

Human Rights Committee advance draft General Comment on freedom of expression

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During its 101st session in New York in March 2011, the Committee started its second reading of the draft general comment No. 34 on Article 19 of the *International Covenant on Civil and Political Rights* (the Covenant), which covers freedom of opinion and expression. The first reading of the General Comment was concluded in October 2010. Mr. Michael O'Flaherty is the rapporteur of the extensive General Comment which will replace the earlier and more limited General Comment No. 10.

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Following the Committee's call for stakeholder comments by end of January 2011, many States, human rights organisations, academics and other actors provided input into the General Comment. In total, the Committee received 70 submissions. All comments were considered, and many discussed by the Committee during the public meetings. Mr. O'Flaherty said that the level of interest among stakeholders was extremely high and that, overall, the commentators welcomed the new General Comment on freedom of opinion and expression.

The Committee evaluated the General Comment on a paragraph-by-paragraph basis, and a number of paragraphs triggered lengthy and contentious discussions. In the first section of the General Comment under the heading 'General remarks', the Committee decided to incorporate a paragraph 2*bis* as proposed by Mr. Gerald Neuman, including a reference to the enjoyment of the freedom of opinion and expression as a necessary condition for realizing the principles of, *inter alia*, transparency.

A lengthy discussion took place on the insertion of some articles containing guarantees for freedom of opinion and expression in paragraph three. Some Committee members contested the inclusion of article 17 (right of privacy) in the list, arguing that its relation to freedom of opinion and expression is unclear. At first the Committee deleted the reference to article 17 but later reinserted it on the basis that paragraph 19 makes a reference to article 17, and therefore the list in paragraph three would be incomplete without the reference. The proposal to include a reference to article 24 (right to nationality) did not find support, with Mr. Krister Thelin remarking that it would lead to the proposal of many more unrelated articles. Similarly, the Committee did not support other proposals which added references to economic, social and cultural rights on the basis that minimalist rather than expansive language was preferred. The Committee included language stating that freedom of expression is integral to exercise the right to vote.

The Committee agreed to delete 'any form of discrimination' from the sentence 'No person may be subjected to any form of discrimination and impairment of any right...' in paragraph nine. Mr. Rafael Rivas Posada observed that the 'discrimination' and the 'impairment' of any right are two different issues, and that discrimination is already dealt with in another paragraph.

The Committee received a large number of comments containing proposals for the modification of paragraph 11. Firstly, the square brackets around 'commercial advertising' were removed, thereby including it as a protected form of freedom of expression. However, because the Committee did not consider commercial advertising to be on equal footing with the other levels of speech, they included the reference in a separate sentence: 'It may also include commercial advertising'. Accordingly, the footnote to the case *Ballantyne v. Canada*, Nos. 359/1989 and 385/1989 was removed because in that decision the protection of commercial advertising was considered equivalent to other means of expression.

Secondly, Mr. Neuman raised the importance of the right to receive information, especially in relation to

political issues, and argued that this right should be treated equally to the right to express ideas. Therefore, a second sentence was added to paragraph 11: 'This right includes the expression *and receipt of communications* of every form of idea [...].'

A third contentious issue related to the proposal by several NGOs to reference the right of expression of sexual orientation and gender identity. The experts were generally reluctant to include such a reference. Sir Nigel Rodley voiced concern about the generic quality of the terms, while at the same time emphasising that the guarantee of expression covers sexual orientation and gender identity. As a compromise, Mr. O'Flaherty proposed including 'forms of dress and other manners of expression of sexual orientation and gender identity' in the list of means of expression in paragraph 12. However some Committee members, including Sir Rodley, Mr. Thelin, Mr. Ahmad Amin Fathalla and Ms. Christine Chanet, articulated their discomfort with referencing sexual orientation and gender identity, which led to just the addition of the phrase 'forms of dress' to paragraph 12. The Committee also decided to take out paragraph 13, since the freedom to express oneself in a language of one's own choice was not considered central to the freedom of expression.

Paragraph 15, though short, was also subject to heated debate. Most comments focussed on whether to strengthen the recommendation: specifically, whether 'must' should be replaced by 'should', and 'encourage' by 'guarantee'. Ultimately it was agreed that the two sentences should be compressed into one, reading: 'As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.'

Paragraph 16, on the independence of public broadcasting services, was the only fully bracketed paragraph in the draft General Comment. NGOs and many national human rights institutions (NHRIs) have urged the retention and even strengthening of the paragraph, but experts were divided on the matter. On the one hand, Ms. Iulia Motoc argued that paragraph 16 should be retained because a reference to media independence is fundamental given some practices of excessive state control in the global South. Mr. Thelin and Ms. Chanet did not support the paragraph as it is drafted, since it can be counterproductive to provide instructions on how the state could ensure media independence as the second half of the paragraph tries to do. For example, the prescriptions in the second half of the paragraph are very weak, and they do not support any particular model to guarantee independence. Furthermore, Ms Chanet observed the issue was far too complicated to elaborate on properly and there is no case law available. Taking note of these concerns, the Committee adopted a revised version of paragraph 16: 'State parties should ensure that public broadcasting services operate in an independent manner. In this regard, State parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.'

Throughout the session, the Committee struggled with the incorporation of a paragraph on new or social media. Multiple commentators and all members of the Committee unanimously expressed the necessity of a contemporary General Comment, specifically given the use of new media in the situations in North Africa. Over the course of the session, Mr. O'Flaherty drafted a new paragraph on social media. The paragraph 16bis says: 'States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.'

The last meeting on the 24 March started with a lengthy debate regarding the specification of public bodies in paragraph 18. Some experts favoured mentioning all three branches of government. Others wanted to remove specific reference to the judiciary. Mr. O'Flaherty resolved the issue by pointing out that the Committee had already addressed the issue in paragraph six. Therefore, he proposed alternative language: 'Public bodies are as indicated in paragraph 6 of this General Comment.' Under the same section on the right to access of information, a suggestion was made to include an extra paragraph on the leaking of information, in particular on whistleblowers. While most Committee members recognized that the treatment of whistleblowers was an important topic, they did not want to include it in the General Comment since they had no solid jurisprudence in that area.

The subsequent section under the heading 'freedom of expression and political rights,' consists of merely one paragraph. It was observed that the two middle sentences of the paragraph are identical to those in paragraph 14. The Committee, however, found itself unable to remove the two sentences arguing that the paragraph would lose meaning.

In terms of paragraph 23, which covers the application of restrictions on freedom of opinion and expression, the Committee had received a proposal that the draft Comment include a reference not only to the principle of necessity but also to that of proportionality. Though Ms. Chanet pointed out that the principle of proportionality is already dealt with extensively in paragraph 35, the Committee believed that a reference to proportionality would also be appropriate in the context of paragraph 23. Hence, a phrase will be inserted as follows: 'restrictions must meet a strict test of necessity and proportionality'.

The final paragraph under scrutiny was paragraph 24. The main criticism was that preventive strategies were overlooked. A human rights organisation recommended the draft Comment include that 'State Parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right of freedom of expression.' The Committee was sympathetic to this approach, and adopted that wording.

Furthermore, it was noted that the International Court of Justice has found that, in addition to journalists and human rights defenders, judges and lawyers also need special protection. Again, this suggestion was added to the text in paragraph 24 without any resistance.

The Committee will continue the second reading of the draft Comment in July 2011 in Geneva.

Other resources

Extensive notes by the Open Society Institute on the public meetings on the second reading of General Comment 34 are available at <http://freedominfo.org/documents/HRCnotesMarch2011.pdf>