The 'Chilling Effect': Are Journalistic Sources Afforded Legal Protection?

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Various academics have described 'whistleblowers' as persons who disclose unauthorised information either internally or externally.[1] Other academic literature, however, submits that whistleblowing solely relates to disclosures which are made in the public domain.[2] This lack of a conclusive definition of whistleblowing has ensued mixed approaches to the way in which whistleblowers are handled, as well as the legal protections individuals are afforded, should they decide to leak information.

The option for whistleblowers to make unauthorised disclosures to journalists provides an alternative means to making these disclosures through internal, official channels. In a democratic society, the media play a central role in ensuring that whistleblowers are afforded a voice, which may have gone unheard had they chosen an alternative route of disclosure[3]. Journalism therefore relies on the distinct ability to offer protection to sources and whistleblowers[4]; if the identity of a whistleblower was to be revealed, there could be serious consequences, from workplace reprisals to prosecution.[5] Nevertheless, this essay will seek to prove that domestic law does not provide adequate protection for journalistic sources in compliance with Art.10 European Convention on Human Rights (ECHR)[6], resulting in a potentially detrimental effect on the future flow of whistleblowers whilst undermining the role of the journalist in society.

Firstly, this essay will explore the high standard of protection set by the European Court of Human Rights (ECtHR) before ensuing to ascertain that the law in the United Kingdom (UK) does not adequately meet such standards.

European Court of Human Rights

In the case of *Goodwin v United Kingdom*[7], the aforementioned high standard was set by the ECtHR for journalistic source protection.[8] The court held that the reason in which the company in this case, Tetra, sought disclosure of the journalistic source, was to take action against them as the source was presumed to be an employee. The court held that this reason was sufficiently outweighed by the interests of a free press in a democratic society and therefore the order requesting the disclosure of the source was deemed to breach Art.10 of the ECHR. The court held that the protection of sources 'is one of the basic conditions for press freedom'[9]. Thus, if journalistic sources were not protected, this would deter future whistleblowers from disclosing information on matters of public interest, whilst 'the vital public watchdog role of the press may be undermined'.[10] This, leading to a chilling effect, which could only be justified where there is an 'overriding requirement in the public interest'[11] and which would subsequently have both direct and wider consequences.[12] The reasoning in Goodwin has been followed in several subsequent cases[13] and demonstrates that there is an element of some protection for journalistic sources within the law.

The ensuing case of *Sanoma Uitgevers BV v The Netherlands*[14] held that journalists could not be forced to hand over any material which may reveal a source unless a proportionality test is conducted by a separate body to the investigatory authority. The journalist in this case was required to provide the police with confidential photographs to allow them to identify a suspect in a criminal investigation; the photos were used by the police for this purpose only. Thus, on one hand this case can be argued to demonstrate a reinforcement of the protection of journalistic sources as it emphasises the need for a proportionality test. However, the decision in the case in not finding a violation of

Art.10 ECHR introduced ambiguity concerning the safeguards of journalistic source protection and therefore risked undermining the standards laid down in *Goodwin*. Although the proportionality test is favourable and does evidence strong protection of source identity, it also highlights that the legal protection afforded to journalists is not absolute. Therefore, even with such a high standard, it is still difficult to conclude that the legal protection for sources is certain.

The more recent case of *Telegraaf Media Nederland Landelijke Media BV and others v The Netherlands**[15]*** concerned the unauthorised disclosure of documents from the Netherlands Security and Intelligence Service. In this case, the ECtHR held that the Netherlands, by demanding documents from two journalists alongside placing them under surveillance, had violated Articles 8 and 10 of the ECHR. The ruling of this case provides that member states of the European Union cannot interfere with the rights of journalists to protect their sources under Art.10, the only exception being the justification of such interference by an overriding public interest requirement. This case is therefore consistent with the previous law and emphasises the ECtHR's belief in the importance of journalistic source protection for press freedom in a democratic society, whilst reinforcing the importance of the potential 'chilling effect' that an order of source disclosure could have on such freedom. However, even if it can be established that ECtHR judgements support the protection of journalistic sources, there is no guarantee that this will be applied by UK courts.

UK Courts

Although s2 and s3 of the Human Rights Act (HRA) 1998 permits the UK court to apply ECHR and ECtHR decisions, there are also provisions in the Act protecting parliamentary sovereignty. In addition, s4 HRA also allows courts to make a declaration of incompatibility with a convention right. The UK, unlike Sweden[16], does not have an overarching journalistic shield law'[17] and instead the protections are spread across a number of different statutes. These include the Contempt of Court Act 1981; Police and Criminal Evidence Act 1984; Investigatory Powers Act 2016; and the Terrorism Act 2000.[18]

The first element of domestic protection covers court orders which compel journalists to disclose their sources. An application for a *Norwich Pharmacal* order[19] can be made to the court by an aggrieved party. If granted, an innocent third party who knows the identity of an alleged wrongdoer is compelled to disclose this information. It must be noted that this cannot be a blanket order – it must be relatively specific and targeted, as well as being necessary and proportionate. If the third party then refuses to disclose the alleged wrongdoer's identity, they are then liable for prosecution under the Contempt of Court Act 1981.

If an unassociated third party is threatened with prosecution, they are unlikely to be hesitant in disclosing the source's identity[20], therefore a particularly low standard of journalistic source protection was established in this case.

Section 10 of the Act, however, does provide safeguards for journalistic sources:

…no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible.[21]

There is however, an exception to this:

…unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.[22]

Following the amalgamation of the European Convention on Human Rights (ECHR) into domestic law by way of the HRA 1998, s.10 of the Contempt of Court Act is to be 'read and given effect'[23] in a way which is compatible with Art.10 ECHR. Freedom of expression under Art.10(2) can be restricted for numerous different reasons.[24] S.10 Contempt of Court Act includes 'interests of justice' as an exception to the confidentiality of journalistic sources, which is not one of the exceptions under Art.10(2) ECHR. This is problematic, because what is deemed to be in the 'interests of justice' can then be interpreted broadly.[25] This has an impact on UK court consistency with Art.10 and the ECtHR standards. Using different wording and different tests provide for inconsistent law whereby the UK courts

would arguably never come to the same result as the ECtHR. An example of this is the case of*Interbrew SA v. Financial Times Ltd*.[26]

In *Interbrew*, the Court of Appeal held that a focus on the bad intentions and 'malevolent motive' of the source was sufficient to justify ordering the identity of the source to be revealed 'in the interests of justice.' The Financial Times then applied to the ECtHR, who held that without significant evidence, the UK court could not assume that the source had acted in 'bad faith'.[27]

The need for compelling evidence in order to determine the motive of the source poses particular problems in relation to *Norwich Pharmacal* orders, which are often made quickly and without notice. Consequently, the court only hears the submission from the side requesting the order, who are applying to reveal the source's identity. Therefore, there is no opportunity for a response and no submissions put forward for why the order should not be granted, unlike other court room settings where there is an applicant and a respondent.

This creates further problems as it is inherently difficult to determine the motivation of the source if the source's identity is unknown. The ECtHR held that the evidence of their bad faith must be 'compelling', but without the opportunity to question the source themselves, how can this be plausible? This creates a circular argument and highlights that the principle of journalistic source protection which was established in *Goodwin* has been honoured in the UK more often in the breach of such rule, rather than in its compliance.[28] The ECtHR have found that British judges frequently request access to journalistic sources,[29] regularly 'fail[ing] to get the balance right.'[30] Thus, evidencing further the inconsistent approach to journalistic source protection and demonstrating that there is not a strong or certain level of protection for journalistic sources in full compliance with Art.10 ECHR.

The Possibility of Future Disclosures

A further example of inconsistencies within the law is the case of *Camelot v Centaur Communications.*[31] Here, a journalist published an article based on information they had received from a source regarding the confidential financial records of the company, Camelot. Camelot then obtained an order preventing the journalist from using such information whilst requiring the journalist to provide the company with the leaked information, so they were able to identify the source. On appeal, the Court of Appeal upheld the order and attempted to differentiate the current case from that of *Goodwin*. They suggested that the current case concerned the possibility of future disclosures, as the disclosed information had already been released by the company themselves at this point. It is submitted, however, that this distinction is inadequate and that in *Camelot* and *Goodwin*, both of the company's intentions were the same – to identify and take action against the source in order to prevent future disclosures. The court in *Camelot* focused on the particular source rather than giving consideration to the principle of journalistic sources as a whole, demonstrating the inconsistent approaches in the law and evidencing that protection of journalistic sources is undoubtedly not strong, nor is it certain.

Obtaining Journalistic Material

The second element of domestic protection concerns procedures that the police must abide by when obtaining a warrant to search and seize journalistic resources and materials.

Where there is journalistic material, the Police and Criminal Evidence Act (PACE) 1984 places police under an obligation to apply for a court order using a certain procedure. S.1 PACE 1984 states:

The officer must: identify that there are reasonable grounds an indictable offence has been committed, that the material is likely to be of substantial value to the investigation and relevant and that it is in the public interest to order disclosure. The police must try to use other methods to obtain the material first unless those methods would be 'bound to fail.[32]

Although the above-mentioned safeguard does provide some form of protection to journalists and the exposure of their sources, the police have used other methods (i.e. the Terrorism Act 2000) to obtain journalistic materials. An

example of this is the case of *Miranda v Secretary of State for the Home Department.* [33] In this case, David Miranda, the partner of journalist Glenn Greenwald, was detained under the Terrorism Act 2000[34] because the UK Security Service believed he was carrying material leaked by Edward Snowden. Miranda argued that police had acted unlawfully, because they had stopped him for a purpose other than those permitted by the statute and that the use of such statute was in breach of Art.10 ECHR, particularly in relation to journalistic material. The Court of Appeal found that the stop and search had been lawful in this case, evidencing the loopholes in the domestic legal protections for journalistic sources. However, they did also declare that this power under the Terrorism Act 2000 was incompatible with Art.10 in regards to journalistic material, as it did not provide adequate protection for journalists.[35] This case therefore demonstrates the difficulties of a mismatch of legislation rather than a stand-alone journalistic protection law and again evidences that the protection of journalistic sources is neither strong nor certain.

Surveillance and Interception of Communications

The third element of domestic protection concerns surveillance and the interception of communications. The Snowden leaks have revealed the mass secret interception of the UK and the USA's surveillance capabilities.[36] Snowden alleged that the Government Communications Headquarters (GCHQ) were unlawfully accessing undersea cables to gather communication data, whilst storing vast quantities of this for analysis and hacking into telephone communications. The Intelligence and Security Committee stated that these allegations were within the law on the basis of legislation[37]; where there were large quantities of data interception, this was lawful because authorities do not read through every communication but instead, filter it for trigger words. This decision in this case has been described as an 'aggressive interpretation of [the] laws'[38], evidencing the broad scope of such legislation with limited judicial oversight. The need for judicial oversight reflects the 'conflicting incentives' of the police and intelligence agencies, who are 'institutionally unlikely to give adequate weight to privacy concerns.'[39]

The recent introduction of the Investigatory Powers Act (IPA) 2016, however, improved the aforementioned lack of independent judicial oversight. S.29 of the Act requires that the application of a warrant by the intercepting authority:

…must contain a statement that the purpose, or one of the purposes, of the warrant is to identify or confirm a source of journalistic information.[40]

However, the Act is described as providing inadequate safeguards and further conflicting with the Art.10 right.[41] The main problem is that the Act allows for the retention of large quantities of data – internet providers are now required by law to store all internet histories and communication data. It has been argued by the authorities that the retention of data would only be relevant in circumstances regarding crime or to identify a sender of an online communication.[42] In doing so, internet providers only store websites, rather than webpages. This is arguably still very intrusive as it would still be possible to develop a detailed picture of an individual's browsing history by the web addresses of such websites.

In the case of *Secretary of State for the Home Department v Watson and others* [43], the legality of the Data Retention and Investigatory Powers Act (DRIPA) 2014 was challenged on the basis that the powers were haphazard and should have been restricted to serious crimes. The Court of Appeal ruled that this Act was unlawful, which has an impact on the current IPA 2016, as a large amount of powers set out under DRIPA were incorporated and expanded upon in the IPA 2016. It is unsurprising then, that there have already been numerous challenges to the legality of the IPA 2016.[44] This further inconsistent approach to the legislation provides additional evidence that the original statement is incorrect. The law is most definitely weak and uncertain when it comes to journalistic source protection, thus making it impossible for any whistleblower to correctly predict whether their identity would be ordered to be disclosed under the current domestic system.

Public Interest Disclosure Act 1998

It is also important to note that whistleblower anonymity would render the source unable to seek protection under the Public Interest Disclosure Act (PIDA) 1998.[45] However, the PIDA is problematic in itself, as it can only be used after a person suffers detrimental treatment or dismissal. Furthermore, it is very difficult to receive protection under

PIDA when making disclosures to the media.[46] Therefore, the protection under PIDA for journalistic sources would be weak; further emphasising the need for other areas of the law to provide a strong safeguard for such sources.

Other Jurisdictions

Other jurisdictions provide stronger protection for journalistic sources; a consideration of such may be beneficial in the hope that the UK may follow suit. The Freedom of the Press Act 1949 in Sweden provides protection for the confidentiality of journalistic sources as well as providing protection for the journalist[47], as threats against the right to speak freely are described by the Swedish government as threats against democracy.[48] In addition, although Norway does not have a specific Freedom of the Press Act, it does have much stronger protections contained within its legislation than the UK.

Conclusion

In conclusion, this article has identified that the UK legal regime does not provide journalistic sources with strong and certain protection in full compliance with Art.10 ECHR. Whilst the ECtHR places high standards on the protection of journalistic sources, UK domestic law fails to adhere to these standards, resulting in a potential 'chilling effect' where whistleblowers are likely to be deterred from disclosing public interest concerns to the media; the repercussions of which could have inauspicious consequences on our democratic society.

In a post-Snowdon era, the current surveillance powers also pose further problems as journalists and their sources would be unaware if their communication was to be intercepted.[49] As a result, many journalists are now adopting techniques in an attempt to avoid detection.[50] The increasing role of online communications as well as the evolving journalist–source relationship should also be taken into consideration. Online whistleblowing platforms need to be considered in any future legislation in order to ensure journalists are protected in this internet age. Although firstly, it is essential that protection overall is made stronger and consistent.

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Notes

[1] See Janet Near and Marcia Miceli, 'Organizational dissidence: The case of whistle-blowing' (1985) 4 Journal of Business Ethics 1; M Chiasson, H Johnson and J Byington, 'Blowing the Whistle: Accountants in Industry' (1995) 65(2) CPA Journal 24

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[3] Ashley Savage, *Leaks, Whistleblowing and the Public Interest: The Law of Unauthorised Disclosures* (Edward Elgar Publishing 2016) 91

[4] Judith Townend and Richard Danbury, 'Protecting Sources and Whistleblowers in a Digital Age' (Information Law and Policy Centre, Institute of Advanced Legal Studies: An initiative supported by Guardian News and Media, 2016)

[5] Depending on which category the whistleblower falls into, unauthorised disclosures may lead to civil consequences or criminal consequences. Breaches of professional codes could also lead to dismissal.

[6] European Convention on Human Rights 1950

[7] App no 17488/90 (ECtHR 1996)

[8] Eva-Maria Poptcheva, 'Press freedom in the EU' (2015) European Parliamentary Research Service Briefing Paper PE 554.214 <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf> accessed 1 May 2018

[9] ibid

[10] ibid

[11] ibid

[12] Direct consequences include the risk of punishment and restricted expression for the journalist and the source. Wider consequences include a reduction in the likelihood of publications from sources whilst reducing the number of sources who take information to journalists. Citizens would also be deprived of public interest matters.

[13] See *Voskuil v The Netherlands* App no 64752/01 (ECtHR 22 November 2000); *Becker v Norway* App no 21272/12 (ECtHR 5 October 2017)

[14] App no 38224/03 (ECtHR 14 September 2010)

[15] App no 39315/06 (ECtHR 22 November 2013)

[16] Which has a Freedom of the Press Act (Tryckfrihetsförordning) 1949 (Sweden)

[17] (n 3) 96

[18] This is not an exhaustive list.

[19] *Norwich Pharmacal Co. and others v Customs and Excise Commissioners* [1974] AC 133

[20] Unlike journalists, third parties are also more likely to disclose information as they do not have to abide by the National Union of Journalists Code of Conduct.

[21] Contempt of Court Act 1981, s 10.

[22] ibid

[23] Human Rights Act 1998, s 3(1).

[24] Including in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[25] (n 3)

[26] [2002] EWCA Civ 274

[27] *Financial Times Ltd v United Kingdom* App no 821/03 (ECtHR 15 December 2009)

[28] (n 4)

[29] ibid

[30] (n 3) 98

[31] *Camelot Group Plc v Centaur Communications Ltd* [1999] Q.B. 124

[32] Police and Criminal Evidence Act 1984, s 1.

[33] [2014] EWHC 255

[34] Terrorism Act 2000, Schedule 72(b).

[35] *Miranda v Secretary of State for the Home Department and Commissioner of Police for the Metropolis* [2016] EWCA Civ 6

[36] Dimitris Xenos, 'The Guardian's publications of Snowden files: assessing the standards of freedom of speech in the context of state secrets and mass surveillance' (2016) 25(3) Information & Communications Technology Law 201

[37] See Intelligence Services Act 1994; Regulation of Investigatory Powers Act 2000

[38] T McIntyre, *Judicial Oversight of Surveillance: The Case of Ireland in Comparative Perspective* (Edward Elgar 2016) 6

[39] ibid

[40] Investigatory Powers Act 2016, s 29.

[41] Rob Evans, Ian Cobain and Nicola Slawson, 'Government advisers accused of 'full-frontal attack' on whistleblowers' *The Guardian* (London, 12 February 2017) <https://www.theguardian.com/uk-news/2017/feb/12/uk-government-accused-full-frontal-attack-prison-whistleblowers-media-journalists> accessed 5 May 2018

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[43] [2018] EWCA Civ 70

[44] See Alan Travis, 'Liberty launches legal challenge to 'state spying' in snooper's charter' *The Guardian* (London 10 January 2017) < https://www.theguardian.com/world/2017/jan/10/liberty-launches-legal-challenge-to-state-spying-in-snoopers-charter> accessed 30 April 2018

[45] Presuming that the whistleblower is an employee.

[46] See Public Interest Disclosure Act 1998, ss 43G, ss 43H.

[47] Such protection would have been beneficial in *R v Kearney* (November 2008)

[48] Government Offices of Sweden, 'The Swedish Press Act: 250 years of freedom of the press' (The Government of Sweden 2016) < http://www.government.se/articles/2016/06/the-swedish-press-act-250-years-of-freedom-of-the-

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[49] Unless later disclosed in a court trial.

[50] Emily Bell, Taylor Owen, Smitha Khorana and Jennifer Henrichsen, 'Journalism After Snowden: The Future of the Free Press in the Surveillance State' (Columbia University Press 2017)

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