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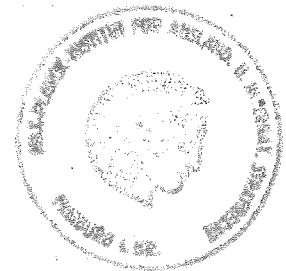
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## REPORT OF THE COMMITTEE OF EXPERTS ON HUMAN RIGHTS TO THE COMMITTEE OF MINISTERS ON THE RIGHT TO RESPECT FOR PRIVACY



### General introduction

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1. On 31 January 1968 the Consultative Assembly of the Council of Europe adopted Recommendation 509 (1968) concerning human rights and modern scientific and technical developments, by which it proposed to the Committee of Ministers:

"... to instruct the Committee of Experts on Human Rights:

- (i) to study and report on the question whether, having regard to Article 8 of the Convention on Human Rights, the national legislation in the member States adequately protects the right to privacy against violations which may be committed by the use of modern scientific and technical methods;
- (ii) if the answer to this question is in the negative, to make recommendations for the better protection of the right to privacy."

2. At the same time the Committee of Experts on Human Rights proposed the inclusion of the following item in the draft Programme of Work for 1968-69: "Study of the right to privacy in connection with the press and other media of mass communication and with modern scientific and technical developments."

3. The Committee of Ministers considered Recommendation 509 in April 1968 and decided to include in the intergovernmental Programme of Work for 1968-69 the following item (Item 2212/1 of the Work Programme 1971-72):

"The right to privacy as affected by:

- (a) the press and other mass media; and
- (b) modern scientific and technical devices.

Study of the advisability of preparing a Recommendation to Governments."

4. In view of the complex technical aspects of this subject and of the problems of civil and criminal law which might arise, the Committee of Ministers decided to instruct the Secretariat to place this item on the agenda of the Committee of Experts on Human Rights, the European Committee on Crime Problems and the European Committee on Legal Co-operation, with a request that each should consider the implication of the problem in their respective field.

5. It was agreed that:

- (a) the Committee of Experts on Human Rights would examine to what extent the provisions of the European Convention on Human Rights, and in particular Article 8, constituted an adequate framework for the protection of privacy and whether national law corresponded to these norms;
- (b) the E.C.C.P. would examine whether the existing provisions of criminal law were sufficient in this matter and, if not, on what points amendments should be proposed;
- (c) the C.C.J. would examine the constitutional and civil law aspects of the matter.

It was agreed that it would be the Committee of Experts on Human Rights which would take up study of the question first and that the two other bodies would await the results of its study.

6. The Committee of Experts on Human Rights agreed to examine first how the right to respect for privacy was affected by modern scientific and technical devices, a problem which was raised by the Assembly in January 1968. It completed examination of this aspect of the problem on 9 October 1970, the date on which it drew up a report which constitutes the first part of the present document. This report was communicated on 18 November 1970 by a letter from Sir Samuel Hoare, then Chairman of the Committee of Experts on Human Rights, to the Chairmen of the E.C.C.P. and the C.C.J.

7. The question of the right to respect for privacy as affected by the press and other mass media - raised by the Consultative Assembly in its Recommendation 582 of 23 January 1970 - could only be examined by the Committee of Experts in the course of 1971-72; a complementary report was adopted by the Committee of Experts at its 36th Meeting held from 2 - 6 April 1973. It constitutes Part II of the present document.

8. It appeared that a special aspect of the problem of the right of privacy as affected by modern scientific and technical devices is constituted by the use of data banks. The Committee

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of Experts on Human Rights therefore decided to make this the object of a separate study after the conclusion of its work on the other two aspects of the problem and after the Third International Colloquy on the European Convention held in Brussels in October 1970.

9. In the meantime, the Sub-Committee on the Civil Law Aspects of the Protection of the Right to Privacy appointed by the C.C.J., which met in October 1971, decided to propose to the latter that it should concentrate its efforts in the first place on the question of the protection of privacy vis-à-vis electronic data banks; subsequently, the Committee of Ministers approved a proposal of the C.C.J. to establish a special Committee of Experts on this problem.

10. It is obviously extremely difficult to co-ordinate the work of three separate intergovernmental committees which all have many other items outstanding on their agenda so that they each give their attention to the three problems concerning the right to privacy, which have just been indicated, within the time limits laid down in the Programme of Work. The Committee of Experts is conscious of the fact that the Programme of Work gives 1972 as the date for completion of its task on the right to privacy. Moreover, the Chairman of the Committee of Experts has received a letter from the Secretary General stressing the necessity that it should complete its work on various topics within the time limits set out in the Programme.

11. In all these circumstances, the Committee of Experts on Human Rights has thought it right to send the Committee of Ministers now, and irrespective of the state of the work of other Committees, this report on the work it has done concerning the problem of the right of privacy as affected by modern scientific and technical devices, and by the mass media, so as to comply with the instructions received in 1968.

#### Working methods

12. In order to carry out its mandate, the Committee of Experts also took account of the later developments in the Council of Europe in respect of the right to privacy:

(a) In June 1969, the Committee of Ministers considered Recommendation 557 (1969) on the use of computers in local government, which was based on the Report of the Committee of the Consultative Assembly on Regional Planning and Local Authorities (Doc. 2562). It was decided to transmit this Recommendation to Governments for information and opinion, and to send it for information, together with the report contained in Doc. 2562, to the Committees requested to study the right to privacy as affected by the press and mass communications media and by modern scientific and technical developments.

(b) The Committee of Experts on Human Rights was also informed of Resolution No. 3 concerning the protection of the right to privacy, adopted by the Sixth Conference of European Ministers of Justice, held at The Hague from 25 to 28 May 1970, and it took into account the recommendations contained in this Resolution, in particular with regard to the priority to be given to the problems of the protection of the right to privacy in carrying out its work.

(c) The Committee also took note of the work of the European Conference for the Conservation of Nature, held at Strasbourg from 9 to 12 February 1970, insofar as it had a bearing upon questions concerning the right to privacy (Declaration of 12 February 1970).

(d) The Committee took into account in its work the discussions relating to the right to privacy which took place in the Third International Colloquy on the European Convention on Human Rights, which was held in Brussels from 30 September to 3 October 1970, and at which the Committee's members had been able to participate. Although the Brussels Colloquy did not adopt any formal texts, it nevertheless provided clarifications of great usefulness towards the solution of problems in this field, particularly as it brought together both lawyers and technicians (including those concerned with computers).

13. Moreover, the Committee of Experts on Human Rights had due regard to the work carried out in the field of the right to privacy by the United Nations and other international organisations. In this respect, it appeared to the Experts that, although the very general approach adopted within the framework of the Council of Europe required the Committee to consider certain aspects of the protection of privacy already being studied by other international organisations, there is at present no real duplication or overlapping between work done at the Council of Europe and that carried out by other international organisations.

#### Composition of the Report

14. The report is divided into two parts:

- the first part deals with the right to respect for privacy as affected by modern scientific and technical devices;
- the second part deals with the right to respect for privacy and mass communications media.

The Appendices contain the list of working papers and the list of the members of the Committee of Experts who attended the meetings devoted to the preparation of this report.

During the examination of this question the Committee has elaborated a survey of legislation relating to human rights and modern scientific and technical devices which has been included in a separate document (DH/Exp (73) 9).

The Committee was also informed about the work of other international organisations relating to the right to respect for privacy as affected by modern scientific and technical devices.

### Recommendations

15. The terms of reference given to the Committee of Experts on Human Rights, as stated in the Work Programme for 1971/72, are to study the advisability of preparing a recommendation to governments about respect for privacy. As will appear below, the Committee reached the conclusion that it would be advisable that the Committee of Ministers should address a recommendation to governments:

(i) as regards the right to privacy as affected by modern scientific and technical devices:

this could be a recommendation which would clearly recognise that member States have an obligation to take appropriate measures, if necessary of a legislative nature, to ensure that the right to privacy, which is already protected against interference by a public authority by Article 8 of the European Convention on Human Rights, should also be respected by private persons and institutions other than public authorities; the recommendation might also propose that a study should be made as to what are the necessary measures, preventive and repressive, at the national and international level to secure protection of privacy against interferences by private persons and institutions other than public authorities.

(ii) as regards the press and other mass media:

the recommendation might request member governments to keep under constant review the effect of the activities of the mass media on respect for privacy; this might be done by means of regular contacts with the professional organisations representing these media, and at the same time by instructing the Committee of Experts to keep the question on its agenda, in order that European solutions might eventually be found to combat the threats to privacy which may result from new methods of mass communication, such as video-cassettes and television broadcasts by cable and by satellite.

PART I: THE RIGHT TO PRIVACY AS AFFECTED BY MODERN  
SCIENTIFIC AND TECHNICAL DEVICES

I. General Considerations

16. The protection of the right to privacy becomes increasingly necessary with the speed of change in the modern world and the advance of science and technology. Phenomena such as the population explosion, the information explosion and the growth of giant towns, contribute to increase the threats to the individual's right to respect for his privacy. It is however above all the practical application of modern technical devices to the surveillance or observation of individuals that presents the most serious consequences for the right to privacy.

17. These technical devices include in particular many means of recording sounds and images, as well as of storing or processing such records (1). Of special importance is the wide dissemination of small devices, such as miniature microphones and cameras, not readily detectable and functioning from a distance and without being visible. In consequence the individual, who may well be unaware that his person or his environment are under surveillance, is threatened in his right to privacy; he must be protected from the possibility of a growing and almost unlimited number of intrusions, while the devices used become increasingly complex and constantly improved, and in consequence difficult for lawyers to deal with.

These new techniques are believed at present to be used mainly for the surveillance of individuals, for observation by optical or acoustic devices, of their movements, acts, speech or private writings, without their knowledge and against their will. But new psychological forms of intrusion into privacy (the use of oral and written tests, drugs, subliminal advertising, reading and interpretation of brain signals, etc.) may arise in the near future. For this reason, and in view of this rapidity of change and the great variety of possibilities of surveillance and observation of individuals and, therefore, of interference with their privacy, the protection of privacy should be kept under constant attention.

18. This state of affairs has given rise, for some years already, to serious concern. International and regional organisations have been aware of it, as have national authorities. Indeed, it is evident, because of their very nature, e.g. in the case of international communications, that certain forms of interference with the individual's right to respect for

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(1) In this respect, reference may be made to the documentation compiled for the Committee and relating to small devices on free sale and mentioned in the Belgian press.

privacy can only be controlled effectively by concerted inter-governmental action which would seek to co-ordinate and complete, particularly on the European level, the efforts already undertaken by States.

19. Among the measures already taken by the member States of the Council of Europe in order to guarantee the right to privacy, mention should be made in particular of the important recent changes in the domestic law of certain of these States: one may point out, for instance, the laws adopted between 1967 and 1970 in Austria, the Federal Republic of Germany, France and Switzerland, while in other States bills or legislative proposals in the same direction are at present pending before the competent organs. (1).

II. The protection of the right to respect for private life by Article 8 of the European Convention on Human Rights

20. Article 8 of the European Convention on Human Rights provides as follows:

- "(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."

21. This provision has in regard to the right of privacy its counterpart in Article 17 of the U.N. Covenant on Civil and Political Rights. The Committee of Experts has made a comparison of these two texts in the report it has submitted to the Committee of Ministers and which the latter has adopted in May 1970 (2). The Committee accordingly refers to this Report insofar as necessary.

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- (1) See document DH (73) 9 which contains a concise summary of the law on privacy of various member States of the Council of Europe.
  - (2) Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Report of the Committee of Experts on Human Rights to the Committee of Ministers: Differences as regards the rights guaranteed (Doc. H (70 7, paras. 158-164)



22. As regards the meaning of Article 8 in so far as it protects the right to respect for private life, the following statements may be made, taking into account, in particular, the jurisprudence and practice of the organs of the Convention (European Commission and Court of Human Rights, Committee of Ministers):

(i) Paragraph 1 of Article 8 does not contain a definition of the term "private life", nor is it possible to deduce a definition from the "travaux préparatoires" of the Convention.

(ii) The decisions of the European Commission of Human Rights do not give any sufficient indications as to the content of the concept of "private and family life" (1); certain decisions merely stress that the "unity" of family life is to be respected (2).

(iii) It is not clear to what extent "home" and "correspondence", which are mentioned separately in Article 8, paragraph 1, are to be considered as part of "private life".

(iv) Paragraph 1 of Article 8 does not appear to provide for protection against attacks on honour or reputation as such (3).

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- (1) For "private life", cf. for instance, Application Nos. 104/55 (Yearbook, Vol. I, pp. 228-229) and 530/59 (Yearbook, Vol. III, pp. 184-196); for "family life", cf. Application Nos. 312/57 (Yearbook, Vol. II, pp. 352-354), 1420/62, 1477/62, 1478/68 (Vol. VI, pp. 591, 629), 1855/63 (Yearbook, Vol. VIII, p. 200), 2535/65 (Coll. of Dec., Vol. 17, p. 28), 2676/65 (Coll. of Dec., Vol. 23, p. 31), 2991/66 and 2992/66 (Yearbook, Vol. X, pp. 478, 482), 3325/67 (Yearbook, Vol. X, p. 528) and the Belgian Linguistic Case, Applications No. 1474/62 (Yearbook, Vol. VI, p. 332), 1677/62 (Yearbook, Vol. VII, p. 140), 1691/62 (Yearbook, Vol. VII, p. 140), 1769/63 (Yearbook, Vol. VI, p. 444), 2126/64 (Yearbook, Vol. VII, p. 252).
- (2) Cf. for instance the Application No.s 2991/66 and 2992/66, Alam and Singh against the United Kingdom, Yearbook Vol. X, p. 483, and the Belgian Linguistic Case, Publications of the European Court of Human Rights, Series B, Pleadings, Oral Arguments and Documents, Vol. II, Strasbourg 1968, pp. 16 and 40.
- (3) Article 17 of the U.N. Covenant on Civil and Political Rights provides for protection against "unlawful attacks on (one's) honour and reputation" - cf. doc. H (70) 7, para. 158, p. 48, referred to above. Cf. also European Commission of Human Rights, Decision on Application No. 2413/65, of 16.2.66, in: Coll. of Dec., Vol. 23, p. 7: "The right to reputation is not as such guaranteed by the Convention".



(v) The right to respect for private life - like other human rights protected by the Convention - can be subject to restrictions which, on the whole, are similar, though not identical, with those which are provided for by certain other provisions of the Convention. In particular, paragraph 2 of Article 8 only takes into account interferences by public authorities.

(vi) Existing international jurisprudence and practice, whether of the Commission, the Court or the Committee of Ministers, do not contain sufficient indications as to the meaning of "measures necessary in a democratic society" referred to in paragraph 2, nor do they indicate the exact meaning of the various grounds for permissible restrictions of the rights guaranteed by paragraph 1 and the permissible interference by public authorities in the exercise of these rights (1).

(vii) It is not possible either, from the jurisprudence of national courts referring to these provisions of the Convention, to draw sufficiently clear indications as to the meaning of the various concepts included in paragraphs 1 and 2 of Article 8. The Committee has noted, however, that the national jurisprudence relating to provisions similar to those of Article 8 contains interesting indications as to the interpretation of relevant concepts and it has taken account thereof, in particular when formulating its conclusions.

23. For the purpose of a more precise conception of "private life" and the scope of permissible interferences by public authorities, the Committee also examined the main legal writings on this matter as well as the most important studies undertaken by non-governmental organisations (2).

24. This examination does not, however, modify the Committee's conclusions on Article 8 of the Convention, that is to say that there is no generally accepted definition of private life in either international or national legislation, jurisprudence or practice, or in legal writings. Nevertheless, there exists a certain consensus of opinion on certain of the elements which are, or should be, part of private life. Therefore, without devoting further consideration to this question of definitions, the Committee decided to formulate its views on the essential practical problems arising in this matter, and to propose measures which should be taken.

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(1) Cf. the applications referred to above.

(2) See in particular the proceedings of the Conference of Nordic Jurists (1967): "Nordic Conference on the right to privacy" (Cf. S. Strömholm, Right of Privacy and Rights of the Personality, Stockholm, 1967).

### III. Conclusions

25. The Committee considered that it was not its task to proceed to a critical study of the national legislation relating to the right to privacy. It does not follow that the Committee has not found that differences exist from one State to another as regards the extent to which privacy is protected, but in the Committee's opinion it was sufficient at present to take note of the efforts, already crowned with success, or in progress, in all member States, towards solving the problems examined in this report.

26. The Committee was unanimous in considering that it would be appropriate to recommend to the Governments of member States that they should pursue their efforts towards an ever-increasing protection of privacy, taking into account certain principles developed below which could be of value towards a common approach to the problem.

27. In order to formulate these principles, the Committee examined the following questions:

- (a) who should be entitled to protection of the right to privacy ?
- (b) what are the values that should be protected by this right ?
- (c) in what instances should interference with this right be inadmissible and in what instances could interference be regarded as admissible ?
- (d) to what extent does the European Convention on Human Rights provide protection for this right ?
- (e) what measures could be taken with a view to fuller protection of this right ?

28. For each of these questions, the Committee has formulated a certain number of principles which might also constitute elements to be included in the recommendation to Governments mentioned in paragraph 18 above. The Committee considers, however, that it could not usefully formulate such a recommendation until after the CCJ and the ECCP have expressed their opinion on the questions raised in paragraph 37 below.

#### A. The persons entitled to protection of the right to privacy

29. The right to privacy should belong, to its full extent, to any living person; to a certain extent, the protection of this right should also be assured after the death of such person. Legal persons and other organisations and groups should also be entitled to this right insofar as, by its nature, it is applicable to them.

B. The values to be protected

(i) General considerations

30. Respect for privacy is a concept of considerable complexity and covers a wide range of values. Generally speaking, this concept includes all values relating to the individual that need to be protected against outside interference. But this is equally true of the vast majority of other fundamental rights which, with a very few exceptions, are individual rights intended to guarantee to the individual a sphere of freedom.

31. The values denoted by the term "private life" are, however, particularly closely bound up with the individual. Since individual circumstances vary, in particular according to the society in which the person lives, the legal protection of these values should be so devised as to take account of this fact.

(ii) The various elements of the right to privacy

32. The right to respect for privacy is based essentially upon the recognition of the individual's interest that he should be protected against any intrusion into his intimate life and into any part of his existence which he might legitimately desire to keep to himself. This interest concerns personal communications and relations, and all happenings that affect private life and the personality of the individual, and applies in particular to the individual's likeness, his voice, his home and those possessions which belong to his personal sphere.

33. The right to respect for privacy is closely related to certain other human rights guaranteed by other provisions of the Convention, such as the right to physical and mental integrity (Articles 2 and 3 of the Convention).

C. Interferences with the right to privacy

1. Definitions

34. According to the nature of the interferences, it is necessary to distinguish between observation, recording and utilisation, concepts which the Committee has defined as follows for the purposes of the present report:

(a) Observation: is an activity of intentional perception, whatever the nature of such perception, and whatever the means employed, be it natural or be it with the help of technical aids (1);

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(1) The Committee's definition of "observation" includes listening.

(b) recording: is any intentional retention of observed phenomena, whatever the means employed;

(c) utilisation: is the making use of the results of observation or recording and, in particular, the publishing of such results or making them otherwise accessible to any other person.

35. In general, recording of a phenomenon constitutes a more serious interference of the right to privacy than its observation; and utilisation of the results of such observation is again more serious than its recording.

## 2. Unlawful interferences

36. Although the acts considered below do not exhaust the list of what might be considered as illicit, they nevertheless constitute some of the most serious interferences in privacy and should therefore be considered unlawful.

37. In attempting to define the unlawful interferences, the Committee has had no intention of drawing up legal provisions. In particular, the list of unlawful interferences that follows, is not to be understood as defining a series of punishable offences. Nor has the Committee dealt with the question of what should be the nature of the measures to be taken at the national and international levels either for the prevention or the sanctioning of these interferences, though the Committee considers that the solutions are to be sought both in administrative action (prohibitions) and in civil remedies and penal sanctions, according to the nature of these acts and their seriousness in relation to the need for the respect of the right to privacy.

38. In undertaking the study of the consequences upon privacy of modern scientific and technical devices, the Committee was aware of the fact that, while these devices have aggravated the threats to privacy, other and more classic threats nevertheless remain. In the list, therefore, the scientific and technical devices are considered as particular cases of a more general problem.

39. Finally, the Committee wishes to emphasise that the list of unlawful interferences should be considered in the light of paragraph 45 below, which deals with admissible interferences and states certain criteria for their admissibility which would be applicable, inter alia, to the list of unlawful interferences which follows.

### (a) Unlawful Observation

40. The act of observing persons or things in any place should be considered as unlawful interference.

(i) if this observation, in particular in view of its object or the circumstances in which it takes place, could reasonably be considered as a serious annoyance to the persons concerned; or

(ii) if it is carried out in a clandestine manner by means of technical devices which appreciably increase the possibilities of natural perception (1).

(b) Unlawful Recording

41. The act of recording should be considered as unlawful interference when it is:

(i) the recording of unlawful observations of persons or things;

(ii) the recording of observations of persons or things if the recording is done in a clandestine manner;

(iii) the recording of observations of persons or things contrary to the will of the person concerned; or

(iv) the recording of observations of persons or things in a manner which could reasonably be considered as a serious annoyance to the persons concerned.

(c) Utilisation of observations and recordings

42. The following should be considered as an unlawful interference:

(i) the utilisation of observations or recordings obtained in an unlawful manner;

(ii) the utilisation of observations or recordings obtained contrary to the will of the persons concerned; or

(iii) the utilisation of observations or recordings in a manner which could reasonably be considered as a serious annoyance to the persons concerned.

(d) Interception of communications

43. It should be considered as unlawful interference for any person to obtain intentionally knowledge of, or to record, a communication transmitted by any means and not intended for him.

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(1) For example, teleobjective lens, directional microphones, etc.

### 3. Admissible interferences

44. As regards interferences by public authorities, the limitations are laid down in Article 8, paragraph 2 of the European Convention on Human Rights. In the opinion of the Committee, the provisions of this paragraph should be interpreted in a restrictive manner (1) and measures of restriction taken by public authorities should be in proportion to the needs and, in particular, consistent with the provisions of Article 18 of the Convention (2).

45. As regards interferences by private persons and institutions other than public authorities, these are not expressly mentioned in Article 8 of the Convention. In the opinion of the Committee, they should be admissible only in exceptional circumstances and, in general, only when strictly necessary, after weighing, one against the other, the necessity of protecting privacy and the particular reason for interference. This applies in particular to the following cases:

(i) where there is a special relationship of dependency sanctioned by law (such as the relationship between parents and children);

(ii) in the exercise of the freedom of information as defined in Article 10 of the European Convention and in Article 19 of the U.N. Covenant on Civil and Political Rights; or

(iii) when the interference is justified by a legitimate overriding interest.

Interference may also be admissible where there is express or implied consent of the person concerned or where it is in conformity with generally admitted practice.

#### D. The protection of the right to respect for privacy by the European Convention on Human Rights

46. In the opinion of the Committee, Article 8 of the European Convention, which protects privacy against interferences by public authorities, does not in this respect require modifi-  
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(1) Cf. Application No. 753/60, Decision of 5 August 1960, Yearbook III, p. 310.

(2) Article 18 of the Convention provides as follows:  
"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

cations or additions.

47. The question whether Article 8 is also applicable to interferences by private persons and by institutions other than public authorities, has already been the object of certain considerations of the Committee in the report it has prepared on problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights (see Doc. H (70) 7, paras. 47 and 48). This question has also been discussed at the Third Colloquy about the Convention, at Brussels. The Committee considered that it was not in a position to formulate an opinion on this question.

E. Measures to be taken

48. The study made by the Committee has led it to make the following two proposals which could be incorporated in the recommendation to be addressed to the Governments of member States:

(a) There should be a clearly established obligation on States to take appropriate measures, if necessary of a legislative nature, to ensure that the right to privacy is equally respected by private persons and institutions other than public authorities (1). This proposal may be realised either within or outside the framework of the European Convention on Human Rights.

(b) It should be considered what measures among the appropriate measures, preventive and repressive, are necessary, at the national and international level, to secure protection against interferences with privacy by private persons and institutions other than public authorities. This examination should be made in relation to criminal law (e.g. penal sanctions), civil law (e.g. claims for damages), and administrative law (e.g. control or prohibition of the manufacture, distribution or use of devices particularly liable to be used to interfere with privacy), taking account of the principles set out in paragraphs 29 to 47 above. The European Committee on Legal Co-operation and the European Committee on Crime Problems will no doubt wish to give their opinion on this second proposal.

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(1) In this respect, see, for instance, para. 7, C, of Resolution 428 (1970) of the Consultative Assembly of the Council of Europe, containing a Declaration on Mass Communication Media and Human Rights.



PART II: THE RIGHT TO PRIVACY AS AFFECTED BY THE PRESS  
AND OTHER MASS MEDIA

The elements of privacy

49. For the purposes of the second part of this report, the definition of the various aspects of the right to privacy, as set out by the Committee in the first part of this document, remains valid. Like modern scientific and technical devices, mass media may affect the right to respect for privacy, the elements of which are set out in the first part of this report (para. 32).

Definition of mass media

50. In current usage, the concept of mass media refers principally to the press, in particular dailies and periodicals, the cinema, radio and television. It would seem that it is these mass media which are most likely to intrude into the private life of individuals. However, other forms of disclosure or dissemination should not be ignored, such as posters, oral communications spread by means of loudspeakers, and video-cassettes, whose social effects can be as considerable as the mass media. Moreover, technical and economic developments may at any moment produce new forms of expression having the character of mass media and thus, by one means or another, capable of interfering with private life.

In the light of these various and complex facts, the Committee of Experts considers it neither possible nor advisable to define the concept of mass media precisely. If at present the press, radio and television are most likely to intrude into private life, other means of disclosure and dissemination comprising similar risks for the protection of privacy cannot be ignored.

Balance of interests

51. Here it is to be recalled that when drawing up rules intended to strike an equitable balance between the interests attached by private persons to the protection of privacy, as guaranteed by Article 8 of the Convention, and the interests represented by the mass media, protected by Article 10 of the Convention, account must be taken of the fact that the mass media normally covered by that term may fulfil an essential function in the general interest of the public, which has a right to benefit from the free circulation of information. At the same time, it is precisely because of their mass effect that, from the point of view of the protection of privacy, these mass media embody such perils that they call for special rules. In that respect, the situation is less complex and the

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interests attached to the protection of privacy more entitled to consideration in cases where such interests are threatened by the forms of mass media outlined above, which do not fulfil such a function in the life of a democratic society. With regard to methods used, for example for commercial publicity, their very effectiveness, which justifies treating them for the purpose of legal rules on an equal footing with mass media in the strict sense, constitutes, through the risks they entail for the protection of privacy, a strong reason for submitting them to a more severe treatment.

#### Basic principle of the report

52. The basic principle adopted by the Committee in its work is that the right of privacy should be respected by the mass media as well as by individuals and public authorities.

#### Interference with privacy by the mass media: importance of publication

53. When studying the various forms of violation of privacy made possible by modern technical devices, the Committee found it necessary to give particular consideration to such unlawful interferences as consist in the observation and recording of facts relating to private life, as defined above, for observation and recording are the most important forms of interference committed by means of such devices. Thus the Committee, in the first part of this report, had to refer only in general terms to intrusions into privacy through the use of information so obtained, the ways in which such information may be used being numerous and various.

54. In commencing the study of intrusions into privacy committed by mass media, the Committee found it necessary to concentrate above all on the various forms of using information relating to private life and notably on those that are characteristic of the mass media. This can result in the publication of such information and the public presentation of facts relating to private life regardless of the way in which the material thus made accessible to the public has been obtained. Accordingly, the main conflicts which arise when privacy is confronted with the mass media and which are the subject of the present report, go beyond the scope of those considered in paragraph 42 above. In so far as these conflicts come under the cases envisaged in paragraph 42, they claim the Committee's attention only by virtue of the extent and gravity of the use of information so obtained due to the social impact of the mass media.

55. For the purposes of this report, publication signifies any means of disclosure or dissemination, whatever technical methods or means of presentation may be employed, and

regardless of the particular sense which "publication" may have in specific branches of law, such as penal law and copyright.

#### Methods used by mass media for obtaining information

56. There are a great number of different methods used by mass media to obtain information relating to private life, many of which are not unique to the mass media. For this reason, they are subject to the normally applicable legal rules. The principles laid down by the Committee in the first part of the present document in respect of scientific and technical devices apply equally where such devices are used by the mass media.

#### Infringements on the right of privacy by the mass media

57. The Committee wishes to state in the first place that any publication by mass media which constitutes an infringement of privacy should be considered illicit. In this connection it should be recalled that Article 10 (2) of the European Convention on Human Rights expressly reserves the possibility of limiting freedom of information in the interests of protecting the reputation or rights of others, as well as of preventing the disclosure of information received in confidence. It is understood, however, that such infringements should not be liable to sanctions unless they go beyond what is normally tolerable in the society concerned.

58. The principle set out in the previous paragraph applies particularly to the publication of a person's image, the public use of his voice, the public exploitation of his name or words, in a form or manner likely to cause him serious annoyance.

59. The need for the public in a democratic society to be informed of the facts of public life in the political, economic, social, cultural, religious, scientific and technical fields, may in exceptional circumstances justify that in the exercise of the right of freedom of expression as defined in Article 10 of the European Convention on Human Rights (cf. para. 45 above) information referring to matters normally protected by the right of privacy should be published through the channel of mass media. Such interference may be permitted to the extent strictly necessary in so far as the information is of overriding importance for legitimate public interests. This may be particularly so with regard to information relating to a person who, by virtue of his function or position, is subject to legitimate public attention.

60. Similarly, with regard to methods for acquiring information affecting privacy, the activities of observation and recording, considered in principle as unlawful, according

to paragraphs 40 and 43, may be considered lawful, if the activity in which the person concerned is engaged at the time of the observation or the recording is, by its nature, or by reason of the position or previous activities of the person concerned, the object of a legitimate and overriding public interest and if the observation or recording aims at informing the public by means of the mass media. However, this exception should not be applicable if such observation and recording is carried out in a clandestine manner by means of technical devices which appreciably increase the possibilities of natural perception.

61. Interference with privacy may also be admissible if the person concerned has given his explicit or tacit consent. However, such consent is valid only for the individual act to which it relates and does not, therefore, apply generally to similar acts of interference. Equally, such consent as may be presumed to have been given by persons active in public life extends to their private life only in so far as information concerning the latter is of a legitimate and overriding public interest.

Methods used to safeguard privacy in relation to the mass media

62. In the opinion of the Committee of Experts, it would be appropriate that the Committee of Ministers should recommend to member Governments that they should propose the adoption of rules of law designed to assure effective protection of privacy against interference by the mass media according to the principles set out in this report.

63. However, in view of the special character of the mass media and the role they play in the public interest, solutions intended to avoid possible interferences with privacy should be the object of joint discussions between governments, as representatives of the general interest, and professional organisations representing the mass media. For this purpose, institutions such as Press Councils or the establishment of ethical standards freely accepted by the press, may contribute to the protection of privacy. The Committee has deliberately refrained from formulating recommendations in this respect at the present stage, since the question of Press Councils and of the harmonisation of press law in member States of the Council of Europe already appears in its Work Programme.

64. In conclusion, the Committee would first of all reiterate, in relation to the mass media, the conclusions reached in the first part of this report, which concerned the right to respect for privacy as affected by modern scientific and technical devices, and particularly those set out in paragraphs 34 to 48.

65. Because of their social importance, mass media add a new dimension to the problem of privacy and give it a character of urgency. In these conditions, and in view of the variety of situations to be found in the different member States and the rapid evolution of means of mass communication, the Committee of Experts considers that it would be desirable to recommend to member Governments to keep under constant review the impact of mass media upon the respect for privacy through regular contacts with the professional bodies representing these media. It is particularly through such contacts that adequate solutions, capable of filling the lacunae left by legislation in this field, may be found by common agreement.

66. On the European level, the Committee of Experts considers that the problem of privacy, as affected by the mass media, should also be kept under constant review, so that European solutions may eventually be found which would take account of the possible dangers to privacy stemming from new forms of mass communication, such as video-cassettes, and television programmes transmitted by cable and by satellite. The Committee suggests for this reason that the question should be kept on its agenda.

A P P E N D I X    II

List of Working Documents

Document CDH (67) 5 of 12 May 1967: Preparatory work on Article 8 of the European Convention on Human Rights.

Assembly Document 2326 of 22 January 1968: Report presented to the Consultative Assembly on Human Rights and Modern Scientific and Technological Developments (Rapporteur: Mr. Czernetz).

Recommendation 509 (1968) adopted by the Consultative Assembly on 31 January 1968, on Human Rights and Modern Scientific and Technological Developments.

Document DH/Exp (68) 5 of 18 January 1968: Comparison between Article 17 of the U.N. Covenant on Civil and Political Rights and Article 8 of the European Convention on Human Rights. Memorandum prepared by the Delegation of Belgium.

Document DH/Exp (68) 25 of 22 July 1968: Conclusions of the Nordic Conference of Jurists on the "Right to Privacy", held on 22 and 23 May 1967.

Document DH/Exp (68) 32 of 10 October 1968: Extract from the 170th Meeting of the Ministers' Deputies (29 April - 3 May 1968).

Document DH/Exp (68) 33 of 7 November 1968: Document prepared by the Directorate of Human Rights on the Legislation on Human Rights and Modern Scientific and Technological Developments in member countries.

Document DH/Exp (68) 40 of 20 December 1968: Note prepared by the Secretariat of the Commission of Human Rights on the jurisprudence of the Commission on the subject of the protection of the right to respect for one's private life.

Assembly Document 2562 of 9 May 1969 and Appendix of 10 May 1969: Report presented to the Consultative Assembly on the Use of Computers in Local Government (Rapporteur: Mr. Jakobsen).

Recommendation 557 (1969) adopted by the Consultative Assembly on 14 May 1969, on the Use of Computers in Local Government.

Document DH/Exp (69) 9 of 2 September 1969: Document prepared by the Directorate of Human Rights - points for discussion.

Document DH/Exp (69) 10 of 29 August 1969: Document prepared by the Directorate of Human Rights containing information on legislation and on activities of other international organisations.

Document DH/Exp (69) 11 of 9 September 1969: Document submitted by the United Kingdom Expert.

Document DH/Exp (69) 12 of 28 August 1969: Document submitted by the Netherlands Government.

Document DH/Exp (69) 13 of 1 October 1969: Document submitted by the Swiss Government.

Bibliographical Survey on the Right to Privacy as affected by Mass Communications Media and Modern Technological Devices.

Document DH/Exp (69) 17 revised of 31 March 1970: Memorandum by the Secretariat on the 27th Meeting, held from 13 to 17 October 1969.

Document DH/Exp (70) 1 of 20 January 1970: Summary report by "Justice" (British Section of the International Commission of Jurists) on Privacy. Extract from "The Times" of 16 January 1970.

Document DH/Exp (70) 2 of 20 January 1970: Press Council attack on Privacy Bill. Extract from "The Times" of 16 January 1970.

Document DH/Exp (70) 4 of 15 April 1970: Secretariat Memorandum on the 28th Meeting, held from 9 to 13 February 1970.



Document DH/Exp (70) 5 of 15 April 1970: Certain principles affecting the protection of privacy and the secrecy of communications. Memorandum by the Belgian Expert summing up the discussions in the Committee of Experts in February 1970.

Document DH/Exp (70) 6 of 16 April 1970: Memorandum on the Protection of Private Life drawn up by the Committee of Experts on Human Rights for the CCJ and the ECCP. Draft submitted by the Austrian Expert.

Document DH/Exp (70) 7 of 21 April 1970: Draft Report of the Committee of Experts on Human Rights to the Committee of Ministers.

Document DH/Exp (70) 8 of 20 July 1970: Report of the Committee of Experts - preliminary draft subsequent to the meeting of a Working Party from 27 to 30 April 1970.

Document DH/Exp (70) 14 of 2 October 1970: Some observations formulated by the Dutch Expert on the "third-party" effect or "horizontal" effect of Article 8 of the European Convention on Human Rights.

Document H (70) 7 of September 1970: Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights - Differences as regards the rights guaranteed - Report of the Committee of Experts on Human Rights to the Committee of Ministers.

Document DH/Exp (70) 15 of 18 November 1970: Report of the Committee of Experts on Human Rights to the Committee of Ministers.

Document DH/Exp (70) 15 Revised, Appendix II of 3 February 1971: Survey of the legislation on Human Rights and Modern Scientific and Technological Developments.

Document DH/Exp (71) 2 of 5 March 1971: Report by Mr. Charles Debbasch, expert consultant, relating to the Right of Privacy and the Mass Media (Federal Republic of Germany - United Kingdom).

Document DH/Exp (71) 4 of 10 March 1971: Report by Mr. Charles Debbasch, expert consultant, relating to the Right of Privacy and the Mass Media (General Study).

Document DH/Exp (71) 25 of 14 October 1971: Proposed additional comments as to the report DH/Exp (70) 15.

Document DH/Exp (72) 11 of 28 August 1972: Draft Report of the Committee of Experts to the Committee of Ministers - Part Two : The right to respect for privacy and mass media.

Document DH/Exp (72) 11 of 2 October 1972L Revised draft of the second part of the Report to the Committee of Ministers.

Document DH/Exp (73) 2 of 12 January 1973: Draft Report (Part II) to the Committee of Ministers (DH/Exp (72) 11 revised).

Document DH/Exp (73) 10 of 23 March 1973: Observations by the Netherlands' Expert relating to the Second Part of the draft report to the Committee of Ministers (DH/Exp (73) 2).

Document DH/Exp (73) 11 of 23 March 1973: Observations by the Swiss Expert on the draft report (Part II) to the Committee of Ministers (DH/Exp (73) 2).

Document DH/Exp (73) 9 of 23 March 1973: Survey of Legislation in Member States on Human Rights and modern scientific and technical devices.

Document DH/Exp (73) 8 of 29 March 1973: Draft report of the Committee of Experts on Human Rights to the Committee of Ministers on the right to respect for privacy (General Introduction).

ANNEXE II

Liste des membres du Comité d'experts  
qui ont pris part aux réunions consacrées à  
la préparation du présent rapport

24e réunion :	18 - 22 novembre 1968	(1)
25e réunion :	20 - 24 janvier 1969	(2)
26e réunion :	14 - 18 avril 1969	(3)
27e réunion :	13 - 17 octobre 1969	(4)
28e réunion :	9 - 13 février 1970	(5)
29e réunion :	5 - 9 octobre 1970	(6)
31e réunion :	15 - 19 mars 1971	(7)
33e réunion :	8 - 12 mai 1972	(8)
35e réunion :	27 novembre - 1er décembre 1972	(9)
36e réunion :	2 - 6 avril 1973	(10)

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DH/Exp (73) 17  
Annexe II

- 33 -

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