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EUROPEAN COMMISSION OF HUMAN RIGHTS

PREPARATORY WORK ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Information Document
prepared by the Secretariat of the Commission

1. Article 8 of the European Convention on Human Rights is worded as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

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2. The Universal Declaration of Human Rights, adopted on 10th December, 1948, by the General Assembly of the United Nations, includes an Article 12 worded as follows:

Article 12

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

3. In August 1949, when the Consultative Assembly of the Council of Europe had obtained the inclusion in its Agenda of "measures for the fulfilment of the declared aim of the Council of Europe, in accordance with Article 1 of the Statute, in regard to the safeguarding and further realisation of Human Rights and Fundamental Freedoms", M. Teitgen, the Rapporteur, laid before the Committee on Legal and Administrative Questions certain proposals including, in particular, this passage: (1)

"The Convention and the procedure to be determined later by the Committee will guarantee the fundamental rights and freedoms listed below to every person residing within the metropolitan territory of a Member State:

.....
The inviolability of his private life, of his home, of his correspondence and of his family, in accordance with Article 12 of the United Nations Declaration ..." (Doc. A. 116) (2)

At the meeting of the Committee on 29th August, 1949, Lord Layton (United Kingdom) suggested that this paragraph be deleted. His amendment was negatived by 15 votes to 3.

(1) Translation; original English text unavailable.

(2) The drafts of the European Movement, by which the Consultative Assembly was considerably influenced (cf. Official Report of the Consultative Assembly, 1949, II, p. 410), provided for protection against all interference in the family* (Doc. INF/2/E, February 1949), and later for protection of "the natural rights deriving from marriage and paternity and those pertaining to the family", as well as "the sanctity of the home" (Doc. INF/5/E/R, June 1949, Article 1(g) and (h), p. 6).

* Translation; original English text unavailable.

Instead, the Committee adopted, by 16 votes to 0 with 3 abstentions, an amendment proposed by M. Rolin (Belgium) and M. Teitgen (France) to substitute for M. Teitgen's original text the words "immunity from arbitrary interference in his private life, his home, his correspondence and his family, as laid down in Article 12 of the Declaration of the United Nations". (Doc. A.142)

4. Article 2, para. 4, of the draft submitted to the Consultative Assembly by the Committee on 5th September, 1949, was worded as follows:

"In this Convention, the Member States shall undertake to ensure to all persons residing within their territories:

.....

"(4) freedom from arbitrary interference in private and family life, home and correspondence, in accordance with Article 12 of the United Nations Declaration". (Doc. AS (1) 77, p. 204; cf. also Doc. A.290, p.10,(1) and Doc. B.22, p. 10) (2)

The Report presented by M. Teitgen to the Assembly on behalf of the Committee said, inter alia:

"The inclusion in the list of guaranteed rights and freedoms of the 'family' rights, which are represented by:

- (a) freedom from all arbitrary interference in family life;
- (b) the right to marry and to found a family;
- (c) the prior right of parents to choose the kind of education to be given to their children,

(1) In Doc. A.290 the passage read :

"All Member States, signatories to the Convention, shall bind themselves to ensure to all persons residing within their territories:

"....."
"(4) immunity from all arbitrary interference in private life, home, correspondence and family, in accordance with Article 12 of the Declaration of the United Nations."

(2) This text differed, however, from Article 12 of the Universal Declaration in that the words "nor to attacks upon his honour and reputation" did not occur. The omission was deliberate. Indeed, "in referring to one or other Article of the Declaration of the United Nations with the object of defining this or that freedom better, the Resolution adopted by the Committee did not mean to refer to all the provisions of the Article in question, but only to those specifying the content of the freedom provided for in this Resolution." (Doc. AS (1) 77, para. 7, pp. 198 and 199).

raised, within the Committee, various objections based on the fact that in these cases no rights regarded as essential for the functioning of democratic institutions were at stake, so that it was preferable to exclude them from the guarantee and to limit the latter solely to these essential rights.

"This argument did not prevail, since the majority of the Committee thought that the racial restrictions on the right of marriage made by the totalitarian regimes, as also the forced regimentation of children and young persons organised by these regimes, should be absolutely prohibited."

(Doc. AS (1) 77, para. 9, p. 199)

Para. 4 of Article 2 did not, however, give rise to any discussion in the Assembly (1), and was embodied without change in the Assembly's Recommendation of 8th September, 1949. (Doc. AS (1) 108, Article 2, para 4, pp. 261 and 262).

5. The Committee of Ministers of the Council of Europe then submitted the Assembly's Recommendation to a Committee of Experts on Human Rights which it had decided to convene (November 1949).

The Committee's terms of reference stated that: "due attention should be paid to the progress which had been achieved in this matter by the competent organs of the United Nations" (Doc. AS (1) 116, para. 6, pp. 288 and 289).

6. The "Draft International Covenant on Human Rights" prepared by the United Nations Commission on Human Rights at its Fifth Session, held at Lake Success from 9th May to 20th June, 1949, contained no provision corresponding to Article 12 of the Universal Declaration or to the present Article 8 of the European Convention. (Doc. E/1371). (2)

7. The preliminary draft Convention prepared by the Committee of Experts on Human Rights at its first meeting (Strasbourg, 2nd to 8th February, 1950,) provided in its

(1) Unlike paras. 10 and 11, which concerned respectively the right to marry and to found a family and the prior right of parents to choose the kind of education to be given to their children.

(2) The same applies to the document entitled "Comments of the Government of the United Kingdom received by the Secretary-General" (of the United Nations) "on 4th January, 1950". (Council of Europe ref. Doc. A.770 and UN. ref. Doc. E/CN 4/353/Add. 2).

Article 2, para. 4, clearly based on Article 12 of the Universal Declaration, that:

"(4) No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. (1) Everyone has the right to the protection of the law against such interference." (Doc. A.833, p.3; cf. also Doc. A.809, Article 3, para. 4, p.4).

With regard to this paragraph, the preliminary draft Report of the Committee of Experts explained that:

"(3) In accordance with the Assembly's intentions, only a certain part of the rights mentioned in Articles 12 and 16 of the Universal Declaration were included in the Convention (1) (cf. the Report submitted to the Assembly by M. Teitgen on behalf of the Committee on Legal and Administrative Questions, Doc. 77)". (Doc. CM/WP 1 (50)1, para.3, p.11)

8. Alternatives A and A/2 (method of enumeration of rights and freedoms to be safeguarded), of the draft Convention submitted to the Committee of Ministers by the Committee of Experts after its second and last meeting (Strasbourg, 6th to 10th March, 1950) included an Article 2, para. 4, which was merely a repetition of the above-quoted paragraph (2) in the preliminary draft (Doc. CM/WP 1 (50) 15 appendix, p.1; cf. also Doc. CM/WP 1 (50) 14, Alternative B. p. 9).

On the contrary, no comparable paragraph was contained in Alternatives B and B/2 (method of precise definition of rights and freedoms to be safeguarded). (Doc. CM/WP 1 (50) 15 appendix, pp. 5 et seq.; cf. also Doc. CM/WP 1 (50)14, Alternative A, pp. 1 et seq.).

With regard to Article 2, para. 4, in Alternatives A and A/2, the Report of the Committee of Experts contained the same remarks as those already quoted (2) from the preliminary draft Report. (Doc. CM/WP 1 (50) 15, para. 3, p. 15).

The Committee of Experts had agreed that it was not competent to decide between these Alternatives, since such a choice "depended on considerations of a political character" (Doc. AS (2) 8, para. 58, p. 571).

9. In these circumstances, the Committee of Ministers decided, at its third Session (Strasbourg, 30th March to 1st April, 1950) "to convene a meeting of senior officials, who, on the instructions of their Governments, would have the task of preparing the ground for the Ministers' decision from the political point of view" (Doc. AS (2) 8, para. 59, p. 571).

(1) Deletion of the words: "nor to attacks upon his honour and reputation". (cf. supra. p. 3, footnote (2)).

(2) Supra, pp. 4 and 5, para. 7.

10. The Conference of Senior Officials (Strasbourg, 8th to 17th June, 1950) succeeded in "amalgamating Alternatives A and B of Section I of the Committee of Experts' draft Convention", while adopting Alternative B (method of precise definition) as the basis of its work [Doc. CM/WP 4 (50) 19, p.137].

The "New draft of Alternatives B and B/2", on which the Conference was called upon to express its opinion, left a blank space for an article "on privacy" [Doc. CM/WP 4 (50) 9, p.57].

The United Kingdom delegation proposed that this Article be worded as follows:

"1. Everyone shall have the right to freedom from governmental interference with his privacy, family, house or correspondence.

"2. No restrictions shall be placed on the exercise of this right other than such as are in accordance with law and are necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime or for the protection of health or morals" (Doc. CM/WP 4 (50) 14).

Finally, the Conference of Senior Officials adopted an Article 8 worded as follows⁽¹⁾:

"1. Everyone's right to respect for his private and family life, his home and his correspondence shall be recognised.⁽²⁾

"2. There shall be no interference by a public authority⁽³⁾ with the exercise of this right⁽⁴⁾ except such as is in accordance with law and is necessary

(1) The alterations made to the above-quoted British proposal are underlined.

(2) Doc. CM/WP 4 (50) 16 Appendix, p.6: "The right to privacy in respect of family, home and correspondence shall be recognised".

(3) The subject of "interference by a public authority" (cf. "governmental interference") is now embodied in paragraph 2 (statement of permissible limitations) and no longer in paragraph 1 (statement of the right itself).

(4) Doc. CM/WP 4 (50) 16 Appendix, p.6: "these rights".

in a democratic society⁽¹⁾ in the interests of national security, public safety, for the prevention of disorder or crime or for the protection of health or morals" (Doc. CM/WP 4 (50) 19 Appendix, pp. 5 and 6; cf. also Doc. CM/WP 4 (50) 16 Appendix, p.6).

In the Report of the Conference of Senior Officials to the Committee of Ministers, this Article was only the subject of the following brief comment:

"The Conference also introduced into the text of Alternative B the right for everyone to respect for his private and family life, home and correspondence, which appeared in Alternative A of the Committee of Experts' draft but not in Alternative B." (Doc. CM/WP 4 (50) 19, p.14)

11. After the conclusion of the work of the Conference of Senior Officials, the United Kingdom delegation proposed the following alteration in the English text of paragraph 2 of Article 8:

"Insert 'or' between 'national security' and 'public safety', deleting the comma." (Doc. A.1690, p.2).

12. The Report and draft Convention adopted by the Conference of Senior Officials were laid before the Committee of Ministers of the Council of Europe, which agreed, on 3rd August, 1950, that a Committee of Governmental Experts would meet next day to revise the text of the draft, having regard to proposals received and the documentation already available (Documents of the Committee of Ministers, 5th Session, p.26).

13. On that occasion, the United Kingdom delegation maintained, with regard to Article 8, that:

"In its present form this Article does not provide either for the rules under which the party to a civil action may be compelled to give disclosure of his documents to the

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(1) According to the Report of the Conference (Doc. CM/WP 4 (50) 19, p.13), the reference to a "democratic society" was introduced into Article 8, as well as Articles 9, 10 and 11, in order to "make Alternative B more acceptable to the supporters of Alternative A". Indeed, Article 6 (General clause of limitation of rights and freedoms) of the Consultative Assembly's draft (Doc. AS (1) 108) and of Alternative A of the Committee of Experts' draft (Doc. CM/WP 1 (50) 14 and 15 appendix) contained a similar reference to this conception.

other party or for the powers of inspection (for example the opening of letters which are suspected of attempting to export currency in breach of Exchange Control Regulations) which may be necessary in order to safeguard the economic well-being of the country. H.M. Government, therefore, propose an amendment to paragraph 2 of this Article to read: '..... in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'" /Doc. CM 1 (50) 6, p.27.

The Sub-Committee on Human Rights accordingly amended the second paragraph of Article 8 as follows:⁽¹⁾

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." (Doc. CM 1 (50) 9, p.3)

14. On 7th August, 1950, the Committee of Ministers agreed upon the text of a "draft Convention of Protection of Human Rights and Fundamental Freedoms", which it decided to send to the Consultative Assembly for opinion.

Article 8 of the draft was worded as follows:

Article 8⁽¹⁾

"1. Everyone has the right to respect for his private and family life, his home and his correspondence."⁽²⁾

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country,

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(1) The alterations made in the text prepared by the Conference of Senior Officials (supra, pp. 6 and 7) are underlined.

(2) The words "shall be recognised" have been deleted.

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (Doc. CM (50) 52, pp. 5 and 6; cf. also Doc. AS (2) 11, Appendix A, Article 8, p. 606).

15. In its recommendation of 25th August, 1950, regarding the draft Convention for the Protection of Human Rights and Fundamental Freedoms, the Consultative Assembly proposed no alteration in Article 8, which received no particular mention during the debate (Doc. AS (2) 104, Article 8, p. 1032).

16. On 3rd November, 1950, a Committee of Legal Experts carried out the last examination of the text of the Convention and introduced a number of corrections of form and translation (Doc. CM/Adj. (50) 3 Rev., para. 6).

The English text of Article 8, however, remained unchanged (1) and was confirmed next day by the signing of the Convention.

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Until 1953, the draft International Covenant on Civil and Political Rights made no provision for the protection of private and family life, home and correspondence. In other words, there is no such close affinity between Article 8 of the Convention and Article 17 of the draft Covenant, which ~~was~~ introduced at the 9th Session of the Commission on Human Rights at the request of the Philippine delegation, as exists between most of the other Articles of Section I of the Convention and the corresponding Articles of the draft Covenant.

The Secretariat of the Commission nevertheless deemed it useful to attach to this document the corresponding extract from the Annotation on draft Covenants prepared by the Secretary-General of the United Nations in 1955 at the request of the United Nations General Assembly (Doc. A/2929, pp. 145 to 148, Appendix).

(1) Subject to the substitution of "in accordance with the law" for "in accordance with law" in para. 2.

A P P E N D I X

ARTICLE 17

Privacy, home, correspondence,
honour and reputation

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

99. In the discussion of this article, no difference of opinion arose as to the principle involved. It was pointed out that privacy, the sanctity of the home, the secrecy of correspondence and the honour and reputation of persons were protected under the constitutions or laws of most, if not all, countries. Moreover, the right of everyone to protection from "arbitrary interference with his privacy, family, home or correspondence" and from "attacks upon his honour and reputation" was proclaimed in Article 12 of the Universal Declaration of Human Rights. However, the view was expressed that it would be very difficult to translate the general principles enunciated in Article 12 of the Declaration into precise legal terms, especially in the form of a brief article in the covenant which would be applicable to all legal systems of the world. Against this view, it was argued that the covenant would suffer a serious mission if it failed to include an article on such an elementary right as the right to privacy, home, correspondence, honour and reputation. Such an article could lay down a general rule, leaving the exceptions thereto and the methods of application to the legislation of each contracting State.

100. The first clause of the article, guaranteeing to every person the right to protection from "arbitrary or unlawful interference with his privacy, home or correspondence" and from "unlawful attacks on his honour and reputation" seeks to protect the individual not only against acts of public authorities, but also of private persons. The view was expressed

that the article should be confined to imposing restraints on governmental action and should not deal with acts of private individuals which were a matter for municipal legislation. It was feared that the article as formulated might be construed as requiring changes to be made in existing rules of private law and this would raise considerable difficulties particularly for countries with Anglo-Saxon legal traditions. On the other hand, it was pointed out that the article, which was couched in general terms, merely enunciated principles, leaving each State free to decide how those principles were to be put into effect.

101. There was some discussion of the meaning and scope of the expression "arbitrary or unlawful interference". Some thought that a distinction should be made between "arbitrary" interference by public authorities and "unlawful" interference by private persons. Interference by public authorities could be lawful and yet "arbitrary"; interference by a private person would be "unlawful". Others thought that the article should protect the individual against "arbitrary" and "unlawful" interference by private persons as well as by public authorities.

102. The use of the terms "privacy, home or correspondence" was criticized on the ground that their precise legal implications were not clear. Objections to the use of the term "arbitrary" were also raised. It was suggested that the term "unreasonable" was preferable to "arbitrary or unlawful". A proposal was also made to add "unreasonable" to the words "arbitrary" and "unlawful" in qualifying "interference", but the proposal was rejected. In support of the proposal it was maintained that the term "arbitrary" conveyed merely the notion of capriciousness, while the word "unreasonable" had a much broader meaning. An action or a law might not be arbitrary and yet could be unreasonable. On the other hand, it was pointed out that the term "unreasonable" did not have a precise legal meaning itself. It was recalled that when Article 12 of the Universal Declaration was adopted, the General Assembly had preferred the term "arbitrary" to "unreasonable" as conveying both the notion of illegality and of unreasonableness.

103. The second part of the first clause guarantees protection against "unlawful attacks" on the honour and reputation of an individual. The insertion of "unlawful" before "attacks" was intended to meet the objection that, unless qualified, the clause might be construed in such a way as to stifle free expression of public opinion. It was thought

that the law could protect the individual only against "unlawful" or "abusive" or "unwarranted" attacks on his honour and reputation, and that fair comments or truthful statements which might affect an individual's honour or reputation should not be considered as "attacks on his honour and reputation." An objection was raised to the use of the term "attacks" which was thought to be unsuitable in an international treaty.

104. The second clause provides that "everyone has the right to protection of the law against such interference or attacks." The need for such a clause was questioned since Article 2 of the draft covenant already provided that each State party would undertake "to take the necessary steps ...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this covenant." On the other hand, it was contended that the addition of the clause would not be superfluous. It was not enough to recognize the right of everyone not to be subjected to arbitrary or unlawful interference with his privacy, home or correspondence or to unlawful attacks on his honour and reputation; his right to be protected by the law against such interference or attacks must also be expressly recognized. Misgivings were raised concerning the use of the term "protection" since it might be understood to imply that States were bound to suppress, or censor in advance, views thought to be unlawful. The expression "protection of the law" however could not be interpreted as authorizing censorship, since that would violate the provisions concerning freedom of opinion and expression set forth in Article 19 of the draft covenant.

DOCUMENTATION

<u>Organ and session</u>	<u>Records of discussion</u>	<u>Other documents</u>	<u>Article number</u>
DC (II)		E/CN.4/AC.1/21	
CHR (VI)		E/CN.4/353/Add.3; ESC (XI), suppl.5, annex III	
ESC (XI)	E/AC.7/SR.149	E/C.2/254/Add.1; E/L.68, para. 99	
GA (V)	3rd Com., 291st mtg.	GA (V), annexes, a.i. 63, A/C.3/534, para. 6	

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DOCUMENTATION (cont'd)

<u>Organ and session</u>	<u>Records of discussion</u>	<u>Other documents</u>	<u>Article number</u>
CHR (VII)		E/CN.4/515/Add.6; 528, para. 23-27	
CHR (VIII)		E/CN.4/528/Add.1; 660, para.12; ESC (XIV), suppl.4, annex II, sect.A, part VI, and annex IV	
CHR (IX)	E/CN.4/SR. 373-376	E/CN.4/674, paras. 14-16; L.265; ESC (XVI), suppl. 8, paras.65-71, annex I B, art. 17, and annex III, paras. 29-34	
CHR (X)		E/CN.4/694/Add.2, 6	17
GA (IX)	3rd Com., 562nd, 565th, 567th mtgs.		17