

IN THE EUROPEAN COURT OF HUMAN RIGHTS

(Case No. 16/1994/463/544)

CASE OF WILLIAM GOODWIN

v.

THE UNITED KINGDOM

WRITTEN COMMENTS SUBMITTED BY ARTICLE 19,
THE INTERNATIONAL CENTRE AGAINST CENSORSHIP, AND
INTERIGHTS, THE INTERNATIONAL CENTRE FOR
THE LEGAL PROTECTION OF HUMAN RIGHTS,
PURSUANT TO RULE 37 OF THE RULES OF THE COURT

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L INTRODUCTION

1. These written comments are submitted by ARTICLE 19, the International Centre Against Censorship, and INTERIGHTS, the International Centre for the Legal Protection of Human Rights, pursuant to the permission granted by the President, Mr. Ryssdal, in accordance with Rule 37 s.2 of the Rules of Court, by letter dated 29 February 1995. As authorized by that letter, these comments are limited to the provision of information about relevant national law from several European and a few non-European states concerning the protection of journalists' sources.

2. The present comments are based in large part on the statements of legal experts from seven European countries published in 1993 in a book edited by ARTICLE 19 titled *Press Law and Practice: Press Freedom in European and Other Democracies*, supplemented by information published in August 1993 in *The ARTICLE 19 Freedom of Expression Handbook*. In preparing these comments we contacted the contributors to our books and other legal experts to ascertain whether there had been any significant legal developments in the intervening months, and the information they supplied is also included. The seven European countries whose law and jurisprudence are herein discussed are Austria, France, Germany, the Netherlands, Norway, Spain and Sweden.

II. INTEREST OF ARTICLE 19 AND INTERIGHTS

3. ARTICLE 19 is an international human rights organization based in London which works impartially to promote freedom of expression and access to information and to condemn, document, prevent and stop acts of censorship around the world. Taking its name and mandate from the nineteenth article of the Universal Declaration of Human Rights, ARTICLE 19 seeks to develop interpretations of international norms that are protective of freedom of expression and related rights. ARTICLE 19's Board of Directors includes leading writers, journalists and lawyers from around the world.

4. INTERIGHTS is an international human rights law centre based in London which

works to promote the effective use of international human rights standards and legal procedures. INTERIGHTS assists individuals in bringing international human rights cases before appropriate fora, and disseminates information on international human rights law through its Bulletin and through conferences, workshops and colloquia. INTERIGHTS' Board of Directors and Advisory Council include human rights experts from around the world.

5. Both organizations are registered charities, independent of all ideologies and governments. Jointly they have sought and been granted leave to file comments in three previous cases before this Court; each individually has also filed comments in several cases.

6. ARTICLE 19 and INTERIGHTS agree with the majority of the European Commission on Human Rights that

"[T]he protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of 'public watchdog' in a democratic society. If journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest. The right to freedom of expression ... therefore requires that any such compulsion must be limited to exceptional circumstances where vital public or individual interests are at stake."¹

ARTICLE 19 and INTERIGHTS express the hope that this Court will reach a similar conclusion and that it will articulate reasoning that will provide guidance to the member states of the Council of Europe as well as to the countries around the world that look to this Court for guidance in construing constitutional protections and drafting legislation. The judgments of this Court, including on questions of freedom of expression, have often been cited by national courts outside of Europe, particularly throughout the Commonwealth,² as

¹ *Goodwill* case, App. No. 17488/90, Report of 1 March 1994, at para. 64.

² See, e.g., Supreme Court of India, *Rangarajan v. Jagjivan Ram and Ors*, decided 30 March 1989, [1990] LRC (Const.) 412, 427; [1989] (2) SCR 204, 226 (discussing *Handyside*); Supreme Court of Mauritius, *Director of Public Prosecutions v. Mootoocarp*, judgment of

well as by other regional and international tribunals,³ and furthermore are consulted by drafters of legislation particularly in countries of the former Soviet Bloc.⁴

7. Prosecutions of journalists for refusing to reveal their sources constitute a substantial threat to freedom of expression and a deterrent to the exposure of corruption and wrongdoing around the world. For instance, in March 1995, **Basildon Peta**, a reporter with the Harare-based *Daily Gazette* newspaper, was repeatedly detained, interrogated and finally charged by police under Zimbabwe's Official Secrets Act, after he exposed massive tax evasion by companies owned by the ruling ZANU-PF party. During five days of incessant questioning, police tried to make Peta tell them who had given him information about the fraud. Peta steadfastly refused and eventually was released from custody. It is perhaps worth noting that Zimbabwe's Supreme Court has expressly referred to this Court's jurisprudence in at least one case.⁵ Countless other journalists in numerous countries are subjected to similar harassment and punishments.⁶

21 Dec. 1988, [1989] LRC (Const.) 768, 773 (discussing *The Sunday Times* case at considerable length); Supreme Court of Papua New Guinea, *The State v. NTN Pty Ltd and NBN Ltd*, 7 April 1987 (SC No. 323) 14 *Common L Bull* (1988), 45.

³ See, e.g., Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opn OC-5/85 of 13 Nov. 1985, Series A No. 5 (discussing *The Sunday Times* case); Privy Council, *Minister of Home Affairs v. Fisher* [1980] AC 319, 329.

⁴ When ARTICLE 19's Law Programme Director was in Mongolia in November 1994, she was told by people involved in drafting the new media law that they would be very interested in this Court's judgment in the present case.

⁵ In *Stephen Ncube v. The State*, *Brown Shuma v. The State*; *Innocent Ndhlovu v. The State*, Judgment No. 156/87, *Common L Bull* (1988), 593, the Supreme Court discussed *Tyrer v. United Kingdom* at some length in ruling the punishment of whipping unconstitutional. Subsequently, the Constitution was amended to permit courts to inflict moderate corporal punishment on juveniles.

⁶ See Committee to Protect Journalists, *Attacks on the Press 1993: A Worldwide Survey* (New York, 1994).

8. A clear statement from this Court that the confidentiality of sources should be respected and should give way to overriding public or private interests only in exceptional circumstances would provide an important tool for exposing corruption, wrongdoing and other matters of public interest in Europe and elsewhere. ARTICLE 19 and INTERIGHTS would welcome a further clarification that sources may be entitled to particular protection when the information they have uncovered relates to matters of considerable public importance.

III. THE LEGAL ISSUE

9. The Court is asked to decide in this case whether the applicant, a journalist, was entitled to refuse to disclose the identity of a source who had given him information in confidence about a company that, if published, might have caused the company financial harm. The High Court ordered the applicant and his publishers to disclose the notes, and held them in contempt when they refused. The applicant and his publishers appealed this decision to the House of Lords, which dismissed the appeal. The High Court then fined the applicant £5,000 for contempt. The applicant applied to the European Commission of Human Rights which ~~decided~~, by a vote of 11 to 6, that there had been a violation of Article 10 of the European Convention on Human Rights.

10. The legal issue addressed in these comments is whether the interference by the State Party was necessary in a democratic society ~~within~~ the meaning of Article 10 (2) and whether the disclosure order was proportionate to the aim of protecting the company's rights.

IV. EXAMINATION OF COMPARATIVE LAW AND PRACTICE ON PROTECTION OF JOURNALISTS' SOURCES

11. This section offers a survey of the law and jurisprudence of seven European countries: Austria, France, Germany, Netherlands, Norway, Spain and Sweden. The relevant case-law of Japan and Nigeria are also briefly examined as illustrative of jurisprudential

reasoning outside of Europe. These comments conclude with a comparative analysis of the approaches of the different countries.

Austria⁷

12. Article 31 of the Media Act of 1981 provides strong protection for the confidentiality of journalists' sources. Publishers, editors, journalists and other employees of a media enterprise who are called as witnesses before a court or administrative authority have the right to refuse to answer questions referring to the author, contributor or source of information, or to the contents of information disclosed to them in regard to their professional activities.

France⁸

13. The law on protection of sources and confidential information was substantially revised by the Act of 4 January 1993 which amended the Code of Criminal Procedure. Newly added Article 109(2) now provides that:

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

14. Before passage of the 1993 Act, the duty of professional secrecy did not apply to journalists,⁹ who could be questioned regarding their confidential sources of information. Refusal to appear or to answer was an offence punishable by a fine or jail sentence.

⁷ Information in this section is drawn from the chapter on Austria in *Press Law and Practice* (ARTICLE 19, 1993), at 35, by Walter Berka, Professor of Administrative Law at the Johannes-Kepler University of Linz who specializes in the areas of media and human rights.

⁸ Information about French law is based upon the discussion of protection of sources by Roger Errera, a member of the Conseil d'Etat, in his chapter in *Press Law and Practice*, at 74, updated by information he supplied to ARTICLE 19 and which is published in *The ARTICLE 19 Freedom of Expression Handbook*, at 184.

⁹ On professional secrecy in French law, see F Warenbourg-Auque, "Reflexions sur le secret professionnel en droit français," in *Travaux de l'Association H Capitant*, 23, *Le secret et le droit* (Paris, 1974), 105; B Decheix, *Un droit de l'homme mis a mal: le secret professionnel*, D. 1983, 133.

However, in practice very few courts or investigative *magistrats* went so far as to require a journalist to disclose his or her sources. When this was done, the journalist generally declined to answer, invoking professional custom, and the court refrained from ordering sanctions. Journalists were sanctioned in only one or two cases during the decade preceding adoption of the 1993 Act. Adoption of the Act brought the law in line with what had become accepted practice.

Germany¹⁰

15. Regulation of the press in Germany is a matter in the first instance for the *Länder* (states). The press laws of most of the *Länder* include a provision that grants journalists a strong right to refuse to divulge the identity of their confidential sources. Paragraph 24(1) of the *Land* North Rhine Westphalia's Press Law is typical.¹¹ It reads:

Editors, journalists, publishers, printers and others involved in the production or publication of periodical literature in a professional capacity can refuse to give evidence as to the person of the author, sender or confidant of an item published in the editorial section of the paper or communication intended wholly or partly for such publication or about its contents.¹²

16. Paragraph 24(1) admits of no exceptions. In contrast, sub-paragraphs (2), (3), and (4) render evidence inadmissible in court if obtained via confiscation of materials or a search of premises that belong to the party entitled to refuse to provide evidence, unless "the party ... is urgently suspected of being the perpetrator of or participant in a criminal offence." The fact that this exception does not apply to subparagraph (1) implies that journalists cannot be forced to divulge their sources even where they are suspected of having been involved in a criminal offence.

¹⁰ Information in this section is based on the discussion of protection of sources by Ulrich Karpen, Professor of Constitutional and Administrative Law at the University of Hamburg, in his chapter in *Press Law and Practice*, at 92-94.

¹¹ Pamphlet on the Press Law of Germany, issued by the Ministry of Information (1989), at 14.

¹² Press Law for *Land* North Rhine Westphalia, 24 May 1966, *ibid.*, at 15.

17. Federal law also provides strong protection for the confidentiality of sources, especially in civil cases. In civil cases, Section 383 of the Civil Procedure Code acknowledges that when facts are confided to persons because of their profession, including but not limited to journalists, these persons are entitled to refuse to give testimony about these facts unless their source consents to disclosure. In criminal cases, Section 53 of the Criminal Procedure Code authorizes radio and print journalists to refuse to testify concerning the content or source of information given in confidence.

18. In the *Spiegel* case, the Federal Constitutional Court (FCC) declared that the right to refuse to give evidence about the source and contents of published information was essential to the public function of the press.¹³ However, it reasoned that the press' right to refuse to disclose sources may be overridden by other pressing considerations, such as the interest in law enforcement. In a 1969 decision, the FCC concluded that a reporter was required to answer questions regarding the identity of suspects who had claimed to him that they had been promised sums of money by law enforcement authorities. The Court determined that the state interest in exposing corruption by public officials outweighed the interest in protecting the confidentiality of the journalist's sources.¹⁴

19. In a 1983 decision,¹⁵ the FCC indicated that it might have decided the 1969 case differently, reasoning that the constitutional right to protect confidential sources is primarily intended to protect the role of a free press in controlling government abuse (whereas in the 1969 case the FCC saw the two interests as being in conflict). In the 1983 case, the FCC rejected the journalist's effort to shield the identity of the source of an advertisement because the matter did not touch on public affairs at all.

¹³ 20 FCC 162 (1966).

¹⁴ 25 FCC 296 (1969) (*Pressezeugnisverweisungsrecht*).

¹⁵ 64 FCC 108 (1983).

The Netherlands¹⁵

20. The Supreme Court has stated that journalists do not have a "right to remain silent" concerning their sources. A court may compel a journalist to reveal his or her source by ordering payment of a *dwangsom* (a daily fine for failure to perform an obligation) or remand into custody. However, a recent decision by the Court of Appeals in the Hague reflects a shift towards affording journalists a qualified right to protect their sources absent a compelling countervailing need for disclosure.

21. On 24 November 1994, the Court of Appeals in the Hague concluded that four journalists were not obliged to answer questions at a pre-trial hearing regarding the identities of their sources for their articles and TV stories about alleged corruption by the mayor of Brunssum (a small town in the south of the Netherlands).¹⁶ The mayor claimed that the stories were defamatory and were based on confidential information supplied by police officers in violation of the law. The mayor wanted to discover the source so as to mend the leak and to recover damages from the state if the information had indeed been leaked by a police officer. The court of first instance issued an order on 15 March 1994 to compel the journalists to reveal their source. The Court of Appeals reversed.

22. In so doing it referred to the drafting history of article 10 of the European Convention on Human Rights as well as to the Report of the Commission in the present case.¹⁷ It then examined the valuable role journalists serve in a democratic society and the importance to their ability to serve that role of being able to protect their sources:

¹⁵ The information in this section, including translations of quotes from the Court's judgment, was supplied to ARTICLE 19 by Ineke Boerefijn, a legal researcher at the Netherlands Institute of Human Rights (SIM), in a letter dated 17 February 1995 and by Peter Baehr, Director of SIM, in a letter dated 26 November 1994.

¹⁶ *Johannes Joseph Adrianus Slats v. Hendrikus Willem Riem*, Court of Appeals in The Hague (First Chamber), Decision of 24 November 1994, Case No. 0293 H 94.

¹⁷ Operative para. 7.

In a democratic society it is of great importance that social evils are brought to public attention through **newsgathering** by the media. It goes without saying that this interest is well served by the fact that a journalist, in various circumstances, does not have to reveal the identity of his sources of information so as to prevent his sources from drying up. This interest should prevail in the present case, which deals with a serious structural social evil that touches the heart of the credibility and reliability of the **administration** of the province of Limburg, and which the State on its own has apparently not managed to uncover within a reasonable time. Under these circumstances, in the current proceedings, the interest of the mayor - who does not directly challenge the truth of the publications — in discovering the identity of the sources must be set aside in favour of the interest of the investigative press in protecting its sources.¹⁸

23. The Court of Appeals noted that the mayor's interest in obtaining the identification information was not strong given that persons who hold public office are obliged to tolerate a greater degree of press scrutiny than private individuals and that he could try to find any leak in the Police Department by initiating criminal proceedings. Accordingly, the Court concluded that the mayor's interest was outweighed by the strong interest of the press in protecting its sources.

24. The Press Council, an independent body established in 1960 by the Dutch Association of Journalists, the Association of Editors, the broadcasting companies and the publishing houses, has long maintained that journalists are entitled to withhold information provided they can prove that they exercised prudence in their use of sources.¹⁹

Norway²⁰

25. Journalists and editors in Norway have a qualified right not to answer questions

¹⁸ Operative para. 9.

¹⁹ J Doomen, *Opinies over journalistiek gedrag. De uitspraken van de Raad voor de Journalistiek 1960-1987* (Arnhem: Gouda Quint bv, 1987) 112, cited in the chapter by Ineke Boerfijn in *Press Law and Practice*, at 112-13.

²⁰ Information in this section is based on the discussion of protection of sources by Steingrim Wolland, a Norwegian media lawyer and co-author of a book on press ethics, media legislation and freedom of expression, in his chapter in *Press Law and Practice*, at 127.

concerning the **identity** of their sources. A court may order the editor or journalist to disclose a source, but only if the court finds that it is of particular importance to have this information. The court must take into consideration the conflicting interests, the character of the case and the need for the information. If the information sought by learning the identity of the source can be obtained by other means, it is extremely unlikely that a court will order disclosure of the source.

26. Although the law subjects editors and journalists to the risk of imprisonment and large fines, including continuing fines, in practice journalists and editors rarely reveal their sources; imprisonment has not been used for at least several decades and fines, if ordered at all, are modest. For instance, in one typical 1992 case, an editor was fined NK 20.000 (US\$ 3,200).

27. Two recent decisions of the Supreme Court have made great strides in securing in jurisprudence the protection of sources that has long been observed in practice. In the *Edderkopp* case,²¹ decided in January 1992, the Supreme Court declared: "In some cases ... the more important the violated interest is, the more important it will be to protect the sources." The case involved two journalists who had written a book entitled *Edderkopp* (Spider), about the activities of a Norwegian furniture manufacturer who had secretly taped his telephone conversations with noted politicians. Various passages in the book discussed connections between the Labour Party and the Norwegian intelligence agency. A Parliamentary oversight body sought the source of this information in order to determine whether it had been illegally provided by an agency employee. The authors refused to reveal their sources, and the body attempted to obtain a court order compelling them to do so. The court refused the application. The Supreme Court, in upholding the lower court, ruled that the authors had a right to protect their sources.

28. On 3 September 1993, the Supreme Court ruled that a journalist, Ole Ragnar Ekren,

²¹ *Retstidende* 1992, at 39.

was not obliged to give information about his source for numerous articles about an illegal killing of a wolf.²² Because the wolf is an endangered species in Norway and protected under Norwegian law, anyone who kills a wolf is liable to penalty under the Criminal Act. During the autumn of 1992, a local newspaper, *Aura Avis*, published 20-30 articles about a wolf that allegedly had killed numerous sheep in the area. The matter aroused considerable dispute, including as to whether the damage was caused by a wolf or a dog. Eventually, Mr. Ekren was informed that the wolf had been killed, and the skin and body of the wolf were delivered to him as proof. Whether or not the sheep had been killed by a wolf was of considerable importance to the farmers who could only receive compensation from the government if they could prove that the killings were by a wolf. *Aura Avis* published pictures of the skin and brought the skin and body to an expert who verified that it was a wolf.

29. The Chief of Police of Nordmore asked the court of enforcement, *Nordmore Forhørsrett*, to order Mr. Ekren to name his source and also to name the person who had killed the wolf. On 16 December 1992, the court ordered Mr. Ekren to disclose this information. Mr. Ekren appealed, and the Court of Appeal, *Eidsivating Lagmannsrett*, ruled in his favour.

30. The Chief of Police argued that Mr. Ekren had not been acting as a reporting journalist but as a "go-between" for the wolf-killer and had in fact destroyed evidence by removing the wrapping of the skin before giving it to the Police. For these reasons, the Police Chief urged that Mr. Ekren was not entitled to protect his source. Mr. Ekren successfully argued that he had a right to protect his source from identification, even to the extent of removing the wrapping. The Supreme Court accepted his reasoning, and concluded that his actions had been motivated by legitimate professional interests. The decision establishes the principle that the press has a right to take an active role in factfinding as well as to protect its sources.

²² Supreme Court of Norway, ruling of 3 September 1993, *Retstidende* 1993, at 982. Information about this case was supplied by Steingrim Wolland in a letter to ARTICLE 19 dated 7 March 1995.

Spain²³

31. The second sentence of Article 20.1.(d) of the Constitution states: "The right to invoke the conscience clause and that of professional confidentiality shall be governed by statute." As of 1993, this provision had not been developed by the legislature and the Constitutional Court had not ruled on the professional privilege of journalists.

32. The only ordinary regulation on the subject states: "Journalists have the duty to maintain their professional secrecy, except for cases of obligatory cooperation with the administration of justice, for the sake of the common good." This provision is found in the General Principles of the Journalists' Profession, which are listed as an annex to the Statute of the Journalists Profession (Decree 744/67, 13 April 1967, paragraph 5). These General Principles, which do not have the force of law, were adopted under Franco's regime and today are of little practical importance since for the most part they have been superseded by laws enacted after the Constitution.

33. The General Principle to maintain professional secrecy conceives of professional secrecy as a duty imposed on journalists, subject to court-ordered disclosure, and not as a right. There have been few court cases and these have not produced any clarification of the meaning of "cases of obligatory cooperation with justice" or "the common good".

Sweden²⁴

34. Chapter 3, Article 1 of the Freedom of the Press Act (which has constitutional status) explicitly prohibits the investigation or disclosure of a journalist's sources, with certain limited exceptions. A journalist who reveals his or her source without consent may be subjected to

²³ Information in this section is based on the chapter on Spain in *Press Law and Practice* by Blanca Rodriguez Ruiz, a Spanish media lawyer and Ph.D. candidate at the European University Institute in Florence, at 147.

²⁴ Information in this section is based on the chapter on Sweden in *Press Law and Practice*, at 164-65, by Hans-Gunnar Axberger, a former Press Ombudsman for the General Public and an Assistant Professor of Criminal Law at the University of Stockholm.

criminal prosecution if the source so demands.²⁵ While there have been no prosecutions in recent years there have been a few incidents which have generated public debate. The constitutional protection of sources extends to state and municipal employees, who are thus free to give information to the press without fear of legal repercussions or intimidation.

35. The FPA prohibits any government official from making any kind of inquiry concerning media sources which is not explicitly allowed by the FPA.²⁶ Normally, the authorities may only investigate a newspaper's source when they have reasonable grounds to believe that the source committed treason, espionage, or other similar crimes referred to in Chapter 7, Article 3 of the FPA. Moreover, since the responsible editor alone is responsible for all crimes committed in publishing the newspaper, the police have no grounds for conducting searches to discover the identity of a source or of the journalist who wrote a particular article. For these reasons, most suspected breaches of the Secrecy Act by the media cannot be prosecuted.

36. The responsible editor may be compelled by a court order to disclose the identity of a source which would otherwise be entitled to confidentiality in criminal cases where the published information could jeopardize state security or in which freedom of the press (including libel) is not the central issue and the court finds that the disclosure of a source is justified by an overriding public or private interest.²⁷ Such an overriding interest includes the interest of an accused person in obtaining information which he alleges would prove the falsity of accusations made against him and the interest of the police in obtaining evidence about crime.

37. The protection of news sources under the Swedish Constitution is very strong. People, including public officials and persons representing powerful institutions, rarely try to

²⁵ See FPA, Ch. 3, Art. 5.

²⁶ See FPA, Ch 3. Arts. 4-5.

²⁷ See FPA, Ch. 3, Art. 3(5).

challenge this deep-rooted and highly valued tradition, which is considered to be a part of "messenger freedom". In 1988, a court ordered a reporter working for *Dagens Nyheter*, the largest morning paper, to reveal *when* certain conversations with a *known* source had taken place. Outraged journalists argued that this was unconstitutional, and the Chancellor of Justice, who was prosecuting the case, eventually withdrew his question. The case illustrates the media's commitment to protecting the confidentiality of their sources.

Japan

38. The Sapporo District Court, sustained by the appellate courts, held that Article 281 of the Code of Civil Procedure protects the journalist's privilege as a witness to refuse to divulge information about a source as "an occupational secret" unless the information is necessary for a fair trial.²⁸ In an article, a journalist alleged that parents were complaining about child abuse in a local nursery school. The owner of the school sued the journalist for erroneous and defamatory reporting. Under questioning, the journalist refused to identify his sources. The courts upheld his privilege on the ground that, when a fair trial is not at issue, compelling disclosure of confidential sources would improperly impair the reporter's pursuit of his profession.

Nigeria²⁹

39. The High Court of Lagos State ruled that the Senate of the National Assembly had exceeded its authority in summoning a journalist to disclose the confidential sources of an article he had written. In concluding that the summons had interfered with the journalist's right to freedom of expression as guaranteed by the Constitution, the Court stated:

It is a matter of common knowledge that those who express their opinions, or impart ideas and information through the medium of a newspaper or any

²⁸ *Sasaki v. The Hokkaido News, Inc.*, 930 Hanrei Jiho 44, Sapporo District Court, 30 May 1979; affirmed 937 Hanrei Jiho 16, Sapporo High Court, 31 Aug. 1979; affirmed 30 Minshu 403, S.Ct (Third Petty Bench), 8 March 1980. This case is discussed in *The ARTICLE 19 Freedom of Expression Handbook*, at 185.

²⁹ This section is drawn from *The ARTICLE 19 Freedom of Expression Handbook*, at 185.

other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. How else is a disseminator of information to operate if those who supply him with such information are not assured of protection from identification **and/or disclosure?**³⁰

40. In another case,³¹ after the editor of *Sunday Punch* published an article accusing the Nigerian National Assembly of monumental fraud, a committee appointed by the National Assembly to investigate the allegations demanded that the editor reveal the confidential source of his information. He refused. The High Court of *Ikeja* declined to compel him to reveal his source. It reasoned that the powers granted to the investigatory committee did not include the power to require a journalist to disclose a confidential source except in grave and exceptional circumstances such as when state security was threatened. It concluded that no such exceptional circumstances existed in the instant case. The Court further observed that if journalists were compelled to disclose their sources of information, their sources would dry up. Wrongdoers would no longer be exposed. A legislative investigation must comply with the Constitution and it would be wrong for a court simply to assume that every legislative investigation is justified by a public need that outweighs the rights of the press.

V. CONCLUSION

41. In all seven European countries whose law and jurisprudence have been examined in these comments, journalists rarely divulge information that could compromise sources, courts rarely compel disclosure. In most of these countries, the mass media are afforded greater protection of freedom of expression than are private individuals because they are seen to play an instrumental, and crucial, role in safeguarding the right of the public to information and ideas of public interest. In contrast, in the Anglo-American countries, the press is not afforded special protections, although in the US the press as well as private

³⁰ *Tony Momoh v. Senate of the National Assembly* [1981] 1 NCLR 105 (High Court: Lagos).

³¹ *Innocent Adikwu and Others v. Federal House of Representatives of the National Assembly* [1982] 3 NCLR 394 (High Court: Ikeja).

individuals are both entitled to a high level of protection.³²

42. Of the seven countries, Austria, France, Germany (at the *Land* level) and Sweden afford the strongest legal protections to the confidentiality of sources (and other information communicated in confidence to journalists). This protection is premised on the assessment that society is better served by encouraging people to disclose matters of public interest to the press, even though in confidence and even when the information may include evidence of their own wrongdoing, than by identifying and possibly convicting a particular wrongdoer.

43. In Sweden, journalists have both a right and an obligation of constitutional magnitude to protect the identity of their sources unless the source consents; the source is reasonably suspected of treason, espionage or similar crimes; failure to disclose could jeopardize state security; or disclosure is necessary to protect an overriding public or private interest, excluding cases where press freedom is a central issue.

44. In Austria and France, recently enacted laws entitle journalists to refuse to testify or answer questions concerning the source of confidential information gathered in the course of their journalistic activities. These laws codified a right which previously had been widely respected in practice though not in law. The press laws of most of the states in Germany provide similar protection. German federal law entitles journalists (along with other professionals) to protect information confided to them because of their profession; the Federal Constitutional Court has ruled that while the right of journalists to refuse to give evidence is essential to the public function of the press, this right may be overridden for compelling reasons such as to punish crime and, possibly, to investigate government corruption.

45. Although the laws of the Netherlands and Norway traditionally have provided only a weak protection for the confidentiality of sources, recent judgments by the Supreme Court of Norway and the Court of Appeals in the Hague reflect the articulation of jurisprudence

³² See chapters on Australia, Canada and the United States in *Press Law and Practice*, at 18-19, 51-52 and 211-13.

similar to that of the German Constitutional Court.

46. The protection in Spain's Constitution of the confidentiality of journalist's sources has not been developed by legislation or interrupted in any significant way by the Constitutional Court.

47. The courts of Japan and Nigeria have recognized the importance of allowing journalists to protect the confidentiality of their sources. In **Nigeria**, where the courts showed a considerable degree of independence during the 1980s, and where the government frequently violated press freedom, one leading court suggested that the presumption in favour of confidentiality should be breached only in exceptional circumstances such as where state security is threatened.

48. In sum, this survey of comparative law suggests that there is a decided trend within Europe, matched by developments in other parts of the world, towards strengthening the right of journalists to protect the confidentiality of their sources. Although the right may be overridden by compelling public and private interests, in most if not all countries surveyed it seems unlikely that the courts would consider the interests of the company in the *Goodwin* case to rise to that level. Moreover, it is respectfully submitted that clear guidance from this Court on the exceptional circumstances that would justify overriding the journalist's right to protect his sources would provide an important protection of press freedom and the public's right to information in countries in Europe and throughout the world.

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