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COMMITTEE OF EXPERTS ON HUMAN RIGHTS

Problems arising from the coexistence of
the United Nations Covenants on Human Rights
and the European Convention on Human Rights

Differences in the definitions
of the rights guaranteed

Comparison between Article 19 of the
UN Covenant on Civil and Political Rights
and Article 10 of the European Convention
on Human Rights

(Memorandum prepared by the
delegation of Italy)

Comparative Study of Article 19 of
the UN Covenant on Civil and Political
Rights and of Article 10 of the European
Convention on Human Rights (1)

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 10

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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- (1) The present study was undertaken on the basis of an examination of the preparatory work regarding the two provisions, of the jurisprudence of the Commission and the European Court of Human Rights and of the doctrines which have up to now appeared on the subject.

For the sake of brevity we have omitted the comments regarding the common provisions of the two articles because the object of the present note is to point out the differences, where they exist, in the contents of the two articles.

BIBLIOGRAPHY: Amongst the numerous studies on the subject, those that deal specifically with the articles in question are: ANTONOPOULOUS, La jurisprudence des organes de la Convention européenne des Droits de l'Homme, Leyden 1967; CAPOTORTI, Studio introduttivo sui Patti internazionali sui Diritti dell'Uomo, Padova 1967; DROST, Human Rights as Legal Rights, Leyden 1965; ROBERTSON, The European Convention for the Protection of Human Rights in the British Yearbook of International Law, 1950, p. 145 ff; VASAK, La Convention européenne des Droits de l'Homme, Paris, 1964; WEIL, The European Convention on Human Rights, Leyden 1963.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others.

(b) For the protection of national security or of public order (ordre public) or of public health or morals.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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.

A. The first paragraph of Article 19 "Everyone shall have the right to hold opinions without interference" has no direct reference in Article 10. Therefore one might suppose an apparent difference in the contents of the two articles.

1. The provision that inspired the compilation of the two Articles is Article 19 of the Universal Declaration: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference".

The above-mentioned paragraph poses a serious problem of interpretation in the framework of the Covenant itself regardless of the comparison with Article 10 of the European Convention.

In fact, the two versions, the English and the French ones, differ not only in form but also in substance; while the English text affirms that "Everyone shall have the right to hold opinions without interference" the French one states

that "Nul ne peut être inquiété pour ses opinions". The two formulations, while both recognising "the right to hold opinions" differ deeply because while one (the English one) limits itself to sanctioning the right that everyone may hold opinions without interference, the other (the French one) attempts mainly to establish that no negative consequence may derive from the simple fact that an individual has such and such an opinion.

2. Having established this difference, a comparison with Article 10 of the European Convention cannot be made on the basis of the English text or of the French text but only on the basis of the common concept that they express or presuppose, and that is, of guaranteeing the right to hold opinions.

The same right on the other hand, is guaranteed by Article 10 of the Convention in so far as it is explicitly included in the concept of freedom of expression: "This right shall include freedom to hold opinions.....".

In conclusion therefore it would seem that there is no substantial difference regarding the rights guaranteed by the two articles.

However, the fact of having inserted the right to hold opinions in a separate paragraph, and of having expressly provided that the limits contained in paragraph 3 apply only to those freedoms mentioned in paragraph 2, **excluding** therefore the right to hold opinions sanctioned in paragraph 1, implies that Article 19 gives an absolute value, free from all limitations.

Vice versa, the formulation of Article 10, in which the right to hold opinions is included in freedom of expression, brings it within the limitations provided for such freedom of expression in paragraph 1 and renders lawful the restrictions as defined in paragraph 2.

3. This being so and notwithstanding the differences stated, the two concepts of opinion and expression could be closely examined in order to evaluate whether the ratification of the Covenant and therefore of Article 19, determines in practice for the State a different obligation from the one assumed by the ratification of the European Convention, and particularly of Article 10.

We might, first of all, say that the right to hold opinions and freedom of expression are clearly of different character: the first is an exclusively personal matter, which remains in the mind of the person, while the second is an external objective and affects social relations, since it deals with the moment when the individual manifests to others his opinions.

The same Commission which elaborated the Covenant, realising this difference, while it did consider it opportune to establish limits to freedom of expression, did not think to limit freedom to hold opinions which neither laws nor public powers can affect.

If opinion is, therefore, a psychological moment, which exists in the individual, its freedom does not differ substantially from the common concept of freedom of thought, already recognised not only by Article 18 of the Covenant but also by Article 9 of the European Convention (1).

In consequence, the apparently greater guarantee of the right to hold opinions contained in Article 19 of the Covenant as compared to Article 10 of the European Convention is only apparent and not real since Article 9 of the Convention recognises freedom of thought (and therefore of opinion as that term has been defined) without applying the limits provided by paragraph 2 of Article 10.

B.

Article 10, paragraph 1

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Article 19, paragraph 2

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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(1) Article 9 "Everyone shall have the right to freedom of thought"

4. The sphere of individual application of the two norms does not present any difference. In fact, the French expression (toute personne) and the English expression (everyone) used in the two Articles are identical. Similarly there is no difference whatsoever concerning the attribution contained in the two norms: in both cases it is a matter of right (droit-right). (A nuance exists in the English version where on the one hand it is stated that "everyone shall have the right" while on the other "everyone has the right".)

5. If the title of the right "liberté d'expression" is also identical, the determination of its contents appears instead to be different. The first difference that one notices in the phrase of Article 10 "this right shall include freedom to hold opinions" which has no reference in Article 19, is only a formal one; since, as we have seen, freedom to hold opinions as that term has been defined is automatically sanctioned in the first paragraph of the same Article 19.

The further determination of the contents of the recognised right, consists on the basis of Article 10, of the freedom "to receive and impart information and ideas", on the basis of Article 19, of the "freedom to seek, to receive and impart information and ideas".

6. The first of such activities, "rechercher" (to seek) specified in Article 19 of the Pact, is not mentioned in Article 10 of the Convention. If one takes the literal meaning of the word "seek" it seems at least doubtful to attempt to define the notion of expression by means of this word without giving it a wider meaning than its usual one.

The selection of the verb and its implications, which were not examined closely during the "travaux préparatoires" of the European Convention, seem, however, to be controversial in the reports of the Commission which drew up the text of the Covenant. In fact, at that time it was pointed out that the utilisation of the word "to seek" (rechercher) included the right to carry out active researches and could imply an excessive interference in the affairs of others. The words "recueillir" and "rassembler" were thus proposed as alternatives which do not represent any such danger. However, the approved definitive text continues to use the verb "to seek" and it is difficult to affirm that this was done with the precise intention of also including the above-mentioned implications.

However the lack of any corresponding reference in the text of Article 10 of the European Convention, leads us to the conclusion that freedom "to seek" information and ideas, provided for and guaranteed by the Covenant, is not guaranteed by the Convention.

7. The second activity indicated in Article 19 by the verb "receive" does not present any problem since it is confirmed by the usage of the same word in Article 10 of the Convention.

8. The third and last activity, indicated in Article 19 by the verb "impart" (répandre) could raise some doubts concerning the identity of its contents only if one were to refer to the French texts. In fact, in these the term "répandre" contained in Article 19 seems to indicate something that goes beyond the simple "communiquer" utilised in Article 10. These preoccupations, however, cease to exist when we examine the English text which in both Articles uses the word "to impart".

9. The object of the above-mentioned activities, i.e. "information and ideas", common to both paragraphs does not seem to make any difference in their contents even though the text of Article 19 contains the added: "information and ideas of all kinds". (1)

10. The specification that such freedoms are granted "regardless of frontiers" presents no problem since it is common to both Articles. The same may be said of the phrase "either orally, in writing or in print, in the form of art, or through any other media of his choice" contained in Article 19. In fact, it does not seem that the above cited specification can attribute to the above-mentioned activities (to seek, receive and impart) mentioned in Article 19 a different meaning from the similar activities (to receive and impart) mentioned in

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(1) The fact that the connective between the two words which in the French text is made once by the use of "et" and once by "ou" but which in the English text is always made by "and" can be considered negligible.

Article 10. In fact, the formulation of this last **Article**, since it contains no specification to the words, allows them to be interpreted in the sense of including any means by which it is possible to express ideas and information. (With the exception of audiovisual means of which we shall speak later) (1).

11. The same cannot be said instead for the further specification contained in Article 10 "without interference by public authorities" for which there is no corresponding part in Article 19 of the Covenant.

In the elaboration of this last text it was proposed to add the phrase "sans intervention de la part du gouvernement, sous **réserve** des dispositions du paragraphe 3". The proposal was not accepted since it was thought that the control exercised on the information media by economic interests and private monopolies could be as prejudicial to freedom of expression as any control exercised by governmental intervention.

On the basis of the actual texts, as well as on the basis of the above-mentioned elucidation, it may be concluded that, while Article 19 (2) of the Covenant may be interpreted as guaranteeing freedom of expression from any interference either from the public authorities or from private sources, the corresponding Article 10 (1) of the European Convention limits itself to guaranteeing freedom of expression solely from interference from the public authorities.

12. Paragraph 1 of Article 10 of the European Convention includes a last sentence in which it is specified "this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises"...

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- (1) We can point out also that in the first drafts of Article 10 of the European Convention there was a phrase similar to the one in Article 19. The reference to forms of expression no longer appears in the definitive text while the travaux **préparatoires** give no indication of the precise reason for this omission.

The provision, which constitutes a first general limit to freedom of expression, has no corresponding reference in Article 19 of the Covenant. This does not mean, however, that there exists a substantial difference regarding this matter between the two texts. In fact, from the preparatory work of the UN Commission we may easily infer that a similar proposal in which "installations licites" or "légalement exploitée" and also "document autorisées" are mentioned, was presented and amply debated. The delegations favourable to such an insertion pointed out that it was not a question of submitting to control news so diffused, but the means of diffusion (radio, television, cinema, etc.....).

The proposal, however, was not accepted, but not because it was deemed inopportune to allow the use of the above-mentioned means, but because it was thought that such an indication could lead to illegal interpretations which would therefore create obstacles to freedom of expression. Many delegations, however, affirmed that in their opinion, the above-mentioned authorisation was legitimised by the limits of public order contained in paragraph 3 and did not need therefore any specific mention.

From the above we can infer that the lawfulness of a system licensing of the cinema, radio and television, explicitly mentioned in the European Convention, is included also in Article 19 of the Covenant but only by the interpretation of the concept of public order mentioned in paragraph 3 as is suggested by the travaux préparatoires.

C.

Article 10, paragraph 2

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, **conditions**, restrictions or penalties as are **prescribed** by law and are necessary in a democratic society, 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.

Article 19, paragraph 3

3. The exercise of the rights provided for in paragraph 2 of this **Article** carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.

(a) For respect of the rights or reputation of others:

(b) For the protection of national security or of public order (**ordre** public) or of public health or morals.

13. The first concept contained respectively in paragraphs 2 and 3 of Articles 10 and 19 expresses the idea that the use of the freedoms mentioned in the Article leads to duties and responsibilities. The formal differences existing between the two texts do not affect the identity of contents. In the first place it is of no special importance that the grammatical formulation in Article 10 is a secondary phrase (comportant) and in Article 19 it is a principal phrase (comporte). Similarly the reference contained in Article 19 (rights provided for in paragraph 2) cannot be invoked except as regards the remarks already made regarding freedom of opinion.

14. The qualification of speciality (special duties and responsibilities) mentioned in Article 19 but not in Article 10 merits an explanation. From the preparatory studies of the UN Commission we can infer that a proposal had been submitted which aimed at abolishing any reference to duties and responsibilities of the individual. To keep the text intact it was observed that the right to freedom of expression is not only a precious heritage but also a dangerous instrument and that in consideration of the influence that modern means of expression have on individuals and on national and international relations, it would be opportune to underline the duties and the responsibilities which the use of the right to freedom of expression implies. Finally, the Commission adopted the definitive text in which there is the addition of the adjectives "special" in order to underline the fact that they are not general rights and responsibilities, but only rights and responsibilities which are strictly connected with the use of freedom of expression. However the text does not in any way differ from Article 10 of the European Convention, in which mention of duties and responsibilities, while not accompanied by any specification, cannot be interpreted in any other manner than in the sense above-mentioned, and that is, as an indication of the duties and the responsibilities inherent to the use of freedom of expression.

15. The next sentence of the paragraphs in question, introduces limits to the freedoms already mentioned.

The limiting measures listed in the paragraphs should be examined in order to evaluate their identical or dissimilar contents.

Article 10 mentions "such formalities, conditions, restrictions or penalties" while Article 19 only mentions "certain restrictions". If we interpret literally this last term it would seem that it easily includes both "formalities" and "conditions". Indeed, both have a less restrictive meaning than "restrictions".

While it is correct to state that there is no substantial difference regarding the limitations allowed by Article 10 by the use of the words "formalities, conditions and restrictions" as compared to the sole use of the word "restrictions", it would not be correct to make a similar statement regarding the word "penalties" which completes the list of the measures allowed by Article 10.

First of all, we may say that it is possible to examine the meaning of penalties under two aspects. We can assume them to be a consequence of not having complied with the permissible limitations imposed on freedom of expression, or we can assume them to be penalties which are in themselves a limitation to freedom of expression. Therefore, if it is possible, on the basis of the two regulations which we are examining, to submit the exercise of the above-mentioned freedom to certain restrictions, it would not be illogical to presume the lawfulness of certain penalties in the case of a violation of such legally imposed restrictions. Indeed, while most States have adopted freedom of expression, none can tolerate abuses to the exercise of that same freedom. Therefore, as an example, he who goes beyond the limits established for freedom of the press will commit an unlawful act resulting in penal or civil sanctions, which in principle can be considered compatible with the provisions of the paragraphs we are examining. We may, therefore, conclude by stating that for a correct interpretation of the literal meaning of paragraph 3 of Article 19, the possible sanctions provided for in the case of violations to restrictions legally imposed upon the liberty of expression, are to be considered lawful in themselves, in so far as they are sanctions, as they are allowed not only by Article 10 which expressly mentions them, but also by Article 19 which does not mention them.

Instead, as regards those sanctions which consist in a limitation of freedom of expression it is not possible, a priori, to affirm that they are allowed by Article 10 and not by Article 19. For a correct interpretation of the norms there is, in fact, no advantage in considering the nature of "penalties" but it would be necessary to evaluate in each instance if the limitations to freedom of expression, where the penalties themselves are to be found, correspond with the provisions of the Article. If the text is interpreted in this manner, it is obvious that the omission of a precise mention of penalties in paragraph 3 of Article 19 does not produce in itself any difference between the paragraph in question and paragraph 2 of Article 10 of the European Convention (1).

16. Before enumerating the reasons which render lawful the imposition of restrictions to freedom of expression, both Articles 10 and 19 introduce general limits, by means of the following phrases: "but these shall only be such as are provided by law and are necessary" (Article 19) and "as are prescribed by and law and are necessary" (Article 10).

In spite of the easily identifiable formal differences, the two norms are not different in contents since they both require legislative procedures for the imposition of restrictions and both include the concept of necessity for the restrictions themselves.

17. A further general limitation is mentioned only in Article 10 by means of the phrase "necessary in a democratic society". It regards a limitation customary to the European

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- (1) The European Commission of Human Rights has had occasion to express its opinion in this regard in the De Becker case. At that time the Commission explained that paragraph 2 of Article 10 "does not permit the infliction of incapacities in regard to freedom of expression whether that is done by way of penal sanctions or preventive measures, except where the nature itself of the offence obviously necessitates such incapacities". (Publication of the Court, "De Becker Case", Series B, p. 128)

Convention since it appears in Articles 6, 8, 9 and 10 and was also interpreted by the Convention on the occasion of the De Becker matter (1).

18. The most important point of the paragraphs in question concerns naturally the listing of the motives and the objectives which justify the restrictions.

The preparatory work for both Articles clearly shows that the solution which has been adopted **constitutes a** compromise between two theses: one would have had the limiting clause briefly indicating restrictions of a general matter and the other would have expressly indicated all the cases which would have rendered legal the restrictions.

However, the texts of the two paragraphs, in their final versions, seem to contain a specific rather than an indicative indication, of the motives which render legal the restriction to freedom of expression.

For an evaluation of the possible differences between the two provisions, the general observations above-mentioned are not as important as a detailed examination of the individual motives. However, to this end, it would be inopportune to examine those motives which are contained in both texts and which form the basis for the conclusion that the two provisions are perfectly identical in their contents. The following form part of this category: "national security", "protection of health or morals", and "protection of the reputation or rights of others".

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- (1) The Commission in its report of 8th January 1960 interpreted paragraph 2 of Article 10 and, in particular, the idea expressed by "necessary in a democratic society". In this connection, it emphasised that "les auteurs de ce paragraphe songeaient avant tout aux conditions, restrictions et sanctions auxquelles la liberté d'expression est normalement soumise dans une société démocratique et qui sont jugées nécessaires pour empêcher les publications séditieuses, diffamatoires, blasphématoires et pornographiques, pour assurer la bonne administration de la justice, pour garantir le secret des informations confidentielles etc."

19. Apart from the grounds quoted in both, Article 10 also mentions "territorial integrity", "public safety", "prevention of disorder or crime" while Article 19 only mentions "public order" in the continental meaning of the word. (In fact, the English text has "public order" followed by "ordre public" in italics.) As is known, the above words "ordre public" (public order) do not have a precise meaning but can be interpreted in many ways allowing the individual States a wide latitude for evaluating them. However in our opinion the concepts of territorial integrity, public safety, the prevention of disorder and crime can also be included, without difficulty in the concept of public order (1).

20. Lastly, paragraph 2 of Article 10 of the European Convention contains two other limitations which have no precise parallel in Article 19 of the Covenant and they are so formulated: "for preventing the disclosure of information received in confidence and for maintaining the authority and impartiality of the judiciary".

Regarding the reference to maintaining the authority and impartiality of the judiciary it would seem possible to include it in the concept of public order mentioned in Article 19, without straining its meaning. The same cannot be said for the reference to the divulcation of confidential information.

We can add, however, that while it is not easy to include the above in the concept of public order - flexible as this concept is - nonetheless a great deal of what is meant to be safeguarded by such a formulation would be already safeguarded by the limitation allowed "for the protection of the reputation or rights of others". This is because the greater part, if not practically all, the confidential information that does not regard the cases already mentioned (national security, prevention of disorder or crime etc.) and which should not be divulged, would certainly be closely connected with the reputation or the rights of others and as such would be explicitly protected.

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- (1) The concept of territorial integrity was expressly included, upon proposal of the Turkish delegation, in order to take into consideration the necessity of States to defend themselves against any activity that could bring about the disintegration of the nation. On the basis of this consideration it would perhaps be better to consider the concept included in the concept of "national security" already mentioned in both the Articles.

Therefore, in conclusion, notwithstanding the different formulation of the two paragraphs, in the part which enumerates the reasons which would render legal the restrictions to freedom of expression, it would seem that there is no substantial difference between the two provisions. Some doubts, mostly theoretical, could exist regarding the reference to the aim of "preventing the disclosure of information received in confidence" contained in Article 10 and not in Article 19, but would be limited to the divulgation of that confidential information which is not already included in the other motives mentioned in the text of Article 19.