

TREATY BODY MONITOR

International Service for Human Rights



Human Rights Monitor Series

HUMAN RIGHTS COMMITTEE

97TH SESSION

FIRST READING DRAFT GENERAL COMMENT NO. 34
23 & 27 OCTOBER 2009

Overview of key issues	1
Freedom of expression and freedom of opinion	1
Freedom of expression and freedom of opinion in the context of society	2
Two dimensions of freedom of opinion and expression	2
Link between the freedom of opinion and expression and other human rights	2
Derogations and reservations	3
Content of freedom of opinion	3
Other issues	4

Overview of key issues

On 23 and 27 October 2009 the Human Rights Committee (the ‘Committee’) held its first reading of the Draft General Comment No. 34 (the ‘Draft Comment’) on Article 19 of the *International Covenant on Civil and Political Rights* (the ‘Covenant’). Article 19 safeguards the rights to freedom of opinion and expression from any interference. The Draft Comment was authored and presented to the Committee by Rapporteur and Committee member, Mr Michael O’Flaherty. During the two-day meeting, Committee members discussed the first nine paragraphs of the 56-paragraph draft. Of these nine paragraphs, the first eight provisions cover general remarks (derogability and reservations, relationship with other human rights, States’ obligations to respect freedoms of opinion and expression, obligation on incorporation into domestic law), and one provision addresses substantive issues related to the freedom of opinion.

The current interpretation of Article 19 was adopted by the Committee in its General Comment No. 10¹ in 1983. The Draft Comment proposes to replace the current ‘skimpy’² Comment No. 10. However, in light of the absence of agreement between Committee members, it was provisionally decided to leave discussion on the relationship of General Comment No. 10 with the new General Comment No 34 for further consideration, and come back to the question at the end of the Committee’s first reading of the Draft Comment.

Freedom of expression and freedom of opinion

Paragraph 2 of the Draft Comment expressly refers to the ‘freedoms of opinion and expression’. The original version of the proposed draft provision was amended during the discussion upon suggestion of Mr Rodley. In

¹ General Comment No. 10 ‘Freedom of Expression (Art. 19)’ A/38/40.

² Mr Rodley.

his opinion, for the sake of precision, the provision in question should specifically mention freedom of opinion *and* freedom of expression as two separate rights. Mr Rodley's proposal was followed by a long discussion among the Committee members, and was supported by other members, including Mr Lallah and Mr Amor. The main part of the discussion with regard to paragraph 2, however, was devoted to the role of the two rights in a broader social context.

Freedom of expression and freedom of opinion in the context of society

The text of the Draft Comment describes the freedoms of opinion and expression as 'cornerstones for any free and democratic society'. This point was the subject of substantial discussion by the Committee. Mr Lallah suggested to not link the two freedoms to 'free' and 'democratic' societies *only*, as was originally written in the Draft Comment. This idea was supported by Mr Amor, in whose view the freedoms of opinion and expression were the key elements for *any* society, regardless whether it was democratic or not. As he stated, the two freedoms are individual rights, and any individual should enjoy them regardless of the society in which she or he lives. Mr Amor further stated that a reference to democratic society may lead to a misunderstanding that in a non-democratic society an individual does not automatically have these rights. Mr Lallah reiterated that both rights covered in the Draft Comment were supposed to be of international nature.

This position was not shared by all members of the Committee. Committee Chairman Mr Iwasawa disagreed with Mr Amor, stating that the two freedoms were of particular importance specifically in conditions of a democratic society. That position was echoed in the statement of Mr Thelin that in 'deleting the reference to the democratic society we would make a false statement'. In turn, that would lead to erroneous 'transformation' of some non-democratic societies to 'democratic'. Mr Rodley reiterated this view, adding that 'freedom of opinion and expression should be a cornerstone for any society because any society should be free and democratic'. Concluding the dialogue on that particular issue, Mr Rodley suggested to leave the provision at this stage, and to add at a later stage a separate provision on the importance of freedom of opinion and expression for *any* society. Mr O'Flaherty, Mr Amor and Mr Bouzid also favoured a new sentence specifying the importance of the rights regardless of the type of society.

Two dimensions of freedom of opinion and expression

During the discussion, Mr O'Flaherty highlighted the innovative approach of the Draft Comment in considering both the subjective and objective dimensions of the two rights. In addition to emphasising the importance of the two freedoms for society, the Draft also describes them as 'indispensable conditions for the full development of the [individual] person'. As Mr O'Flaherty stressed, this subjective element of the two freedoms had never previously been explicitly stated by the Committee.

Link between the freedom of opinion and expression and other human rights

In his Draft, Mr O'Flaherty sought to highlight the relationship between the freedoms of opinion and expression to other rights and freedoms guaranteed under the Covenant, namely, to Articles 14 (right to equality before courts and tribunals and to a fair trial), 17 (right to privacy), 25 (political rights) and 27 (protection of minorities).

However, Mr O'Flaherty's attempts to link the freedoms of expression and opinion with the rights listed above gave rise to debate among the Committee members. The original proposal to link the rights was not welcomed by the majority of the Committee members, including Ms Chanet, Mr Rodley, Ms Majodina, Mr Rivas Posada, Mr Sanchez-Cerro, and Mr Lallah. In particular, Ms Chanet questioned the link between the freedom of opinion and expression and the right to equality before the courts and tribunals and to a fair trial as

enshrined into Article 14 of the Covenant. She also noted that the Draft mentioned only the links with civil and political rights, but not with social and economic rights. These views were supported by Mr Rodley, and Mr Rivas Posada. As Mr O’Flaherty later explained, having mentioned the link with Article 14 of the Covenant he meant primarily, the right to translation. Reference to other articles mentioned above was accepted by the Committee without any debate. Mr Bouzid proposed to make explicit reference to the links between the two freedoms and to Article 24 (rights of the child). However, this proposal was not supported due to the narrow nature of Article 24, as explained by Mr O’Flaherty.

Derogations and reservations

One of the most noteworthy issues of the Committee’s reading was the issue of derogability of rights. For the first time, the Committee agreed that the right to hold opinions without interference under Article 19(1) was a non-derogable right, under which no reservation may be submitted by States to the Covenant. In paragraph 3 of the Draft text, Mr O’Flaherty explained the basis for this non-derogability by highlighting the ‘overlap of application’ between the freedom of opinion and the non-derogable freedom of expression as enshrined in Article 19 and freedom of thought, conscience and religion as covered in Article 18. This was reiterated more specifically in paragraph 4 of the Draft Comment which stated that by virtue of ‘inexorable relationship’ between Article 19(1) which covers freedom of opinion and Article 18 which enshrines freedom of thought, no reservation to Article 19(1) is permissible. This link or extension suggested in the Draft Comment was not obvious for other Committee members. Ms Chanut was not sure that it is accurate to say that Articles 19 and 18 have similar scope or ‘overlap’ of application. Similarly, Ms Majodina suggested that the text be more precise on the issue of derogability and complement the provision with a more clear statement as to why Article 19(1) is non-derogable. In addition, this logic was not persuasive for Mr Rodley, in whose view non-derogability of Article 18 does not make Article 19(1) non-derogable as well.

With respect to the freedom of expression, while the proposed draft text stated in paragraph 5 that a ‘general reservation’³ to the rights set out in Article 19(2) would be ‘incompatible with the object and purposes of the Covenant’ (despite the possible acceptability of reservations to ‘particular elements of’ Article 19(2)), the Committee’s discussion on this issue was not without animation. In particular, Ms Wedgwood expressed her concern about the inclusion of such a general prohibition of reservations to Article 19(2). She stated that such broad-ranging reference would be ‘imprudent’, in the context of some situations where a country might want to ratify a human rights treaty, but is, at the same time, ‘leery’ about ‘being caught up in situations it wants to deal with domestically’. These concerns were not shared by Mr Rodley who questioned the likelihood of these consequences occurring in practice.

Ms Wedgwood expressed further concern of linking the two freedoms with General Comment No. 24 on reservations. She highlighted the ‘unusual procedural circumstances’ which gave birth to this General Comment, and affirmed at the same time her wish to construct the present Draft General Comment on ‘uncontroverted’ grounds. Mr O’Flaherty did not share these views and argued that all general comments must be seen to be of equal status. He did, however, agree to amend the text of paragraph 5 to remove reference to a ‘general reservation’ and instead preclude any ‘reservation [that] would be against the object and purpose of the Covenant’.

Content of freedom of opinion

The Committee began its discussions on the substantive content of the freedom of opinion, outlined in paragraphs 9 and 10 of the Draft. Due to time constraints, the discussion was restricted to paragraph 9, which draws upon the text of the current General Comment No. 10 in restating the non-derogability of ‘the right to hold opinions without interference’ enshrined in Article 19(2). The paragraph goes on to outline the right of

³ Mr O’Flaherty highlighted that he borrowed the term ‘general reservation’ from the Committee’s General Comment No. 24: ‘Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant’, CCPR/C/21/Rev.1/Add.6. See paragraph 8.

persons to be free from any form of discrimination on the basis of his or her opinions, and includes a non-exhaustive list of the forms of opinion which are protected, and ways in which the freedom can be violated. In contrast to the Draft's extensive commentary of the freedom of expression, the 'thinness' of the content on freedom of opinion was acknowledged by Mr O'Flaherty, who pointed to the lack of significant jurisprudence of the Committee that focuses exclusively on the freedom of opinion. In this context, Mr O'Flaherty welcomed a proposal made by Mr Amor to include the issue of the recording in some countries of individual's political and religious views on national identity cards and in the files of public and private agents.

Other issues

The Committee also considered a number of other procedural issues in their first reading of the draft, without substantial discussion or disagreement among Committee members. Paragraph 6 outlines the **nature of States' obligations** with respect to Article 19, and specifies both a negative obligation on the part of States to respect the freedoms of opinion and expression (this obligation was specified to be binding on all branches of the State, and other public or governmental authorities including semi-state enterprises), and a positive obligation of states to ensure the protection of persons 'from any acts of private persons or entities' that would impair the enjoyment of the two freedoms. While uncontroversial, Mr Salvioli was strong in emphasising the importance of the inclusion of this paragraph in the Draft. He stated that it was 'absolutely vital' that the Committee not adopt 'narrow' or 'classic' language in the context of the possible expansion of States' responsibilities under international human rights law, and further stressed the importance for the Committee 'not to lag behind the rest of the international community' in the context of human rights violations that are not perpetrated solely by States.

Paragraph 7 speaks of the obligation of States to ensure that the freedoms contained in Article 19 are subsequently **enshrined in domestic law** in accordance with General Comment No. 31. Mr O'Flaherty highlighted the importance of cross-referencing General Comment No. 31 for the benefit of States and to ensure the coherency and comprehensiveness of the Draft. The Draft also includes a paragraph (paragraph 8), described by Mr O'Flaherty as 'classic in its objectives', intended to guide States in their **reporting of Article 19 to the Committee**, including the need to provide information on the legal, administrative, judicial and policy measures implemented by States to protect the freedoms of opinion and expression.

The Committee will continue its first reading of the Draft General Comment No. 34 on Article 19 in its next session in March 2010 in New York.

Last revised and updated: 9 February 2010.

TREATY BODY MONITOR STAFF

Eléonore Dziurzynski, Communications Manager Geneva

Gareth Sweeney, Deputy Manager, Geneva

Katrine Thomasen, Manager International Programme, Geneva

Michael Ineichen, Human Rights Officer, Geneva

Michelle Evans, Representative to the UN, New York

Vanessa Jackson, Human Rights Officer, New York

AUTHORS OF THE REPORT

Kylie Marks, Intern

Viktoriya Romanova, Intern

ABOUT THE PUBLICATION

The *Treaty Body Monitor* forms part of the Human Rights Monitor Series produced by ISHR. It reports on each country reviewed by the six treaty bodies (all but the Committee on the Rights of the Child) and provides an overview of every treaty body session. It is currently an online publication that can be found at www.ishr.ch.

COMMENTS AND FURTHER INFORMATION

We would welcome your feedback on this publication so please send any comments and suggestions to information@ishr.ch. You can check the latest Treaty Body Monitor reports published on www.ishr.ch.

COPYRIGHT, DISTRIBUTION AND USE

Copyright © 2009 International Service for Human Rights

Material from this publication may be reproduced for training, teaching or other non-commercial purposes as long as ISHR is fully acknowledged. You can also distribute this publication and link to it from your website as long as ISHR is fully acknowledged as the source. No part of this publication may be reproduced for any commercial purpose without the prior express permission of the copyright holders.

ISHR accepts no responsibility for any inaccuracies arising from or connected to unapproved or unofficial translations of its publications or parts thereof.

DISCLAIMER

While every effort has been made to ensure the accuracy and reliability of the information contained in this publication, ISHR does not guarantee, and accepts no legal liability whatsoever arising from any possible mistakes in the information reported on, or any use of this publication. We are however happy to correct any errors you may come across so please notify information@ishr.ch.