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The Handbook of **Communication Rights, Law, and Ethics**

Edited by Loreto Corredoira, Ignacio Bel Mallén, and Rodrigo Cetina Presuel

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The Handbook of Communication Rights, Law, and Ethics

Seeking Universality, Equality, Freedom and Dignity

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Journalists, Confidentiality, and Sources

Lorenzo Cotino Hueso

Two aspects of the protection of information sources (Lazkano Brotóns 2004, p. 3) are relevant to a book about communication rights and ethics such as this one. On the one hand, journalists and democracy-guarding watchdogs have the right to secrecy, to not identify their sources of information if they are asked to do so, and to not suffer any burden or harm for refusing to share this information. At the same time, this right has another increasingly important dimension: it entails special guarantees against investigations, searches, and interception of their data and communications related to their information sources. Unlike other forms of professional secrecy, in this case, what is protected is not the content (which is normally published by the journalist) but its source or origin (Navas-Sánchez 2019, p. 5).

International treaties do not expressly regulate the right to professional secrecy, though it is considered to be part of communication rights. It should be remembered that the UDHR expressly protects a person's right to "seek, receive and impart information of all kinds" (Art. 19), while the ICCPR protects the "freedom to seek, receive, and impart information and ideas of all kinds" (Art. 19.2). An authoritative interpretation of this right from the United Nations affirms "the limited journalistic privilege not to disclose information sources."[1]

[1] UN Human Rights Committee, General Comment No. 34, Article 19, *Freedoms of opinion and expression*, September 12, 2011 https://www.refworld.org/docid/4ed34b562.html (accessed January 15, 2021) Also, in Concluding observations on Kuwait, CCPR/CO/69/KWT.

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Recognition and Regulation of Protection of Journalists' Sources

International Recognition and Regulation

The right not to reveal sources and the right to secrecy are recognized in the most important international declarations, though these are not legally binding.[2] The Special Rapporteurs' Joint Declaration on Freedom of Expression[3] begins by affirming the confidentiality of sources. Recently, the expression of this right was highlighted in Point 7 of the Global Charter of Ethics for Journalists of 2019 by the International Federation of Journalists.[4] Some declarations and UNESCO call for its legal regulation. It has also been stated that "a minimal international construction of the content of this right would be desirable" based on Article 19 of the ICCPR (Lazkano Brotóns 2004, p. 12). Most notable here are the Perugia Principles of 2018.[5]

International Recognition in Europe and Latin America

This right has been most strongly recognized within the Council of Europe, especially since the ECtHR case *Goodwin v. UK*, March 27, 1996. Until then, it was considered more as an ethical rule rather than as a legal one, and it was not uniformly regulated by states (Lazkano Brotóns 2004). It was a disputed court decision, approved by 11 to 7. Since Goodwin, there have been about 20 rulings that have created consolidated, specific, and advanced case law (ECtHR 2011–2015; Bychawska-Siniarska 2017, pp. 102–111). Likewise, between 2000 and 2016, the Council of Europe issued various nonbinding yet very important declarations, resolutions, and reports on this right, as well as en masse surveillance of journalists and their sources.[6]

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[2] Point 6 of the *Bordeaux Declaration*, IFJ, International Federation of Journalists (1954) https://research.uta.fi/ethicnet/country/ifj-declaration-of-principles-on-theconduct-of-journalists; Point 14, Resolution 1003 *Ethics of journalism* COE, Council of Europe-Parliamentary Assembly July 1, 1993 (42nd Sitting). https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16414&lang=en (accessed January 15, 2021); and Principle 4 of the *International Principles of Professional Ethics in Journalism*, UNESCO General Assembly, Paris, November 21, 1983 https://research.uta.fi/ethicnet/country/international-principles-of-professional-ethics-in-journalism (accessed January 15, 2021).

[3] International Mechanisms for Promoting Freedom of Expression, December 19, 2006. http://www.oas.org/en/iachr/expression/showarticle.asp?artID=746&lID=1 (accessed January 15, 2021).

[4] 30th IFJ World Congress in Tunis on June 12, 2019. https://www.ifj.org/who/rules-and-policy/global-charter-of-ethics-forjournalists.html (accessed January 15, 2021).

[5] Jointly drafted under Posetti's leadership with Blueprint for Free Speech, Reuters Institute for the Study of Journalism, RISJ, World Association of Newspaper and News Publishers, WAN-IFRA, and Signals Network (Posetti, Dreyfus, and Colvin 2019).

[6] By Committee of Ministers, in 2000, *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*, March 8. https://bit.ly/3csEZHE. Also in 2016, Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, April 13, 2016 (1253rd meeting). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680 6415d9#_ftn1 (access by registration). By Parliamentary Assembly, in 2010. *Report on the protection of journalist' sources from the Council of Europe*. https://www.coe.int/en/web/freedom-expression/safety-of-journalists. In 2011 *Recommendation 1950 on the protection of journalists' sources.* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTMLEN.asp?fileid=17943&lang=en. *Resolution 2045 2015, Mass surveillance*, April 21, 2015 (12thSitting)https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTMLEN.asp?fileid=21692&lang=en.

Within the EU, the resolutions of 1994 and 2014 stand out.[7] The most remarkable aspect, in any case, which I discuss in my analysis at the end of this study, is regulation of the protection of whistleblowers, even when in the exercise of communication rights they directly make public disclosures. In Latin America, the protection of sources is generally protected by Article 13 of the American Convention on Human Rights (the Pact of San José), November 7–22, 1969. Various regional declarations do include this right.[8] To date, and as far as is known, there is no specific court decision or ruling on this right (Chocarro 2017a, 2017b). Various countries regulate this right constitutionally and legally.

Recognition in National Regulations and in Different European Countries

Posetti analyzed the regulations of 121 states for UNESCO; she calls for greater and "explicit and clear protection" in constitutions or legislation (Posetti 2017, pp. 9–10). It should be noted that since 2007 most countries in the world have improved their regulation (85% of Arab, Ibero-American, and Caribbean states; 75% of states in Asia and the Pacific; 66% in Europe; and 56% in Africa) (Posetti 2017, p. 8). There is a particular need for regulation on protecting sources in view of advances in and control over digital technologies. The report calls for: regulation that is clearly imposed in a very limited and strict way when it comes to exceptions to the right; a guarantee that the restrictions are enacted by a judicial decision (or by an independent authority), and with the possibility of appeal; the classification of violation of the right as a crime; and the supplementing of regulation with protection for whistleblowers (Posetti 2017, p. 136).

A comparative analysis of European countries (Banisar 2007; Mörä and Korpisaari 2012; Posetti 2017) reveals most have some type of legal protection. Section 383 of Germany's Civil Procedure Code grants journalists the right not to disclose sources unless they consent to it. In addition, Section 53 of the same code authorizes radio and print journalists to refuse to testify about the content or source of the information. Chapter 3 of Sweden's Freedom of the Press Act protects sources that provide information to a journalist under the condition of anonymity. This protection does not apply in cases of high treason, espionage, or unlawful release of an official document (Chapter 5, Art. 3, The Fundamental Law on Freedom of Expression, Sweden, Chapter 2, Art. 5). In the UK, (Public Interest Disclosure Act 1998, Contempt of Court Act 1981) no court can require a person to disclose a source, and neither is he or she guilty of contempt of court for refusing to disclose it. Spain regulates professional secrecy in Article 20 of its Constitution of 1978; it is judicially protected, though the provision has not been the subject of legal development of the constitutional general regulation.

Since 2007, regulations have been incorporated in various European countries, as well as in the Netherlands, Greece, and smaller jurisdictions such as the Holy See and Andorra. In Slovakia, the right is regulated by Law No. 167/2008 and the amendment thereto, Amendment

[7] The European Parliament's Resolution on the Confidentiality of Journalists' Sources, January 18, 1994, and Conclusion 31 of the EU Council's *EU Human Rights Guidelines on Freedom of Expression*, Foreign Affairs meeting Brussels, May 12, 2014. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf (accessed January 15, 2021).

[8] Chapultepec (1994). *Chapultepec Declaration*, Hemispheric Conference on Freedom of Expression, Mexico, March 11, 1994 No. 3. http://www.concortv.gob.pe/file/2015/04-declaracion-chapultepec.pdf (accessed January 15, 2021). Also in Point 8 of the *Declaration of Principles on Freedom of Expression*, October 2–20, 2000, IACHR Inter-American Commission on Human Rights (2000a). http://www.cidh.oas.org/Basicos/Spanish/Declaracionle.htm (accessed January 15, 2021). And this organization's Lima Principles (principles 6 and 9), of November 16, 2000. http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=158& (accessed January 15, 2021).

Law No. 221/2011. Iceland ratified a new law in 2011; in 2010, Estonia amended its Criminal Code. France strengthened the protection of sources with a law that entered into force in 2010 (LOI no. 2010–2011 du 4 Janvier 2010, see Art. 109 (2) of France Code of Criminal Procedure). Ireland has incorporated this right in its case law.

The Concept of "Source," the Content and Foundation of the Right, and the Duty to Maintain Secrecy and Silence

The Broad Concept of "Source" and the Scope of Protection

"Sources" are the locus from or through which news flows and where journalists can turn when they are looking for material. The ECtHR Case *Nagla v. Latvia*[9] (at para. 81, follows the Observation of 2000 (COE 2000, p. 7)). It defines "journalistic 'source'" as "any person who provides information to a journalist," and it also defines "information identifying a source." The ECtHR has extended the concept of information that has to be protected even to "the unpublished part of the information provided by a journalist" as well as his or her notes (ECtHR case *Telegraaf Meda v. The Netherlands;*[10] ECtHR case Saint-Paul Luxembourg[11]).

The ECtHR has been very generous in its interpretation and has extended the protection of sources in several of its judgments since 2003 (ECtHR Case *Roemen*[12] February 25, 2003, and following). In *Nagla v. Latviathe*, ECtHR makes it clear that the law also protects new information and storage media – for example, laptops, external memories, memory cards, or hard drives. The ECtHR additionally holds that protection also applies to sources' workplaces, residences, vehicles, and mobile devices such as smartphones and tablets. Likewise, the metadata generated in communications are protected (ECtHR case *Big Brother Watch and others*[13] *v. UK*). As I will discuss later, there are special guarantees regarding searches and investigations in all these areas.

Protection also extends to all data related to contacts entered into with the source (mode, duration, frequency), even when the police or the court already knows the source's identity (ECtHR case *Becker v. Norway*[14]).

The Content of the Right to Maintain Secrecy and Silence: Right or Duty?

As has been argued, the law implies that when the public authorities, the police, or, especially, courts, as well as parliamentary committees, ask about sources, there is a right to secrecy and silence – to not reveal them – and refusal cannot give rise to negative consequences (COE, Recommendation No. R (2000) 7, principle 7; Navas-Sánchez 2019, p. 5). It should be clarified that this right does not protect against a breach of the obligations to appear in court as a witness or as a defendant or before the corresponding institutions. Nor does this right protect against lies. A different matter is whether, when a journalist is the defendant, they have a general right not to testify.

The journalist's right is independent of the unlawful acts or crimes that the source has committed (disclosure of secrets, breach of confidentiality, data protection breaches, and so forth)

[9] *Nagla v. Latvia*, July 16, 2013.
[10] *Telegraaf Meda v. The Netherlands*, November 22, 2012.
[11] Saint-Paul Luxembourg, April, 18, 2013.
[12] *Roemen and Schmit v. Luxembourg*, February 25, 2003.
[13] *Big Brother Watch and others v. UK*, September 13, 2018.
[14] *Becker v. Norway*, October 5, 2017.

(ECtHR Cases *Tillack v. Belgium*[15] and *Nagla v. Latvia*). The journalist is protected even in cases where the source discloses information in bad faith and for the purpose of causing harm (ECtHR, *Financial Times Ltd and others v. UK*[16]).

If we move from law to ethics, we find that the confidentiality of sources is positioned as a "classic duty" of journalism – as an "obligation," "commitment," and ethical, deontological, and behavioral principle (Posetti 2017, pp. 18, 137 et seq); Sixth Principle of Perugia and Bordeaux declaration (IFJ 1954). This duty is usually included in codes of conduct.

However, legally it is a journalist's right, not an obligation. As a right, it depends on the will of the journalist to avail – or not avail – themselves of it. Legally, it is clearly not the case that this ethical duty can become an obligation. An obligation not to disclose the source will be enforceable in some cases. For example, if such a duty was set in a confidentiality contract, the disclosure will bear the consequences and damages provided in the contract (Puerto 1992; Navas-Sánchez 2019, p. 5). In collective labor agreements, breach of the duty by the journalist may be treated as an infraction, one that can be considered as "very serious" misconduct (Moretón Toquero 2004, pp. 131, 137).

In some countries, there is some form of regulation when it comes to the duty of maintaining secrecy. In Sweden, willful or negligent breach of the duty can lead to a prison sentence or a fine. It is also an obligation in Slovakia.[17]

The Right's Basis

This right is not a privilege for journalists or sources. Rather, it is an instrument to ensure and increase the flow of information (Lazkano Brotóns 2004). It is a guarantee of communication rights and not of freedom of expression (Navas-Sánchez 2019). The statement by the ECtHR[18] in *Goodwin v. UK* (para. 39) is important in this regard:

> 39. Protection of journalistic sources is one of the basic conditions for press freedom…. Without such protection, sources may be deterred from assisting the press iinforming 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.

The right transcends the private rights and interests of the journalist, and their source "cannot be considered a mere privilege" (ECtHR, Nagla case, para. 97). In any case, its purpose is not for a source to use the press to escape personal legal or criminal liability (ECtHR case *Stichting Ostade Blade v. The Netherlands*[19]).

Special Guarantees Against Searches and Investigation and the Technological Activism of Journalists and Their Sources

Protection of sources is guaranteed not only by the journalist's secrecy or silence, but increasingly by specific guarantees against investigations, interception of communications, indiscriminate searches of files, confiscation of materials, and so forth. (COE, Recommendation No. R (2000) 7, Principle 6). And it should be remembered that secrecy also includes the protection

[15] *Tillack v. Belgium*, November 27, 2007.
[16] *Financial Times Ltd and others v UK*, December 15, 2009.
[17] In Sweden, Chapter 5, Article 3, The Fundamental Law on Freedom of Expression, Chapter 2, Article 5. In Slovakia, Article 4 Source Protection Law No. 167/2008 and No. 221/2011 (Posetti 2017, p. 115; Posetti, Dreyfus, and Colvin 2019, p. 11).
[18] *Goodwin v. UK*, March 27, 1996.
[19] *Stichting Ostade Blade v. The Netherlands*, May 27, 2014.

of workplaces, residences, vehicles, and mobile devices, and this therefore implies special guarantees regarding searches of these places.

If this right did not protect against such searches, it would be merely formal and not material (Lazkano Brotóns 2004). As the ECtHR has stated, such investigations are more serious restrictions than mere requests or orders issued by the police or a court to journalists so that they directly reveal the identity of their sources. As the ECtHR states in *Ressiot and others v. France*[20] these investigations give police and courts access to all the data and information protected by secrecy that journalists hold. Therefore, a very strict analytical test must be applied.[21]

As far back as the case of *Ozgür Gündem v. Turkey*,[22] the ECtHR deemed the measure of seizing the files, documents, and library of a newspaper disproportionate. And Principle 7 COE, Recommendation No. R (2000) 7 indicates that secrecy is a guarantee against indiscriminate access to such data by searches, controls, seizures, confiscations, phone tapping, and so on.

These guarantees are increasingly important when it comes to the use of new technologies by both journalists and their sources. In the twenty-first century, national security legislation and blanket and selective surveillance have become increasingly important. Journalists' confidential communications are frequently caught in mass surveillance "networks." Surveillance is "eroding," "compromising," and "undercutting" traditional guarantees (Posetti 2017 and Posetti, Dreyfus, and Colvin 2019).

In addition to protecting access to journalists' data, information, and sources with these strong guarantees, the aim is to mitigate or eliminate a chilling effect Puerto Olga, C. (1992) that is, to avoid a situation where sources, knowing that they may be subject to searches and investigations, refrain from leaking information into the public domain. Similarly, the intention is to prevent journalists from feeling inhibited or afraid as they go about their work. That is why it is necessary to be very restrictive even with the possibility that investigations are carried out, even though in the end, the journalist has not been registered or tracked down: "While it is true that no search or seizure took place in the present case, the Court emphasizes that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources" (*Sanoma II, Sanoma Uitgevers B.V. v. The Netherlands*,[23] para. 71 and *Financial Times Ltd and others v. the UK*, para. 70).

For these guarantees to apply, it is not necessary to fully prove that the purpose of the search and seizure was to find out the identity of the source. It is sufficient that such measures, due to the broad, vague, or indiscriminate way in which they were authorized or executed, did not exclude such a possibility (ECtHR, Saint-Paul Luxembourg)[24] of ascertaining the identity of the source in question or, even, those of the journalist's other sources (ECtHR Case *Nagla v. Latvia*).

In addition to preventions against indiscriminate surveillance, guarantees are stronger if electronic surveillance is selective and specific with respect to journalists and their sources. These investigations are only justified by an "overriding requirement in the public interest."

In the case of *Big Brother Watch and others v. UK*,[25] the surveillance system that was analyzed did have special guarantees and requirements regarding investigations and selective searches pertaining to a journalistic source. However, it was understood that there was a violation of Article 10 ECHR because the system did not extend these special guarantees to other

[20] *Ressiot and others v. France*, June 28, 2012.

[21] Along these lines, ECtHR cases Röemen, February 25, 2003; *Ernst and others v. Belgium*, July 15 2003; and *Nagla v. Latvia*, July 16, 2013.

[22] *Ozgür Gündem v. Turkey*, March 16, 2000.

[23] *Sanoma Uitgevers B.V. v. The Netherlands*, September 14, 2010.

[24] Saint-Paul Luxembourg, April, 18, 2013.

[25] *Big Brother Watch and others v. UK*, September 13, 2018.

collateral intrusions of access to the journalist's communications data. The Grand Chamber's decision is pending.

In the United States, the issue of investigations and searches targeting journalists and their sources is worrying. Since 2015, there have been special requirements when it comes to investigations undertaken by the Department of Justice.[26] It is necessary to "consult with the Criminal Division" before the investigation, and there are stipulations that the information was sought through alternative means and that negotiations with the journalist have been initiated, in addition to the fact that the information sought is "essential." However, the scope of these guarantees is very limited: agencies other than the Department of Justice are not subject to the obligation, and the requirements do not apply to data collection and investigations based on other laws. And it has been pointed out that the wide range of legal mechanisms available for surveillance is "overwhelming" (Posetti 2017, p. 21). Thus, the applicable regulations linked to national security can be very varied: the FISA Amendments Act of 2008, the amended program of Section 215.3, or Executive Order 12333 may apply. This is having a chilling effect that has been denounced in reports issued by PEN America (2015), Human Rights Watch, and the ACLU (2014).

Technological Training and Measures and the Growth of Collaborative Activism

In the face of indiscriminate and selective surveillance of journalists and their sources, of increasing importance is "digital defense" and the use of encryption (Perugia Principle 5), awareness of the risks run by journalists and their sources, greater knowledge, and technological training.

Likewise, risks must be explained to the source (Perugia Principle 7). It is necessary to ensure that communications are secure and that encryption systems are used. This entails not only training but also costs (Posetti 2017, pp. 2, 8; see also pp. 103 et seq.) and secure deletion of data (Perugia Principle 9). The Perugia principles even recommend the possibility of "going back to analogue methods" to ensure sources are protected (Perugia Principle 4).

It is very important to point out that encryption systems, security tools, secure mailboxes, and guarantees of technological anonymity are becoming increasingly important (Perugia Principle 10). UNESCO has provided important information to journalists (Henrichsen, Lizosky, and Betz 2015). And, in particular, it is necessary to underline the important joint initiatives undertaken by the media and NGOs concerning tools to ensure source anonymity and vetting. The Government Accountability Project (2017) stands out in this regard, as do, especially, the activities undertaken and technologies developed collaboratively by the Whistleblowing International Network (https://whistleblowingnetwork.org/Home); Global Investigative Journalism Network (https://gijn.org); Associated Whistleblowing Press (www.awp.is); Hermes Center for Transparency and Digital Human Rights (https://www.globaleaks.org and https://www.hermescenter.org); and Free Press Unlimited (https://www.freepressunlimited.org). These associations and consortia work collaboratively with hundreds of nongovernmental organizations (NGO) and media outlets. They provide technological tools to allow communication with whistleblowers and the disclosure of public information.

[26] Department of Justice (2015). Annual report. Department of Justice Use of Certain Law Enforcement Tools to Obtain Information from, or Records of, Members of the News Media; and Questioning, Arresting, or Charging Members of the News Media, https://www.justice.gov/criminal/file/888316/download (accessed January 15, 2021). Office of the Attorney General (2015). *Memorandum to all Department employees*, January 14. http://www.justice.gov/file/317831/download (accessed January 15, 2021).

So that journalists and their sources are aware of possible surveillance, it is also important for there to be transparency about mass surveillance carried out by states or private actors. Unfortunately, and on different scales, cases such as Snowden or Cambridge Analytica do happen. In this regard, in the ECtHR case *Youth Initiative for Human Rights v. Serbia*[27] it was held that it was a matter of public interest and mandatory to provide information on people subjected to technological surveillance by the Serbian intelligence services. Failure to provide this information prevented the NGO from exercising a watchdog role.

Journalists' Requirements Regarding Diligence and Limits to the Right

Diligence and Public Interest Requirements and the Need to Disclose the Source to Demonstrate Diligence

The journalist's right is conditioned by diligence and vetting of the truthfulness of the information provided by sources, as well as by analysis of the information's relevance or public interest (Moretón Toquero 2014; cf. Fernández Miranda Campoamor 1990). As Perugia Principle 4 states, the material and its public interest should be verified, and documents and datasets should be published in their entirety if possible.

The journalist must be diligent and act in good faith, publishing reliable and accurate information and respecting journalistic ethics.[28] The need for "accurate and reliable information" is recalled in *Sanoma II Uitgevers B.V.*, para. 50; *Weber and Saravia*, para. 143; *Goodwin*, cited previously, para. 39; *Roemen and Schmit v. Luxembourg*, para. 46, and *Big Brother Watch and others v. the UK*, September 13, 2018 (para. 487).

The right not to reveal sources does not protect journalists if they are ones who commit illegal acts and crimes to obtain information, such as when they illegally intercept communications (ECtHR case, *Brambilla and other v. Italy*[29]). Such acts are not protected by freedom of expression. The right to protection of sources is also different from the limits of investigative journalism and the exclusion of the protection of ECHR Article 10 with respect to hidden or deceitful recordings made of people who have an expectation of confidentiality, as the ECtHR has pointed out in various rulings.[30]

Notwithstanding the above, journalists do not have to disclose their sources, even if the sources – not the journalist – have committed crimes by obtaining secrets or confidential materials. The journalist is protected even if their sources acted in bad faith and have been pursued by the police and the courts as a result. This possible illegality or bad faith does not affect the journalist's right.

A controversial issue arises when the journalist must reveal a source to prove diligence and truthfulness. If possible, the journalist must use other sources, evidence, and objective data to verify the veracity of the information, without compromising a source. However, that may be insufficient (Moretón Toquero 2012; Navas-Sánchez 2019, p. 10). In these cases, the journalist must choose between identifying a source to avoid being convicted and accepting the punishment imposed for not being able to demonstrate the truthfulness of the facts reported (Pradera 1994).

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[27] *Youth Initiative for Human Rights v. Serbia*, June 25, 2013.

[28] *Fressoz and Roire v. France*, January 21, 1999; Navas-Sánchez (2019, p. 9).

[29] *Brambilla and other v. Italy*, September 23, 2016.

[30] Among others, *Haldimann v. Switzerland*, February 24, 2015; *Bremner v. Turkey*, October 13, 2015, and *Alfha Doryforiki v. Greece*, February 22, 2018.

The ECtHR has not offered a clear answer regarding these situations. In *Stângu and Scutelnicu v. Romania*,[31] para. 52, the ECtHR requires journalists to provide a solid factual basis for the prosecuted allegations, though this does not imply an obligation to disclose the names of the people who had provided the information used as a basis for writing their article.

This Right is only very Exceptionally Limited and has Judicial Guarantees

The right to secrecy is a right that can be limited. However, for a journalist to be obliged to reveal sources or for searches and selective investigations to be a possibility, a very strict level of analysis and scrutiny must be passed. Since *Goodwin v. UK*,[32] March 27, 1996 (para. 39), the ECtHR has affirmed that "such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

This highly restrictive scrutiny or test must be carried out by a judicial or independent authority. Judicial oversight cannot be merely formal, and a severe analysis of all the interests involved must take place (*Görmüs et al. v. Turkey*[33]). The ECtHR strongly emphasizes that to limit this right there must be no alternative; it must be the only possible means available. And it is up to the authorities, and not the journalist, to demonstrate the absence of these other alternatives or their ineffectiveness. Exceptions to this right are limited to crimes of special gravity and involve situations in which the testimony or information required from the journalist is absolutely essential for the establishment of the truth during proceedings.

In addition, analysis by a court or by an independent authority must be prior to the investigations and seizure or search of documents, materials, instruments, and communications.[34]

Only for justified reasons of urgency could an investigation without prior judicial review be warranted. But there must be a procedure to identify and isolate the material subject to a search so that, until a judicial decision has been made, the data and evidence cannot be effectively accessed by the authorities (ECtHR Case *Sanoma II*;[35] Navas-Sánchez 2019, p. 8).

Journalists and Other Subjects Who Have the Right and Those Under an Obligation

The right to secrecy and not to reveal sources was initially recognized vis-à-vis journalists and, in some regulations, journalism "professionals." However, it is becoming increasingly difficult to determine who such people are. It is at least clear that it is not possible to require registration or a license to practice journalism and, therefore, to have this right.

In any case, as I have already indicated, this right is an instrument and guarantee of communication rights and not a privilege. That is why there has clearly been some momentum when it has come to recognizing this right not only in the case of journalists but in that of different types of democracy-guarding watchdog – for example, leaders of social networks, NGOs, and individuals who investigate matters of public interest. As UNESCO states (Posetti 2017, p. 136), "Broadening the legal definition of 'journalist' … is desirable."

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[31] *Stângu and Scutelnicu v. Romania*, January 31, 2006.
[32] *Goodwin v. UK*, March 27, 1996.
[33] *Görmüs et al. v. Turkey*, January 19, 2016.
[34] *Sanoma II*, September 14, 2010, para. 90–92; *Nagla v. Latvia*, July 16, 2013.
[35] *Sanoma II*, September 14, 2010.

It should be remembered that this expansion of the subjects' right of access to information has occurred little by little. That said, the UN has taken different positions on whether it recognizes the right vis-à-vis "every member of the public" or only a few qualified individuals who are recognized as journalists.[36] More clearly, in the Ibero-American sphere, the right of access to information is recognized for all, especially since the case of *Claude Reyes et al. v. Chile*, September 19, 2006.[37]

Since 1985, in more than 150 rulings,[38] the ECtHR has affirmed the importance of the role played by democracy-guarding watchdogs against abuses of power. Initially, reference was made to the media. However, the range of persons has been expanding in recent years. In the ECtHR case *Magyar Helsinki Bizottság v. Hungary*,[39] it was stated that the special protection of Article 10 ECHR "is not limited to the press but may also be exercised by, among others, non-governmental organisations" (para. 166). The status "also extends to academic researchers and authors of literature on matters of public concern. The Court would also note that, given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may also be assimilated to that of 'public watchdogs'" (para. 168).

More than looking at the status of the person concerned, the key is the information of public interest that is disseminated in the context of secrecy and the right not to reveal the sources. Today, the focus is more on the "identification of 'acts of journalism,' rather than occupational or professional descriptors" (Posetti 2017, p. 136). In the same vein, Ugland (2008) has affirmed that the US Supreme Court should adopt a definition of the press that focuses on the functions that it performs and not on the identity or characteristics of those who perform those functions. As Chief Justice Burger wrote: "The First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms" (*First Nat'l Bank v. Bellotti*,[40] 435 US 765, 802 [1978] [Burger, C.J., concurring]).

Regarding subjects who are bound, the right to secrecy and not to disclose sources, obliges the public authorities, the police, courts, parliamentary commissions, and other public bodies that ask a journalist to identify their sources. They cannot impose burdens or restrictions if the journalist refuses to do so.

In principle, it is a right against everyone, including individuals. However, whether the right is able to protect the journalist against the editor of the media outlet, other hierarchical superiors, coworkers, and so on is a debatable and controversial issue. The workplace context can make this guarantee especially difficult (Fernández Miranda Campoamor 1990, p. 44; Escobar Roca 2002, p. 214).

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[36] Thus, the English version (no. 44) of the "UN norms" recognizes the right of "all members of the public" (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, January 18, 2000). The same thing can be found in Ibero-American or African declarations. However, the HRC General Comment No. 34 of 2011 states that access to public information is given to the media so that it can provide the results of the committee's activity to the public (UN General Comment No. 34, 2011, no. 18). However, the right extends to other persons who have special ties to oversight and surveillance of the public authorities, such as authors who publish on the Internet (No. 44) or associations defending human rights (UN HRC Communication No. 1470/2006, 28 of March 2011, *Nurbek Toktakunov vs. Kyrgyzstan* (particularly para. 6.3 and 7)).

[37] Inter-American Court. Case *Claude Reyes et al. v. Chile*, September 19, 2006. Available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf (accessed January 15, 2021).

[38] Since *Barthold vs. Germany*, March 25, 1985, and *Lingens v. Austria*, July 8, 1986.

[39] *Magyar Helsinki Bizottság v. Hungary*, November 8, 2016.

[40] *First Nat'l Bank v. Bellotti*, 435 US 765, 802 (1978) (Burger, C.J., concurring).

The right also places an obligation on those who want to undertake searches, interceptions of communications, and investigations of journalists. They must comply with legal requirements. In this sense, communications operators, intermediaries, and platforms from which data are requested, must be aware of the special guarantees emanating from this right.

The Protection of Sources and Whistleblowers when they Directly Disclose Information into the Public Domain

As Perugia Principle 7 states, whistleblowers and informants are a subset of confidential journalistic sources, though not all of them seek to involve the media in their attempts to reveal information of public interest, and nor do they all require confidentiality.

In recent years, regulation regarding and protection of whistleblowers and the like who leak or reveal information as a way of warning of illegal activity have become more and more important. The ECtHR has gradually recognized the protection of these sources (Bychawska-Siniarska 2017, pp. 102–107) since *Guja v. Moldova*,[41] para. 72. It repeated this recognition in *Heinisch v. Germany,* July 21, 2011. In *Matúz v. Hungary*,[42] the ECtHR recognized the need to protect a public disclosure that was made directly – without internal complaints or ones to the relevant institutions – because it was considered that this was an appropriate measure "for want of any effective alternative channel."

Recommendation CM Rec (2014) 7 of April 30, 2014, by the Committee of Ministers, on the protection of whistleblowers, has been very important in stimulating regulation in many countries in Europe.[43] In any case, mention must be made of Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019, on the protection of persons who report breaches of Union law.[44] This directive must be transposed into the internal legislation of all states before December 17, 2021.

Its Recital 31 states that "persons who report information about threats or harm to the public interest obtained in the context of their work-related activities make use of their right to freedom of expression." It also asserts that "Whistleblowers are, in particular, important sources for investigative journalists. Providing effective protection to whistleblowers from retaliation increases legal certainty for potential whistleblowers and thereby encourages whistleblowing also through the media. In this respect, protection of whistleblowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies" (Recital 46).

Despite the above, the protection that this Directive gives to whistleblowers (Art. 15) "shall not apply" if there are "specific national provisions" to protect communication rights for those who disclose information directly to the press. This is certainly strange, and it can be explained by the fact that the Directive, in theory, does not regulate freedom of expression, a properly constitutional matter of states.

What is relevant here is that the Directive offers a structure of three subsidiary steps: the internal complaint in the organization, the external complaint to the competent institutions, and, ultimately, the "public disclosure," that is, "to persons who make such information

[41] *Guja v. Moldova*, February 12, 2008.

[42] *Matúz v. Hungary*, October 21, 2014.

[43] EU Council (2014). *EU Human Rights Guidelines on Freedom of Expression*, Foreign Affairs meeting Brussels, on May 12, 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf (accessed January 15, 2021).

[44] https://eur-lex.europa.eu/legal-content/en/TXT/?uri = CELEX%3A32019L1937.

available in the public domain, for instance, directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions, or professional and business organisations" (Recital 45). "Public disclosure" or "to publicly disclose" are defined as "the making of information on breaches available in the public domain" (Art. 5.6). Regulation of this is contained in Article 15. Direct public disclosure is the last option: "The reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case" (Recital 33).

The reporting person or whistleblower will be protected if they "has reasonable grounds to believe that: (i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach."

As Recital 82 states, it is necessary to guarantee "the confidentiality of the identity of the reporting person during the reporting process and investigations triggered by the report." The identity should only be disclosed "to safeguard the rights of defence of persons concerned." However, confidentiality will not be guaranteed if the reporting person has revealed their identity intentionally.

The Directive regulates the "immunity" (Recital 92) of the person who discloses information, if "the reporting person had reasonable grounds to believe that reporting or public disclosure was necessary." The exemption does not extend to the disclosure of "superfluous" information (Recital 91). It is affirmed that there will be liability under national law for those who have made disclosures "not necessary for revealing a breach" (Art. 21.4).

The Directive affirms that there must be exemption and legal immunity when access to information and its disclosure is illegal under civil, administrative, or employment law. However, if obtaining or disclosing information is a criminal offense, protection of the source will depend on the legislation of each state (Art. 21.3). There must also be protection if the disclosure affects trade secrets.[45]

In addition, there is a requirement for the reporting person to have analyzed the information to ascertain that it is true. The reporting person must have "reasonable grounds to believe that the information on breaches reported was true" (requirement for protection, Art. 6.1). Similarly, the reporting person may be penalized and could have to pay compensation if he or she deliberately leaked inaccurate or misleading information. The "public disclosure of inaccurate or misleading information" generates a right to compensation under national law. And there may be sanctions "where such inaccurate or misleading information was reported or publicly disclosed deliberately and knowingly" (Recital 101, see Art. 23.2,)

Conclusions

In this chapter, I have described the highly significant process of regulating the right to secrecy and the right not to disclose information sources at the international, regional, and national levels. Since the 1996 Goodwin case before the ECtHR, Europe has perhaps been the place where there has been the most developed recognition of this guarantee. Since then, around 20 rulings have distilled and specified a clear legal regime, with strong and concrete guarantees. These rulings have been assimilated by the different European states, as well as by other international declarations that, though not binding, are very influential. Beyond the law, the

[45] See especially Recitals 97 and 98.

Perugia Principles are entirely relevant and mark the path forward. In various regions of the world and in many states, the protection of this right must continue to be implemented as an integral part of communication rights. And this necessary regulation must also be adapted and updated to meet new challenges.

Secrecy of sources enjoys a special and strong protection, which implies the application of a very strict test to possible limitations on it. Likewise, it implies a guarantee of the competent body, which can only be a court or, where appropriate, an independent authority that authorizes an intervening over or restriction of this right when there are very good reasons to do so. The substance of this right entails the refusal to reveal sources when requested by the public authorities to do so. As has been said today, in legal terms, we now speak essentially of a right and not of a duty, despite the fact that ethically and professionally an obligatory nature is stressed. On the other hand, the scope and types of information that should not be disclosed have to be interpreted very broadly.

Today, the true guarantee is no longer the right not to reveal sources if the journalist is asked to do so. Now, the key is that sources cannot be discovered or hacked via blanket or selective intercepts of communication undertaken using the Internet. Certainly, technological developments and the protection of public and national security have put this right at risk. In any case, the right has been updated against these new threats.

Another legal challenge is whether this right is going to be extended to all democracy-guarding watchdogs, or even to all those who divulge information of public interest. The trend clearly must be in that direction. However, this generalization or extension of the right must involve some precautions to avoid abuses of it or fraud. It should be recalled in this regard that this right does not protect a lack of professionalism or diligence, and it does not protect people who commit unlawful acts to obtain information if they are journalists or other kinds of communication professionals. It is also striking that we are in the process of giving protection not only to journalists and social communicators, but also directly to sources. In this sense, the European Union's recent Whistleblower Protection Directive is especially pertinent. In the coming years, we will witness, on the one hand, a clear momentum that facilitates the flow of information of public relevance, by protecting both journalists and their sources. But on the other hand, the risk of mass or selective surveillance on the Internet may work in the opposite direction and be a brake on the flow of information. We must get behind the first, most positive momentum in favor of democracy.

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