

The international situation

Sweden

Chapter 3, Article 1 of the Freedom of the Press Act, which has constitutional status provides broadly for protection of journalists' sources. A journalist who reveals his sources without consent may be prosecuted at the source's behest. These provisions extend to state and municipal employees who may thus give information to the press without fear of repercussion. "Messenger freedom" is a deeply rooted and highly valued legal tradition in Sweden.

Norway

Journalists have a qualified right not to answer questions concerning the identity of their sources. Courts may only order disclosure where the information is of particular importance and they must take into account the conflicting interests at stake.

The Netherlands

The Dutch Press Council has long maintained that journalists are entitled to withhold information provided they can prove that they exercise prudence in their use of sources. The Supreme Court, however, has held "that the position that a journalist has a right to protect his sources cannot be accepted as a general rule".

Germany

The press laws of most of the German states include a provision granting journalists a right to refuse to divulge the identity of their confidential sources. Paragraph 24(1) of North Rhine Westphalia's Press Law is typical and provides absolute privilege admitting no exceptions.

France

In 1993 the Code of Criminal Procedure was amended. Article 109(2) says: "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." The right not to reveal is absolute.

Austria

Article 31 of the Media Act 1981 provides strong protection for the confidentiality of journalists' sources. Publishers, editors, journalists and other employees of a media enterprise have the right to refuse to answer questions about sources of information disclosed in the course of their professional duties.

United States

In the leading case on this issue (*Branzburg v Hayes*) the US Supreme Court held that the First Amendment of the US Constitution did not grant journalist the privilege to refuse to divulge the names of confidential sources in the context of a grand jury trial. However, laws providing protection for journalistic confidentiality have been adopted by a large number of states.

Canada

Some protection may be found in both the common law and under the Canadian Charter of Rights and Freedoms guarantee of freedom of expression. The common law provides only limited protection and has rarely been applied. The extent to which the Charter prevents judges from ordering journalists to disclose the identity of their sources remains unclear.

England

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

Mozambique

The Constitution of the Republic of Mozambique enshrines the right of journalists to protect their sources. In Article 30 on professional secrecy, the constitution says:

1. Journalists shall enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment.
2. Where the origin of the information is not indicated, it shall be presumed that it was obtained by the author.
3. The right referred to in this article shall also extend to the directors of the mass media, and to journalistic companies when these are aware of the sources of information.

South Africa

Section 205 of the Criminal Procedure Act says: "A magistrate may, upon the request of the attorney-general, require the attendance before him or any other magistrate, for examination by the attorney-general or a public prosecutor ... of any person who is likely to give material or relevant information as to any alleged offence ..."

Testing 205

By Moegsien Williams

Photographer Benny Gool took the shocking pictures of Cape Flats gangster Rashaad Staggie who was shot and burnt to death by People Against Gangsterism And Drugs. When the police demanded his pictures for their investigation, Gool refused. They then served Section 205 warrants on him and his editor Moegsien Williams. After pressure on Western-Cape Attorney-General Frank Kahn and meetings with the President and the Commissioner of Police, the subpoenas were temporarily withdrawn.



Our quest to entrench media freedom in South Africa will mean testing vigorously in our courts Section 205 and all other existing and future legislation which we believe to be contrary to the letter and spirit of Section 16 of our Constitution.

We must operate on the assumption that the authorities, with all their good intentions, really have no interest in removing legislation from the statutes which in their view can be used to do their job more effectively.

Our approach has been to fight the subpoenas like 205 all the way to the Constitutional Court to obtain a definitive legal position on it.

The law in South Africa is not settled yet as far as it relates to a journalist's rights regarding the confidentiality of his/her sources. As it stands at present there is no privilege for a journalist and a journalist must always testify when called upon to do so.

However, a serious conflict exists. The constitution of the South African Union of Journalists states emphatically that a journalist shall protect confidential sources of information. These principles are also enshrined in the Declaration of Principles of the Conduct of Journalists which is published by the International Federation of Journalists.

Even our pro-Constitution courts have been sensitive to this issue.

Generally the law as it stands, without reference to the Constitution, does not afford journalists any protection. There are serious consequences for journalists who fail to appear in court. Until 1993 extreme penalties were available to make journalists talk.

There is no general privilege for journalists in our pre-Constitution law. Privilege can only be claimed under the "just excuse" banner. However, according to a lawyer I consulted, our courts have never extended any privilege *per se* to journalists, especially not before 1994.

In our post-Constitution period there is no

clarity on the issue. The matter has not yet been fully tested by our courts.

The argument could be made that a journalist, when called upon to testify and reveal sources, would be able to raise fear of reprisal, fear of being ostracised in his profession as just excuses why he should not reveal his sources. However, until 1994 this argument was not accepted until the case of the State v Cornelisen.

The question must be asked why a journalist should not be compelled to give evidence about a murder when a doctor or psychiatrist in the same situation would be compelled to do so. Is the confidentiality of the journalist's source so much more sacred than the public interest in getting a criminal convicted?

In the Cornelisen case the journalist was sentenced to a year in prison for not testifying. This caused outrage and changes were made to Section 205. Cornelisen appealed and the court held that he had a just excuse to refuse to testify. The excuse involved the argument that he and his newspaper needed to maintain a confidential relationship with the public, that there could be a perception that he was a police informer and that the information could have been obtained from hundreds of other people (the audience at a meeting at which Peter Mokaba chanted "kill the boer, kill the farmer").

This case extended the meaning of the words "just excuse" and was a small step forward, although it was pre-Constitution. There is no test of Section 16 of the Constitution. In Cape Town we believe that our approach has demonstrated our impartiality under hostile conditions, has safeguarded our credibility and, in spite of the death threats and other forms of intimidation, saved our staff from physical harm.

Now we are just waiting for somebody like Frank Kahn to make it possible for us to have our day in court.

Section 16 of Chapter 2 of the Bill of Rights: Everyone has the right to freedom of expression, which includes:

- freedom of the press and other media
- freedom to receive and impart information and ideas
- freedom of artistic creativity
- academic freedom and freedom of scientific research.

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