Human Rights Committee adopts General Comment 34 on freedom of expression

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During its 102nd session in Geneva in July 2011, the Human Rights Committee (the Committee) adopted a new General Comment number34. The General Comment is on article 19 of the International Covenant on Civil and Political Rights (the Covenant) which covers freedom of opinion and expression. Mr Michael O'Flaherty was the rapporteur of this extensive General Comment, which replaces General Comment 10, the Committee's previous interpretation of article 19.[1] For a full list of the general comments developed by the Committee see here. In three public meetings (19, 20, and 21 July 2011) the Committee completed the second reading of paragraphs 25 to 54 and adopted the amended version of General Comment 34. For previous reports on the Committee's discussions on the drafting of this General Comment, see here and here.

Two main issues persisted throughout the meetings. Firstly, there was a general concern about language in certain paragraphs, which would open loopholes for States to avoid their treaty obligations. For instance, a recurring issue was Japan's proposal to change the word 'must' to 'may' throughout the General Comment. This was rejected by the Committee. Secondly, the fact that Committee members originate from many different legal cultures, occasionally posed a difficulty in reaching compromise and triggered lengthy discussions.

Many States, human rights organisations, and other actors provided input to the General Comment, amounting to a total of 350 submissions. Not all comments were considered during the public meetings, but many were discussed. The Committee evaluated the General Comment on a paragraph-by-paragraph basis and a number of paragraphs (24, 25, 28, 47-49)[2] triggered lengthy and contentious discussions. To make the negotiations flow more smoothly, the Committee opted to work with an implied consent approach.

An extensive discussion took place on the issue of the definition and meaning of the term 'law' (paragraph 24) reflecting the different legal backgrounds of the Committee members. The first reading of this paragraph had prompted heated debates around concerns to avoid giving the impression of imposing one system of law on other States. These debates continued at the second reading, in particular around the second sentence which read: '"Law" in this regard may include statutory law [and where appropriate case law].' The United States submitted a proposal to remove the whole second sentence, considering the meaning of 'law' to be evident. Conversely, Mr Lallah stressed that it is vital to have reference to statutory law in order to avoid condoning a judicial dictatorship in which all decisions are left to the courts. Eventually, the Committee agreed to the United States' proposal. Mr O'Flaherty further suggested adding 'enshrined in traditional, religious or other such customary law' in the final sentence in order to clarify the meaning of 'customary law'.

The Committee received two suggestions relating to the issue of the qualitative requirements for a norm to be considered 'law' (paragraph 25). Firstly, the Committee agreed that the requirement that 'it must be made public', while accurate, was not very elegant and should be changed to 'must be made accessible to the public'. Secondly, members agreed to add a final sentence to the end of the paragraph: 'Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts of expression are not.'

Negotiations on paragraph 30, on treason laws and state secrets laws, led to a heated debate over the misuse of treason laws and other provisions relating to national security to impose restrictions on freedom of expression. The second sentence in particular, in which the Committee gives an example of what would not be permitted in this regard,[3] triggered many concerns from stakeholders that giving only this example was too limited. Mr O'Flaherty acknowledged the concern, noting that the Committee has a practice of fleshing out general statements with reference only to their own jurisprudence, which can give a misleading impression that this is all there is to be said on a matter. Eventually, the second sentence was changed to '[i]t is not compatible with paragraph three, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such

information'.

The issue of whether defamation laws can carry penal sanctions (paragraph 47) was another source of robust debate. Some Committee members supported decriminalisation of defamation, while other members argued that criminalisation could be appropriate in certain cases, such as in the case of States or criminals owning newspapers and media outlets and using them to express defamatory speech and press forward their political agendas.

The Committee then continued with a lengthy debate about the controversial issue of blasphemy laws, an issue contained in paragraph 48. There was a clear divide on how to approach this topic with some members considering blasphemy laws to be inherently incompatible with article 19 and others insisting on their legitimacy. The divide and, at the same time, collaborative approach of the Committee was clearly illustrated with one member stating that 'while he would like to ban blasphemy laws outright, he felt that this would not enjoy widespread support and would actually undermine the body of General Comments of the Committee'.[4]

Paragraph 49 and 52, relating to to historical events, specifically 'memory laws' that penalise the promulgation of specific views about past events, were also extensively discussed. In paragraph 49, the Committee decided to delete reference to 'memory laws' and replace 'past events' with 'historical facts'.[5] This was based mainly on Germany's concern about the ambiguous reference of the term 'past events' to long term events such as World War II. This discussion continued in relation paragraph 52 where the Committee agreed to delete both sentences relating to 'hate speech';[6] Germany had raised concerns about the use of this term arguing that it lacked legal precision.

Overall, the general comment is a strong reaffirmation of the central importance for all human rights of the freedom of expression, and sets out narrow parameters within which the right can be restricted by states. Freedom of expression is crucial for the realisation of transparency and accountability, which again are essential for the protection of human rights. However, the discussion also demonstrated how difficult it is to achieve this goal; for instance, the different legal and cultural backgrounds of the Committee members not only made the task of drafting the general comment a difficult one, but also demonstrated the need to take great care to formulate it in such a way that it will be interpreted correctly without becoming subject to misuse.

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[1] General Comment 10 is four paragraphs long, while General Comment 34 is 52 paragraphs long, making it one of the longest general comments drafted by the Committee (only General Comment 32 on article 14: Right to equality before courts and tribunals and to a fair trial is longer at 62 paragraphs).

[2] Paragraph numbers refer to the adopted version of the text.

[3] The second sentence of paragraph 30 originally read, 'It is not compatible with paragraph 3, for instance, to invoke treason laws to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated information of legitimate public interest'.

[4]
Http://www.unog.ch/unog/website/news_media.nsf/
(httpNewsByYear_en)/E4D729D3E6E0CCD5C12578D4004CF6C0?OpenDocument

[5] The original phrase, 'Laws that penalise the promulgation of specific views about past events', now reads, 'Laws that penalise the expression of opinions about historical facts'.

[6] These sentences originally read, 'The Committee is concerned with the many forms of "hate speech" that, although a matter of concern, do not meet the level of seriousness set out in article 20. It also takes account of

the many other forms of discriminatory, derogatory and demeaning discourse.’