Germany's comments on Draft General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights

The second sentence of para. 15 charges States with promoting access to the media for minority groups. No fundamental right to public promotion can be derived from Art. 5 (1) of the German constitution (the "Basic Law" (Grundgesetz), see case report BVerfGE 80, 124, 133). Freedom of the press imposes a duty on the State to protect the press. This includes an obligation to take measures against monopolies of opinion. A concrete entitlement on the part of individuals to public promotion cannot however be derived from this principle. Insofar as public promotion is provided, the second sentence of Art. 5 (1) of the Basic Law imposes a duty of neutrality, which prohibits any differentiation on the basis of content. The targeted promotion of minorities creates further constitutional problems if it is linked to specific minority opinion content.

Such a far-reaching duty to promote minorities cannot be derived from either the wording or the object and purpose of Art. 19 of the Covenant. We should therefore seek to delete the second sentence of para. 15.

Paras. 18 to 20 assert an entitlement vis-à-vis the State to access documents which is derived from the right to freedom of information found in Article 19 (2) of the Covenant. Such an entitlement cannot be derived either from Article 19 (2) of the Covenant nor from the right to freedom of information found in the first sentence of Article 5 (1) of the Basic Law. Freedom of information comprises solely the right of unhindered access to publicly available information sources, e.g. newspapers, broadcast media and the Internet. It does not found any entitlement to access official files or documents that have not otherwise been made public. Notwithstanding minimum information standards, freedom of the press and broadcast media similarly does not entail any right to information from public bodies. A general right to access public records, as envisaged here, i.e. independent of the information seeker's involvement in pertinent proceedings, is granted in Germany under normal legislation (Freedom of Information Act) only; it is not enshrined in the constitution.

The interpretation of Art. 19 of the Covenant goes far beyond its wording. A “freedom of access to information” has been interpreted into the right to freedom of information, as also enshrined in Art. 5 (2) of the Basic Law. This interpretation ultimately (cf. para. 20) results in a demand that States enact “freedom of access to information legislation”. We cannot share this interpretation of Art. 19.

In addition, the passage in para. 19 concerning the right of each individual to request rectification or elimination of incorrect personal data confuses data protection rights (cf. sections 19 to 21 of the Federal Data Protection Act) with means of accessing information. It thus remains unclear whether a subjective right of access to personal data, based on personal interest, is being proposed here, or whether what is being discussed is unconditional access, comparable to that granted under the German Freedom of Information Act. Given the use of phrases including “be able to ascertain” and “control their files”, it would seem that data protection is what is being pursued here, which would logically lead to an interpretation of the right to information based on data protection. We reject the derivation of such a right to information based on data protection from Art. 19 of the Covenant.

Paras. 18 to 20 are thus rejected in whole.

The second sentence of para. 31 seems to suppose that journalists may not be charged with treason for disseminating “information of legitimate public interest”. This interpretation would conflict with the current legal position, pursuant to which a journalist may, even after the entry into force of the Act to Strengthen the Freedom of the Press in Criminal Law and Criminal Procedure Law, be convicted of inciting the disclosure of official secrets (section 353b of the Criminal Code) or of the offences enshrined in section 93 ff. of the Criminal Code, depending on how “legitimate public interest” is interpreted. In any case, it should be stated clearly that journalists, too, may be convicted of acts of treason, since freedom of expression and freedom of the media do not always take precedence over national security.

In para. 49 States parties are asked to consider decriminalising defamation, or at least only applying criminal law in the most serious of cases. It is also stated that imprisonment is never

an appropriate penalty. Such an interpretation would not be in conformity with the offence of defamation as defined in sections 185 ff. of the German Criminal Code, which allow for the possibility of imprisonment. From a fundamental rights perspective, when weighing freedom of expression against the personal freedoms enshrined in Art. 2 (1) in conjunction with Art. 1 (1) of the Basic Law, it does not irreducibly follow that it is always disproportionate to impose a prison sentence for acts of defamation pursuant to sections 185 ff. of the Criminal Code. Rather, a careful consideration of the opposing rights must be undertaken in each given case and a reasonable balance found. One cannot exclude a priori the conclusion that imprisonment may be reasonable in a specific case.
Under certain circumstances (e.g. in the case of a recidivist perpetrator on probation, who commits yet another act of sexual defamation) it may be necessary to impose at least a short prison sentence in order to protect the victim and for special preventative reasons. This is what sections 185 ff. of the German Criminal Code make possible. These provisions are furthermore a key instrument for fighting racist and discriminatory statements and for fulfilling our obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CEFRD).

Moreover, according to para. 49, the publication of untrue statements about public figures should have no legal consequences if they have been published in error but without malice. Germany considers this to be fine, as concerns criminal law, since the offence of malicious gossip (section 186 of the Criminal Code) requires intent. However, it would be problematic if public figures who had suffered considerably due to particular newspaper articles had no means of obtaining damages. The newspaper publishers could claim to have acted in error, and even proven gross negligence would have no consequences for them. Freedom of expression as defined in Art. 19 of the Covenant does not go that far.

Para. 51 contains comments on “laws that penalise the promulgation of specific views about past events”. Such laws are not prohibited as such by the Covenant, but should apparently be subjected to “review” to ensure that they violate neither freedom of opinion nor expression as defined in the Covenant. This review obligation is new. It did not exist in the previous General Comment No. 10 on Article 19. The Federal Ministry of the Interior does not see any necessity for a special review of this kind. The system for reviewing adherence to the Covenant envisages the filing of state reports in accordance with Art. 40 and communications

pursuant to Art. 41. Why there should be a need for a separate review for these laws is not explained in the General Comment. Such a review would furthermore not be particularly productive, since only a very few of the States parties to the Covenant have such legislation on their books. The obligation is also too vague. The Comment does not specify who should undertake this review, nor the form nor timeframe thereof. We therefore recommend that this passage be deleted.

The relationship between Art. 19 and Art. 20 described in paras. 52 and 53 seems to be rather awkwardly expressed. General Comment No. 11 on Art. 20 is far more succinct and so leaves less room for interpretation. It states: “In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.” We recommend that this wording be adopted here too.

The comments on the legal classification of “hate speech” contained in para. 54 are cursory in the extreme. Even within the EU, the legal positions on “hate speech” vary widely. The difficulties in interpretation and classification are not solved by the General Comment. It does not even contain a definition of the term “hate speech”, nor does it give examples of the types of conduct covered by Art. 20 of the Covenant. We therefore recommend that this section be deleted and not replaced.