40.

⁹⁴ *Law on Mass Media*, Article 20(10).

⁹⁵ *Law on the Protection of the Professional Work of Journalists*, Article 5.



in the service of a mass media outlet; but there is no reason to apply a different rule when the middleman is someone else whose profession involves collecting and disseminating information, such as an NGO activist or academic commentator.

In their efforts to define the right to protect sources, some international bodies have opted to entirely avoid the term ‘journalist’. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights states:

Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.⁹⁶

Other bodies have instead been careful to formulate a very wide definition of ‘journalist’, covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as journalists. The Recommendation adopted by the CoE’s Committee of Ministers provides:

The term “journalist” means 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.⁹⁷

By contrast, domestic laws sometimes adopt a more limited definition, covering only ‘traditional’ journalists. The Uzbek journalism law provides an example: “A journalist is a natural person who works for the mass media...”⁹⁸ Such narrow definitions are at odds with international law, because of their potential to constrict the flow of important information to the public.

Finally, in addition to ‘non-traditional’ journalists, international law recognises one further class of persons who should be entitled to invoke the right. Principle 2 of the above-cited CoE Recommendation states:

⁹⁶ See note 76.

⁹⁷ See note 90.

⁹⁸ *Law on the Protection of the Professional Work of Journalists*, Article 3.

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

In other words, the right to withhold a source's identity belongs not only to the 'middleman,' but also to others collaborating with him or her. This purpose of this rule is, of course, to prevent the protection of sources from being simply side-stepped by going around the 'middleman'.

6.1.6.3. *Exceptions to the right*

Like the right to freedom of expression it is derived from, the right to maintain confidentiality of sources is not an absolute one: in certain narrowly defined circumstances, it may be subject to some limitations. As always, such restrictions must be justifiable under the three-part test (Chapter 4).

Principles 3-5 of the 2000 CoE Recommendation⁹⁹ elaborate extensively on the application of the three-part test to the protection of sources, in particular the necessity-leg of the test. The 2002 Declaration of Principles on Freedom of Expression in Africa echoes the main points of the CoE Recommendation.¹⁰⁰

The most important points in these documents are the following:

- A journalist should only be ordered to disclose the identity of a source if there is an overriding requirement in the public interest, and the circumstances are of a vital nature. The CoE Recommendation states that this could be the case only if disclosure was necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime.¹⁰¹

⁹⁹ See note 90.

¹⁰⁰ *Declaration of Principles on Freedom of Expression in Africa*, note 29 above, Principle XV.

¹⁰¹ As quoted in the Explanatory Memorandum, note 90, paras. 37-41.



- The interest in disclosure should always be balanced against the harm of ordering disclosure to freedom of expression.
- Disclosure should only be ordered at the request of an individual or body with a direct, legitimate interest, and who has demonstrably exhausted all reasonable alternative measures to protect that interest.
- The power to order disclosure of a source's identity should be exercised exclusively by courts of law.
- Courts should never order disclosure of a source's identity in the context of a defamation case.
- The extent of a disclosure should be limited as far as possible, for example just being provided to the persons seeking disclosure instead of general public.
- Any sanctions against a journalist who refuses to disclose the identity of a source should only be applied by an impartial court after a fair trial, and should be subject to appeal to a higher court.

Perhaps the most crucial of these principles is the requirement to balance interests: even when there is a strong public interest in uncovering the identity of a source, the vital function of the protection of sources in a democracy should not be overlooked. In fact, as the Norwegian Supreme Court has pointed out, the arguments against disclosure often are strongest precisely when those in favour are also strong:

In some cases ... the more important the interest violated, the more important it will be to protect the sources. ... It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all.¹⁰²

¹⁰² *Edderkopp* case, 15 January 1992, LNR 10/1992, JNR 34/1991, p. 39.