The Contribution of International Human Rights Law to the Protection of Privacy: the Case of Mexico

by

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Abstract

This thesis examines the contribution of international human rights law to the protection of privacy. It poses the question of whether or not international human rights law can compensate for the limitations that other areas of law have in the protection of privacy with respect to the mandatory collection, retention, use or disclosure of personal information carried out by states. The thesis argues that international human rights treaties and jurisprudence offer principles, frameworks and an individual entitlement that can be applied in domestic jurisdictions to protect the private lives of individuals from abuses of power by states through data processing. To test its argument, the thesis uses Mexico as its case study. Several factors make Mexico an especially useful jurisdiction for this purpose. A right to privacy is not explicitly included in the Mexican legal order and the judiciary has yet to develop privacy jurisprudence. Following a 2011 constitutional amendment, Mexico opened its legal system to international human rights law, incorporating into the national bill of rights those human rights included in international treaties. Mexico offers an excellent opportunity for examining what international human rights law can offer in the protection of privacy of individuals with respect to the mandatory data processing carried out by the state. The thesis demonstrates that the right to privacy included in international human rights treaties has been understood by authoritative interpreters as implying other
important principles such as legality, necessity and proportionality. In the Big Data era, where state surveillance is taking on new dimensions, these principles are crucial for the protection of privacy. By showing how the international human rights law on privacy can be received within Mexican law, this thesis shows that the private lives of individuals can be protected from abuses of power committed by the state via data processing.
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Introduction

The information age has changed the world. Never in the history of humankind have civilizations made so much progress in such a short period of time. The emergence of this period was possible due to the technological improvements achieved in computing and telecommunication industries during the second half of the twentieth century. Many of these advancements were oriented to the generation, collection, processing and transmission of data. For this reason, the concept of information technology \(^1\) came into being. Information technologies have transformed the social structures of all countries. We can see the influence in the economic, political, philosophical and sociological realms. The common feature in all countries has been a significant increase in the flow of information. The exchange of data has become the distinctive hallmark by which our society will be remembered: the information society.\(^2\)

The major driver of what some authors have called the ‘information technology revolution’ has been technological innovation.\(^3\) Despite its social benefits, information technology (IT) poses important threats to privacy. This is due to several reasons. First, IT allows information to flow more freely, thus rendering it into a commodity.\(^4\) Information has thus become central in many modern economies. This commodification of information has not excluded personal data which has, in fact, turned into the raw material of many new industries such as online social networking services and social media advertising. Second, IT has facilitated the collection and storage of personal, private information by state agencies, private companies and organizations.\(^5\) This has

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1 Information technology could be defined as the “acquisition, processing, storage, dissemination and use of vocal, pictorial, textual and numerical information by a microelectronics-based combination of computing and telecommunications,” Department of Trade and Industry of Great Britain, quoted in William J. Martin, *The Information Society* (London: Aslib, 1988) at 24.

2 In general terms, information society could be described as “an advanced, postindustrial society of a type found most commonly in the West. It is characterized by a high degree of computerization and large volumes of electronic data transmission and by an economic profile heavily influenced by the market and employment possibilities of information technology.” *Ibid.* at 37. Several theories using technological, economic, occupational, spatial or cultural criteria have been constructed in an attempt to explain the concept “information society.” For a critical account of these theories see Frank Webster, *Theories of the Information Society*, 3d ed. (London: Routledge, 2006).


not only augmented the surveillance capability of both state and corporations, it has enabled them to exercise more control over individuals. This surveillance capability has increased dramatically around the world in the past twenty years with the development of IT, especially with the advent of the Internet and the World Wide Web. To claim that privacy is under threat due to the advances in information technology would be tantamount to assessing the problem in a deterministic fashion. The recent increase of the surveillance capabilities of several states around the world is, rather, the result of various complex factors.

Surveillance is the systematic attention given to personal details for specific purposes such as influence, management, protection or direction. While surveillance practices can be traced back to antiquity, they have emerged as a central component of modern life. With urbanization growing worldwide, surveillance has become essential not only for policing and crime control but also for marketing and consumption. These activities have created an insatiable appetite for personal data in recent decades, the efficient processing of which has much increased because of information technology. Globalization brings with it intense flows of information. This increased the processing of personal information for surveillance purposes. Today, personal information is typically digital, flowing easily across national borders for commercial, intelligence and law enforcement purposes. Other factors have contributed to the significant increase in the capturing, processing and dissemination of personal information for surveillance purposes. This includes the ongoing post-911 securitization where certain areas of social life are deemed risky and require surveillance to maintain security. At the same time, there has been a blurring of the distinction between the state and private corporations where data collected by the

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7 Ibid at 14.
8 Ibid at 12. Early examples include the organization of the military, the carrying out of population censuses and the monitoring of employees. Ibid at 27-36.
9 Ibid at 36-43. The police place individuals under surveillance to prevent crime. Market researchers process consumer data to target potential consumers.
10 In addition to information, globalization also implies the flow of physical artifacts, people, symbols and tokens. See David Held et al, Global Transformations (Stanford, California: Stanford University Press, 1999) at 16.
11 See Colin J. Bennett et al, Transparent Lives: Surveillance in Canada (Edmonton, Alberta: Athabasca University Press, 2014). The authors cite examples like the use of credit cards and the creation of the North American ‘security perimeter’ between Canada and the U.S. In the former, personal credit card details accompany trans-border transactions. In the case of the ‘security perimeter,’ personal information easily flows between Canada and the U.S. for greater border control. Ibid at 105, 118.
private sector are used by governments—and vice versa. There has also been a rise in the prevalence of social media and user-generated data.¹²

Surveillance is taking on a new dimension in the Big Data era where large corporations collect huge quantities of data and apply mathematical tools for the purpose of identifying and targeting individuals.¹³ Because Big Data refers to the processing of large amounts of data “to extract new insights or create new forms of value, in ways that change markets, organizations, the relationship between citizens and governments, and more,”¹⁴ it has brought with it relevant changes in state surveillance techniques. As Edward Snowden revealed in 2013, governments are secretly collecting, storing and ensuring access to huge amounts of communications data.¹⁵ Governmental mass surveillance of ordinary individuals, especially through the access, retention and/or interception of their digital communications data, is becoming common practice in many democratic states. Governments are interested in looking “at the widest possible penumbra of data that surrounds the person,” for the purpose of investigating anyone who falls under suspicion.¹⁶ While Big Data is part of this context where the state is increasing its data processing activities for national security, crime prevention or law enforcement purposes, it is not central to the problem analyzed in this thesis. My thesis is concerned with the pressing reality that state surveillance practices in these areas are challenging our current legal privacy frameworks. There are at least two reasons for this. First, the privacy protections of data protection law apply in the context of national security, crime prevention or law enforcement, but are subject to restrictions that may render them ineffective. Second, the constitutional protection of privacy often focuses on situations in which the state makes use of a particular type of information, not on the strategy the state follows when accessing the information.¹⁷

A simple research question directs this thesis. Can international human rights law compensate for limitations other areas of law have in the protection of privacy with respect to the mandatory

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¹² These and other factors are carefully analyzed in the Canadian context in Colin J. Bennett et al, supra note 11.
¹³ For a general explanation of Big Data, see Viktor Meyer-Schönberger & Kenneth Cukier, Big Data: A Revolution that Will Transform How We Live, Work and Think (Boston: Houghton Mifflin Harcourt, 2013).
¹⁴ Ibid at 6.
¹⁶ Viktor Meyer-Schönberger & Kenneth Cukier, supra note 13 at 157.
¹⁷ For an analysis of the limitations of data protection law and constitutional in Canadian law, see Lisa M. Austin, “Towards a Public Law of Privacy: Meeting the Big Data Challenge” (2015) 71 SCLR 541.
collection, retention, use or disclosure of personal information carried out by states? I argue that
international human rights treaties and jurisprudence offer principles, frameworks and an
individual entitlement that can be applied in domestic jurisdictions to protect the private lives of
individuals from abuses of power by states through data processing.

This thesis uses Mexico as its case study. Several factors make Mexico an especially useful
jurisdiction for examining the research question. First, a general right to privacy is not explicitly
included in the Mexican legal order. Second, Mexico belongs to the civil-law legal tradition and,
unlike many countries, did not change its constitution after World War II. The Mexican
constitution drafted in 1917, still in force, was not seen throughout most of the twentieth century
as a document that could be expanded by judicial interpretation. National courts tended to read
the constitution textually and, thus, narrowly, never creating a right to privacy nor developing
extensive privacy jurisprudence. Third, following a 2011 constitutional amendment, Mexico
opened its legal system to international human rights law, incorporating into the national bill of
rights those human rights included in international treaties. This openness has rendered such
rights into domestic rights, substantially expanding the national catalog of fundamental rights
and freedoms. Mexico is thus a country that gives us an excellent opportunity for examining
what international human rights law can offer in the protection of the privacy of individuals with
respect to the mandatory collection, use or disclosure of personal information carried out by the
state.

The usual response to the challenges that IT has posed to individuals’ privacy in the past decades
has been the enactment of data protection statutes aimed at regulating the collection, use, storage,
and dissemination of personal information. The overall purpose of these statues is twofold. On
the one hand, as Colin Bennett argues, “they were designed to give individuals greater control
over the information collected about them, and to stem the erosion of personal privacy.” On the
other hand, they require data collectors to observe certain principles in the collection, retention,
use and disclosure of personal data. These laws have also established privacy or data protection
agencies with regulatory, advisory, educational and conflict-resolution powers. Moreover, as

18 Colin J. Bennett and Charles D. Raab, supra note 4, at xviii.
19 Ibid.
David Flaherty reports, these agencies have also played a significant role in keeping governmental surveillance under reasonable control.20

The protection of privacy offered by data protection laws has, however, certain limitations. Most of these laws, for instance, do not grant individuals a right to withhold their personal information.21 While the intent of data protection laws is to prevent the unnecessary collection, use or disclosure of personal data, such laws usually do not offer guidance in determining which personal information is necessary for data processing. This issue becomes critical in the public sector, especially when mandatory requests by the state are made regardless of the level of interference with privacy. Such requests are becoming more common in the context of crime prevention, national or public security, law enforcement and other state activities performed in the interest of society at large. Given that the rights and obligations articulated through data protection laws often do not apply in these areas, individuals have no choice but to surrender their privacy by submitting their personal information to the state.

Constitutional law has also been used to protect the private lives of individuals from threats posed by IT. This law has been applied to prevent abuses of power in cases where the state collects, stores and/or uses personal information in the context of law enforcement. Democratic states have the obligation to guarantee individuals areas of freedom not subject to governmental interference. Constitutions thus grant rights to individuals aimed at protecting their persons, homes, papers, ideas, religion, communications, activities or movements from unauthorized state interventions. In several countries, these rights have been used as the basis for the protection of privacy. Paul Schwartz and Joel Reidenberg, for instance, explain that despite the lack of an explicit federal right to privacy, courts in the U.S. have interpreted several constitutional provisions as creating “a zone of privacy against government intrusions on private lives” and such interpretations have had “a significant impact on data protection.” 22 Constitutional law, in other words, can be used to set limits on the use of personal information by the state even when a general right to privacy is not explicitly mentioned in a constitution.

21 For a conception of privacy as the ‘option’ that individuals have to withhold information about one’s self, see James B. Rule, Privacy in Peril (New York: Oxford University Press, 2007) at 3.
The use of constitutional law as a means of protecting privacy may have also limitations. As said, in many countries, privacy has been protected through the judicial interpretation of several constitutional provisions, especially those protecting individuals against unreasonable searches and seizures. These interpretations have produced relevant tests aimed at protecting the private lives of individuals. In the U.S. and Canada, for instance, a ‘reasonable expectation of privacy’ test has been used by the courts to protect the private lives of Americans and Canadians against unreasonable intrusion of the state. There is, however, a problem with this test. When a court applies it, the court may only address privacy concerns related to the state making use of a particular type of information (bank records, pen registers, garbage, etc), but the same court may not examine the strategy a state is following by accessing the information. In other words, courts may only address the question of, say, whether DNA samples or bank records are private information, but not why the state is seeking access to these samples or records. As Lisa Austin argues, “the [Canadian] constitutional framework is best suited to address privacy concerns associated with the state accessing a particular ‘bit’ of information, not the way in which these bits are now being collected as parts of information systems that support new kinds of investigatory techniques.”

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23 See Katz v United States, 389 US 347 (1967). The test involves the Fourth Amendment to the American Constitution. In his concurring opinion, Justice Harlan argued that the privacy of a person is constitutionally protected where he or she has a reasonable expectation of privacy. There is a twofold requirement: first, a person “[has] exhibited an actual (subjective) expectation of privacy and, second, the expectation [is] one that society is prepared to recognize as ‘reasonable’”. Ibid at 361. Later the Court held that “wherever an individual may harbor a ‘reasonable expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion…the specific context and incidents of this right must be shaped by the context in which it is asserted.” See Terry v Ohio, 392 US 1 (1968) at 9. The ‘reasonable expectation of privacy’ test was adopted by the majority of the Court in Smith v Maryland, 442 US 735 (1979). For the Canadian test, see Hunter v. Southam Inc., [1984] 2 SCR 145, R. v. Edwards [1996] 1 SCR 128. The Canadian tests involves section 8 (Everyone has the right to be secure against unreasonable search or seizure) of the Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

24 See, respectively, United States v. Miller, 425 US 435 (1976), Smith v Maryland, 442 US 735 (1979), California v. Greenwood, 486 US 35 (1988). In these cases, the US Supreme Court solidified what has since become known as the third-party doctrine—people who voluntarily provide information to a third party has no reasonable expectation of privacy. This means that the U.S. government can obtain information from third parties without a warrant. The third-party doctrine has been recently called into question. In United States v. Jones, 132 S.Ct 945 (2012), a case involving the police installing a GPS tracking device on a suspect vehicle, Justice Sotomayor, in a concurring opinion, expressed that “More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties…this approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. Ibid at 957.

25 Lisa M. Austin, supra note 17 at 541.
This limitation of constitutional law is becoming increasingly relevant in the Big Data era. The Snowden revelations showed us that governments are applying big-data techniques on communications data to conduct surveillance over nationals and non-nationals for purposes related to national security, crime prevention and law enforcement. It seems that states are no longer simply interested in the content of our communications, but, rather, also in our relationships, connections and interactions with others. This interest supposes an extensive invasion of privacy—the state wants to know who are the people we know and who these people know. At the same time, the use of big-data techniques by the state may give rise to other human rights violations and discriminatory practices. Big Data tools work with data about people not suspected of anything and use that data to make predictions about them. If, for instance, a state mistakenly uses these predictions to punish individuals for actions or behaviors that have not yet happened, the state may violate the presumption of innocence of these individuals. Big Data in the public sector is today one of the biggest challenges of constitutional law and it will continue to be in the years to come.

The limitations of data protection law and constitutional law may be particularly relevant in countries where the constitution fails to articulate an explicit right to privacy and the judiciary has yet to develop thorough privacy jurisprudence. Given that Big Data is also a reality in these jurisdictions, individuals are left in a disadvantaged position. If the state collects, stores, and/or ensures access to huge amounts of personal information, this information may give to the state unfettered power and discretion over individuals. Without appropriate constitutional safeguards, how can individuals in these countries protect themselves from undue intrusions into their private lives carried out by the state?

This is precisely the problem in Mexico. Mexicans are today facing more difficulties in defending their private lives from state intrusion than citizens in other jurisdictions. This became evident a few years ago. In 2008, the Mexican government created a non-public National Cell-

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27 Viktor Meyer-Schönberger & Kenneth Cukier, supra note 13 at 157.
28 Ibid at 192.
29 Ibid at 161-162.
Phone Registry called RENAUT and, in 2009, approved the issuance of a biometrics-based National Identity Card (NIC). While the former required the massive collection of cell phone numbers, the latter involved the collection of sensitive information, such as bilateral fingerprints, iris scans and a face photograph. RENAUT and NIC thus posed significant interference with the private lives of Mexicans via mandatory data processing. Mexicans tried to stop or at least contest the proportionality of these programs. Their efforts proved unsuccessful. There was simply no clear right to privacy to point to or privacy-related constitutional mechanisms that could be used to challenge the privacy invasion carried out by both RENAUT and NIC.

Given that Mexico has yet to develop constitutional jurisprudence on privacy, Mexicans lack the jurisprudential resources on which they could base complaints against unwarranted state intrusions into their private lives through data processing. Mexicans, in other words, cannot invoke privacy tests similar to those developed in other jurisdictions because such tests simply do not exist in Mexico. The Mexican Supreme Court has yet to develop them. A solution to this problem must be found elsewhere. Mexicans cannot invoke foreign privacy tests (such as the ‘reasonable expectation of privacy test) before their national courts. What Mexicans can do is look at what international human rights law has developed for the protection of privacy. Mexico has ratified most international human rights treaties. Given that these treaties include a right to privacy and that human rights interpreters have developed thorough jurisprudence on this right, it is worth to exploring what international human rights law offers with respect to the protection of privacy. Not only may this help improve the protection of privacy in Mexico, it may also do so in other jurisdictions facing similar privacy challenges.

International human rights treaties, at the global and regional level, protect privacy through a single article providing a clear, normative, individual entitlement. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the American Convention on Human Rights (ACHR), for instance, provide individuals with the right to have their privacy protected from unlawful or arbitrary interferences. While somewhat ambiguous, ‘unlawful’ and ‘arbitrary’ nonetheless indicate normative standards that can be used to assess alleged practices of privacy invasion. What is more, both terms have been construed by human rights law authoritative interpreters as implying other important principles such as legality, necessity and proportionality. The right to privacy included in international human rights treaties and its jurisprudence may thus be used to examine the collection, use or disclosure of personal
information carried out by public authorities substantially interfering with the private lives of individuals.

The international human rights law on privacy is not simply a reiteration of the privacy safeguards that already exist at the domestic level. It complements them. National legal systems frequently omit a general right to privacy. Although such omissions do not mean that privacy is unprotected, provisions usually used to protect the private life of individuals (such as those aimed at protecting home, correspondence or communications from unwarranted invasions) may not be best suited to addressing privacy invasions committed by the state through the collection, use or disclosure of personal information. Given that international human rights treaties word the right to privacy as a discrete entitlement, such wording may cover privacy invasions committed by the state that are not covered, in part or in full, by domestic legal provisions. Take as an example the use of communications data by the state for the purpose of mass surveillance. When the UN High Commissioner for Human Rights addressed this issue, he did not conduct his analysis from the perspective of whether individuals have a ‘reasonable expectation of privacy’ on their communications data. Rather, what the Commissioner looked at was whether the surveillance practice was in conformity with the human right to privacy included in international human rights treaties. The Commissioner concluded that the existence of mass surveillance programs creates an interference with privacy and states have to demonstrate that such interference is neither arbitrary nor unlawful.31

The report of the Commissioner illustrates that rights included in international human rights treaties can also be used to improve the protection of human rights at the domestic level. This is precisely because international human rights law also states limits “on what governments may do to people within their jurisdictions.”32 In this sense, international human rights law may help individuals challenge the mandatory collection, use or disclosure of personal information carried out by the state because the purpose of such law is to assure individuals an area of autonomous

development free from unwarranted state interference.\textsuperscript{33} As this thesis shows, international human rights law offers normative frameworks and principles on privacy that may not exist at the domestic level. They can therefore be used to verify that data processing carried out by the state does not unnecessarily infringe upon the private lives of individuals.

It is true that the impact of the human right to privacy and its jurisprudence differs from one jurisdiction to another. It may be greater in countries that directly incorporate human rights treaties into their domestic law (monist approach) than in those countries requiring national legislation to give full effects to international norms (dualistic approach).\textsuperscript{34} In the first case, the human right to privacy could become part of the national legal order and for this reason, judges, legislators and other legal actors may take into account the principles and frameworks developed by authoritative human rights law interpreters. In the second case, the wording of the human right to privacy and its jurisprudence would be less influential. It could nonetheless orient the work of legislators and national judges when addressing issues of modern privacy invasions, such as with recent cases of mass surveillance carried out by the state.

Additionally, the international human rights law on privacy could fill more gaps in countries where legal systems do not include a right to privacy than in those that do include a right to privacy, either in the constitution, a statute or jurisprudence. In the first case, the wording of international human rights treaties and/or the normative frameworks and principles developed by authorized interpreters could well substitute domestic legal provisions aimed at protecting privacy.\textsuperscript{35} In the latter case, such wording, frameworks and principles might be used “to challenge local practices that are antithetical to human rights,” including the right to privacy.\textsuperscript{36} In both cases, the wording of the right to privacy included in international human rights treaties, along with the normative frameworks and principles developed by authoritative interpreters,

\textsuperscript{35} On the function of international human rights law as filling gaps of domestic bill of rights, see Stephen Gardbaum, \textit{supra} note 32 at 251-252.
could be used to examine the private life invasions committed by the state through the collection, use or disclosure of personal information.

The international human rights norms on privacy are thus universal norms that may have the capacity to remedy current limitations of data protection law and constitutional law. Mexico makes a good case for studying this for at least two reasons. First, Mexico illustrates a set of deficiencies these laws may have in the protection of privacy. That said, Mexico shows a way of remedying such deficiencies through the use of international human rights law. Second, the reception of international human rights law at the domestic level is a process full of difficulties. One such difficulty is the domestic configuration of international human rights norms. Mexico shows how constitutional law could be the vehicle through which international human rights norms could be incorporated into a domestic legal system and thus improve the protection of human rights. By showing how the international human rights law on privacy can be received in the Mexican legal order, this thesis shows that the private lives of individuals can be protected from abuses of power committed by the state via data processing.

Other jurisdictions may have fewer or no deficiencies in the application of data protection law and/or constitutional law. While this is true, it does not undermine the contribution that international human rights law can make to the protection of privacy. As this thesis suggests, in certain jurisdictions, human rights approaches to mandatory data processing can be very helpful, even crucial, in a variety of circumstances.

The fact that Mexico does not have a jurisprudentially-created ‘right to privacy’ should not be interpreted as a lack of interest on the part of Mexicans in protecting their private lives from the unwarranted interference from the state or others. As this thesis shows, an initial reference to the term ‘private life’ appeared when the first Mexican constitution was promulgated in 1812. The same reference went back and forth in the constitutional documents adopted throughout the nineteenth century and was finally incorporated into the 1917 Constitution. This history suggests that ‘private life’ was considered a value deserving of protection since Mexico emerged as an independent state. This thesis suggests, rather, that Mexico does not have a jurisprudentially-created right to privacy because, for many decades, the Mexican Supreme Court was reluctant to develop rights not explicitly mentioned in the Mexican constitution. While it is true that the
Mexican Supreme Court has recently made some sporadic references to a right to privacy in its jurisprudence, the Court has never defined the content of such a right nor specified its scope.

To leave things in Mexico as they are at present is not an option. The unrestricted gathering of personal information by any state can create important problems in a democratic society. When a state amasses extensive databases of information related to the personal lives of individuals, that state increases its power over them. As Adam Moore puts it, “…information control yields power and total information awareness radically expands that power…”37 Databases of personal information thus facilitate surveillance, allowing states to focus attention on details of a person’s life for various purposes.38 The surveillance of the actions or communications of individuals therefore infringes upon their personal privacy.39

The digital age is facilitating state surveillance throughout the world, especially in the context of national security, crime prevention or law enforcement. Technological innovations such as high-speed Internet networks, smartphones and other WiFi-enabled devices facilitate communication between people, substantially increasing the flow of personal information. Emails, text messages, phone calls, messages posted in blogs or on social networking websites, along with the traffic data associated with such communications (origin, destination, route, time, date, size or duration), compose the ‘communications data’ of an individual today. Communications data can reveal the most personal and intimate details about an individual’s life, including his present and future actions. For this reason, such data are sought by the state. They represent a valuable source of information that states can use for the prevention and/or prosecution of serious crimes and the forestallment of national security emergencies.40

38 David Lyon, supra note 6 at 14.
40 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UNHRCOR, 23rd Sess, Agenda item 3, UN Doc A/HRC/23/40 (2013), at para 12, online:
But digital surveillance by the state also reduces privacy and threatens democracy. While most of
the digital collection of personal data carried out by states is justified today in the name of
national security, crime prevention and/or law enforcement, collections can be excessive or
disproportionate if adequate legal safeguards are not in place. Mexico is no exception. If Mexico
truly wants to strengthen its democracy, it must respect and protect all human rights, including
the right to privacy. This calls for improving current protections of privacy from undue state
intrusions into the private lives of individuals. Stronger limitations on the collection, use or
disclosure of personal information and a certain level of oversight are needed if abuse of state
power is to be prevented and privacy assured in Mexico.

Privacy is fundamental in any democratic society. Privacy gives an individual the opportunity to
be free of the interference of others, including the state. As long ago as 1890, Samuel Warren
and Louis Brandeis defined this as the ‘right to be let alone.’ Privacy also confers to
individuals the ability to control the information that others know about them and limit the
physical access others have to their persons or possessions. Privacy thus allows an individual to
choose when to retreat from society and when to participate with the disclosure of personal
information. By enabling this choice, privacy facilitates the realization of other important values
such as autonomy, liberty, free expression and civic participation. For all these reasons, privacy
is considered one of the core values of democracy. Not only does privacy offer individuals
physical and psychological spaces for the discussion and deliberation of ideas, it also offers the
ability to exchange such ideas with peers and make decisions as full members of a democratic
group. Although privacy can mean all these things, this thesis focuses on the right to privacy
understood as a right that gives individuals the ability to limit the unwarranted interference of the
state into their private lives.

The first chapter of the thesis focuses on protections of privacy in international human rights law.
The International Covenant on Civil and Political Rights (ICCPR) and the American Convention

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44 Janlori Goldman, “Privacy and Individual Empowerment” in Colin J. Bennett and Rebecca Grant, eds, Visions of
on Human Rights (ACHR) include a right to privacy worded in similar terms. I argue that the right to privacy included in these treaties is forcefully worded, providing individuals with a clear, normative, individual entitlement. I also analyze the normative frameworks of the right to privacy developed by the authoritative interpreters of the ICCPR and the ACHR—the Human Rights Committee and the Inter-American Court of Human Rights respectively. I examine the privacy frameworks developed by other UN and Inter-American organs, highlighting their normative value. Moreover, I emphasize that these frameworks have been designed to tackle the collection, use or disclosure of personal information that substantially interferes with the private lives of individuals, as with communications surveillance. The chapter concludes by arguing that the wording of international human rights treaties and the international jurisprudence on the right to privacy may be used by countries to improve their current privacy legal frameworks.

The limitations of data protection laws are discussed in Chapter Two. These laws are modeled on “fair information practices”—practices aimed at bringing fairness to the processing of personal information by public or private organizations. Mexico has adopted data protection legislation in relation to the state and the private sector, making it appear that it is protecting the privacy of Mexicans. But data protection laws have, in general, certain limitations that are having severe effects in Mexico. While data protection laws provide individuals with important rights associated with the collection, use or disclosure of personal information by public and private organizations, data protection laws do not grant a right to withhold personal data in cases where collection, use or disclosure may invade a person’s privacy unduly. I maintain that some power imbalances may result from the absence of a right to withhold. The imbalance is created because every time the state requests private information about citizens it accumulates power over them, affecting the relationship between people and the state. Although data protection laws have incorporated fair information practice principles aimed at preventing the unnecessary collection of personal information and, thus, mitigate power imbalances, such principles—as well as other principles endorsed by these laws—are not applicable where data processing is carried out by the state on the grounds of national security, crime prevention and/or law enforcement. Furthermore, data protection laws do not usually endorse a notion of proportionality that can be applied to mandatory data processing carried out by the state. While this notion can be inferred from other fair information practice principles, such a notion is not likely to be invoked when it is not explicitly listed on a data protection statute.
Other areas of law such as tort law and constitutional law have been used to address data protection limitations in certain jurisdictions. I argue, however, that in countries such as Mexico, where privacy protection is limited, areas not covered by data protection laws remain unprotected or poorly protected, resulting in important power imbalances. The chapter concludes by highlighting how the international human rights law on privacy analyzed in Chapter One can help mitigate the limitations of data protection laws.

The protection of privacy afforded by Mexican law is presented in subsequent chapters. In the third chapter I briefly present European and American legal influences on Mexican law. Having established these influences, and following James Whitman who distinguishes between the European and American values protected through privacy, I argue that constitutional law in Mexico protects both values, but a right to privacy has not yet been developed. Reasons for this include the design of the constitutional review that existed in Mexico and the authoritarian regime that governed Mexico from the enactment of the Constitution of 1917 through to 2000. I explain how, given these political conditions, neither the judiciary nor academia developed a right to privacy, unlike other jurisdictions where such a right was created by courts and thoroughly discussed by scholars. Therefore, because a right to privacy has not evolved in Mexico, it has not been used extensively to challenge the collection, use or disclosure of personal data that poses inappropriate invasions of privacy. By the end of the chapter, I conclude that Mexico could use the human rights treaties it has ratified to improve the protection of privacy. I argue that because these treaties include a specific article that provides a right to privacy, such a provision could be used by judges, litigators and scholars as a normative standard to start developing a right to privacy. Moreover, I explain that this standard could be used to further elaborate definitions of just what a right to privacy should protect in Mexico. These privacy definitions could therefore become part of the legal structure that is employed by legal scholars in Mexico and taught in law schools. In this way, what is prescriptive (i.e. the international human right to privacy) could also become descriptive (i.e. privacy definitions articulated by courts and scholars), thus improving the protection of privacy. If a right to privacy is thus developed, it could be used to challenge the collection, use or disclosure of personal information currently carried out by the Mexican state. Finally, I suggest that by adopting the right to privacy included in the treaties, the jurisprudence of international human rights courts on this
subject would also be available to all legal actors in Mexico, to better support their arguments in cases where privacy invasion occurs.

In the fourth chapter I present the privacy protection included in civil law. While a right to privacy is not included in the Civil Code, this code encompasses relevant privacy safeguards that protect individuals from other individuals and even from the state. Civil law offers perhaps one of strongest legal protections for the private lives of individuals currently available in Mexico and cannot be dismissed. Based on the theory of personality rights, privacy in Mexican civil law is protected through an action of moral damage: if a person suffers disruption of his or her private life, he or she may file a lawsuit for the infliction of moral damage. The action is brought before ordinary courts against those who have caused the disruption. The Civil Code does not grant a right to privacy, but rather an action for compensation that can be used in cases where someone invades another’s private life. Although the Code’s provision is aimed at protecting privacy, it does not include a normative standard that could be used to construct or develop a right to privacy as such. Moreover, because the Civil Code includes a provision that states that there shall be no civil liability for the commission of a moral damage if such damage is caused in the exercising of freedom of expression, cases where privacy has been infringed upon by the media have been rarely brought to the courts, inhibiting the development of a right to privacy. I argue that because the Civil Code provisions do not encompass an individual right to privacy, these provisions may not be helpful in challenging the collection, use or disclosure of private personal data, especially where data is requested or processed by the state. According to the Civil Code, individuals have to wait until a moral damage is being caused to them before they can file a lawsuit to seek redress for the disruption suffered to their privacy. Therefore, not until moral damage is caused can the collection, use or disclosure of private data be analyzed before a court of law. I argue that if a human right to privacy is adopted, other types of remedies such as precautionary measures might be adopted to prevent or put an end to an invasion of someone’s privacy caused by the processing of personal information. The precautionary measures could stop the invasion of privacy even before the moral damage is proved at trial.

I also argue that the right to privacy included in the human rights treaties ratified by Mexico could be used in the application of the Civil Code, thus improving the civil law protection of privacy. As I explain in more detail in Chapter Five (post 2011) all authorities in Mexico, including ordinary judges, have the duty to protect the human rights enshrined in the 1917
Constitution and in the human rights treaties ratified by Mexico. Since the right to privacy is included in those treaties, ordinary judges could draw upon them and upon the jurisprudence of international human rights courts to further protect privacy in relationships between private individuals. France followed a similar path in 1970 when a new Article 9 of the Civil Code was enacted. The wording of this provision is similar to that of Article 8 of the European Convention on Human Rights. Therefore, a right to privacy that resembles the human right to privacy is now in the Civil Code and it is being applied in conflicts of a private nature among French people.

In Chapter Five I explain how the right to privacy included in international human rights treaties can be incorporated into Mexican law and thus be used to challenge the collection, use or disclosure of personal data that invades individuals’ private lives. The use of international human rights treaties to scrutinize acts of public authorities is a trend in Latin-American countries that Mexico has only recently begun following. In this chapter, I briefly analyze the conditions that made possible the application of international human rights law in the country. I argue that during the 1980s and 1990s transformations in the Mexican economy opened up the then-closed Mexican legal system. International treaties assumed a new role within Mexican law, becoming an important source of law. I also explain how this included international human rights treaties which began to be seen as instruments that could be applied to legal controversies in Mexico. A 2011 constitutional amendment eventually incorporated these treaties into the Mexican Constitution, substantially expanding the bill of rights.

Chapter Five also explains how international human rights law works within the Mexican legal system following the 2011 constitutional amendment. Given that the direct application of international treaties to legal controversies may suppose conflicts of law, new interpretive tools had to be adopted to make international human rights law compatible with Mexican law. The first of these tools, the ‘in-conformity-with’ clause requires all legal actors (but especially judges) to interpret human rights norms in conformity with the Constitution and international treaties on the matter. The second tool, the pro homine principle, mandates that all human rights norms shall be interpreted by favoring the broadest protection found. I thoroughly explain both tools in this chapter. Given that international human rights treaties are subject to interpretation by specialized organs, such as international human rights courts or UN expert committees, the jurisprudence of these organs may also have an important impact in Mexican law. For this reason, the legal nature of such jurisprudence and its particular role in the Mexican legal system
are issues that are briefly covered. The chapter concludes by suggesting how the international human rights law on privacy can be applied to Mexico. It argues that the wording of international human rights treaties and the international jurisprudence on the right to privacy may be used by Mexican judges to deliver the promise of improved protection of privacy in the country.
Chapter 1
The Protection of Privacy in International Human Rights Law

1. Introduction

Privacy is valued in most democratic states. Although these countries protect privacy through different legal forms, a general right to privacy is usually absent from their constitutional documents. This can be explained, in part, because neither the 1789 French Declaration of the Rights of Man and of the Citizen nor the 1791 U.S. Bill of Rights (first ten amendments) provides for a general right to privacy. Given that these documents exerted a strong influence in the constitutional drafting processes of the nineteenth and twentieth centuries, it comes as no surprise that many constitutions around the world today do not include a right to privacy.

The absence of a right to privacy in a bill of rights makes difficult the protection of privacy. It can mean sometimes that an individual has no grounds on which to base a complaint when his or her privacy is invaded. In countries like Canada or the U.S. courts and scholars have played a fundamental role in overcoming the difficulties resulting from the absence of an explicit right to privacy. These institutional actors have managed to articulate such a right to the extent that today nobody challenges its existence within their legal systems. This may not be the case in other jurisdictions, leaving the privacy of individuals unprotected or insufficiently protected. To overcome this problem, countries whose legal systems do not include a general right to privacy nor have developed thorough privacy jurisprudence may consider using international human rights law.

This chapter examines the protection of privacy in international human rights law. There is a good reason for this. Courts and scholars in countries with no right to privacy listed in their constitutions and without thorough privacy jurisprudence may have difficulties in framing privacy protections. This leaves us with international human rights treaties as an alternative source of law to be used in overcoming problems caused by privacy invasion. In other words, a country need not wait until its court system articulates a general right to privacy and/or develops thorough privacy jurisprudence to protect individuals from modern challenges to privacy. Such a country can, rather, make use of international human rights law to improve its current privacy protections. This chapter focuses on how the right to privacy is protected in international human right instruments, such as human rights treaties and other UN documents. The jurisprudence of
authoritative human rights interpreters is also examined. The chapter closes by arguing that the international human rights law on privacy may be used by countries to address privacy interferences caused through the mandatory collection, use or disclosure of personal information carried out by the state.

2. The Right to Privacy in International Human Rights Law

International human rights treaties may prove helpful to those countries whose constitutions do not include a right to privacy and/or whose legal systems have not developed jurisprudence articulating such a right. These treaties might even be helpful in jurisdictions where jurisprudence is developing, provided that such jurisdictions have practices that allow international instruments to inform interpretation of domestic norms. International human rights instruments such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the American Convention on Human Rights (ACHR) include a right to privacy in their texts, clearly demarcating an area of personal freedom that is beyond interference from the state and private parties. Moreover, authoritative interpreters of these treaties such as the UN Human Rights Committee and/or human rights regional courts have developed jurisprudence on the right to privacy, creating normative frameworks that balance the right to privacy with other societal needs. The following section examines both the right to privacy included in international and regional human rights treaties and its jurisprudence. Given that Mexico is the case study of this thesis, the section focuses on the ICCPR, jurisprudence and instruments developed by the United Nations organs as well as on the ACHR, jurisprudence and instruments developed within the Inter-American Human Rights System. As will be explained, these global and regional human rights regimes may exert a positive influence in all countries whose legal system does not include a general right to privacy, including Mexico. The section finishes by highlighting how international human

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rights law can improve the protection of privacy with respect to the mandatory collection, retention, use or disclosure of personal information carried out by states.

2.1 The Right to Privacy in the United Nations Human Rights System

2.1.1 The Right to Privacy in the International Covenant on Civil and Political Rights

The international community recognized the right to privacy as a human right when the United Nations adopted the Universal Declaration of Human Rights on December 10, 1948. It was not until December 16, 1966, however, when the UN General Assembly opened for signature the International Covenant on Civil and Political Rights (ICCPR), that the right to privacy achieved legally binding force at the international level. By ratifying or acceding to the ICCPR, countries undertake to respect the rights and freedoms set forth therein, including the right to privacy.

The UDHR and the ICCPR state the right to privacy in almost identical terms. Each frames it as prohibiting capricious or despotic interferences with the private life of an individual. Article 17 of the ICCPR, for instance, provides

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

This provision articulates a clear and sound individual entitlement aimed at protecting a person from the excessive power that the state or private individuals may exert over him. While the term privacy is not defined here, Article 17 leaves no doubt that a person should have a sphere of individual existence and autonomy free from state interference, but also free from intervention by other individuals. For one legal commentator, the right to privacy enshrined in Article 17 thus gives individuals a zone of freedom in which “men take refuge when the action of the state

50 See supra note 46.
51 See supra note 47.
has become unbearable or life in society exhausts them”.

This right allows every human being to isolate himself or herself from public life, to choose with whom he or she interacts, and to pursue his or her life according to his or her own desires, but without interfering with the rights of others.

Two initial points need to be made about the wording of Article 17 of the ICCPR. First, unlike other fundamental rights and freedoms included in the ICCPR, Article 17 implies that privacy must be protected from invasions by both the state and private parties. This dual protection is consistent with the notion of human dignity endorsed by the UN. James Griffin argues that this means every individual must have the “capacity to choose and pursue his own conception of a worthwhile life.” Given that both the state and private parties can intrude on someone’s privacy and, thus, alter his capacity to choose how he conducts his own life, Article 17 protects individuals from privacy interferences carried out by the state and/or private parties. Article 17 thus imposes two obligations. A state must not only refrain from violating the right to privacy, it must also adopt laws and other measures aimed at preventing interference with the enjoyment of this right by private parties.

The second point related to the wording of Article 17 of the ICCPR deals with the type of freedom guaranteed by this right. The Article does not provide for a freedom from interference with someone’s privacy that is absolute. Interferences with privacy are allowed provided they are neither ‘unlawful’ nor ‘arbitrary.’ While these terms may appear redundant, several commentators have consistently pointed out they mean different things. To some, “unlawful” implies a national legal order while ‘arbitrary’ implies capriciousness. Here, an interference with privacy would be ‘unlawful’ when it contravenes the legal order and an interference with privacy would be ‘arbitrary’ when, despite being lawful, it is unjust, unreasonable or capricious. We will examine with more detail these terms in the following section.

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54 Other examples that provide for the protection of rights against the interference of private individuals are Articles 6, 23, 24 and 27 of the ICCPR.
56 Manfred Nowak, supra note 52 at 379.
57 Manfred Nowak, supra note 52 at 382; Fernando Volio, supra note 53 at 191.
58 Manfred Nowak, supra note 52 at 383; Fernando Volio, supra note 53 at 191-192.
It could thus be argued that Article 17 of the ICCPR does not grant an individual freedom from interference with his privacy, but, rather, ‘freedom from arbitrary or unlawful interference.’ While this argument may seem valid, it cannot be fully accepted. The argument conflicts with the notion of human dignity that underlies the ICCPR. The ICCPR lists rights aimed at allowing the full realization of the dignity of the human person. Article 17 cannot be seen as conferring upon states unfettered authority to interfere with the privacy of individuals whenever they please, provided the interference is lawful and appears non-arbitrary. Article 17 seeks to guarantee that every individual enjoys as much privacy as possible, and that only exceptionally, after a proper balancing of all the circumstances has been made, would an interference with his privacy be permissible.\(^{59}\)

Article 17 of the ICCPR also makes reference to spheres usually associated with the private life of an individual—family, home and correspondence. Manfred Nowak explains that these are ‘institutional structures’ through which privacy typically manifested in the bourgeois society of the nineteenth century. Nowak argues that in the twentieth century, secrecy of telecommunications and the protection of personal data and of the human genetic code have joined the list.\(^{60}\) By protecting a free-from-interference personal zone, the family, home, correspondence (including telecommunications) and personal data, Article 17 enhances the liberty and human dignity of every individual.

Article 17 of ICCPR imposes negative and positive obligations on states. The former require states not to violate the rights of the ICCPR. The latter enjoin states to adopt laws or measures against interference by private parties in the enjoyment of these rights.\(^{61}\) In the case of Article 17, this means that, on the one hand, states must refrain from interfering arbitrarily or unlawfully with the privacy, family, home or correspondence of any individual. On the other hand, states must adopt laws and/or measures to protect these personal spheres from interference or attacks by others. For Nowak, the expression ‘the right to protection of the law’ in Article 17(2) implies

\(^{59}\) Manfred Nowak, *supra* note 52 at 383; Fernando Volio, *supra* note 53 at 192.

\(^{60}\) Manfred Nowak, *supra* note 52 at 378. As will be explained further in this section, telecommunications and communications data have been areas of concern to which the protection afforded by Article 17 of the ICCPR has been extended.

\(^{61}\) For this type of state obligations, see generally, Thomas Buergenthal, “State Obligations and Permissible Derogations” in Louis Henkin, ed, *supra* note 53 at 77-78.
the taking of “positive measures to protect against private interference.”62 Such measures may include, for instance, the creation of obligations or rights for one group of individuals with respect to others or the allocation of resources to improve the protection of vulnerable individuals.63 In any case, positive obligations mean states must adopt measures through private and administrative law and through prohibitive norms under criminal law.64

Article 17 of the ICCPR also protects honor and reputation, integrating them into the personal sphere that is free from unwanted interference. Several commentators consider that honor and reputation are not the same thing.65 The former describes the opinion one holds of oneself, the latter the judgment of others. Honor has to do with the values a person feels his or her conduct has to be measured with (subjective element of a person’s moral integrity) whereas reputation relates to the recognition people give to a person’s qualities or merit (objective element of a person’s moral integrity).66 In any case, honor and reputation are protected because they are connected with a person’s self-esteem and, thus, with his or her dignity. Honor and reputation deserve protection because they make individuals feel respected and appreciated, facilitating their participation in society.67

Unlike other provisions of the ICCPR, Article 17 does not include a limitation clause allowing for restrictions in the interest of other governmental objectives or the rights of others.68 This omission does not mean, however, that the right protected by Article 17 is absolute. Interferences with a person’s privacy, family, home or correspondence are permitted as long as they are not unlawful or arbitrary. In the case of honor and reputation, attacks are permissible provided they are lawful. This means that criticism, fair comments and/or truthful statements do not unlawfully attack a person’s honor or reputation.69 In contrast to what happens with privacy, family, home and correspondence, Article 17 does not protect honor and reputation from ‘arbitrary’ attacks.

62 Manfred Nowak, supra note 52 at 39. Emphasis in original.
63 See generally Lord Lester of Herne Hill & David Pannick, eds, Human Rights Law and Practice, 2nd ed (London: LexisNexis, 2004) at 262. The authors analyze the positive obligations that derive from Article 8 of the ECHR which guarantees everyone the right to respect for his private and family life, his home and correspondence.
64 Manfred Nowak, supra note 52 at 380.
65 Manfred Nowak, supra note 52 at 404; Fernando Volio, supra note 53 at 198-199.
66 Fernando Volio, supra note 52 at 198.
67 Ibid at 199.
68 See, for instance, Arts 12(3), 18(3), 19(3), 21 and 22 of the ICCPR.
69 Manfred Nowak, supra note 52 at 378; Fernando Volio, supra note 53 at 403.
While this omission suggests that a legal order could provide for attacks on the honor or reputation of individuals, this possibility is remote. Such a possibility would imply that public authorities or private parties are authorized to inflict capriciously upon the honor or reputation of individuals, the very thing Article 17 seeks to prevent. The expression ‘unlawful attacks’ in Article 17 means that only those attacks on an individual’s honor and reputation that violate a domestic or international legal provision will be considered unlawful.\textsuperscript{70}

The wording of Article 17 of the ICCPR thus includes several terms that can be interpreted in a variety of ways. In this brief analysis we have analyzed this provision based on what commentators have said about it. The following section examines the interpretations of Article 17 of the ICCPR made by the UN Human Rights Committee.

2.1.1.1 The Jurisprudence of the United Nations Human Rights Committee on Article 17 of the ICCPR

Several normative elements aimed at protecting the privacy of every human being are found in Article 17 of the ICCPR. While this provision can be interpreted differently by all states party to the ICCPR, the jurisprudence of the UN Human Rights Committee (HRC) deserves a closer examination given its authoritative value. This value comes from the fact that the HRC is a committee of independent experts authorized to engage in oversight and issue interpretations of the ICCPR.

As mentioned above, interferences with the privacy of a person are permitted provided they are not unlawful or arbitrary. In General Comment No. 16, the HRC elaborates on the meaning of these terms.\textsuperscript{71} For the HRC, “the term ‘unlawful’ means that no interference can take place except in cases envisioned by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the

\textsuperscript{70} Volio highlights that “attacks” on honor and reputation does not connote mere interference but rather intentional violence. See Fernando Volio, supra note 53 at 199. Nowak considers that Article 17 of the ICCPR only prohibits attacks to a person’s honor and reputation by public authorities or private parties that were committed unlawfully, intentionally and based on untrue allegations. See Manfred Nowak, supra note 52 at 404.

\textsuperscript{71} Human Rights Committee, General Comment No. 16: Article 17 (Right to privacy), UNCCPROR, 32nd Sess, UN Doc (1998) [hereinafter General Comment No. 16] at 1, online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en>
Interference with someone’s privacy must thus be provided by law, which must itself be in harmony with the whole ICCPR. In other words, privacy interferences must have a legal basis, and officers executing such interferences must fulfill all legal requirements. The HRC, however, is silent on what should be understood as ‘law’. Although the meaning of this term varies depending on the sources of law adopted in a particular country, it could be argued that law, as such, for the purposes of allowing interferences with an individual’s privacy, must come from elected legislatures. This guarantees that the provisions authorizing privacy interferences (i.e. limitations on the exercise of a human right) have followed a democratic procedure where all voices (including minority groups) have been heard. It also guarantees that such provisions are generally accessible and have been publicly proclaimed prior interferences. An executive decree, judicial ordinance or administrative regulation would only be classified as ‘law’ if they meet these last criteria.

It must be said that while the HRC does not describe situations in which law will “comply with the provisions, aims or objectives of ICCPR,” several normative elements can be deduced from this phraseology and, thus, be used for the protection of privacy. A judge, for instance, may contrast laws authorizing privacy interferences with the overall objectives of the ICCPR. One such objective is to ensure that all persons are entitled to the equal protection of the law without discrimination (Article 26). If a judge discovers that, let us say, a statute authorizing privacy interferences enables discrimination on the basis of race, gender, religion or sexual orientation, he may determine that such ‘law’ (i.e. statute) does not comply with one of the objectives of the ICCPR. The legality of the privacy interferences authorized by such a statute could thus be contested.

As for the term “arbitrary,” it should be noted that this word appears in other provisions of the ICCPR such as Articles 6 and 9. For this reason, it was the subject of several contested debates before the final draft of the ICCPR was finally adopted in 1966. A majority in the Third Committee of the UN General Assembly, when discussing Article 9 of the ICCPR in 1958, valued the importance of the notion of arbitrariness. For some delegates, the word arbitrary

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72 Ibid at para 3.
73 Nowak, supra note 52 at 382.
74 Article 6 refers to the right to life and Article 9 to the right to liberty and security of the person.
“meant ‘without legal grounds’ or contrary to the law”, but “others considered that ‘arbitrary’ meant not only ‘illegal’ but also ‘unjust’, and incompatible with the principles of justice or with the dignity of the human person.” It was also suggested that an arbitrary act is one that is “capricious, despotic, imperious, tyrannical or uncontrolled”. The word arbitrary, for the Third Committee was thus “a safeguard against injustices,” because it applies not only to laws but also to statutory regulations and all acts performed by the executive. Arbitrary prevents the exercise of discretionary powers “without due regard for the rights of the individual”. While these understandings of the word arbitrary were given in relation to Article 9 of the ICCPR, they can nonetheless assist us in interpreting Article 17 of the ICCPR.

The HRC has followed suit, describing “arbitrary interference” in Article 17 of the ICCPR as that which “can also extend to interference provided for under the law.” The HRC has thus embraced the notion that lawful interferences with privacy can be arbitrary. For the HRC, “the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”. Two normative elements can be drawn from this interpretation. First, an interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR. Second, such interference must be reasonable.

While the HRC does not present examples of situations of privacy interferences that comply with the ICCPR, it can be argued that they take place when carried out in the interest of society at large. In fact, the HRC has held that “as all persons live in society, the protection of privacy is necessarily relative.” This means, for example, that activities regulated by law that are related to law enforcement or tax collection may imply interferences with privacy, but since such interferences benefit society, they would comply with the ICCPR. The danger, however, is that information gained through these activities can also be used to conduct surveillance of people, opening up the possibility of states exerting greater control and power over individuals. To

76 For the debates preceding the adoption of the ICCPR, see Marc J. Bossuyt, Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights (Dordrecht: Martinus Nijhoff, 1987). The debates surrounding Article 17 of the ICCPR can be found at 341-349.
77 See General Comment No. 16, supra note 71 at para 7.
78 Ibid at para 7.
prevent this, the HRC introduces the notion of reasonableness. An interference with privacy “should be, in any event, reasonable, in the particular circumstances.”\textsuperscript{79} But how can an interference with privacy be assessed to determine if it is being reasonable? In General Comment No. 16, the HRC considers that “relevant legislation must specify in detail the precise circumstances in which such interferences [with privacy] may be permitted.”\textsuperscript{80} Therefore, the appropriate way to test the reasonableness of an interference with privacy is through the examination of the legal provisions authorizing such interference. If such provisions do not exist, or they exist but do not detail how interferences with privacy should be conducted, then these interferences may be considered unreasonable and thus contrary to the ICCPR.

Legislation must thus specify the circumstances under which interferences with privacy may be permitted. These interferences, however, cannot be carried out by public authorities at their discretion. A form of control must be established. The HRC considers that “a decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.”\textsuperscript{81} Legislation must therefore not grant blanket authorizations for interfering with privacy, but rather designate public authorities (usually judges) responsible for sanctioning such interferences on the basis of individual cases.

As for the other terms included in Article 17 of the ICCPR, the HRC considers in its General Comment No. 16 that a broad interpretation must be given to the term ‘family’ in order “to include all those comprising the family as understood in… [a given] society…” ‘Home’ indicates “the place where a person resides or carries out his usual occupation.”\textsuperscript{82} The HRC has clearly adopted a broad approach to the wording of Article 17 of the ICCPR, inviting countries to go beyond textual interpretations.

Other normative elements related to the right to privacy protected under Article 17 of the ICCPR are included in General Comment No. 16. The HRC considers, for instance, that the protection of correspondence implies that such correspondence “should be delivered to the addressee without interception and without being opened or otherwise read,” thereby guaranteeing de jure and de

\textsuperscript{79} Ibid at para 4.
\textsuperscript{80} Ibid at para 8.
\textsuperscript{81} Ibid at para 8.
\textsuperscript{82} Ibid at para 5.
facto its integrity and confidentiality.\textsuperscript{83} The HRC also interprets Article 17 of ICCPR as prohibiting surveillance, electronic or otherwise. This includes interceptions of telephonic, telegraphic and ‘other forms of communication’, wiretapping and the recording of conversations.\textsuperscript{84} The HRC does not say if these activities can be conducted with a warrant, but nothing suggests otherwise. If a warrant is issued by an authority designated under the law and on a case-by-case basis, such warrant will be in harmony with the ICCPR. Given that General Comment No. 16 was published in 1988, it does not cover privacy issues related to the Internet. As will be explained below, these issues have recently been addressed by the HRC through its Concluding Observations as well as by other UN organs.

General Comment No. 16 also examines issues related to searches of a person’s home and body. In the case of the former, the HRC considers that Article 17 limits the search to the gathering of ‘necessary evidence’ and it should not be allowed to amount to harassment. Body searches should be carried out “in a manner consistent with the dignity of the person who is being searched.” Body searches conducted by state officials or medical personnel acting at the request of the state must be performed by officials of the same sex as the person subject to search.\textsuperscript{85}

The collection, storage, use, and disclosure of personal information are issues also covered by General Comment No 16, confirming the link between these activities and the right to privacy. For the HRC, such activities must be regulated by law, whether conducted by public authorities or private entities. The HRC also reiterates the rights protected through data protection laws and international instruments discussed in Chapter Two. General Comment No. 16 explicitly mentions the right of every individual to ascertain what information about himself is stored by public authorities or private bodies, and for what purposes. Also included is the right to request rectification or elimination of such information when it is incorrect or when it is being processed contrary to the provisions of the law.\textsuperscript{86} General Comment No. 16 additionally includes a normative element related to data protection that must be highlighted here. The HRC says “Effective measures have to be taken by States to ensure that information concerning a person’s

\textsuperscript{83} Ibid at para 8.
\textsuperscript{84} Ibid at para 8.
\textsuperscript{85} Ibid at para 8.
\textsuperscript{86} Ibid at para 10.
private life [...] is never used for purposes incompatible with the Covenant.”

I would argue that this particular understanding of the HRC about data processing has a very important normative value. First, it means that data processing has to be carried with due respect to the right to privacy; that is, without inflicting unlawful or arbitrary interferences on the private lives of individuals. Second, data processing cannot be used as a means of achieving objectives incompatible with the ICCPR. One case could be data processing aimed at keeping people under surveillance, for purposes such as racial profiling, control over journalists, religious minorities and political dissidents. In all these cases, data processing may undermine the exercising of other rights and freedoms listed in the ICCPR, such as freedom of expression (Article 19), the right to take part in the conduct of public affairs (Article 25), or the right to be protected against discrimination (Article 26).

Finally, General Comment No. 16 addresses issues related to the protection of personal honor and reputation. Although these issues may seem unrelated to privacy at first glance, there are cases where privacy, honor and reputation became deeply connected. The honor or reputation of a person could, for instance, be affected through the disclosure of information related to his private life. One such case could be a former prostitute or former convict. His or her honor or reputation could be compromised if information related to his or her past is disseminated. The HRC says honor and reputation should be protected through legislation, enabling the protection of one’s self from unlawful attacks and providing oneself effective remedies against those responsible for such attacks. The HRC, however, does not say what is meant by ‘attacks’. It should be remembered that the former UN Human Rights Commission, when drafting Article 17 of the ICCPR, said attacks do not include “fair comments or truthful statements.” Therefore, legislation can only protect individuals whose honor and/or reputation is intentionally affected by untrue allegations.

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87 Ibid at para 10.
88 Ibid at para 11.
90 Manfred Nowak, supra note 52 at 404.
2.1.1.2 The Contribution of Article 17 of the ICCPR

Article 17 of the ICCPR protects privacy through a clear, normative, individual right that distinctively delineates a zone of personal liberty and autonomy and shields such a zone from unwanted interference by the state or private parties. The wording of Article 17 may substantially improve the protection of privacy of any individual for several reasons. First, unlike several constitutional documents of the nineteenth and twentieth centuries, which promise privacy protection through provisions aimed at guaranteeing the inviolability of a person’s body, home and correspondence, Article 17 of the ICCPR specifically protects ‘privacy.’ This means, in principle, it secures a specific zone of personal freedom in which no one, including the State, is allowed to interfere. Second, to guarantee a scope of protection within this zone of personal privacy, Article 17 of the ICCPR introduces two normative elements—the words unlawful and arbitrary. Both can be used as parameters to test if an act of interference with an individual’s privacy can be accepted in a human rights-oriented society. A privacy interference shall not be accepted if it is not authorized by the legal order (unlawful) and, if authorized, it is capricious and/or against the principles, aims and objectives of the ICCPR (arbitrary). Article 17 of ICCPR thus offers clear and sound normative elements aimed at examining acts of public authorities that interfere with the privacy of any human being.

It can be argued that despite the lack of a general right to privacy in their texts, many constitutions include provisions by which privacy can be protected. Yet the problem with this protection is that it is contingent on the wording of such provisions and on interpretation by the courts. As discussed in the previous section of this chapter, it took more than 60 years for the U.S. to articulate a constitutional right to privacy. The ‘zone of privacy’ that should remain free from unwanted interference is not always easy to identify, as it depends on the interpretation of several amendments to the U.S. constitution.

Article 17 of the ICCPR makes the protection of privacy easier for at least two reasons. First, privacy is not implied but explicitly mentioned in this provision. Second, Article 17 bestows a specific right on any individual, empowering him against anyone who interferes with his privacy. Article 17 thus gives to any individual the ability to limit unwarranted interference by the state (and private parties) into his private life. He can therefore assert this right when public authorities encroach upon his free-from-interference zone of liberty and autonomy. It is true that
Article 17 of the ICCPR does not define privacy as liberty or autonomy. This provision nonetheless does guarantee a discrete entitlement that allows any individual to put limits on state interference with his private life and thus enjoy some liberty and autonomy.

Furthermore, the words ‘unlawful’ and ‘arbitrary’ included in Article 17 are themselves normative elements and, thus, can be used to analyze all invasions of privacy regardless of whether or not they are related to the family, home or correspondence of a person. As a result, ‘unlawful’ and ‘arbitrary’ are parameters that can be used to examine the mandatory collection, retention, use or disclosure of personal information carried out by states that severely interferes with the private lives of individuals. If, for instance, a collection of personal information is authorized by, say, an administrative regulation which is neither generally available nor publicly proclaimed, Article 17 of the ICCPR can be used to argue that such collection poses an interference with privacy that is unlawful. Similarly, if a collection of personal information is authorized by law, but it imposes an excessive encroachment upon the privacy of an individual, Article 17 of the ICCPR can be used to determine that such collection is arbitrary.

‘Lawful’ and ‘arbitrary’ can thus be applied to the examination of privacy invasions that are not necessarily covered by constitutional provisions traditionally associated with the protection of privacy, such as ‘unreasonable search and seizure’ provisions. This means that Article 17 of the ICCPR could be used to examine the mandatory collection, retention, use or disclosure of personal information carried out by the state, as these activities may not always be considered to be ‘searches’ or ‘seizures’. As will be discussed in the following sections of this chapter, most constitutions around the world grant individuals a right against unreasonable searches and seizures. See, for instance, the Fourth Amendment to the US Constitution and section 8 of the Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The Supreme Courts of both countries have interpreted these provisions as protecting a reasonable expectation of privacy. See, respectively, Katz v United States, 389 US 347 (1967) and Hunter v. Southam Inc., [1984] 2 SCR 145. Although search and seizure provisions do protect privacy, they do not usually apply outside the criminal law context. This is problematic since states are currently collecting, storing, using or ensuring access to personal information about people not suspected of anything. 

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91 In general, a search can be defined as “an examination of a person’s body, property, or other area that the person would reasonably be expected to consider as private.” A seizure is “the act or an instance of taking possession of a person or property by legal right or process” or “a confiscation or arrest that may interfere with a person’s reasonable expectation of privacy.” See Black’s Law Dictionary, 10th ed, sub verbo “search” and “seizure”. Searches and seizures are thus investigatory tools mainly used by law enforcement officials in the investigation of crimes. Given that searches and seizures interfere with property rights and/or privacy-related rights, they require special legal justification. To prevent state abuse, a warrant must be issued by a judge. See also David Feldman, “Search and Seizure” in The New Oxford Companion to Law, ed by Peter Cane & Joanne Conaghan (New York: Oxford University Press, 2008) at 1060. Most constitutions around the world grant individuals a right against unreasonable searches and seizures. See, for instance, the Fourth Amendment to the US Constitution and section 8 of the Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The Supreme Courts of both countries have interpreted these provisions as protecting a reasonable expectation of privacy. See, respectively, Katz v United States, 389 US 347 (1967) and Hunter v. Southam Inc., [1984] 2 SCR 145. Although search and seizure provisions do protect privacy, they do not usually apply outside the criminal law context. This is problematic since states are currently collecting, storing, using or ensuring access to personal information about people not suspected of anything. Article 17 of the ICCPR
Article 17 of the ICCPR has been interpreted as implying proportionality which can be used to limit state interference with the private life of individuals via data processing. Furthermore, as will be explained in Chapter Two, Article 17 of the ICCPR could also be applied to protect the privacy of individuals from data processings belonging to areas not currently covered by data protection laws, such as national or public security, crime prevention or law enforcement. The potential of this provision for improving the protection of privacy is thus enormous.

For all these reasons, Article 17 of the ICCPR can be used to protect the private lives of individuals from the current mandatory collection, retention, use or disclosure of personal information carried out by states. As will be discussed in the following section, Article 17 of the ICCPR and its normative elements were the starting point for the UN’s assessments of privacy invasions in the digital age. These assessments include two resolutions passed by the General Assembly and a report drafted by the High Commissioner for Human Rights. Given that each of these documents contributed to the drafting of the other, the following section analyzes them separately, in the order in which they became public.

2.1.2 Resolution on Privacy Adopted by the UN General Assembly in 2013

As mentioned, General Comment No. 16 does not include Internet-based issues related to invasions of privacy because its 1988 publication predates the ubiquity of the Internet. This gap, however, has recently been addressed by the UN through several instruments and documents. On December 18, 2013, the General Assembly (GA) adopted Resolution 68/167, directing its attention to the right to privacy in the digital age.\(^9\) In this document, the GA recognizes that information and communication technologies have enhanced the capacity of governments, companies and individuals to undertake surveillance, interception and data collection that may violate or abuse human rights—in particular the right to privacy. Moreover, the GA emphasizes that “unlawful or arbitrary surveillance and/or interception of communication, as well as

unlawful or arbitrary collection of personal data, as highly intrusive acts, violate the rights to privacy and to freedom of expression and may contradict the tenets of a democratic society”. The GA has also expressed deep concern for the negative impact that surveillance, interception of communications (even extraterritorial) as well as the collection of personal data, in particular when carried out on a mass scale, may have on human rights.

In this context, not only did the GA reaffirm the right to privacy, as set out in Article 12 of the UDHR and Article 17 of the ICCPR, but it made a very significant affirmation: “the same rights that people have offline must also be protected online, including the right to privacy.” This means that, despite the improvements in information and communication technologies and the ‘open and global nature’ of the Internet, a right to privacy can still be exercised by all individuals.

For this reason, in the operative clauses of Resolution 68/167, the GA calls upon states to: 1) respect and protect the right to privacy in the context of the digital age, 2) take measures aimed at putting to an end violations of the right to privacy and ensure that national legislation complies with their obligations under international human rights law, 3) review their procedures, practices and legislation regarding the surveillance of communications, the interception of such communications and the collection of personal data, with a view to upholding the right to privacy, 4) establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency and established accountability for state surveillance of communications, their interception and the collection of personal data.

Resolution 68/187 is relevant to the protection of privacy for several reasons. First, it mitigates concerns about claiming a right to privacy in the digital age. The GA considers that such a right exists online and must be protected by the state. Second, the GA has required states to review their legislation and procedures related to communications surveillance, the interception of these communications and the collection of personal data. Such legislation and procedures must be in harmony with the state’s obligations under international human rights law. If we follow General Comment No 16, this requirement of the GA means that legislation authorizing surveillance of

93 Ibid at 2.
94 Ibid at 2, para 1-3.
95 Ibid at 2-3, para 4.
communications, the interception of these communications, and the collection of personal data should not be unlawful or arbitrary, nor contrary to the ICCPR in the forms explained above. This requirement also implies that legislation authorizing the collection, use or disclosure of personal information not only has to comply with the data protection principles included in data protection laws or in international instruments on data protection, but also with international human rights law.

The third thing making Resolution 68/167 relevant is the fact that surveillance legislation and regulations need to comply with international human rights law. This may have a very positive effect on the protection of individual privacy. As will be argued in Chapter Two, most data protection laws do not grant individuals a right to withhold their personal information when mandatory requests by the state are made, regardless of the level of interference with their private lives. Moreover, the rights and obligations articulated through data protection laws usually do not apply in the context of crime prevention, national or public security, law enforcement, and other state activities performed in the interest of society at large.\footnote{See, for instance, Recital 16 and Article 13 of the European Data Protection Directive. EC, \textit{Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data} [1995] OJ, L 281/31, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN>}

If international human rights law is applied, the limitations of data protection laws and principles could be ameliorated, especially in the specific case of surveillance legislation and regulations. It means that such legislation or regulations could be examined by a judge to verify if they comply with the objectives of the ICCPR. The judge would be able to determine if surveillance legislation and/or regulations pose unlawful or arbitrary interferences with the private lives of individuals, or if such legislation and/or regulations are inconsistent with other fundamental rights and freedoms protected by the ICCPR. It may be that surveillance legislation and/or regulations grant surveillance powers to public officials that are reasonable and thus non-arbitrary. This reading is acceptable in a democratic society. In any case, what Resolution 68/167 shows us is that Article 17 of the ICCR and its interpretation by the HRC can be used as parameters for controlling the conformity of surveillance legislation and regulations with international human rights law.
Although Resolution 68/167 is a declaratory instrument and hence not binding on UN Member States, its provisions have normative value that is relevant to the protection of individual privacy. The International Court of Justice has held that an *opinio juris* may be deduced from the attitudes of states towards General Assembly resolutions, contributing to the development of customary international law.\(^7\) For the Court,

> The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter [of the United Nations]. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.\(^8\)

The International Court of Justice (ICJ) has also established that resolutions of the GA have normative value.

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.\(^9\)

Following these interpretations, it could be argued that Resolution 68/167 may have normative value for a couple of reasons. First, as said, an *opinio juris* may be deduced from the attitude of UN Member States towards a General Assembly resolution. In the case of Resolution 68/167, while an early draft was jointly introduced only by Germany and Brazil at the 43rd meeting of


\(^8\) *Ibid* at 100, para 188. Emphasis in original

the Third Committee held on November 7, 2013, other countries began to endorse the draft in subsequent meetings. In the end, fifty-five countries co-sponsored Resolution 68/167. There is no record of countries refusing to sponsor it. This means that fifty-five of 193 UN Member States showed their support for the new privacy rules established in Resolution 68/167.

The second reason for giving normative value to a General Assembly Resolution relates to the conditions under which the document is adopted. Resolution 68/167 was adopted by consensus; that is, without a vote. This means that all participating countries reached agreement on the exact wording of all portions of the text. The Third Committee adopted “Draft resolution XI, the right to privacy in the digital age” without a vote at its 51st meeting held on November 26, 2013 and, accordingly, recommended its adoption to the General Assembly. At its 68th Session held December 18, 2013, this UN body adopted Resolution 68/1167 without a vote. The fact that no county requested a vote reveals that a new consensus for the protection of privacy had begun to emerge at the global level—a consensus based on the right to privacy as protected by Article 17 of the ICCPR. Even countries then conducting massive surveillance did not oppose Resolution 68/167, opening the possibility for introducing new rules for the protection of privacy. As evidenced in the official records, when the Third Committee adopted the draft of Resolution 68/167, representatives of four of the Five Eyes partners (Australia, Canada, the

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101 For the list of countries that sponsored Resolution 68/167, see Secretariat of the Third Committee, List of resolutions adopted by the General Assembly at its sixty-eight session on the recommendation of the Third Committee, UNGA, 68th Sess, December 2013, online: <http://www.un.org/en/ga/third/68/List_of_Co_Sponsors_Third_Committee_68.pdf>


103 Report of the Third Committee, supra note 75 at para. 83, p. 146.


105 If a country had requested a vote, the resolution would not have been adopted by consensus. Countries would thus have been required to vote for or against Resolution 68/167 or to abstain. When countries vote against a resolution, they are less likely to implement the actions recommended in such a resolution. See United Nations, supra note 57 at 21.

106 The Five Eyes is an alliance comprising the United States, the United Kingdom, Australia, Canada and New Zealand which purpose is to share intelligence, especially signals intelligence. For a brief description of this alliance, see Carly Nyst, “The Five Eyes Fact Sheet” (26 November 2013), Privacy International, online: <https://www.privacyinternational.org/node/412>; Paul Farrell, “History of 5-Eyes — explainer”, The Guardian (2 December 2013), online: <http://www.theguardian.com/world/2013/dec/02/history-of-5-eyes-explainer>
United Kingdom and the United States) manifested minor disagreements over the wording and/or discussions of the draft, but all expressed their support for the protection of privacy in the digital age.

It could thus be argued that, according to the ICJ criteria, Resolution 68/167 has normative value, thereby contributing to the emergence of a new *opinio juris* on privacy or to the establishment of new privacy rules. It could further be argued that, by sponsoring or consenting to Resolution 68/167, several states have begun to accept the new rules that the GA has established for the protection of individual privacy in the context of the digital age.

2.1.3 The Report of the UN High Commissioner for Human Rights on Privacy

In its Resolution 68/187, the General Assembly asked the UN High Commissioner for Human Rights to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale, to the Human Rights Council and to the GA, with views and recommendations, to be considered by UN Member States.

The UN High Commissioner for Human Rights submitted the 2014 report *The Right to Privacy in the Digital Age* to the Human Rights Council at its 27th Session and to the GA at its 69th Session. Although not legally binding on any UN Member State, the report has important normative value. Based on the human rights jurisprudence of the HRC and of other international human rights bodies, the report provides guidance to UN Member States on how to implement the right to privacy in the digital age.

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109 *The Right to Privacy in the Digital Age, supra* note 92 at para 5.
human rights tribunals, the report of the UN Human Rights Commissioner presents new understandings of Article 17 of ICCPR that cannot be overlooked.\textsuperscript{110}

The Report of the High Commissioner focuses on the protection of privacy in the context of domestic and extraterritorial surveillance, interception of digital communications and collection of personal data, including mass scale.\textsuperscript{111} The Report highlights “the universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice.” The Report examines three important questions 1) What constitutes an interference with privacy in the context of digital communications?, 2) What do the terms ‘unlawful’ or ‘arbitrary’ included in Article 17 of the ICCPR mean? 3) Who is protected under international human rights law, and where?\textsuperscript{112}

With respect to the first question, the Report of the High Commissioner rejects the assumption that an exchange of personal information through electronic mechanisms means that people surrender personal information about themselves and their relationships in return for digital access to goods, services and information. For the Human Rights Commissioner, it remains unclear to what extent “consumers are truly aware of what data they are sharing, how and with whom, and to what use they will be put”.\textsuperscript{113} The Report also rejects the idea that an interception or collection of data about a communication (as opposed to its content) does not imply an interference with privacy. For the Commissioner, the “aggregation of information commonly referred to as ‘metadata’ may give an insight into an individual’s behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of a private communication”.\textsuperscript{114} The Report stresses the observation made by the Human Rights Committee (HRC) in its General Comment No.16 that states should guarantee, de jure and de

\begin{itemize}
\item \textsuperscript{110} Report of the High Commissioner, \textit{supra} note 31.
\item \textsuperscript{111} Report of the High Commissioner, \textit{supra} note 31 at para 6. While the focus of the report is on the right to privacy, it recognizes that other fundamental rights and freedoms such as freedom of opinion and expression, freedom of peaceful assembly and association and the rights to family life and to health are affected by mass surveillance. \textit{Ibid} at para. 14.
\item \textsuperscript{112} Report of the High Commissioner, \textit{supra} note 31 at para 16.
\item \textsuperscript{113} Report of the High Commissioner, \textit{supra} note 31 at para 18.
\item \textsuperscript{114} Report of the High Commissioner, \textit{supra} note 31 at para 19. It should be noted, however, that metadata is not the aggregation of information, but, rather, information about a communication or transaction. This can be an isolated bit of information or can be aggregated. Both can be revealing, depending on context.
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facto, the integrity and confidentiality of correspondence. Based on this assertion of the HRC, the Report says 1) any capture of communications data is potentially an interference with privacy, 2) the collection and retention of communications data amount to an interference of privacy whether or not those data are subsequently consulted or used, and 3) even the mere possibility of communications information being captured creates an interference with privacy. For these reasons, the Report concludes this section by arguing that a mass surveillance program creates an interference with privacy, placing the onus on the state to demonstrate that such interference is neither arbitrary nor unlawful.

With regard to the terms arbitrary and unlawful included in Article 17 of the ICCPR, not only does the Report take up the interpretations made by the HRC in its General Comment 16 but it introduces other important normative elements sketched by the HRC in its ‘Views.’ It must be recalled that for the HRC, a lawful interference with privacy should be in accordance with the ICCPR and, in any event, “reasonable in the particular circumstances.” Drawing upon this interpretation of the HRC, the Report brings together other relevant HRC jurisprudence to construct a framework applicable to the protection of privacy in the context of the digital age.

The Report highlights the HRC’s interpretation of reasonableness to mean proportionality—“the [Human Rights] Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.” The Report also makes an important connection between proportionality and permissible restrictions on the rights and freedoms protected by the ICCPR. For the Human Rights Commissioner, the fact that Article 17 does not include an explicit

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117 General Comment No. 16, supra note 71, at para. 4.
limitation clause does not mean that any restriction on the right to privacy may be permitted. The Commissioner recalls that in its General Comment No. 31,\textsuperscript{119} the HRC has interpreted Article 2, paragraph 1 of the ICCPR\textsuperscript{120} as imposing a specific obligation on states party to the ICCPR when they restrict human rights. For the HRC, “State Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”\textsuperscript{121} By invoking General Comment No. 31 and considering other legal sources such as Views on Individual Communications (complaint procedures), Concluding Observations, regional and national case law, as well as the views of independent experts, the Report of the Human Rights Commissioner has established a kind of ‘test of proportionality’ for the protection of privacy. UN Member States are called to consider such a test when imposing restrictions on the right to privacy.

The test of proportionality suggested by the Human Rights Commissioner is based on the principles of legality, necessity and proportionality. Furthermore, the test is structured in several steps around these principles:

1) Any limitation of privacy rights reflected in Article 17 of the ICCPR must be provided by law. For the Commissioner, law must be sufficiently accessible, clear, and precise so that an individual may look to the law and ascertain who is authorized to interfere with his privacy;

2) The limitation must be necessary for reaching a legitimate aim;


\textsuperscript{120} Article 2 provides: 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[…]

\textsuperscript{121} General Comment No.31, \textit{ supra} note 119 at para 6.
3) The limitation must be in proportion to the aim and the least intrusive option available.\textsuperscript{122}

The Report of the Human Rights Commissioner maintains that limitations placed on a right (in this case, the limitation on the right to privacy for purposes of protecting national security or the right to life of others) “must be shown to have some chance of achieving that goal.” Moreover, the Report puts the onus on state authorities seeking to limit a right to show that the limitation is connected to a legitimate aim, and also clarifies that “any limitation to the right to privacy must not render the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination.” Finally, the Report concludes that if a limitation to the right to privacy does not meet the ‘test of proportionality’ outlined above, such limitation would be unlawful and/or the interference with the right to privacy would be arbitrary.\textsuperscript{123}

The ‘test of proportionality’ suggested by the UN Human Rights Commissioner has an important normative value for the protection of privacy. This test is similar to those used by constitutional courts or judges performing judicial review to examine cases where legislation has been contested on grounds of violation of constitutional rights. The test thus gives a clear methodology to be used in examining interferences with the right to privacy. A UN Member State has to show that: 1) an interference with privacy is provided by law, 2) there is a necessity for this interference, 3) a connection exists between the interference and the legitimate aim, and 4) the interference is proportionate to the aim and is the least intrusive option. Where a UN Member State fails to meet all these conditions, it infringes its obligations under Article 17 of the ICCPR.

Furthermore, the ‘test of proportionality’ suggested by the Human Rights Commissioner may have the broadest impact in countries where legal systems require public authorities to consider international human rights law when adjudicating human rights cases. Such a test would offer judges in these countries a clear normative methodology that could be applied to examining current interferences with the right to privacy. In light of this test of proportionality and the wording of Article 17 of the ICCPR, countries with a legal system open to international human rights law can substantially improve the protection of privacy.

\textsuperscript{122} Report of the High Commissioner, \textit{supra} note 31 at para 23.
\textsuperscript{123} \textit{Ibid}. 
Bearing in mind the ‘test of proportionality’, the Report of the Human Rights Commissioner elaborates on issues related to surveillance, interception of digital communications, and collection of personal data, including mass scale. The Report says surveillance on the grounds of national security or for the prevention of terrorism or other crime may be a legitimate aim in terms of Article 17 of the ICCPR, but “the degree of interference must […] be assessed against the necessity of the measure to achieve that aim and the actual benefit it yields towards such a purpose.”\textsuperscript{124} In other words, national security, prevention of crime and terrorism must fulfill the proportionality test outlined above.

The Report points to HRC’s General Comment No. 27 that sheds light on what should be considered when assessing the necessity of a measure that limits a right protected under the ICCPR. For the HRC, “restrictions must not impair the essence of the right […] ; the relation between right and restriction, between norm and exception, must not be reversed.”\textsuperscript{125} The HRC clarifies that “it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them” and links restrictions with proportionality: “they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest protected”.\textsuperscript{126} In other words, where interferences with the right to privacy (i.e. restrictions) become the rule and render ineffective the essence of such a right, they are incompatible with the ICCPR.

According to the Report of the Human Rights Commissioner, a state can be allowed to engage in intrusive surveillance if there is a legitimate aim and appropriate safeguards are in place. The Report, however, places the onus on the state “to demonstrate that interference with privacy is both necessary and proportionate to the specific risk being addressed.”\textsuperscript{127} For this reason, the Report concludes that “mass or bulk surveillance may thus be deemed to be arbitrary, even if

\begin{itemize}
\item \textsuperscript{124} Report of the High Commissioner, supra note 31 at para 24.
\item \textsuperscript{125} Human Rights Committee, \textit{General Comment No. 27: Freedom of Movement (Article 12)}, UNCCPROR, 67th Sess. UN Doc CCPR/C/21/Rev.1/Add. 9 (1999) [hereinafter General Comment No. 27], at para 12, online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en>.
\item \textsuperscript{126} General Comment No. 27, supra note 125 at para 14.
\item \textsuperscript{127} Report of the High Commissioner, supra note 31 at para 25.
\end{itemize}
they serve a legitimate aim and have been adopted on a basis of an accessible legal regime”.\textsuperscript{128} Moreover, the Report considers that mandatory state requests of third parties, such as telephone companies or Internet service providers, to store metadata about the communications and location of their customers for subsequent law enforcement and intelligence agency access, appear “neither necessary nor proportionate”.\textsuperscript{129}

The Report also highlights that when determining the proportionality of interference with privacy, states must consider “what is done with bulk data and who may have access to them once collected.”\textsuperscript{130} While this issue is usually covered through the data protection principle of ‘purpose limitation’ (analyzed and explained in Chapter Two), data protection principles do not usually apply to state activities related to national or public security, prevention of crime or law enforcement. The Report of the Human Rights Commissioner is very important for several reasons. First, it stresses the lack of use limitations in some national legal frameworks, at least in certain areas such as national security or crime prevention. This lack of use limitations has seen the allowing of one use of personal data, inadvertently permitting other unqualified uses of personal data. The overall result of this lack of use limitations is that “surveillance measures that may be necessary and proportionate for one legitimate aim may not be so for the purposes of another.”\textsuperscript{131} Second, it could be interpreted from the Report that, despite the fact that data protection laws and data protection principles do not apply to cases related to national security or criminal justice, the proportionality of the collection of personal data in such cases can still be legally examined through international human rights law.\textsuperscript{132} In other words, human rights law

\textsuperscript{128} The Report of the Human Rights Commissioner explains: “In other words, it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened: namely, whether the measure is necessary and proportionate.” \textit{Ibid} at para 25.

\textsuperscript{129} Report of the High Commissioner, supra note 31 at para 27.

\textsuperscript{130} \textit{Ibid}.

\textsuperscript{131} \textit{Ibid}.

\textsuperscript{132} A good form to assure that ‘use limitations’ are observed is through the adoption of the good practices suggested by the UN. See, for instance, \textit{Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism}, UNHRCOR, 14th Sess, UN Doc A/HRC/14/46 (2010), annex, Practice 23 (Publicly available law outlines the types of personal data that intelligence services may hold, and which criteria apply to the use, retention, deletion and disclosure of these data. Intelligence services are permitted to retain personal data that are strictly necessary for the purposes of fulfilling their mandate.), online: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.46.pdf>
could be used to challenge mandatory collection, use or disclosure of personal data that interferes with the private lives of individuals.

Another important normative element of the right to privacy developed in the Report of the Human Rights Commissioner is related to paragraph two of Article 17 of the ICCPR. The provision explicitly states that everyone has the right to enjoy the protection of the law against unlawful or arbitrary interference of their privacy. The Report says that a state program that interferes in the private lives of individuals (e.g. via communications surveillance) “must be conducted on the basis of publicly accessible law, which, in turn, must comply with the State’s own constitutional regime and international human rights law”.\footnote{Report of the High Commissioner, supra note 31 at para 28.} For the Human Rights Commissioner, “accessibility requires not only that the law is published, but that it is sufficiently precise to enable the affected person to regulate his or her conduct, with foresight of the consequences that a given action may entail”.\footnote{Ibid.} I would argue that this particular understanding of the Human Rights Commissioner is in harmony with the principle of human dignity—it considers the autonomy of an individual by allowing him the choice of adjusting his behavior.

The Report of the Human Rights Commissioner thus establishes a normative framework for interferences with the privacy of individuals. For the Commissioner, the state must ensure that any interference with the right to privacy, family, home or correspondence is authorized by laws that

- a) are publicly available;
- b) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims;
- c) are sufficiently precise, specifying in detail the circumstances in which any such interference may be permitted, the procedures for authorizing, the categories of persons who may be placed under surveillance, the limits on the duration of surveillance, and procedures for the use and storage of the data collected;
- d) provide effective safeguards against abuse.\footnote{Ibid.}

As with the ‘test of proportionality’, this normative framework on privacy interferences provides a clear template that can be used by judges for examining surveillance legislation or regulations.

\footnote{Ibid.}
and for determining if they comply with the right to privacy protected under Article 17 of the ICCPR. This template was, in fact, used by the Human Rights Committee in its Concluding Observations on a 2014 periodic report on the United States.\footnote{Concluding Observations on the Fourth Periodic Report of the United States of America, UNCCPROR, 110th Sess, UN Doc CCPR/C/USA/CO/4 (2014), at para 22 (expressing concerns in regard to the secret nature of the surveillance programs authorized by U.S. legislation, the secrete nature of the judicial interpretations of such legislation and the current oversight mechanisms that are in place), online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4>}

Based on these Concluding Observations and the ‘meaning of law’ normative framework outlined above, the Report of the Human Rights Commissioner makes some observations related to law permitting interferences with the privacy of individuals:

1) Secret rules and secret interpretations of law (including judicial interpretations) do not have the necessary qualities of “law”;
2) Laws or rules giving excessive discretion to executive authorities (e.g. security and intelligence services) do not qualify as law;
3) A law that is accessible, but that does not have foreseeable effects, is inadequate.\footnote{Report of the High Commissioner, supra note 31 at para 29.}

The Report of the Human Rights Commissioner also establishes a link between the secret nature of a surveillance program and the arbitrary exercise of power. For the Commissioner, “the secret nature of surveillance powers brings with it a greater risk of arbitrary exercise of discretion which, in turn, demands greater precision in the rule governing the exercise of discretion, and additional oversight”. The Report encourages UN Member States to establish the legal framework of surveillance through legislation passed by Parliament rather than subsidiary regulations enacted by the executive. For the Commissioner, legislation passed by Parliament will help “ensure that the legal framework is not only accessible to the public concerned after its adoption, but also during its development”.\footnote{Ibid.}

A significant reflection on the effective remedies for violations of the right to privacy is also included in the Report of the Human Rights Commissioner. Such reflection confirms the obligations that UN Member States undertake by ratifying or acceding to the ICCPR—to ensure that any person whose rights and freedoms are violated has access to an effective remedy.\footnote{Article 2(3) of the ICCPR.} The
Report maintains that effective remedies for violations of privacy through digital surveillance can come in a variety of judicial, legislative or administrative forms. Furthermore, the Report says that effective remedies must be “known and accessible to anyone with an arguable claim that their rights have been violated”, and stresses that ‘notice’ of surveillance must be given. The Report also mentions that a ‘standing’ to challenge such measures is important for the protection of privacy. Notice and standing are therefore critical issues in determining access to effective remedies. While the Report does not itself suggest approaches to ‘notices,’ it mentions those followed in several jurisdictions. While some countries require post facto notifications to surveillance targets, others provide for such notifications once investigations are concluded. As for the standing of an individual to bring judicial challenges, the Report cited a rule of the European Court of Human Rights, in which the Court established that “a claim was justifiable only where there was a ‘reasonable likelihood’ that a person had actually been subjected to unlawful interference.”

Remedies also involve prompt, thorough and impartial investigation of alleged human rights violations. This could be achieved through an independent oversight body. To describe this body, the Report draws on the opinions of the Special Rapporteurs of the UN and of the Inter-American Commission on Human Rights. These experts consider that an independent oversight body shall monitor the collection of personal data for legitimate surveillance purposes, and that such collection shall be “governed by sufficient due process guarantees and judicial oversight, within the limitations permissible in a democratic society.” Moreover, independent oversight bodies “must have access to all relevant information, to resources and expertise to conduct investigations, and the capacity of issue binding orders.” The Report of the Human Rights Commissioner also highlights that effective remedies must be capable of ending ongoing

141 Ibid.
142 Ibid.
privacy violations through the deletion of data or other reparation, and when human rights violations rise to the level of gross violations, criminal prosecution will be required.\textsuperscript{144}

Finally, it should be noted that the Report of the Human Rights Commissioner touches upon other privacy-related issues such as extraterritorial surveillance and the interception of communications,\textsuperscript{145} procedural safeguards and effective oversight,\textsuperscript{146} and the role of the private sector as facilitator of digital surveillance.\textsuperscript{147} In the latter case, the Report speaks about the responsibility of private enterprises, especially information and communication technology companies, to protect the right to privacy. The Report states that “when a company supplies data or user information to a State in response to a request that contravenes the right to privacy under international law, a company provides mass surveillance technology or equipment to States without adequate safeguards in place or where the information is otherwise used in violation of human rights, the company risks being complicit in or otherwise involved with human rights abuses.” This statement of the Human Rights Commissioner is extremely relevant. It assigns to private corporations the responsibility of respecting human rights, an area in which, traditionally, only the state bears responsibility. For the Commissioner, private enterprises “are expected to seek to honour the principles of human rights to the greatest extent possible, and to be able to demonstrate their ongoing efforts to do so.” To achieve this goal, the Commissioner suggests that companies can interpret government demands for access to data “as narrowly as possible, seeking clarification from a Government to the scope and legal foundation for the demand, requiring a court order before meeting government requests for data, and communicating transparently with users about risks and compliance with government demands.”\textsuperscript{148}

As argued, the Report of the Human Rights Commissioner may not be legally binding on member states of the UN, but it has established two normative frameworks (“test of proportionality” and “meaning of law” framework) for the right to privacy that can substantially improve the protection of the private lives of individuals. Moreover, judges in countries that

\textsuperscript{144} Report of the High Commissioner, supra note 31 at para 41.
\textsuperscript{145} Report of the High Commissioner, supra note 31 at para 34-36.
\textsuperscript{146} Report of the High Commissioner, supra note 31 at para 37-41.
\textsuperscript{147} Report of the High Commissioner, supra note 32 at para 42-46.
\textsuperscript{148} Report of the High Commissioner, supra note 31 at para 45.
recognize international human rights law as a source of law within their legal systems could use and apply such frameworks, increasing the protection of privacy in their own jurisdictions.

2.1.4. Resolution on Privacy Adopted by the UN General Assembly in 2014

The General Assembly of the UN adopted on December 18, 2014 a second resolution on the right to privacy—“Resolution 69/166: The right to privacy in the digital age.” The GA issued this resolution after the publication of the Report of the Human Rights Commissioner described above, a Human Rights Council resolution on the promotion, protection and enjoyment of human rights on the Internet, a panel discussion on the right to privacy in the digital age, and after considering the reports of the Special Rapporteurs of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and on the promotion and protection of the right to freedom of opinion and expression.

Although the preamble of Resolution 69/166 borrows language from Resolution 68/167 and from the Report of the Human Rights Commissioner, it also lists recent developments and adds new statements. For instance, Resolution 69/166 recognizes that metadata can provide benefits, but such data “can also reveal personal information and can give an insight into an individual’s behaviour, social relationships private preferences and identity.” Resolution 69/166 emphasizes that unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary collection of personal data, “as highly intrusive acts”, not only do

151 The panel was held during the 27th session of the Human Rights Council in Geneva, Switzerland on 12 September 2014. For a summary of the discussion, see “Human Rights Council holds panel discussion on the right to privacy in the digital age,” online: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15017&LangID=E>
154 The Right to Privacy in the Digital Age, supra note 149.
they violate privacy but also “can interfere with the right to freedom of expression and may contradict the tenets of a democratic society, including when undertaken on a mass scale.”\textsuperscript{155} This statement of the GA is of the utmost importance. It recognizes that mandatory collections of personal information may be ‘unlawful’ and ‘arbitrary’ from the perspective of international human rights law. As previously argued, data protection law (national and international) does not usually apply to the collection, use or disclosure of personal information in areas such as national security and the prevention of crime, leaving individuals unprotected when collection, use or disclosure takes place in these contexts. The GA has thus noted that surveillance of digital communications (commonly used in the context of national security, prevention of crime or law enforcement) “must be consistent with international human rights obligations and must be conducted on the basis of a legal framework”. In this regard, the GA has echoed the suggestions of the Human Rights Commissioner as well as the Special Rapporteurs by arguing that a legal framework “must be publicly accessible, clear, precise, comprehensive and non-discriminatory and that any interference with the right to privacy must not be arbitrary or unlawful, bearing in mind what is reasonable to the pursuance of legitimate aims”. The GA has also emphasized that UN state members have the same obligations “when they intercept digital communications of individuals and/or collect personal data and when they require disclosure of personal data from third parties, including private companies.”\textsuperscript{156}

In this Resolution, the GA has made clear that the collection, use or disclosure of personal information is not only an issue of data protection law but also of human rights law. For the GA,  

\textit{Recognizing} the need to further discuss and analyze, based on international human rights law, issues relating to the promotion and protection of the right to privacy in the digital age, procedural safeguards, effective domestic oversight and remedies, the impact of surveillance on the right to privacy and other human rights, as well as the need to examine the principles of non-arbitrariness and lawfulness, and the relevance of \textit{necessity} and \textit{proportionality} assessments in relation to surveillance practices. 

(Emphasis added)

\textsuperscript{155} \textit{Ibid.}  
\textsuperscript{156} \textit{Ibid.}
With these statements, the GA has thus started to endorse the normative frameworks for the right to privacy suggested by the Human Rights Commissioner such as the ‘test of proportionality’ and the “meaning of law” framework for cases of privacy interferences described above. Furthermore, the GA’s statements indicate that human rights law can also be applied to an examination of the mandatory collection, use, retention and disclosure of personal information carried out by states or private parties, activities that have traditionally belonged to the exclusive domain of data protection law and constitutional law. By allowing for the application of international human rights law to data processing activities, the GA has opened up the possibility of compensating for the imitations that other areas of law have in the protection of privacy.

Resolution 69/166 also mentions that business enterprises have a responsibility to respect human rights, echoing the opinion of the Human Rights Commissioner in this regard. Furthermore, it notes the particular situation of human rights activists, highlighting the fact that they “suffer insecurity as well as unlawful or arbitrary interferences with their right to privacy as a result of their activities.” Finally, Resolution 69/166 notes that public security and anti-terrorism measures may justify the gathering and protecting of certain sensitive information, but such measures should not entail non-compliance with international law, including international human rights law.

Although the operative clauses of Resolution 69/166 are almost the same as those found in Resolution 68/167, the former introduces new statements, reflecting the views and recommendations included in the Report of the Human Rights Commissioner. Paragraph 4(e), for instance, calls upon state members of the UN to give those individuals whose right to privacy has been violated by unlawful or arbitrary surveillance access to an effective remedy, consistent with international human rights obligations. Finally, the GA 1) reaffirms an earlier statement included in Resolution 68/167 “the same rights that people have offline must also be protected online, including the right to privacy” (paragraph 3), 2) encourages the Human Rights Council to remain actively seized of the debate around the protection of privacy (paragraph 5), and 3) decides to “remain seized of the matter” (paragraph 6).

It should be noted that Resolution 69/166 also has a record of being successfully approved. Like its predecessor, the draft resolution was introduced by Brazil and Germany at the 43rd meeting of the Third Committee held on November 11, 2014, but in this case, the draft was also
sponsored by other UN Member States.\textsuperscript{157} In the subsequent meetings of the Third Committee during the same month and year, more countries co-sponsored the draft resolution, resulting in a total of 66 sponsors.\textsuperscript{158} The Third Committee approved “Draft resolution I, the right to privacy in the digital age” by consensus (without a vote) at its 54\textsuperscript{th} meeting held on November 25, 2014 and recommended its adoption by the General Assembly.\textsuperscript{159} Resolution 69/166 was also adopted without a vote by the General Assembly at its 69\textsuperscript{th} Session held on December 18, 2014.\textsuperscript{160} This was the second time that a resolution on the protection of privacy was passed by consensus by both the Third Committee and the General Assembly, confirming the growing support of the international community in asserting a right to privacy as set out in Article 17 of the ICCPR.

Furthermore, the fact that the GA adopted two resolutions on the right to privacy within a year indicates that new normative frameworks aimed at protecting the privacy of individuals had begun to emerge with greater strength. As explained, Resolutions 68/167 and 69/166 may not be legally binding on UN Member States, but no doubt these documents are showing a consistent \textit{opinio juris} that may lead to the establishment of new rules for the protection of privacy at the international level. In fact, when the draft resolution of Resolution 69/166 was adopted by the Third Committee, several countries highlighted the normative elements of Article 17 of the ICCPR; that is, that privacy should be protected against unlawful and arbitrary interferences. Furthermore, other countries pointed to the principles of proportionality and necessity, by saying that interferences with privacy must have a legal basis and be proportionate and necessary to achieve a legitimate aim.\textsuperscript{161} These principles will no doubt play a fundamental role in assessing interferences with the right to privacy as protected in Article 17 in the years to come.

\textsuperscript{158} For the list of countries that sponsored Resolution 69/166, see Secretariat of the Third Committee, \textit{List of resolutions adopted by the General Assembly at its sixty-ninth session on the recommendation of the Third Committee}, UNGA, 69th Sess, December 2014, online: <http://www.un.org/en/ga/third/69/List_of_Co_Sponsors_Third_Committee_69.pdf>
\textsuperscript{159} Report of the Third Committee, \textit{supra} note 157 at para. 46, 156.
\textsuperscript{161} See Summary Record of the 54th meeting, UNGAC3, 69th Sess, 54th Mtg, UN Doc A/C.3/69/SR.54 (2014) at paras. 2, 6, 7, 19, online: <http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/69/SR.54> It should be noted, however, that the U.S. mentioned that Article 17 of the ICCPR does not impose a standard of necessity of
The appointment of a Special Rapporteur on the right to privacy in 2015 by the Human Rights Council also indicates that the UN will remain actively involved in improving the protection of privacy and this active role of the UN means that more normative frameworks and/or new rules may appear in the near future.162

To sum up, these are the legal and normative elements that international human rights law at the global level provides for the protection of privacy:

- A clear, normative, individual entitlement articulated in Article 12 of UDHR and Article 17 of the ICCPR;
- A General Comment (No. 16) of the Human Rights Committee interpreting the wording of Article 17 of the ICCPR;
- Two resolutions of the GA articulating new understandings of the right to privacy in the digital age;
- A report elaborated by the UN High Commissioner for Human Rights establishing new normative frameworks for the right to privacy.

Finally, it should be noted that the right to privacy has also been addressed in Resolution 68/178 of the GA163 and in the report of the Special Rapporteur of the Human Rights Council on the protection of human rights and fundamental freedoms while countering terrorism, submitted in accordance with such resolution.164 The right to privacy has also been considered in several reports of the Special Rapporteur of the Human Rights Council on the promotion and protection of the right to freedom of opinion and expression.165 A recent report of such Rapporteur (2015), for instance, has highlighted the importance of anonymity and encryption for the protection of the right to privacy and freedom of expression, indicating that individuals should receive notice proportionality. For the U.S, the appropriate standard is unlawful and arbitrary, affirming that “an interference with privacy must be reasonable given the circumstances.” Ibid at para. 18.

164 In paragraph 6(g), the GA “Urges States, while countering terrorism: […] To safeguard the right to privacy in accordance with international law, in particular international human rights law, and to take measures to ensure that interferences with or restrictions on that right are not arbitrary, are adequately regulated by law and are subject to effective oversight and appropriate redress, including through judicial review or other means.” See supra note 152.
165 See supra note 153 at para 24—29 (highlighting the interrelations between the rights to privacy and to freedom of expression and opinion)
when their privacy has been compromised as in the cases of weakened encryption or compelled disclosure of user data.  

2.2. The Right to Privacy in the Inter-American System of Human Rights

2.2.1 The Right to Privacy in the American Convention on Human Rights

Privacy is unequivocally recognized as a fundamental human right at the regional level. The wording of Article 11 of the American Convention on Human Rights is similar to that of the UDHR and the ICCPR:

Everyone has the right to have his honor respected and his dignity recognized.

1. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.  

Two minor differences exist between this provision and Article 17 of ICCPR. While the former uses the terms ‘abusive interference’ and ‘private life,’ the latter includes the terms ‘unlawful interference’ and ‘privacy’. Given that no meaningful distinction exists between these terms, it can be concluded that Article 11 of the ACHR also articulates a clear, normative, individual entitlement for the protection of privacy. This means that Article 11 of the ACHR also secures a zone of personal liberty and autonomy that is beyond interference from public authorities and private parties.

2.2.1.1 The Jurisprudence of the Inter-American Court of Human Rights on the Right to Privacy

The Inter-American Court of Human Rights has developed jurisprudence on privacy, covering different areas such as home, sexual life, telephone conversations, honor and

168 Ituango Massacres Case (Colombia) Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2006, Inter-Am Ct Hr (Ser C) No 148, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf>
reputation,\textsuperscript{171} freedom of expression \textit{versus} right to privacy\textsuperscript{172} and \textit{versus} right to honor,\textsuperscript{173} images,\textsuperscript{174} sexual orientation,\textsuperscript{175} and the decision to have children through assisted reproductive technology.\textsuperscript{176} When interpreting Article 11 of the ACHR, the Inter-American Court has stated that such an Article “…recognizes that there is a personal sphere that must be protected from interference by outsiders…” For the Court, “the sphere of privacy is characterized by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or the public authorities.”\textsuperscript{177} The Inter-American Court, however, provides no explanation on what would be an abusive and/or arbitrary invasion or attack to privacy. The Court has also considered that “the scope of privacy […] may include, among other dimensions, the freedom to make decisions related to various areas of a person’s life, a peaceful personal space, the option of reserving certain aspects of private life, and control of the dissemination of personal information to the public”.\textsuperscript{178} Although the Court has acknowledged that privacy is an ample concept and thus not subject to exhaustive definitions, the Court has stated that it protects certain realms such

\textsuperscript{170} Rosendo Cantu et al Case (Mexico) Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2010, Inter-Am Ct Hr (Ser C) No 216, at para. 119, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf>.
\textsuperscript{171} Tristán Donoso Case (Panamá) Preliminary Objection, Merits, Reparations and Costs, Judgment of 29 November 2011, Inter-Am Ct Hr (Ser C) No 193, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf>.
\textsuperscript{172} Escher et al Case (Brazil) Preliminary Objection, Merits, Reparations and Costs, Judgment of 6 July 2009, Inter-Am Ct Hr (Ser C) No 200, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_200_ing.pdf>.
\textsuperscript{173} Tristán Donoso Case, supra note 170; Escher et al Case, supra note 170.
\textsuperscript{174} Fontevecchia and D’Amico Case (Argentina) Merits, Reparations and Costs, Judgment of 29 November 2011, Inter-Am Ct Hr (Ser C) No 238, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf>.
\textsuperscript{175} Herrera Ullloa Case (Costa Rica) Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 July 2004, Inter-Am Ct Hr (Ser C) No 107, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf>.
\textsuperscript{176} Ricardo Canese Case (Paraguay) Merits, Reparations and Costs, Judgment of 31 August 2004, Inter-Am Ct Hr (Ser C) No 111, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf>.
\textsuperscript{177} Kimel et al Case (Argentina) Merits, Reparations and Costs, Judgment of 2 May 2008, Inter-Am Ct Hr (Ser C) No 177, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf>.
\textsuperscript{178} Fontevecchia and D’Amico Case, supra note 172.
\textsuperscript{179} Atala Riffo and Daughters Case (Chile) Merits, Reparations and Costs, Judgment of 24 February 2012, Inter-Am Ct Hr (Ser C) No 239, online: <http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf>.
\textsuperscript{180} Artavia Murillo et al Case (‘in vitro fertilization’) Case (Costa Rica) Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2004, Inter-Am Ct Hr (Ser C) No 257, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf>.
\textsuperscript{181} Ituango Massacres Case, supra note 168 at para. 193–194; Tristán Donoso Case, supra note 170 at 55.
\textsuperscript{182} Fontevecchia and D’Amico Case, supra note 172 at para 48.
as “sex life and the right to establish and develop relationships with other human beings.” For the Court, “privacy includes the way in which the individual views himself and to what extent and how he decides to project this view to others”.

The Inter-American Court has been expanding the content of Article 11 of the ACHR over the years. An interesting interpretation of such Article was delivered in 2012. The Court argued that the scope of protection of the ‘right to private life’ goes beyond the ‘right to privacy’, but the Court did not elaborate on the reasons for creating a distinction between two rights that are commonly treated as synonymous. Inspired by the jurisprudence of the European Court of Human Rights, the Inter-American Court established

…the right to a private life encompasses physical and social identity, an individual’s personal development and personal autonomy as well as their right to establish and develop relationships with other people and their social environment, including the right to establish and maintain relationships with people of the same sex. Moreover, the right to maintain personal relationships with other individuals, in the context of the right to a private life, extends to the public and professional spheres.

Although it seems hard to understand why the Inter-American Court distinguishes between the ‘right to a private life’ and the ‘right to privacy’, it is clear that the Court has expanded the former to include issues related to personal autonomy. In a later ruling, not only did the Inter-American Court reaffirm this interpretation but it included in the right to private life matters related with the dignity of the human being. The Court thus argued that the protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the future course of relevant events for a person’s quality of life. Private life includes the way in which an individual

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179 Artavia Murillo et al Case, supra note 176 at para 162; Fernandez Ortega et al Case, supra note 169 at para 129; Rosendo Cantú et al Case, supra note 169 at 119.
180 Ibid.
181 Atala Riffo and Daughters Case, supra note 168 at para 135. Endnotes omitted.
views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality.”

Therefore, it seems that the Inter-American Court has interpreted the right to privacy as one that gives individuals a personal sphere free from arbitrary or abusive interferences from the state, and the right to private life as protecting issues related to the personality of an individual—the ability to determine his aspirations, identity, personal relationships (including sexual relationships with people of the same sex) and personal decisions such as starting a family.

The Inter-American Court has also argued that Article 11 of the ACHR not only imposes on states party to the ACHR a duty to refrain from interfering with privacy but also an obligation “to guarantee the right to privacy through positive actions, which may involve, in some cases, the adoption of measures to ensure that private life is protected against interference by public authorities as well as by individuals or private institutions…. The Court, however, did not elaborate on the type of positive actions or measures states party to the ACHR are required to adopt.

The right to privacy is not absolute and may be restricted by states party to the ACHR. According to the Inter-American Court, for an interference with the right to privacy not to be abusive or arbitrary, it must comply with three requirements: 1) it must be established by law, 2) it must have a legitimate purpose, and 3) it must be appropriate, necessary and proportionate in a democratic society. Consequently, the Court has also established a ‘test of proportionality’ for privacy interferences. The Court considers that “the absence of any of these requirements implies that the interference is contrary to the Convention”. Two issues should be highlighted from this proportionality test. First, the Inter-American Court set out this test in a case related to the privacy of telephone conversations, but it has not necessarily applied the test to all privacy-related cases. Second, the Court has not substantially elaborated on each of the steps of the test.

182 Artavia Murillo et al Case, supra note 176 at para 143. Endnotes omitted.
183 Fontevecchia and D’Amico Case, supra note 172 at para 49.
184 Escher et al Case, supra note 170 at para 116 and para 129; Tristán Donoso Case, supra note 170 at para 56 and para 76.
185 The test, for instance, was applied in Atala Riffio and Daughters Case, supra note 175, at para 116-167, but not in Fernandez Ortega Case et al, supra note 169 at para 129 nor Rosendo Cantú et al Case, supra note 169 at 119.
Notwithstanding the latter issue, it should be noted that Article 30 of the ACHR provides that restrictions on the enjoyment or exercise of the rights and freedoms recognized therein may not be applied except in accordance with ‘laws’ enacted for reasons of general interest and in accordance with the purpose for which restrictions have been established. Furthermore, the Inter-American Court has interpreted in an Advisory Opinion that the term ‘laws’ “can have no other meaning than that of formal law, that is, a legal norm passed by legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State”\textsuperscript{186}.

For this reason, it could be argued that limitations to the right to privacy must be provided by legislation enacted by an elected Parliament. In fact, this criterion was followed by the Inter-American Court in the cases related to the privacy of telephone conversations referred to above.\textsuperscript{187}

As for the right to privacy in the digital age, the Inter-American Court has addressed some issues relating to the privacy of communications. The Court has argued that notwithstanding the fact that Article 11 of the ACHR does not explicitly mention telephone conversations, they are included in such provision.\textsuperscript{188} Furthermore, the Court has considered that Article 11 not only protects conversations using telephone lines installed in private homes or in offices (regardless of their content) but also the technical operations designed to record their content by taping it or listening to it as well as any other elements of the communication process. For the Court, such elements are “the destination or origin of the calls that are made, the identity of the speakers, the frequency, time and duration of the calls, aspects that can be verified without the need to record the content of the call by tapping the conversation”\textsuperscript{189} In other words, content and traffic data about a communication are protected under Article 11 of the ACHR. The Court has acknowledged that new technological tools in communications and their uses put individuals at greater risk, but affected individuals should not be placed in a situation of vulnerability when

\textsuperscript{186} The Word “Laws” in Article 30 of the American Convention on Human Rights (1986), Advisory Opinion OC-6/86, Inter-Am Ct HR (Ser A) No 6, at para. 27, online: <http://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf>

\textsuperscript{187} Escher et al Case, supra note 170 at para 130; Tristán Donoso Case, supra note 170 at para 77.

\textsuperscript{188} Tristán Donoso Case, supra note 170 at para 55; Escher et al Case, supra note 170 at para 114.

\textsuperscript{189} Escher et al Case, supra note 170 at para 114.
dealing with the State or other individuals. For the Court, “the State must increase its commitment to adapt the traditional forms of protecting the right to privacy to current times”.\textsuperscript{190}

The Inter-American Court has analyzed interferences with communications only in the context of telephone interceptions. According to the Court, for an interference to be in harmony with the ACHR, it must be based on a law “that must be precise and indicate the corresponding clear and detailed rules, such as the circumstances in which [a] measure can be adopted, the persons authorized to request it, to order it and carry it out, and the procedure to be followed”.\textsuperscript{191} It remains to be seen if the Court will apply the same rules or if it will develop new rules to be applied to digital communications not conducted with the use of a telephone set (i.e. the Internet).

2.2.2 Pronouncements of the Inter-American Commission on Human Rights

While the Inter-American Court has yet to develop case law related to communications surveillance, the Inter-American Commission has not remained silent on this topic and has issued several pronouncements through its Special Rapporteurship for Freedom of Expression. After the revelations of the surveillance programs conducted by the U.S. National Security Agency (involving the mass collection or interception of communications data in the U.S and abroad,) the Special Rapporteur for Freedom of Expression of the Inter-American Commission and her UN counterpart issued a joint declaration expressing their concerns about the impact that such programs may have on freedom of expression and the right to privacy.\textsuperscript{192} Such a declaration maintains that states must “guarantee that the interception, collection and use of personal information, including all limitations on the right of the affected person to access his information, be clearly authorized by law in order to protect them from arbitrary or abusive interference with their private interests”.\textsuperscript{193} The joint declaration states that such law must establish limits with regard to the nature, scope and duration of these types of measures; the

\textsuperscript{190} Escher et al Case, supra note 170 at para 115.
\textsuperscript{191} Escher et al Case, supra note 170 at para 131.
\textsuperscript{192} “Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression,” [hereinafter joint declaration] supra note 143.
\textsuperscript{193} Ibid at para 8.
reasons for ordering them; the authorities with power to authorize, execute and monitor them; and the legal mechanisms by which they may be challenged.\textsuperscript{194}

Furthermore, the joint declaration considers that access to communications and personal information must be authorized by law under the most exceptional circumstances defined by legislation. In the case of surveillance of correspondence and personal information on grounds of national security, “the law must clearly specify the criteria to be used for determining the cases in which surveillance is legitimate”.\textsuperscript{195} The joint declaration also specifies that such surveillance shall be authorized 1) only in the event of a clear risk to protected interests and 2) when the damage that may result would be greater than society’s general interest in maintaining the right to privacy and the free circulation of ideas and information. Finally, the joint declaration provides that the collection of personal information “shall be monitored by an independent oversight body and governed by sufficient due process guarantees and judicial oversight, within the limitations permissible in a democratic society”.\textsuperscript{196}

As in the case of the UN, the right to privacy has been addressed in the reports of the Special Rapporteur of the Inter-American Commission for Freedom of Expression. In a 2013 specialized document, the Special Rapporteur analyzed the right to privacy and freedom of expression in the context of the Internet.\textsuperscript{197} Echoing several observations included in the reports of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,\textsuperscript{198} the Inter-American Special Rapporteur has insisted on the limits that states should observe when conducting communications surveillance programs—limitations must be provided by law,

\begin{footnotes}
\item[194] \textit{Ibid.}
\item[195] \textit{Ibid} at para 9.
\item[196] \textit{Ibid.}
\item[197] Inter-American Commission on Human Rights, Freedom of Expression and the Internet, OEA/Ser.L/V/II (Washington: Office of the Special Rapporteur for Freedom of Expression, 2013) at 58-85, online: \textless \url{http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20_WEB.pdf} \textgreater
\item[198] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, \textit{supra} note 153.
\end{footnotes}
necessary and proportionate and authorized by judicial authorities.\textsuperscript{199} Similar recommendations have been included in her annual reports.\textsuperscript{200}

Finally, it should be noted that while the General Assembly of the Organization of American States has issued resolutions relating to the protection of personal data, these documents have addressed such protection when dealing with issues of access to public information, without establishing rules or normative frameworks related to the right to privacy.\textsuperscript{201}

3. The Contribution of the International Human Rights Law on Privacy

Having analyzed the development of the right privacy under the United Nations and the Inter-American Human Rights Systems, I turn to the question of whether international human rights law can improve the protection of individuals when their private lives are invaded through the undue collection, use or disclosure of personal information. I answer this question in the affirmative, based on the arguments that follow.

1) The wording of international human rights treaties

International human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) protect privacy through an article providing a clear, normative, discrete entitlement. Article 17 of the ICCPR and Article 11 of the ACHR provide individuals with the right to have their privacy protected from unlawful, arbitrary or abusive interferences. This means both articles clearly demarcate a zone of

\footnotesize{\textsuperscript{199} Inter-American Commission on Human Rights, \textit{Freedom of Expression and the Internet}, supra note 190 at 75, para 165. 
\textsuperscript{201} See, for instance, the most recent resolution on this issue. OAS, General Assembly, 44\textsuperscript{th} Sess, \textit{Access to Public Information and Protection of Personal Data} OR OEA/Ser.P/XXIV-O.2, Vol 1 (2014) at 151, online: <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaramenes.asp>
personal liberty and autonomy and shield that zone from unwanted interference by the state or private parties. No comparable provision is to be found in the constitutions of most democratic countries. Although these documents usually include provisions aimed at protecting the privacy of the home, the family, correspondence and perhaps even telephone conversations, these provisions offer no clear entitlement giving individuals a right to privacy. While several jurisdictions have developed jurisprudence articulating a right to privacy similar to that included in human rights treaties, others have lagged behind. It is in these countries where international human rights instruments can have a significant impact on improving the protection of privacy.

The right to privacy is forcefully worded in both ICCPR and ACHR. Each puts forward standards like ‘unlawful’ and ‘arbitrary’ that judges at the domestic level could use when examining cases of alleged privacy violation. If, for instance, a statute authorizes public authorities to collect, use or disclose personal information, but the data processing intrudes substantially in the private lives of individuals, then a judge may use Article 17 of the ICCPR or Article 11 of the ACHR as a normative parameter for examining such a statute. When drawing on international jurisprudence on the right to privacy, if the judge finds that the statute does not meet the requirements of legality, necessity and proportionality, he may well conclude that the collection, use or disclosure of personal information authorized by the statute is legal but arbitrary and, thus, violates the right to privacy.

The terms ‘unlawful’ and ‘arbitrary’ are therefore normative elements that can be used to cover privacy invasions that go beyond interferences with a person’s home, family or correspondence. As explained, both terms were the starting point for the UN (and to some extent, the Inter-American Court of Human Rights) in developing new normative frameworks, such as the ‘test of proportionality’ and the ‘meaning of law’ framework, aimed at addressing modern forms of privacy interference. The frameworks are of significant value. Not only do they address challenges to personal privacy posed by mass surveillance, but they can be used at the domestic level to examine all the mandatory collection, retention, use or disclosure of personal information that, in the name of national or public security, crime prevention or law enforcement, are carried out by states through the use of modern technologies. Given that these areas of government are not usually covered by data protection laws, these normative frameworks can give individuals an extra layer of protection against privacy interferences by the state. Similarly, because not all data processing activities are searches and/or seizures per se, the
normative frameworks developed by the UN and the Inter-American Court are best suited to addressing privacy invasions committed through the mandatory collection, retention, use or disclosure of personal information than most search and seizure constitutional provisions.

For these reasons, the wording of Article 17 of the ICCPR and Article 11 of the ACHR makes the promise of positive change in the protection of privacy in countries whose legal systems do not include a general right to privacy.

2) The international jurisprudence on the right to privacy

The human right to privacy has been interpreted by the UN Human Rights Committee (HRC) and by the Inter-American Court of Human Rights. Each body has developed normative frameworks on the right to privacy, elaborating on the meaning of Article 17 of the ICCPR and Article 11 of the ACHR. HRC’s General Comment No. 16, for instance, offers normative criteria explaining terms included in Article 17, such as ‘unlawful’ and ‘arbitrary.’ As said, these criteria may be useful when determining if a collection, use or disclosure of personal information unduly interferes with the privacy of individuals. Although General Comment No. 16 is a non-binding document, its normative force comes from the fact that it was issued by an authoritative interpreter of the ICCPR. For that reason, judges might still choose General Comment No. 16 as a guiding document in the construction of their own interpretations of the right to privacy.

The Report of the UN Human Rights Commissioner may also assist judges in this task. Given that the report sets out a test of proportionality, which can be applied to cases involving the interception and/or collection of communication data, judges could use this test to analyze cases centering on the same issues. The other normative framework suggested by the Commissioner, in which she established requirements that laws authorizing privacy interferences must fulfill (“meaning of law” framework,) may also be of use to judges. These judges could use the framework to examine statutes authorizing the mandatory collection, use or disclosure of personal information. Although this Report is also a non-binding document, it has important normative force given that the UN Human Rights Commissioner drafted it drawing upon the human rights jurisprudence of the UN Human Rights Committee.
The Inter-American Court of Human Rights has also delivered normative frameworks aimed at interpreting Article 11 of the ACHR. The Court, for instance, has repeatedly stated that interferences with the right to privacy must be established by law, must have a legitimate purpose and must be appropriate, necessary and proportionate in a democratic society. The Court, in other words, has established its own test of proportionality that could be applied to cases involving the collection, use or disclosure of personal information that substantially interferes with the right to privacy.

The test of proportionality developed by the Inter-American Court assumes greater importance if we consider that the jurisprudence of this Court is legally binding on states party to the ACHR. As will be explained in Chapter Five, the Inter-American Court has ruled that judges of such states are required to exercise a ‘control of conventionality’ between their domestic legislation and the ACHR. When undertaking this task, they must take into account the interpretations of the ACHR delivered by the Inter-American Court. This means that in cases involving privacy interferences, judges of those states party to the ACHR are required to take into consideration not only Article 11 of the ACHR but also the test of proportionality developed by the Inter-American Court.

The pronouncements of the Inter-American Special Rapporteur for freedom of expression on the protection of privacy in the context of the Internet also offer judges normative frameworks that can be used in their interpretative tasks. Such frameworks may be applied to cases involving legislation authorizing surveillance programs on the grounds of tackling organized crime. While these frameworks are not legally binding on states party to the ACHR, they have normative force given that they were developed drawing on the jurisprudence of the Inter-American Court, and/or other international human rights tribunals and human rights treaty bodies, as well as on the views of experts.

Recent developments in international human rights law on privacy have thus created an important opportunity for increasing the protection of privacy. International human rights law can make a significant contribution in those countries with constitutions dating back to the late eighteenth and early nineteenth centuries and which do not include a general right to privacy. International human rights treaties can be used to update privacy-related provisions included in such constitutions and define the right to privacy as a clear, normative, discrete entitlement. The
jurisprudence developed by authoritative interpreters of human rights treaties may also assist judges when resolving cases related to the collection, use or disclosure of personal information that substantially interferes with the private lives of individuals. International human rights jurisprudence could be very useful for all judges, especially for those working where legal systems do not include a general right to privacy and jurisprudence has not articulated such a right. In these cases, international human rights law might assist these judges, at least until such time as their nations develop their own normative frameworks for the protection of privacy.

To more fully appreciate the potential contribution of international human rights law, the next chapter analyzes data protection law. This law protects privacy by giving individuals control over their personal information. While this law has been crucial in the protection of privacy over the past forty years, it has limitations that could be compensated for by using the international human rights law on privacy.
Chapter 2
The Limitations of the Protection in Data Privacy Law

1. Introduction

In the previous chapter I examined the protection of privacy afforded by international human rights law. I maintained that international human rights treaties and jurisprudence offer a discrete entitlement and normative frameworks that can be used to protect the private lives of individuals from the mandatory collection, retention, use or disclosure of personal information carried out by the state. In this chapter I argue that data protection laws have certain limitations with respect to the protection of privacy which international human rights law on privacy can help mitigate.

Data protection laws have governed the processing of personal information for the past forty years. Modeled on what are known as ‘fair information practices,’ these laws protect privacy by conferring upon individuals control over their personal information. Data protection legislation not only regulates the collection, use and disclosure of personal information by state agencies and/or private corporations. It provides individuals with relevant rights like the right to access their personal records held by these organizations and the right to amend those records.

Mexico has enacted data protection legislation in the past decade, giving the impression that it is protecting the privacy of Mexicans. The problem is, however, that the data protection framework that applies to the state is limited. Additionally, data protection laws have, in general, certain limitations that can leave individuals unprotected in certain cases of mandatory collection, use or disclosure of personal information carried out by the state. While several jurisdictions have attempted to compensate for these limitations through the use of other areas of law, such as constitutional law and tort law, in Mexico these alternatives are not robust, at least for the moment. As will be discussed in Chapter Three, thorough privacy jurisprudence has yet to be developed by the Mexican Supreme Court. Similarly, Chapter Four will show that the Mexican civil law protection of privacy is not best suited to counteracting the limitations of data protection law. These shortcomings in Mexican law make data protection law limitations more critical in Mexico than in countries where extensive privacy jurisprudence exists. The privacy framework at the level of international human rights law examined in the previous chapter can thus be of help. It can be used to mitigate the limitations of data protection law in Mexico.
This chapter is divided into three sections. The first examines the data protection laws that exist today in Mexico. While these laws include relevant safeguards aimed at protecting the personal information of Mexicans, they are limited or subject to exceptions that may render such safeguards ineffective. The second section of the chapter briefly presents the emergence of data protection legislation in Sweden, the US and Great Britain. The legislative processes that took place in these pioneering countries are relevant because they explain the legal structure that exists today in most data protection laws and in international data protection instruments. Mexico has followed these instruments, but did not participate in the discussions preceding their enactment. An understanding of the logic that shapes these documents is nonetheless important when considering the Mexican case. The normative principles included in the international data protection instruments are also outlined in this section. These ‘data protection principles’ form the core of most modern data protection statutes and deserve close examination. The limitations of data protection law are discussed in the third part of the chapter. As is explained, these laws give individuals significant rights that are especially relevant to the protection of privacy. These rights, however, might not help individuals stop interference with their private lives caused through the mandatory collection, retention, use or disclosure of personal information carried out by the state. This is particularly relevant today in light of the state surveillance practices that are being carried out on grounds of national security, crime prevention or law enforcement. The chapter closes by highlighting those areas of social life not covered by data protection laws and by reflecting on how international human rights instruments might compensate for the limitations of these laws.

2. Data Protection Law in Mexico

Most countries have enacted data protection legislation. Mexico is no exception. In 2002, Mexico adopted the Transparency and Access to Public Governmental Information Act, a federal statute containing a few data protection principles similar to those commonly found in data protection laws and international data protection instruments. As explained in more detail

202 Although the 2002 Transparency and Access to Public Governmental Information Act (Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental) [hereinafter Transparency Act] was repealed by the 2016 Transparency and Access to Public Information Act (Ley Federal de Transparencia y Acceso a la Información Pública), the data protection principles included in the first of these statutes will remain in force until a thorough data protection statute covering the public sector is passed by the Mexican Congress. See the Second
below, the general data protection principles usually include the fair and lawful processing principle, the purpose imitation principle, the minimality principle, the data quality principle, the data security principle, the sensitivity principle, the individual participation principle and the proportionality principle.

Although the Transparency Act mostly regulated the right of access to public information, it also gave Mexicans, for the first time in history, the right to access their personal records held by federal state agencies and the right to amend those records.203 The Transparency Act defines personal information as information about an identified or identifiable individual (Art.3, fr. II). With regard to the processing of personal information by federal agencies, the provisions of the Transparency Act can be read as embodying certain data protection principles such as the principles of minimality, data quality and data security (Art.20). That said, the Transparency Act does not include a section listing the most common data protection principles. Nowhere in the Act, for instance, does there appear reference to other primary principles like the fair and lawful processing principle and the purpose limitation principle. Nor is there any notion of proportionality. The Transparency Act also in several cases authorizes the disclosure of personal information without the consent of the individual to whom it relates. This includes instances where the disclosure is authorized by law, is made to comply with a warrant issued by a judicial authority, or is made for research or statistical purposes prior to data anonymization (Art. 22). The Transparency Act also mentions that no consent from individuals is needed when personal data are shared between governmental agencies, provided that such data are used by these agencies solely “to perform their functions” (Art. 22, fr. III).

The Transparency Act provides for a public authority (the National Institute for Transparency, Access to Information and Data Protection—INAI) responsible for overseeing compliance with the data protection provisions included in the Act. At the time of writing this thesis, however, INAI has no authority to receive and investigate complaints from individuals who allege that

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203 See chapter IV, Title I, of the 2002 Transparency and Access to Public Governmental Information Act online: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTAIP.pdf>
their personal information held by federal public agencies has been used or disclosed against such provisions. INAI mostly hears complaints from individuals who have been refused access to their personal records, or who have received denials to amend such records (Arts. 24, 25 and 26).

In short, the Transparency Act contains a few data protection provisions commonly found in data protection laws, but is mostly a statute aimed at facilitating access to information held by federal agencies, including personal records.

Several years following the enactment of the Transparency Act, in 2009, a right to data protection was incorporated into the Mexican Constitution. This right resembles the one included in Article 8 of the Charter of Fundamental Rights of the European Union, which is different from the right to privacy worded in Article 7 of the same charter.204 Article 16 of the Mexican Constitution today provides

Every person has the right to the protection of his personal data, to access, rectify and cancel such data, and to manifest his objection to the processing of that data, in accordance with the law, which must itself establish the exceptions to the principles governing the processing of personal data for reasons of national security, provisions of public order, public security or public health, or to protect the rights of third parties.205

Article 16 thus words the right to data protection as a fundamental right and not as a judicial guarantee similar to those found in the habeas data provisions commonly included in the constitutions of several Latin American countries.206

204 The Charter of Fundamental Rights of the European Union provides: “Article 7 (Respect for private and family life) Everyone has the right to respect for his or her private and family life, home and communications. Article 8 (Protection of personal data) 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down in law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.” See EC, Charter of Fundamental Rights of the European Union, [2012] OJ, C 326/391 at 397, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

205 The amendment to the Mexican Constitution was published in the Official Gazette [Diario Oficial de la Federación] on 1 June 2016, online: <http://www.dof.gob.mx/nota_to_imagen_fs.php?codnota=5092143&fecha=01/06/2009&cod_diario=220533>

A few months earlier, a constitutional amendment gave Congress the power to enact laws regulating the protection of personal data in possession of private parties. The protection of personal information in the public sector remains, however, a matter of shared jurisdiction—both the federation and the states have the power to enact data protection legislation.

The Mexican Congress a year later passed the 2010 Protection of Personal Data in Possession of Private Parties Act, a comprehensive European-style data protection statute that today applies to data processing carried out by the private sector. The Data Protection Act includes most of the data protection principles included in the international data protection instruments and which are described below in this chapter. Given that Mexico is a member of the Organization for Economic Cooperation and Development (OECD), the Data Protection Act follows the OECD data protection Guidelines. The Data Protection Act requires companies to deliver a (paper-based or electronic) privacy notice (aviso de privacidad) to all data subjects explaining relevant aspects of the data processing (Art. 16). Other remarkable features of the Data Protection Act include the fact that companies can obtain tacit consent from individuals through a privacy notice (Art. 8), special rules for the processing of sensitive data (Art. 9), and the imposition of monetary penalties or criminal sanctions to data processors who fail to comply with the Data Protection Act (Arts. 63-64 and Arts. 67-69).

Unlike the Transparency Act, the Data Protection Act gives to INAI the power to initiate an action to verify compliance with the Act by data collectors upon request by an interested party or ex officio (Art. 59). This investigatory power cannot, however, be extended to the mandatory collection, retention, use or disclosure of personal information carried out by the state. The Data Protection Act does not apply to government authorities (Art. 2). The Act also states that no consent from individuals is needed where data processing is authorized by law (Art. 10, fr. I).

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208 Hereinafter, Data Protection Act. The name of the Act in Spanish is Ley Federal de Protección de Datos Personales en Posesión de los Particulares, and it was published in the Official Gazette [Diario Oficial de la Federación] on 5 June 2010, online: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFPDPPP.pdf>

209 For a brief overview in English of the Data Protection Act, see Lothar Determann and Sergio Legorreta, “New Data Privacy Law in Mexico” (2010) 27:12 Computer & Internet Lawyer at 8.
and declares that all data protection rights and principles included in the Act could be limited on grounds of national security, public order, public security and public health (Art. 4).

The Data Protection Act does not therefore apply to cases involving government requests for personal data held by private companies, provided that such requests are authorized by law. A good example is the 2015 Broadcasting and Telecommunications Act. This Act requires telecommunications providers “to collaborate with justice.” This means that they must comply with any written order issued by a competent authority in accordance with the law. The Broadcasting and Telecommunications Act also requires telecommunications providers to store for two years information about the communications and location of their customers, and to give law enforcement and intelligence agencies access to such data (Arts. 189 and 190).

The Broadcasting and Telecommunications Act states that telecommunications providers must process personal data as prescribed by the Data Protection Act “without prejudice to what is prescribed in this [Broadcasting and Telecommunications] Act” (Art. 190, fr. II). This means that the data protection principles included in the Data Protection Act apply in cases of government requests for individuals’ communications/location data, but are limited by the Broadcasting and Telecommunications Act. The provisions of the Broadcasting and Telecommunications Act authorizing government requests for communications/location data were constitutionally challenged, but the Supreme Court of Mexico declared in 2016 that such provisions comply with the Mexican constitution. The Court did, however, limit the scope of such provisions. It prescribed that, with the exception of location data, telecommunications providers must require law enforcement and intelligence agencies to show a court order before submitting any communications data related to their customers.

The Federal Institute of Telecommunications has issued Guidelines detailing the procedures that telecommunications providers must follow when submitting costumers’

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211 The Court argued that because location data can be used to tackle crime and, thus, save the life or integrity of individuals, such data must be delivered in real time; that is, without a court order. See Suprema Corte de Justicia de la Nación [Supreme Court], 4 May 2016, Amparo en Revisión 964/2015 (Mexico), online: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=185299&SinBotonRegresar=1>
communications/location data to law enforcement or intelligences agencies. While these Guidelines reiterate that telecommunications providers must comply with the Data Protection Act, in cases involving public authorities requesting access to communications/location data the Guidelines state only that these authorities will be subject to “all the legal and administrative provisions governing the processing of personal information.” The Guidelines therefore confirm three relevant aspects related to the application of the Data Protection Act. First, the Data Protection Act applies to government requests for personal information held by third parties (telecommunications providers), but other legislation may limit this application. Second, the Data Protection Act could apply to cases involving mandatory data processing carried out by the state for national security, crime prevention or law enforcement, but the Act itself is subject to exceptions that may render its rights and principles ineffective in these areas. Third, the Transparency Act is the only data protection law that applies today to the Mexican state.

A thorough data protection statute regulating the public sector has yet to be approved by the Mexican Congress. Such a statute is expected to be enacted before the end of 2016. Because of the Transparency Act, it can be said that Mexico, in general, has adopted data protection legislation that applies to the state. But this Act has fallen short of what is expected of countries with regards to the protection of personal information. As the following sections show, certain rights and principles commonly listed in data protection laws and international data protection instruments are still absent in the data protection legislation that applies to the public sector in Mexico. The fair and lawful processing principle, the purpose limitation principle, the sensitivity principle and the proportionality principle, for instance, can be incorporated into the Mexican data protection legislation. The following sections present the normative rights and principles commonly found in data protection laws and international data protection instruments which Mexico should indeed not overlook.

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213 Ibid, Third guideline.

214 It is expected that the Mexican Congress will pass the bill during fall. An electronic copy of the bill is available, see, online: <http://inicio.ifai.org.mx/nuevo/Propuesta%20de%20Ley%20General%20de%20PD%20PDF.pdf>
3. Conceptual References

Before examining how data protection laws emerged, the meaning of certain terms must be examined. ‘Data protection’ is commonly used in Europe to refer to a set of policies aimed at regulating the collection, storage, use and transmission of personal information. It comes from the German Datenschutz which is derivative of Datensicherung (data back-up) and Datensicherheit (data security).\textsuperscript{215} Colin Bennett explains that English-speaking nations opted for using the word ‘privacy’ when referring to these policies because it adds “popular appeal.”\textsuperscript{216} For this reason he argues ‘information privacy’ can be considered an analogous concept.\textsuperscript{217} Paul Schwartz and Joel Reidenberg offer one possible explanation for the failure of Anglophone countries to embrace the term data protection. They argue that ‘data protection’ in the U.S. “evokes intellectual property principles of copyright and trade secrets as well as technological security measures.”\textsuperscript{218} In any case, ‘data protection’ and ‘information privacy’ imply that information about individuals shall be treated fairly either by public or private organizations. In this chapter I use both terms interchangeably.

‘Data protection laws’ can be conceptualized as laws containing rules governing the form in which personal information is collected, registered, stored, used, transmitted and disseminated. These laws usually regulate both public and private sectors through a single comprehensive statute. In some jurisdictions, however, one statute regulates public agencies and another, private organizations. The United States proves the exception. There, the private sector has been regulated by following a sectoral approach; that is, laws have been enacted on an ad hoc basis, targeting only certain industries.\textsuperscript{219}

\textsuperscript{217} Ibid at 14.
\textsuperscript{218} Paul M. Schwartz and Joel R. Reidenberg, \textit{supra} note 22 at 5.
\textsuperscript{219} Joel R. Reidenberg, “Privacy in an Information Economy: A Fortress or Frontier for Individual Rights?” (1992) 44:2 Fed. Comm L.J. 195. Joel Reidenberg explains that the federal sectoral approach is a consequence of the federal legislative jurisdiction for commercial information processing drawn from the Interstate Commerce Clause set out in the U.S Constitution, art.1, section 8, clause 3. At the state level, state laws and common law rules also provide privacy rights. The ‘multilayered approach’ to the protection of privacy thus reflects the distribution of powers that exists in the United States. \textit{Ibid} at 208 and accompanying notes.
In general, the main goal of data protection law is to protect the rights and interests of individuals when others process their personal information. These rights and interests are intended to ensure the participation of individuals in data protection operations. The hope is that the erosion of citizens’ privacy will be minimized by erecting these rights and interests. It should be noted that data protection statutes regulate the processing of personal data of individuals and never include collective entities.

At the core of data protection laws lies a set of normative principles that regulate the processing of personal information. These principles, commonly known as ‘fair information practice principles’ or ‘data protection principles’ have been developed in the past three decades through data protection statutes from different jurisdictions and through other international privacy agreements. Lee Bygrave summarizes the principles in the following way:

- Personal information should be collected by fair and lawful means;
- The amount of personal data collected should be limited to what is necessary to achieve the purpose for which the data are gathered and further processed;
- Personal information should be collected for specified, lawful or legitimate purposes and not processed in ways that are incompatible with those purposes,
- Use and disclosure of personal information for purposes other than those specified should occur only with the consent of the person to whom the information relates or by authority of law;
- Personal information should be relevant, accurate and complete in relation to the purposes for which it is processed;
- Security measures should be taken to protect personal information from unauthorized or unintended disclosure, destruction, modification or use;
- Persons should be informed of, and given access to, information relating to them held by others, and be able to rectify this information if it is inaccurate or otherwise misleading;
- Those responsible for processing information on other persons should be accountable for complying with measures giving effect to the above principles.

220 Lee Bygrave, supra note 215 at 2.
221 Colin J. Bennett and Charles D. Raab, supra note 4 at xviii.
222 Lee Bygrave argues, however, that the rights granted to individuals by data protections laws could also been extended to collective entities since “the basic principles of data protection laws are sufficiently broad and flexible to cater for any differences between the data protection needs of various types of collective entities and the equivalent needs of individuals.” Lee A. Bygrave, supra note 215 at 282.
223 Lee A. Bygrave, supra note 215 at 2. For other data protection-principles summaries, see Colin J. Bennett and Charles D. Raab, supra note 4, at 12; Paul M. Schwartz and Joel R. Reidenberg, supra note 22 at 12-17; James B. Rule, supra note 21 at 26.
Data protection statutes have also created independent public agencies responsible for supervising the implementation of the norms included in such statutes. Commonly known as ‘data protection authorities,’ these agencies have more or less the same regulatory, advisory, educational and conflict-resolution powers.\(^{224}\) Their powers are generally aimed at monitoring compliance with the law, handling complaints filled by individuals, providing advice to public or private organizations on data protection issues and promoting awareness on the protection of information privacy. Moreover, as David Flaherty reports, data protection authorities have played a significant role in keeping governmental surveillance under reasonable control.\(^{225}\)

Because data protection laws embrace normative principles, they may operate like framework legislation in certain jurisdictions. This means that data protection laws may be supplemented by other data protection regulations.\(^{226}\) Data protection authorities may issue these regulations to provide additional details on how the collection, use or disclosure of personal information shall be carried out in certain sectors (e.g. health, telecommunications, finance) according to their own needs. For this reason, when one refers to data protection laws, one should consider other regulations issued by data protection authorities.

Data protection laws only protect the privacy of personal information. All other issues that cannot be reduced to informational terms, such as those related to individuals’ spaces, behaviors or decisions are excluded.\(^{227}\) Data protection laws assume a control-based definition of privacy; that is, they safeguard privacy by giving individuals certain control over their personal information. Several leading scholars have argued in favor of this particular understanding of privacy. Charles Fried, for instance, maintains that privacy “is not simply an absence of information in the minds of others; it is the control we have over information about ourselves.”\(^{228}\) Arthur Miller similarly observes that “the basic attribute of an effective right of privacy is the individual’s ability to control the circulation of information relating to him.”\(^{229}\)

\(^{224}\) Colin J. Bennett and Charles D. Raab, *supra* note 4 at xviii.
\(^{225}\) David H. Flaherty, *supra* note 20 at 371.
\(^{226}\) Lee A. Bygrave, *supra* note 215 at 3.
\(^{228}\) Charles Fried, “Privacy” (1968) 77:3 Yale L. J. 475 at 482.
The most prominent exponent of the control-based definition of privacy is, however, Alan Westin. For Westin, privacy is “the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others.” Control-based definitions of privacy are criticized because they treat privacy as something that is at the sole “discretion of the individual to whom the information relates.” Privacy, critics argue, is not simply a “subjective matter of individual prerogative; it is also an issue of what society deems appropriate to protect.” Given that personal information is essential to our daily transactions with public and private institutions, it may not fall under the exclusive control of the individual. There are indeed some instances where the processing of personal information is required by law or conducted in ways that do not give individuals the opportunity to exercise meaningful choices, as in the case of ‘take-it-or-leave-it’ boilerplate agreements. While it is true that the processing of personal information may sometimes escape the absolute control of an individual, the fact is that data protection laws tend to maximize such control.

Although there are no two identical data protection laws in the world, in the past four decades, these laws have created legal regimes that today look very similar. Data protection regimes include principles, statutes, regulations, and public, independent authorities overseeing compliance. Despite their similarities, data protection regimes form a complex legal framework that includes different legislative models and international data protection instruments. In order to fully understand the workings of a data protection legal regime and some of its limitations, I will explain briefly how information privacy laws initially emerged.

4. Causes for the Emergence of Data Protection Laws

In the 1960s, computer technology quickly showed its capacity for storing, retrieving, processing, transmitting and using large amounts of personal information. Before that, manual information systems used limited-access paper files or cards. Paul Sieghart explained that the introduction of computers to these systems would bring important changes because:

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[M]ore transactions will tend to be recorded; the records will tend to be kept for longer; information will tend to be given to more people; more data will tend to be transmitted over public communication channels; fewer people will know what is happening to the data; the data will tend to be more easily accessible; and data can be manipulated combined correlated, associated and analyzed to yield information which could not have been obtained without the use of computers.  

Computers thus introduced the possibility of assembling data that otherwise would be scattered. They facilitated the task of linking information stored in different locations, increasing the effectiveness of both public and private organizations. In other words, computers brought significant benefits to the operation of both public and private organizations. They rendered cumbersome operations into fast and efficient administrative tasks. Modern organizations sought to incorporate computers into the processing of personal information, in order to better meet the demands of customers and clients. In the case of the state, the adoption of computers proved to be of the utmost importance. After first improving record keeping activities, they quickly moved on to reinvent approaches to administrative and statistical tasks. Therefore, as Colin Bennett argues, the combination of information technology and bureaucratic uses of personal data created the policy problem that data protection laws were meant to address.

Information technology and bureaucratic uses of personal information were not problematic per se. The privacy problem began when people realized that computers would enable the creation of centralized databanks. They feared that the assemblage of personal information would lead to the creation of surveillance profiles. Once aggregated, records of personal transactions can produce predictions about present and future actions of individuals that they might otherwise wish to keep private. Moreover, aggregation of personal data produces new valuable information that can empower those who hold such data. Colin Bennett considers that such

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235 Paul Sieghart argues that “in a typical administrative task data about identifiable individuals are processed with the object of carrying on the main business of the [information] system,” such as, for instance, when an organization calculates its payroll. “In a typical statistical task,” Sieghart explains, “data about individuals will be combined in order to find out something about them as a group which will not (usually) affect any of them as individuals” as when data show what proportion of particular individuals tend to develop specific diseases. Paul Sieghart, *supra* note 234, at 66.
information enables agencies to identify, target and perhaps manipulate certain segments of the population of any country.\textsuperscript{240}

Individuals may or may not have been irrational in their fear of computers. Their concerns, however, existed and had to be addressed by policy instruments. As Paul Sieghart stated:

\begin{quotation}
“The whole issue arises because people have fears about their privacy. Now fears may be irrational – but that doesn’t make them go away. Privacy itself is in one sense irrational: it is all about people’s feelings. But feelings are \textit{there}, they are facts. And if people’s anxieties aren’t relieved, they tend to find outlets which are likely to be painful.”\textsuperscript{241}
\end{quotation}

For Colin Bennett, those fears were exacerbated by a number of factors that occurred throughout the 1970s in certain developed countries such as the United States, Sweden, Germany and Great Britain. These factors included plans for the creation of centralized databanks, the adoption of personal identification numbers, the conduction of population censuses, and the publication of alarmist books well received by popular culture.\textsuperscript{242}

Given the growing ability of computers for storing, retrieving, processing, transmitting and using large amounts of personal information, a new method for the protection of citizens’ privacy was needed. The advent of computers called for the creation of new policy instruments to address fears and concerns about privacy invasions committed through the collection, retention, use or disclosure or personal information. These policy instruments came in the form of data protection laws and were designed with the rationale described below.

\textbf{5. Data Protection Law Rationale}

Changes brought by computers were mainly quantitative at first glance. Computer technology, however, began to alter, as Paul Sieghart called, “the nature of transactions.”\textsuperscript{243} In other words,

\begin{footnotesize}
\textsuperscript{240} Colin J. Bennett, \textit{supra} note 216 at 19.
\textsuperscript{242} Colin J. Bennett, \textit{supra} note 216 at 46-55.
\textsuperscript{243} Paul Sieghart, \textit{supra} note 234 at 59. Emphasis in original
\end{footnotesize}
computer technology also had a qualitative impact on the privacy of individuals. With computers, an organization was able to retrieve past transactions descriptive of someone’s life. A financial institution, for instance, could retrieve data related to the credit card purchases of its clients. This retrieval brought to life facts of an individual’s private life that he/she might otherwise prefer to keep for himself/herself. The situation created new privacy risks. Individuals began to lose control over who could access their personal information. The only way to protect privacy without impeding the processing of personal data with the use of computers was by giving individuals control over the personal information that others were collecting about them. The logic behind this protection was described by Paul Sieghart in the following terms:

“[i]t is clear that there is unlikely to be any risk to privacy if the system only uses the ‘right’ data for the ‘right’ purposes and gives only the ‘right’ information to the ‘right’ people.”

For Sieghart, the ‘right data’ are those which are accurate; the ‘right purposes’, those to which individuals explicitly or implicitly agreed or which are sanctioned by law, and the ‘right people’, those who need to use the data for solely such purposes alone. Consequently, “risks to privacy” will occur only when one or more of these conditions are unmet. Therefore, it could be assumed that an individual’s privacy will not be infringed if he or she in some way controls the collection, use and disclosure of his or her personal data. This would clearly be so where he or she can be sure that only the right information (i.e. the accurate data that he or she consents to give or is required to give by law) would be used for the right purposes (i.e. the ones that he or she agrees upon) and by the right people (i.e. the organizations with whom he or she deals.) This is just one reason behind the data protection principles outlined above and, for that matter, all data protection laws.

A second reason behind data protection principles and data protection laws relates to the relationship between citizens and organizations, and how this relationship changed with the use of information technology (IT). Basically, IT increased the record-keeping capacity of all public and private organizations, increasing their power over individuals. As the American Privacy

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244 Ibid at 65
245 Ibid at 67
246 Ibid at 76
Protection Study Commission acknowledged in a 1977 report, “the broad availability and low cost of computer and telecommunications technologies provides both the impetus and the means to perform new record-keeping functions.”247 The concern was that IT would be used by organizations to create and maintain records that would enable such organizations to exercise greater control over the life of individuals. Fears were strongest in the case of the state as IT changed the balance of power between citizens and governments. “The computer,” as Michael Stone and Malcolm Warner describe, “has given bureaucracy the gift of omniscience, if not omnipotence, by putting into its hands the power to know. No fact unrecorded, nothing forgotten nor lost, nothing forgiven [...] There is no little doubt that technically the State could maintain an integrated dossier on every man, woman and child.”248 As a result, personal information could be employed by governments to make adverse or unfair decisions about citizens. Moreover, it could also be used to “embarrass, harass and injure the individual,”249 creating “infra-structures of tyranny.”250 By giving individuals rights that provide for their participation in data processing activities, information privacy laws contribute to the balancing of the power that public or private organizations may have over the life of individuals.

The abovementioned concerns give rise to a third reason behind data protection laws and data protection principles. To address such concerns and to prevent the formation of tyrannical regimes, data protection laws promote transparency and openness in the record-keeping practices of the state and private organizations. Colin Bennett recognizes that “one assumption behind [information privacy] policy making is the need to “take the lid off” the data processing environment.” He argues that “if the data processing environment has to be opened up, then citizens must be given certain knowledge about the processing of data about them, for example, about the existence of record-keeping systems, the nature of the information collected and stored, the uses and disclosure of the data, and so on.”251 Data protection principles and data protection

249 Ibid at 260.
250 Ibid at 260.
251 Colin J. Bennett, supra note 216 at 121.
laws are thus oriented to provide transparency and openness in the collection, storage, use and disclosure of personal information.

6. The First Data Protections Laws in the World

Data protection laws appeared in the developed world throughout the 1970s. The first data protection law in the world was promulgated by the German state of Hesse in 1970. It emerged as a consequence of a plan suggesting the use of centralized information by the local administration. According to Viktor Mayer-Schönberger, the statute dealt with the processing of information itself, regulated the conditions under which data protection could have legally taken place, and included measures of secrecy and security. One of the distinctive features of the Hesse statute was the creation of a data protection commissioner—a public official appointed by and responsible to the Land parliament, in charge of ensuring compliance with this statute. In the following years, the Hessian Data Protection Act became a model of reference, influencing the legislative efforts of other European countries.

The first countries to adopt data protection laws at the national level were Sweden in 1973 and the United States in 1974. A few years later, other nations joined the list: Germany and Canada, 1977; France, Norway, Denmark, and Austria, 1978; Luxembourg, 1979; New Zealand, 1982; United Kingdom, 1984; Finland, Ireland, Australia, Japan and the Netherlands, 1988. With the exception of Germany, the passage of data protection legislation in these countries was preceded by the establishment of national study commissions or committees created to address the fears and concerns described above. The creation of these commissions or committees represents the official response to the privacy problem posed by information technology. As Colin Bennett suggests, their establishment indicates “when privacy and data protection moved from the systemic to the institutional agenda.”

253 Ibid at 223.
255 Colin J. Bennett, supra note 216 at 57.
256 Ibid at 55.
257 Ibid at 60. For Bennett, the systemic or social agenda consists of all issues commonly perceived to merit political attention whereas the institutional or governmental agenda comprises those specific items that captivate the active and serious attention of authoritative decision makers. Ibid at 45.
Of all the national commissions and committees created in the 1970s, those of Sweden, the U.S. and Great Britain deserve close attention. Not only did the reports of these bodies model the first data protection laws in the world but they also exerted a strong influence on the legislative processes that took place in other countries in the years that followed. This influence is reflected in the data protection principles mentioned above. The principles were put forward by the committees and/or commissions of these countries and are included in nearly all data protection laws and international privacy instruments that exist today. Given this influence, and because Mexico did not participate in the discussions that lead to the enactment of the international data protection instruments, it is important to understand the problems analyzed by the committees and/or commissions of these pioneering countries, and the privacy approaches followed.

6.1 Sweden

The main concerns that the Swedish Commission on Publicity and Secrecy of Official Documents addressed in its 1972 report called *Computers and Privacy* were “data privacy and the protection of individuals against intrusion by computerized information.” The Commission had to deal with the principle of free access to official documents—fundamental principle introduced to the Swedish constitution through the Freedom of the Press Act in 1776—and with one of the exceptions to such a principle: the protection of privacy established in the Secrecy Act. In particular, the Commission had to respond to the privacy implications of automatic data processing (ADP) without restricting the right of access to public information.

In its report, the Commission considered that “access to information for the public must not be impaired through computerisation, but means should be provided to prevent misuse of the new technique.” The Commission referred to the American and British concepts of privacy,

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258 For a list of these commissions and the years when they were set up by their national governments see Colin J. Bennett *supra* note 216 at 59.


261 *Ibid* at 3.

while acknowledging their vagueness and admitted that limits on privacy “cannot possibly be drawn distinctly, definitely or in detail.”\textsuperscript{263} The Commission suggested, rather, the adoption of some “guide-lines,”\textsuperscript{264} and concluded that the “ADP technique gives rise to quite new threats to personal privacy.”\textsuperscript{265}

Despite the existence of the Secrecy Act, the Commission proposed the adoption of a special Act, the Data Act, whose “aim is limited to the protection of privacy.”\textsuperscript{266} This Act was based on the “essential rule” that “no information that can be assigned to individuals may be computerized without permission from a Data Inspection Board (DIB).”\textsuperscript{267} This rule became one of the distinctive features of the newly minted Swedish data protection statute—the compulsory licensing system, repealed today.\textsuperscript{268} The Commission also recommended that DIB’s employees should be under secrecy obligations and that failure to comply with the Act would entail liability for damages and even criminal responsibilities.\textsuperscript{269} Finally, the Commission proposed to grant citizens certain rights, such as the right to access their personal records and to keep those records up to date.\textsuperscript{270}

\textsuperscript{263} Sweden Commission on Publicity and Secrecy of Official Documents, supra note 259 at 5
\textsuperscript{264} These guidelines were: 1) all information about the conditions of individuals may concern privacy; 2) the possibility of its use for different purposes may be felt as a threat or an invasion; 3) the use of information may cause undue encroachment on privacy; 4) some information is of especially sensitive character; 5) ADP makes it possible to collect and survey very large quantities of information; 6) information may cover a large number of individuals and contain a great many things about each; 7) information can be stored for a very long time and still kept accessible and 8) registers can be centralized to a very high degree, which makes it much easier to find a fact. \textit{Ibid} at 5-6.
\textsuperscript{265} \textit{Ibid} at 6.
\textsuperscript{266} The Commission argued that although the privacy problems could have been met through amendments to the Secrecy Act, that option would not have been sufficient because the Secrecy Act only applied to information held by official bodies, excluding private “enterprises or individuals, who may also collect and use information”. \textit{Ibid}.
\textsuperscript{267} \textit{Ibid} at 7.
\textsuperscript{268} Lee Bygrave explains that the 1998 \textit{Personal Data Act}, which replaced the 1973 \textit{Data Act}, dispenses with any licensing requirement, providing instead for mere notification to data protection authorities. See Lee A. Bygrave, \textit{supra} note 215 at 76 and accompanying notes. Bygrave also mentions that the licensing system operated in only a few countries (Sweden, Norway and France) and was reserved “for certain designated sectors of business activity, such as credit reporting, or for overseas transfers of personal data, or the matching of such data.” \textit{Ibid}. at 75-76.
\textsuperscript{269} Sweden Commission on Publicity and Secrecy of Official Documents, \textit{supra} note 259 at 9.
\textsuperscript{270} “[t]he commission suggests than any individual should be entitled to access the information kept about him in a register. This privilege should be granted without cost but only once in every twelve months.” Every keeper of a register should take sufficient steps to avoid incorrect, incomplete or obsolete information… If an individual registered alleges that information about him is erroneous and this cannot be corroborated, the disputed information should be deleted if the individual concerned so requests.” \textit{Ibid} at 8
On July 1, 1974, the Swedish Data Act came into full force, creating the first national data protection system in the world. The Act included the guidelines and recommendations of the Swedish Commission. The Data Act was launched “as an experiment, a strategy for gaining experience.” It created a model of data protection that “has had an enormous and direct influence on the development of data protection in Western European countries.”

The report of the Swedish Commission is relevant to this thesis for several reasons. First, if one compares the Commission’s recommendations with some of the data protection principles that are applied today, one discovers they are essentially the same. For instance, the right that an individual has to access his or her own records kept by others, the right he or she has to have those records corrected when they are inaccurate and the obligation that any ‘keeper’ has to hold personal data only for the time that is absolutely necessary are considered today ‘basic principles’ of any data protection regime. Therefore, we are applying, in the twenty-first century, a privacy protection system designed more than forty years ago.

Second, as acknowledged by the Commission, there is no clear definition of privacy behind the Swedish guidelines. As mentioned above, the Commission considered both British and American formulations of privacy (understood as the ‘right to be let alone’), but dismissed them on grounds of vagueness. For the same reason, the Commission avoided any attempt to define privacy and, given the information technology context of the time, the guidelines suggested by the Commission and later incorporated into the Data Act were ‘procedural’ in nature.

Third, the Swedish guidelines did not address the power imbalances that came with information technology. This issue was acknowledged in the Commission’s report when it stated: “…problems connected with shifting of the balance of power through computerization are not dealt with.” One might therefore conclude that data protection principles were not designed and were not intended to challenge the power that information technology holders may acquire when they collect, store, use or disclose personal information. The Swedish principles were designed to provide individuals with certain procedural rights that can be exercised against IT

272 David H. Flaherty, supra note 20 at 94.
273 Colin J. Bennett, supra note 216 at 121.
274 Sweden Commission on Publicity and Secrecy of Official Documents, supra note 259 at 6.
holders, but such principles include no rights that could be used to challenge requests of personal information by these holders or assess the proportionality of such requests.

6.2 United States

In the mid-sixties, the U.S. Congress began to study privacy problems created by the development of information technologies. The concerns addressed by both the House of Representatives and the Senate were related to both the record-keeping on private persons and the information-gathering techniques employed by the American government. What triggered the main concern of Congress, however, was the proposal for the creation of a National Data Center that would centralize and store personal records that were held separately. Although the Center was never created, the privacy problem caused by the automation of personal information was an issue that received sufficient attention by the U.S. Congress.

In 1970, the Secretary of Health, Education and Welfare (HEW) convened a federal advisory committee, the Advisory Committee on Automated Personal Data Systems, to draft a report in response to “the growing public and private use of automated data systems containing information about individuals.” The HEW Committee issued in 1973 a very influential report, Records, Computers and the Rights of Citizens, highlighting several problems related to the application of computers to record-keeping systems. To address these problems, the HEW

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275 See James Rule et al., The Politics of Privacy (New York: Elsevier, 1980) at 54-55. It was estimated that between 10,000 and 25,000 federal statutes authorized the executive branch to collect and store personal information without any comprehensive framework for resolving conflicting interest with information practices. See David M. O’Brien, Privacy, Law and Public Policy (New York: Praeger Special Studies, 1979) at 205.


277 James Rule reports that several congressional hearings were carried out with the purpose of addressing privacy concerns that arose between 1965 and 1977. James Rule et al, supra note 275 at 190-197.

278 Hereinafter, the HEW Committee


280 U.S. Department of Health, Education and Welfare (DHEW), Records, Computers and the Rights of Citizens: Report of the Secretary’s Advisory Committee on Automated Personal Data System (Washington, DC: Department of Health, Education and Welfare, 1973) at xix-xx. The Committee identified that 1) the application of computers to record-keeping had challenged traditional constraints on record-keeping practices; 2) the computer had enabled organizations to substantially enlarge their data processing capacity while greatly facilitating access to recorded data, both within organizations and across boundaries that separate them; 3) the effect of computerization was that it became easier for record-keeping systems to affect people than for people to affect record-keeping systems; 4) computerization had created a new class of record keepers whose functions were technical and whose contact with suppliers and users of data were often remote; and 5) under the then current law, personal privacy was poorly protected against arbitrary or abusive record-keeping practices.
Committee recommended the enactment of a federal “Code of Fair Information Practice” for automated personal data systems that would rest on five basic principles:

- There must be no personal data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.  

The name ‘fair information practices’ was inspired by the ‘Code of Fair Labor Practices.’ The ‘fair information practice principles’ thus implies rules to mediate between potential conflicting interests. These principles called for the adoption of several protective measures that the HEW Committee called ‘safeguard requirements.’ For the Committee, a violation of any safeguard requirement “would constitute an ‘unfair information practice’ subject to criminal penalties and civil remedies.”

The fair information practice principles outlined above provided the framework for the Privacy Act of 1974. They also influenced subsequent data protection legislation in many other countries. It is important to understand how the HEW Committee conceived the concept of privacy. It helps explain the rationale behind the fair information practice principles included in most data protection laws and international privacy instruments.

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281 Ibid. at xx. Emphasis in original.
283 James B. Rule, supra note 21 at 24.
284 There were two sets of requirements, one for administrative records and one for statistical records. See U.S. DHEW, supra note 280 at xxvi-xxxii.
285 Ibid. xxi. Emphasis in original. The HEW Committee also stated that: 1) the suggested Code should provide for injunctions to prevent violations of safeguard requirements and give individuals the right to bring suits for unfair information practices to recover damages in individual or class actions; and 2) pending the enactment of the Code, federal, state and local governments should “adopt the safeguard requirements by whatever means are appropriate.” Ibid at xxiii.
286 Robert Gellman, supra note 279 at 195-196.
287 David H. Flaherty, supra note 20 at 306.
The HEW Committee acknowledged the difficulties in defining privacy. While the Committee referred to some values usually associated with privacy, such as seclusion or withdrawal from public view, it discarded them by arguing that they “denote a quality not inherent to most record-keeping systems.” The Committee thus emphasized the open nature of records. It noted that, with the exception of intelligence records, “a record about someone requires that its contents be accessible to at least one other person.” The Committee then cited the control-based definitions of privacy proposed by Alan Westin and Charles Fried previously outlined, but criticized them arguing that they suppose a unilateral role for the data subject. Instead, the HEW Committee maintained that personal data records “usually reflect and mediate relationships in which both individuals and institutions have an interest, and are usually made for purposes that are shared by institutions and individuals.” For this reason, an individual cannot “monopolize” control over the content of his or her records, but rather he or she must expect to share such content. At the same time, institutions cannot unilaterally take decisions regarding the content and use of someone’s records.

For the HEW Committee, a relation of ‘mutuality’ thus exists between an individual and a record-keeping organization, and personal privacy should be understood precisely in terms of this mutuality. As a result, the HEW Committee considered that records about an individual must be governed by procedures that afford him a right to participate in deciding what the content of those records will be. If data processing is not governed by these procedures, it would be considered unfair information practice unless such processing is authorized by law.

Therefore, as with the Swedish Commission, the HEW Committee considered that the protection of privacy had to be ‘procedural’ in nature. Moreover, the Committee did not suggest any free-from-interference right nor give a basis for “determining a priori which data should or may be

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288 U.S. DHEW, supra note 280 at 38
289 Ibid at 40.
290 The HEW Committee recognized, however, that sometimes institutions “behave as if they had been given such a unilateral role to play.” The Committee went on describing the then existing problem: “[a] record subject usually has no claim to a role in the decisions organizations make about records that pertain to him. His opportunity to participate in those decisions depends on the willingness of the record-keeping organization to let him participate and, in a few instances, on specific rights provided by law.” An individual, in other words, was usually excluded from the processing of his or her personal information carried out by organizations. Ibid.
291 Ibid.
292 Ibid at 40-41.
recorded and used, or why, and when.” 293 All that mattered was to provide a ‘data subject’ with procedures assuring him or her “a right to participate in a meaningful way in decisions about what goes into records about him and how that information shall be used.” 294 Therefore, by providing an individual with certain procedural rights, the Committee balanced the organizations’ needs for personal data with a citizen’s interest in controlling the disclosure of his or her own personal information.

The HEW Committee considered that all organizations should have to adhere to the fair information practice principles every time they collect, use or disclose personal information. Otherwise, they risk incursion into ‘unfair information practices.’ The HEW Committee also indicated that deviations from these principles should only be permitted by law and only in cases where such deviations serve significantly the interest of the same individual or a paramount societal interest. 295 The Committee, however, does not explain what should be understood by ‘law.’ This means that privacy protection afforded by the Fair Information Practice Principles (FIPs) could be abrogated by an Act passed by Congress, and executive decree, an administrative regulation or jurisprudence.

The HEW Committee Report is important for this thesis because it established the main elements of what evolved to become the dominant features of today’s data protection laws. First, FIPs do not embrace the values of solitude or withdrawal usually protected through a general right to privacy like the one included in international human rights treaties. As discussed in Chapter One, such a right protects a zone of personal liberty and autonomy from unwanted interference by the state and private parties. Second, FIPs adopt a control-based definition of privacy, but the control they grant to an individual is not unilateral. Such control has to be understood in terms of the concept of mutuality. Third, FIPs protect privacy through procedural safeguards. This means that FIPs do not provide free-from-interference rights but, rather, procedural entitlements that allow an individual to participate in decision-making with regard to the content of their records held by an organization. Fourth, FIPs do not provide a basis for determining \textit{a priori} which data should or may be recorded and used, when and why. Fifth, an organization that does not comply with

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293 \textit{Ibid} at 41.
294 \textit{Ibid}.
295 \textit{Ibid} at 42.
FIPs risks incursion into unfair information practices, violating the privacy of individuals. Sixth, deviations of FIPs are permissible when provided by law.

6.3 Great Britain

Great Britain set up in the early 70s several national commissions and committees to study problems associated with the protection of privacy. In the beginning the scope of the British reports was not restricted to the privacy implications of information technology. The 1970 Justice Report, for instance, concluded that the law of privacy in England was not comprehensive.296 The only available causes of action for privacy invasion were those used in other cases of interference, such as the ones related with one’s person, property or reputation.297 For these reasons, the Justice Report suggested the enactment of legislation that included a “general right to privacy” that would be “applicable to all situations” and would allow “flexibility in a changing society.”298

The committee that authored the Justice Report defined privacy as “[a]n area of a man’s life, which in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade.” Therefore, the Committee’s main concern was not limited to the impact information technology was having upon the privacy of Britons. That said, the Justice Committee did consider the privacy implications of computers, and recommended the adoption of a method assuring that information be kept accurate and be accessed only by those legally authorized to extract it. In addition, individuals to whom the information was related would have the opportunity of checking such information to correct it and discovering to whom it was transferred.299

296 Justice (British Section of the International Commission of Jurists), Privacy and the Law: A Report by Justice; Joint Chairmen of Committee Mark Littman and Peter Carter-Ruck (London: Stevens, 1970) at 18. The Report considered that “where an individual seeks redress for, or protection from, unwanted intrusions into his privacy, he cannot at the present time bring an action based squarely on the infringement of this interest.” Ibid.

297 The Justice Report also highlighted that British criminal law was far from being comprehensive because criminal penalties aimed at protecting privacy were scattered throughout different unrelated statutes. Ibid.

298 The Justice Report included a “Draft Right of Privacy Bill” which incorporated all the recommendations of the authors of the Report. Ibid at 33.

299 Ibid at 34.
The 1972 Younger Report reached, however, an opposite conclusion. It saw no need for a general law of privacy since the intrusions that were happening in Great Britain could be addressed by the existing law if certain measures were adopted.\textsuperscript{300} Contrary to the Justice Committee, the Younger Committee refused to define privacy.\textsuperscript{301} It also rejected the ‘right to be let alone’ definition on grounds that it was an ‘unrealistic concept.’\textsuperscript{302} In fact, the Younger Committee argued that the main concern about privacy invasions involved the “treatment of personal information.” As a result, the focus of the privacy analysis shifted from the ‘right to be let alone’ to one related to “the unauthorized use, by way of compilation, communication and dissemination, of personal information” and “the means used to extract such information from its private domain.”\textsuperscript{303} The Younger Committee therefore analyzed various areas of social life involving the use of personal information,\textsuperscript{304} and considered in more depth the privacy implications of computers. It recommended the adoption of certain ‘basic principles’ for the handling of personal information by computers.\textsuperscript{305}

Similar to the American fair information practice principles and the Swedish recommendations outlined previously, the focus of the Younger principles is not on the substance of the personal data that could be processed by computers. Neither do the Younger principles focus on the interferences with the private lives of individuals that the collection, use or disclosure of personal information may cause. Excepting the tenth principle (care should be taken in coding value


\textsuperscript{301} \textit{Ibid} at 18, para. 58.

\textsuperscript{302} \textit{Ibid} at 19, para. 63.

\textsuperscript{303} \textit{Ibid} at 20, para. 66.

\textsuperscript{304} These areas were the press, credit ratings, banks, employment, education, medicine, prying by neighbors and landlords, sales methods, private detectives, industrial espionage, and technical surveillance devices.

\textsuperscript{305} The Younger principles were: 1) Information should be regarded as held for a specific purpose and not be used, without appropriate authorization, for other purposes; 2) access to information should be confined to those authorized to have it for the purpose for which it was supplied; 3) the amount of information collected and held should be the minimum necessary for the achievement of the specified purpose; 4) in computerized systems handling information for statistical purposes, adequate provision should be made in their design and programs for separating identities from the rest of the data; 5) there should be arrangements whereby the subject could be told about the information concerning to him; 6) the level of security to be achieved by a system should be specified in advance by the user and should include precautions against the deliberate abuse or misuse of information; 7) a monitoring system should be provided to facilitate the detection of any violation of the security system; 8) in the design of information systems, periods should be specified beyond which the information should not be retained; 9) Data should be accurate. There should be machinery for the correction of inaccuracy and the updating of information; 10) care should be taken in coding value judgments. \textit{Ibid} at 182-184.
judgments), the principles are ‘procedural’ in nature; that is, they provide procedures that allow the participation of individuals in the processing of their personal information, just like the principles recommended by the HEW Committee and the Swedish Commission. Even though the Younger principles were intended to apply only to electronic information, they had tremendous influence in the years that followed both in Great Britain and abroad, to the extent that most of them became the basic rules for the handling of personal information. The Younger principles shifted the scope of the analysis of the privacy problem in Great Britain. The broad question of intrusions into the private lives of Britons became simply an issue of computers and privacy, and this was reflected in the official workings of the subsequent years.

A 1975 white paper entitled *Computers and Privacy* and its accompanying supplement *Computers: Safeguards for Privacy* centered on issues related to computers, security, privacy, as well as dangers associated with the content, access and uses of personal data held in the computer systems of governmental departments and public bodies. A second Committee was appointed one year later and its terms of reference were limited to the protection of computerized personal data. The Committee on Data Protection, also known as the Lindop Committee because it was chaired by Sir Norman Lindop, published its report in 1978. It recommended, among other things, passing legislation creating a Data Protection Authority that would define in detail the rules that should be applied to any system for collecting, processing or storing personal information on computers. To achieve this, the Authority would prepare codes of practice in accordance with principles similar to the Younger principles, but also tailored to meet

306 Colin Bennett, *supra* note 216 at 88. Bennett explains that a recognition of a general right to privacy would have alienated many segments of the press. A broader coalition was needed and “the [official] discourse centered on the European concept of data protection.”
309 *Ibid* at 6-7, 12.
310 The Lindop Committee recommended seven principles. These were: In the interest of data subjects: 1) data subjects should know what personal data relating to them are handled, why those data are needed, how they will be used, who will use them, for what purpose, and for how long; 2) personal data should be handled only to the extent and for the purposes made known when they are obtained, or subsequently authorized; 3) personal data handled should be accurate and complete, and relevant and timely for the purpose for which they are used; 4) no more personal data should be handled than are necessary for the purposes made known or authorized; 5) data subjects should be able to verify compliance with these principles. In the interest of users: 6) users should be able to handle personal data in the pursuit of their lawful interests or duties to the extent and for the purposes made known or authorised without undue extra cost in money or other resources. In the interest of the community at large: 7) the
different types of institutional needs and contexts. After the Lindop Committee Report, the Younger principles were broadly accepted in a subsequent white paper published in 1982 and finally incorporated into the British Data Protection Act enacted in 1984.

For this thesis, the experience of Great Britain is important because it contributed to the framing of the data protection principles included in most data protection laws in force in the world today. The unique features of the British experience are the following. First, excepting the Justice Committee, the British committees also suggested that a basic set of principles (the Younger principles) should be applied to ensure the protection of privacy when handling personal information with computers. Second, the Younger Committee excluded the “right to be let alone” definition of privacy from the analysis of the privacy problem. For this reason, such understanding of privacy is not endorsed by the Younger principles. Third, this means that the protection afforded by the Younger principles is also procedural in nature. They do not provide any free-from-interference right or any other right aimed at challenging the substance of the personal data that can be collected by any organization. Fourth, the Justice Committee showed that the adoption of a general right to privacy could also be used for the protection of privacy, especially in those areas not covered by principles aimed at the handling of personal data by computers. This means that a general right to privacy could also be used as a legal mechanism to stop intrusions into citizens’ private lives caused by the collection, use, process or storage of personal data.

7. What the Swedish, American and British Experiences Mean to Us Today

The Swedish, American and British cases are important for this thesis because they clearly confirm that data protection principles and thus data protection laws only protect the privacy of personal information. Data protection statutes protect privacy by granting individuals procedural rights that can be exercised when organizations collect, process, store, use, or disclose their

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311 Ibid at 201.
312 Ibid at 164; Colin Bennett, supra note 216 at 89.
313 Colin Bennett, supra note 216 at 99.
personal data. These laws do not, however, grant citizens legal mechanisms that could be used to challenge or call into question intrusions into the private lives of individuals committed when organizations collect, store, use or disclose personal data. This particular limitation, which appears in most data protection laws, can be explained from the reports of the three countries examined above. The Swedish commission and the American and British committees deliberately excluded from the national discussions issues related to intrusions into citizens’ private lives made through the collection, processing, use or disclosure of personal information. This means that if one of these countries decides, for instance, to collect DNA samples from the population for administrative or planning purposes, this collection would cause an important intrusion into the privacy of citizens. Data protection laws would, however, not provide individuals with any right to challenge or call into question any such request. James Rule warned about this and other limitations of data protection laws in the early 1980s. For Rule, data protection laws pursue an “efficiency criterion” in the protection of privacy in personal-data systems. This means that data protection laws facilitate surveillance provided that personal information captured by agencies (public or private) is kept accurate, complete and up to date; that openly promulgated due-process rules govern the workings of data systems; that organizations collect and use only the information necessary for attaining their “legitimate” goals; and that individuals have the right to monitor and contest all these principles.\(^\text{313}\)

Organizations, Rule argues, can “claim to protect the privacy of those with whom they deal, even as they demand more and more data from them and accumulate ever more power over their lives.” For this reason, Rule considers that it is almost impossible to object to any surveillance practice provided that such a practice is carried out efficiently, and concludes that “the official interpretation or privacy protection encourages the growth of surveillance and the erosion of personal privacy.”\(^\text{314}\)

This limitation of data protection laws remains to this day. Even worse is the fact that a collection of any type of personal data can be carried out by any state if it is provided by law. Then, as now, data protection laws were not designed to provide free-from-interference rights

\(^{313}\) James Rule et al., *supra* note 275 at 71. Emphasis in original.

\(^{314}\) *Ibid* at 71-72.
that can be used to challenge collections, uses or disclosures of personal information that interfere with the private life of individuals.

The commission and the committees of the three countries analyzed above rejected the understanding of privacy as the ‘right to be let alone.’ Accordingly, the right to enjoy spaces of solitude, intimacy, anonymity and reserve are not necessarily safeguarded by data protection principles and data protection laws. This means that these dimensions of privacy can only be protected by using other areas of law, such as civil actions or criminal offences. It could be argued that in these cases courts can provide some remedies to affected individuals. These legal mechanisms, however, are not designed to solely address unwanted intrusions into one’s privacy. They are mostly intended to deal with specific interferences such as the ones related to an individual’s property, person or reputation. If the affected individual cannot provide sufficient evidence to demonstrate harms caused by those interferences to his or her property, person or reputation, there is no redress for him or her despite the privacy invasions that he or she might have suffered. Constitutional law may provide certain remedies against these invasions through the ‘unreasonable search and seizure’ provisions. But, as discussed in Chapter One, such provisions may not be well suited to challenging interferences with the private lives of individuals caused by the collection, retention, use or disclosure of personal information.

Another important consideration related to the Swedish commission and the American and British committees needs to be highlighted here. The data protection principles suggested by these bodies do not encompass rights that citizens can use to challenge the power acquired by information technology holders when they collect, store, use or disclose personal information. As explained, this problem was expressly acknowledged by the Swedish Commission. If an organization (public or private) decides that certain personal data should be collected, used or disclosed as a condition for the exercising of a right, the claim of a benefit or the provision of a service, that organization undoubtedly gains power over citizens. This places the latter in a disadvantaged position. As Janlori Goldman explains, individuals and organizations are not

315 Alan Westin, supra note 42 at 31-32.
316 See, for instance, the four torts developed in the US — intrusion upon seclusion or solitude, or into private affairs, public disclosure of embarrassing private facts, publicity which places a person in a false light in the public eye, and appropriation of name or likeness. See William L. Prosser, “Privacy” (1960) 48:3 Cal L Rev 383 at 389.
always on an equal playing field.\footnote{Janlori Goldman, "Consequences to the Individual: Data Collection, Information Use, and Electronic Health Systems" in U.S Department of Health, Education and Welfare, Task Force on Privacy, \textit{supra} note 282 at 77.} If an individual wishes to exercise the right, claim the benefit or receive the service, he or she has no choice but to submit his or her personal information. And, as James Rule argues, there are “services which people cannot really go without.”\footnote{James Rule et al, \textit{supra} note 275 at 168.} It must be said that there will be no power imbalance if an individual can choose to claim the benefit or receive the service and only the information needed to provide such benefit or service is collected. A power imbalance may occur, however, if an individual has no choice but to participate in the data processing. Data protection principles themselves offer citizens little assistance in challenging the power an organization wields by collecting, using or disclosing personal information. The situation becomes critical where the state is the party collecting, storing, using or disclosing personal information. In such a case, individuals may have no choice but to submit their personal information, tipping the balance of power in favor of the state.

Due to these limitations it can be argued that data protection principles endorse rights that are procedural rather than aimed at preventing state interference. There are at least two reasons for this. First, the principles suggested by the Swedish Commission and the British and the American Committees do not provide a clear definition of privacy. Privacy is a concept that cannot be framed in a single manner but rather in many others, depending on the interests that one wishes to protect.\footnote{For instance, interests in non-interference, limited accessibility, information control or intimacy. For an overview of the different conceptualizations of privacy and the interests that each of them protect see Daniel J. Solove, \textit{supra} note 252 at Ch 2.} As a result, the meaning of ‘privacy’ has to be sought, as Lee Bygrave explains, in the “substance of the principles.”\footnote{Lee A Bygrave, “The Place of Privacy in Data Protection Law” (2001) 24 U.N.S.W. L.J 277 at 278.} If one observes the principles, one will discover that they are aimed at providing ‘fairness’ in the processing of personal information – hence the term ‘fair information practice principles’. That is to say, they provide individuals with opportunities for participating in the process of creating their personal records and keeping those records up to date. This will ensure that personal records are not under the unilateral control of institutions. The ‘fair information practice principles,’ do not, however, provide individuals with rights specifically aimed at limiting unwarranted state interference into their private lives.
A second reason to perceive data protection rights as procedural rather than aimed at preventing state interference is the very fact that the Swedish Commission and the British and the American Committees suggest nothing about the substance of the personal information organizations may collect, use or disclose. There is no *a priori* indication either for individuals or organizations of which data may be processed, when and why.\(^{321}\) This means that these principles are not intended to prohibit the processing of personal information that may be considered of very intimate character.

The procedural nature of the principles was in fact acknowledged by the HEW Committee. The Committee argued that the fair information practice principles were aimed at “establishing procedures that assure the individual a right to participate in a meaningful way in decisions about what goes into records about him and how that information shall be used.”\(^{322}\) The same can be said about the British principles. The Younger Committee suggested them for the purpose of establishing procedures that organizations “should apply to the handling of personal information by computers.”\(^{323}\) Colin Bennett thus defines fair information practice principles as “procedural safeguards, consistent with the American emphasis on “due process” rights.”\(^{324}\) In this regard, Lee Bygrave argues that there are strong links between data protection principles and rules of due administrative process.\(^{325}\) In fact, these links can be seen in some of the participatory rights; for instance, the rights to access, correct or amend a personal record. These three rights, which lie at the core of the data protection principles, are similar to the principles of natural justice.\(^{326}\)

The procedural nature of the fair information practice principles is important because it describes the character of the early data protection legislation adopted in many countries. In Europe this legislation was considered more “closely related to the law of public administration than to the law of individual liberties.”\(^{327}\) One possible explanation for this ‘administrative law’

\(^{321}\) U.S. DHEW, *supra* note 280 at 41.
\(^{323}\) Great Britain, Home Office, *Report of the Committee on Privacy, supra* note 300 at 184
\(^{324}\) Colin Bennett, *supra* note 216 at 98. Emphasis in original.
\(^{326}\) *Ibid* at 12.
characterization of data protection legislation is the one given by Jon Bing. Bing argues that many of the “rules and principles that [were] finding their way into data-protection law already exist[ed] outside the computer context, for example in laws on banking, medical practice, taxation, census, etc.”³²⁸ Therefore, data protection legislation did not necessarily emerge for securing human rights, but rather for identifying good and correct practices in the operation of computers to “single out and suppress abuses.”³²⁹

Even though a strong connection between privacy and human rights existed when data protection legislation was first adopted, the administrative emphasis of this legislation downplayed its human rights dimension.³³⁰ This becomes evident from the fair information practice principles suggested by the commission and the committees of the three countries analyzed above. As mentioned earlier, the principles do not necessarily provide people with rights that can be used to stop, challenge or call into question the collection, use or disclosure of personal data that may intrude upon citizens’ privacy. While the principles can be used to challenge, say, a disclosure falling outside an original data-processing purpose (purpose limitation principle) and, thus, intrudes upon someone’s privacy, they cannot be used to prevent states from collecting, using or disclosing personal information. The principles cannot be used to dispute, say, a government’s decision to create a centralized national registry of all citizens with mental illnesses. In this hypothetical case, people with mental health problems would likely have an interest in withholding this information from the state. Given their procedural nature, the fair information practice principles offer little help in this case. The principles are not intended to prevent state interferences into citizens’ private lives per se. Conversely, as discussed in Chapter One, the right to privacy included in international human rights treaties³³¹ does protect citizens from ‘unlawful’ or ‘arbitrary’ interferences into their private lives, thus offering a more substantive protection against the mandatory collection, use or disclosure of personal information carried out by the state.

³²⁹ Ibid.
³³⁰ Lee A. Bygrave, supra note 326 at 12.
³³¹ Such as the Universal Declaration of Human Rights (Article 12), the International Covenant on Civil and Political Rights (Article 17), the European Convention on Human Rights (Article 8) and the American Convention on Human Rights (Article 11).
In this way, it can be argued that both fair information practice principles and human rights treaties protect privacy, but they do so on different fronts. The former does it by providing individuals with some control over the data collected about them and thus “stem[s] the erosion of personal privacy.” The latter grants citizens rights that can be exercised when undue intrusions into their private lives occur. Although international human rights treaties were already in force when the Swedish Commission and the British and American Committees issued their reports, the principles suggested by these bodies did not endorse a human rights approach. As already stated, the fair information practice principles only establish procedures that organizations and individuals must follow when the former collect, store, use or disclose personal information and when the latter wish to exercise some control over such information.

The procedural character of the fair information practice principles suggested by the Swedish Commission and the American and British Committees had a tremendous influence in the years following. This procedural character has shaped the protection of personal privacy that prevails to this day. This is because the principles became the legal framework of data protection statutes enacted not only by the national assemblies of these three countries, but also by parliaments of the industrialized world throughout the 1970s. A couple of reasons have been offered to explain this influence. For one thing, as Frits Hondius reports, there was an “almost total lack of legal precedent and of feedback from practice” when governments encountered the legal issues associated with automated data processing. And, as Jon Bing indicates, there was also a “lack of experience in the field.” Therefore, when privacy issues arose from the use of computers, countries paid attention to what other jurisdictions were doing. Legislation and study commission reports from pioneers (Sweden, Great Britain and the U.S.) achieved prominence. The Swedish Act was the first national law to be promulgated in 1973 and it became a “prototype” that was “followed from both sides of the Atlantic.” The proposals of the

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332 Colin J. Bennett and Charles D. Raab, supra note 4 at xviii.
333 Frits W. Hondius, Emerging Data Protection in Europe (Amsterdam: North Holland, 1975) at 18.
334 Jon Bing, supra note 271 at 150.
335 Frits Hondius, supra note 328 at 4.
336 Frits W. Hondius, supra note 333 at 44.
Younger Report not only “made their way into foreign legislation,” but also shaped the first data protection resolutions of the Council of Europe. 337

The fair information practice principles and their procedural nature have also exerted a continuous influence over the last four decades outside the developed world. As will be explained in the next section, the principles reached the international agenda when they were incorporated into the international data protection instruments enacted in the early 1980s. Countries without data protection laws have been pressured to conform to these principles, adopting a protection of privacy that focuses only on the handling of personal information and the control citizens may have over such information. The problem is, however, that the legal framework created by the fair information practice principles is limited. The principles are not suited to prevent states from undertaking mandatory collection, use or disclosure of personal information that unduly interfere with the private life of individuals. Neither the principles are suited to challenge the proportionality of this mandatory state data processing. To raise this challenge, other areas of law such as constitutional law or, as this thesis argues, international human rights law must be used. Before we get to this point, the next section will examine briefly the most relevant international data protection instruments and how they articulate the data protection principles.

8. The Adoption of Data Protection Instruments at the International Level

The experiences of Sweden, the US and Great Britain examined in the previous section are important because the reports of their national study commissions were the first to be published in the early 1970s. As argued, these reports exerted a strong influence on the legislation drafting processes that took place in many countries throughout the world during subsequent years. Moreover, the influence of the reports reached the international agenda when the fair information practice principles were incorporated into international instruments issued by European and non-

337 Ibid at 52. These resolutions were: Resolution (73) 22 on the protection of the privacy of individuals vis à vis electronic data banks in the private sector, adopted by the Committee of Ministers on 26 September 1973, and Resolution (74) 29 on the protection of the privacy of individuals vis à vis electronic data banks in the public sector, adopted by the Committee of Ministers on 20 September 1974.
European organizations. At the time of writing this thesis, however, the fair information practice principles have not been included in any United Nations multilateral treaty.\textsuperscript{338}

That said, the fair information practice principles have been incorporated into the non-binding \textit{Guidelines on the Protection of Privacy and Transborder Flows of Personal Data} issued by the Organization for Economic Cooperation and Development (OECD) in 1980,\textsuperscript{339} and into the \textit{Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data} adopted by the Council of Europe in 1981.\textsuperscript{340} These documents set out the normative framework that member states of both OECD and the Council of Europe have to follow when passing legislation aimed at addressing privacy invasions caused by the handling of personal data using information technology. If a member state of these organizations has not enacted privacy legislation, but wishes to advance protection, such a country has no other option but to emulate what other nations have done and adopt the fair information practice principles included in the Guidelines or Convention 108.

Even though these data protection instruments were adopted more than thirty years ago, their core principles have not changed, continuing to exert the same normative force. In 2012, however, the OECD Guidelines were revised and updated.\textsuperscript{341} Although changes in

\textsuperscript{338} It should be highlighted, however, that the right to privacy is set out in article 12 of the Universal Declaration of Human Rights, and in article 17 of the International Covenant on Civil and Political Rights (ICCPR). Moreover, as discussed in Chapter One, the Human Rights Committee, which is an independent-expert body that oversees states’ parties implementation of the ICCPR, has read into article 17 some of the fair information practice principles included in international privacy instruments. See UN Human Rights Committee, \textit{CCPR General Comment No. 16: Article 17 (Right to Privacy)}, supra note 71, 191-193.

\textsuperscript{339} Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data, adopted 23 September 1980, (C(80)58/FINAL) [Hereinafter, OECD Guidelines], online: <http://www.oecd.org/sti/economy/oecdguidelinesontheprotectionofprivacyandtransborderflows_ofpersonoecdguidelines_recommendation.htm>. The ‘Guidelines’ as such are included in the Annex of the Recommendation. In this document, the OECD Council recommended to member countries, among other things, to “take into account the principles concerning the protection of privacy and individual liberties set forth in the Guidelines”, and to “endeavor to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data.”

\textsuperscript{340} Opened for signature 28 January 1981; in force 1 October 1985 (ETS No. 108) [hereinafter, Convention 108], online: <http://conventions.coe.int/Treaty/Commun/Cherchesig.asp?nt=108&cl=eng>. The treaty is open for signature by Council of Europe (CoE) member states, and for accession by non-members. As of July 2014, 45 of the 47 member states of the CoE have ratified the Convention. Turkey has signed but not ratified the Convention, and San Marino has not signed it. As for the non-members, Uruguay received an invitation to accede the Convention, which entered into force 1 August 2013.

implementation and enforcement were introduced in a new version of the instrument, the principles were unchanged. The Expert Group in charge of the revision of the OECD Guidelines “took the view that the balance reflected in the eight basic principles of Part Two of the 1980 Guidelines remains generally sound and should be maintained.”\footnote{342} For Lee Bygrave, this could be interpreted as an “unwillingness to reopen a debate which could have led to the diminishment of the protection afforded by the existing principles.”\footnote{343} Regardless of the reasons behind the Expert Group’s decision, the fact is that the revised OECD Guidelines include the same fair information practice principles adopted in 1980 which are similar to those suggested by the Swedish Commission and the British and American Committees in the early 1970s.\footnote{344}

Similarly, Convention 108 is currently undergoing a modernization process. Although the Consultative Committee of the Convention\footnote{345} developed a proposal for a revised document in 2012,\footnote{346} agreement was not reached. The Committee of Ministers of the Council of Europe thus set up an Ad Hoc Committee on Data Protection (CAHDATA) in 2014\footnote{347} with a mandate to finalize and submit to the Committee of Ministers proposals for the modernization of Convention 108.\footnote{348} As of March 2015,\footnote{349} CAHDATA had drafted a Draft Protocol amending Convention 108.


\footnote{343} Lee A. Bygrave, \textit{supra} note 325 at 44.

\footnote{344} Frits Hondius reports that there was “a close affinity between data protection problems in Europe and North America,” and for this reason, European and American legislators continually exchanged ideas “via OECD.” See Frits W. Hondius, \textit{supra} note 333 at 59.

\footnote{345} The official name is: Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-PD).


\footnote{349} For the latest report of CAHDATA, see Council of Europe, Committee of the Ministers, Report of the 3rd CAHDATA meeting, CM Documents, CM(2015)40, online: \(<\text{https://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/CAHDATA%203_Report_Cm(2201)40_E.pdf}>\) CADHATA held a meeting on 15-16 June 2016 in Strasbourg, France. See Council of Europe,
This Protocol reiterates the fair information practice principles adopted in 1981 (explained in detail below) but also incorporates new principles and other substantive elements. The Draft Protocol, for instance, brings into the text of Convention 108 the principles of proportionality and transparency for the processing of personal data, currently absent from the 1981 Convention 108’s text. The Draft Protocol also mentions new categories of sensitive data, such as genetic data, biometric data, personal data related to offences, criminal proceedings and convictions, etc. For the processing of these sensitive data, the Draft Protocol amending Convention 108 states that additional appropriate safeguards must be enshrined in law. These safeguards must be aimed at protecting individuals against the risks that the processing of sensitive data may pose to their rights and freedoms, especially the risk of discrimination.

The proposed changes included in the Draft Protocol amending Convention 108 would have a significant impact on the protection of privacy. The principle of proportionally, for instance, is aimed at achieving a fair balance between all public and private interests in the processing of personal information.


353 The text of Article 5, paragraph 1, of Convention 108 suggested by the Draft Protocol amending Convention 108 says: “Data processing shall be proportionate in relation to the legitimate purpose pursued and reflect at all
challenge the mandatory collection, use or disclosure of personal information carried out by the state that allegedly poses undue interference with the privacy of individuals. It remains to be seen, however, whether the Draft Protocol amending Convention 108 will be approved. To this day, Convention 108 remains unaltered, thereby endorsing the fair information practice principles adopted in 1981.\(^{354}\) Just like the OECD Guidelines, Convention’s 108 principles were inspired by the reports of the study commissions of Sweden, the U.S. and Great Britain.\(^{355}\)

In 1995, the European Union (EU) adopted the \textit{Directive on the Protection of Personal Data and on the Free Movement of Such Data}.\(^{356}\) It is considered the most “ambitious, comprehensive and complex” data protection instrument.\(^{357}\) Even though the Directive is only legally binding among EU Member States, it has exerted a strong influence on data protection legislation of other countries.\(^{358}\) It emerged to harmonize the different data protection regimes that existed in the European Community (EC) in the early 1990s.\(^{359}\) According to Lee Bygrave, the existing

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\(^{354}\) It should be noted, however, that in 2001 the Council of Europe adopted the \textit{Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Flows}, opened for signature 8 November 2001; in force 1 July 2004 (ETS No. 181), online: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=8&NT=181>. As the title indicates, this protocol details rules related to the data protection authorities and transborder flows of personal data to recipients which are not subject to the jurisdiction of a Party to Convention 108.

\(^{355}\) The Younger Report (Great Britain) had a particular influence in the workings of the Council of Europe (CoE) that lead to the adoption of Convention 108. This was because, as Frits Hondius reports, the Chairman of the first Council of Europe committee of experts that dealt with the matter, Mr. Gerald Pratt, had been the Secretary of the Younger Committee. See Frits W. Hondius, \textit{ supra} note 333 at 59. Conversely, the influence of the HEW Committee seems less evident. The report issued by this committee (\textit{ supra} note 280) is not mentioned in the Explanatory Reports of each of the two CoE resolutions on data protection (\textit{ supra} note 337) that formed the basis of Convention 108. However, the U.S. Fair Credit Reporting Act of 1970 is referred to in one of those Reports. See Explanatory Report of Resolution 73(22), \textit{ supra} note 337 at para. 8.


\(^{357}\) Lee A. Bygrave, \textit{ supra} note 325 at 53.

\(^{358}\) Article 25 (1 and 2) of the Directive requires Member States to transfer personal data only to those ‘third countries’ that offer an ‘adequate level of protection’. Therefore, if non-European states (third countries) want to receive personal data from the European Union, they need to incorporate into their national laws similar standards to those included in the Directive. This provision has thus given to the Directive an ‘extraterritorial’ application.

\(^{359}\) See Commission Communication on the protection of individuals in relation to the processing of personal data in the Community and information security (COM(90) 314 final 13, September 1990) [hereinafter Commission Communication], online: <http://aei.pitt.edu/3768/1/3768.pdf> at para. 4. The Commission Communication
dissimilarities among data protection legislation of EU Member States “partly reflected the weakness of Convention 108 and the OECD Guidelines in prompting nation states to adopt comprehensive and relatively uniform data protection regimes.” By 1990, only seven Member States of the EC had ratified Convention 108. This led the EC Commission to develop a proposal for a general directive on data protection in the same year. The Commission found that the differences in data protection legislation among EC Member States had become “an obstacle to completion of the internal market,” and a “community approach” in data protection was needed in order to strengthen the computer industry and data communication services in Europe. The EC Commission was also concerned about the implications of information technology in Europeans’ fundamental rights, especially, the right to privacy. The diversity of the national approaches for the protection of individuals in relation to the processing of personal data was not equivalent within the EC, thus offering different levels of privacy protection from one member state to another.

A new instrument that could reconcile the protection of privacy with the development of the European computer industry was thus needed. After five years of intensive negotiations, the Council of Ministers of the EU struck a balance between these two opposing interests by

mentions that the European Parliament called upon the Commission of the European Communities to prepare a proposal for a directive “harmonizing laws on the protection of personal data.”

Lee A. Bygrave, supra note 325 at 55.

These countries were Denmark, France, Germany, Ireland, Luxemburg, Spain and the United Kingdom, from which Spain had not enacted domestic legislation. See Commission Communication, supra note 359 at p.15.


Commission Communication, supra 359 at para. 6, p. 4.

Ibid at para. 7, p. 4.

Ibid at para. 6, p. 4.

Ibid at p. 15.

adopting the EU Data Protection Directive.\footnote{368} According to the European Commission, the Directive would “ensure a high level of protection for the privacy of individuals… [and would] also help to ensure the free flow of Information Society services in the Single Market by fostering consumer confidence and minimizing differences between Member States rules.”\footnote{369} In other words, the Directive will protect individual data privacy without interfering with the free flow of information among EU countries and their partners.

Even though fifteen years had passed since the adoption of the OECD Guidelines and Convention 108, the EU Data Protection Directive did not adopt a different approach in the protection of privacy. As Colin Bennett and Charles Raab argue, “the familiar set of “fair information principles” around which previous national laws and international agreements have converged is prominently stated in several places and is fleshed out in particular requirements [in the Directive].”\footnote{370} Therefore, if one considers that the fair information practice principles was the privacy protection model suggested by the national study commissions of the pioneer countries analyzed above, one may conclude that, by adopting the same principles, the EU Data Protection Directive reinforced the same model. As a result, as happened with privacy legislation enacted in the 1970s, with the OECD Guidelines and Convention 108, other dimensions of privacy, such as the right to enjoy solitude, are not necessarily covered by the EU Data Protection Directive.

The EU Data Protection Directive will soon be replaced by the General Data Protection Regulation (GDPR) and also the Data Protection Directive (DPD) which covers the police and criminal justice sector.\footnote{371} Although an agreement over these instruments has been reached between the EU Council of Ministers, the European Parliament and the European Commission in December 2015, the final texts of the GDPR and the DPD have yet to be formally adopted by the


Council of Ministers and the European Parliament in 2016. The new rules become applicable two years thereafter. At the time of writing this chapter, the final texts of these instruments have not been published in the Official Journal of the European Union. The drafts of the GDPR and of the DPD reveal that these instruments will keep endorsing the fair information practice principles (described below) included in the EU Data Protection Directive. A relevant change in both instruments, however, should be mentioned. Like the Draft Protocol amending Convention 108, the GDPR and the DPD include relevant principles such as transparency, necessity, proportionality and accountability, commonly used for the protection of fundamental rights and freedoms by domestic courts and international tribunals. But, unlike the Draft Protocol amending Convention 108, the GDPR and the DPD do not explicitly link the principle of proportionality to the processing of personal information. In other words, proportionality is not considered a fair information practice principle. As explained below, both the GDPR and the DPD align such a principle with the limitations that Member States of the EU can impose on the right to the protection of personal data, data protection principles and the rights conferred by these instruments to individuals.

A notable feature of the GDPR is the fundamental right now protected through this instrument. Whereas the EU Data Protection Directive states that its objective is the protection of the right to privacy of individuals with respect to the processing of their personal data (Article 1, para.1), the GDPR now declares that it protects the right to the protection of personal data (Article 1, para.2). This means that the right to the protection of personal data displaced the right to privacy in the

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374 See, for instance, General Data Protection Regulation, supra note 373. Articles 11, 21 and 77 and Data Protection Directive on police and criminal justice, supra note 373, Articles 11, 13 and 54.

new European data protection instrument. The change in the GDPR’s objective can be partly explained from the legislative changes that took place in the European Union during the 2000s. With the 2007 Treaty of Lisbon, which amended both the Treaty on European Union and the Treaty Establishing the European Community (today Treaty on the Functioning of the European Union), the right to the protection of personal data acquired legal status within European Union law. The latter treaty now establishes the principle that everyone has the right to the protection of his or her personal data and states that the EU Parliament and Council shall lay down rules on the protection of personal data and the free movement of such data.376 Furthermore, the 2009 Charter of Fundamental Rights of the European Union now enshrines the right to the protection of personal data as a fundamental right on its own (Article 8), independent of the right to privacy (Article 7).377 This change in EU law may explain why the references to privacy under the GDPR are so minimal.378

The fair information practice principles included in these international instruments are of the most relevance for the protection of privacy of individuals with respect to the processing of their personal information. Such principles, however, have certain limitations. Given their procedural nature, the fair information practice principles may not necessarily protect an individual from arbitrary or unlawful interference with his private life carried out by the state through the mandatory collection, retention, use or disclosure of personal information. Furthermore, the fair information practice principles at this moment do not endorse any notion of proportionality. While it can be argued that proportionality can be inferred from other fair information practice principles, the reality is that a proportionality principle is not explicitly listed in international data protection instruments. This makes it difficult to challenge the mandatory data processing carried out by states that unduly interfere with the private life of individuals. To make this point

376 Article 16 of the Treaty on the Functioning of the European Union provides: “1. Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities […]” See EC, Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ, C 326/47 at 55, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>
377 See supra note 204.
378 See Recitals 41 and 67 and Articles 30(3) and 32(1) of the General Data Protection Regulation, supra note 373.
clear, an overview of the data protection principles included in the international data protection instruments outlined above is presented in the following section.

9. The Fair Information Practice Principles

The OECD Guidelines, Convention 108 and the EU Data Protection Directive have adopted the fair information practice principles as a means of protecting the privacy of individuals. Although these instruments share many characteristics, each has distinctive features. Examining these instruments in great detail would be cumbersome and would exceed the purposes of this section. For this reason, the presentation that follows examines the common fair information principles that appear in all three.\textsuperscript{379} The General Data Protection Regulation is not included in this account, because, at the time of writing this thesis, the EU Data Protection Directive is still the legal instrument applicable within the European Union. Similarly, given that the Draft Protocol amending Convention 108 is a similar working document undergoing frequent updates, such a Protocol is excluded from this account. References to both the General Data Protection Regulation and the Draft Protocol amending Convention 108 are nonetheless made to illustrate substantive approaches to the protection of privacy currently absent from both the EU Data Protection Directive and Convention 108.

9.1 Fair and Lawful Processing Principle

This principle maintains that personal information shall be processed fairly and lawfully. It is included in Art. 6(1)(a) of the EU Data Protection Directive and in Art. 5(a) of Convention 108. While the OECD Guidelines restrict the application of this principle to the collection of data (para.7), the General Data Protection Regulation adds the term ‘transparent’ to its wording (Art. 5). For Lee Bygrave, the fair and lawful processing principle is ‘primary’ because “it embraces and generates the other core principles of data protection laws…”\textsuperscript{380} ‘Fairly’ and ‘lawfully’ are, however, ambiguous concepts, which offer little guidance in the application of the principle. Bygrave says that ‘lawfully’ is ‘self-explanatory’ whereas ‘fairness’ means organizations must take account of the interests and reasonable expectations of data subjects. The fair and lawful

\textsuperscript{379}The presentation that follows will draw upon the classification proposed by Lee A. Bygrave, \textit{supra} note 325, Ch 5; Lee A. Bygrave, \textit{supra} note 215, Ch 3, and Paul M. Schwartz and Joel R. Reidenberg, \textit{supra} note 22 at 12-17.

\textsuperscript{380}Lee A. Bygrave, \textit{supra} note 215 at 58.
processing principle, Bygrave argues, implies that citizens are not “unduly pressured into supplying data on themselves to others or agreeing to new uses of the data once supplied” and this “arguably implies protection from abuse by data controllers of their monopoly position.”\textsuperscript{381}

In addition, ‘fairness’ also includes the design of information systems used in data processing operations and the mandating of the creation of manageable, reliable, robust, comprehensible and accessible systems.\textsuperscript{382} This principle also implies transparency because opacity in the processing of personal information brings a lack of fairness to the data processor-data subject relationship. Fairness can easily encompass different dimensions of such a relationship, but these dimensions are specifically addressed by the following principles.

9.2 Purpose Limitation Principle

This principle maintains that personal information should be collected for specified and legitimate purposes and may only be used in ways compatible with those purposes. It is provided in Art. 5(b) of Convention 108, Art. 6(1)(b) of the EU Data Protection Directive, and in para. 9 of the OECD Guidelines. Also known as ‘purpose specification’ or the ‘finality’ principle,\textsuperscript{383} it is considered a “cornerstone of data protection law.”\textsuperscript{384} Paul Schwartz and Joel Reidenberg argue that it is the “most basic element of fairness for the use of personal information.”\textsuperscript{385} Three elements can derive from the purpose limitation principle. First, the purpose of the collection of data must be ‘specified’ and made ‘explicit’ prior to and not later than the time of data collection. Second, the purpose must be ‘lawful’ or ‘legitimate.’ Third, data must not be further processed in a way incompatible with the purpose for which the data are originally collected. These three elements are explained as follows.

\textsuperscript{381} Ibid.
\textsuperscript{382} Ibid at 58, 368.
\textsuperscript{385} Paul M. Schwartz and Joel R. Reidenberg, \emph{supra} note 22 at 13.
‘Specified’ means ‘sufficiently defined,’ enabling the implementation of any necessary data protection safeguards and delimiting the scope of the processing operation. 386 ‘Explicit’ implies that the “purpose must be sufficiently unambiguous and clearly expressed.” 387

‘Lawful’ and ‘legitimate’ should be understood as separate but cumulative requirements. Whereas the former entails a “legal ground” the latter involves “broader legal principles.” 388 One of the difficulties with the purpose specification principle is determining what constitutes a valid purpose for the collection of personal information. Just as in the case of ‘fairly’ and ‘lawfully,’ ‘legitimate’ seems an ambiguous concept. For Lee Bygrave, the word denotes “a criterion of social acceptability, such that personal data should only be processed for purposes that do not run counter to predominant social mores.” 389 Bygrave’s interpretation of ‘legitimate’ can be used to pose important questions about the protection of privacy. Which collections of personal information, for instance, are intrusive or non-intrusive in the private lives of citizens? Which collections are against social or moral norms? Who will ascertain these norms? How can they be determined? Will they be determined by data collectors unilaterally or will citizens have the opportunity to participate in forming these norms? The Convention 108, the OECD Guidelines and the EU Data Protection Directive offer no specific guidance to answer these questions.

Bygrave also argues that most data protection instruments “comprehend legitimacy prima facie in terms of procedural norms.” 390 This means that if the purpose of the collection of personal data seems compatible with the ordinary and lawful ambit of the data collector activities, such a purpose may be deemed legitimate. According to Bygrave, only a few data protection laws consider more ‘substantive’ criteria. For him, substantive criteria mean a broader criterion of social justification. It would imply that the activities of an organization “promote or do not detract from some generally valued state of affairs.” 391 An example of a substantive criterion might be Section 5(3) of Canada’s Personal Information Protection and Electronic Documents Act (PIPEDA). The provision states that “an organization may collect, use or disclose personal

386 A29WP, supra note 384 at 13.
387 Ibid.
388 Ibid.
389 Lee A. Bygrave, supra note 215 at 61.
390 Ibid at 62. Emphasis in original.
391 Lee A. Bygrave, supra note 325 at 155.
information only for purposes that a reasonable person would consider are appropriate in the circumstances.”392 While ‘reasonable’ and ‘appropriate’ included in Section 5(3) of PIPEDA seem ambiguous, they may be used to restrict the collection of personal data that might unduly intrude into the private lives of citizens.

Additionally, the Article 29 Data Protection Working Party (A29WP)393 considers legitimacy to mean that “purposes must be ‘in accordance with the law,’ including within the meaning of ‘law’ both written and common law, primary and secondary legislation, municipal decrees, judicial precedents, constitutional principles, fundamental rights, other legal principles, as well as jurisprudence, as such ‘law’ would be interpreted and taken into account by competent courts.”394 Moreover, A29WP also opens the possibility of including within ‘law’ customs, codes of conduct or codes of ethics, contractual agreements and the “general context and facts of the case.”395 Although A29WP’s interpretation of ‘law’ may seem progressive at first glance, such interpretation may also cause some damage to the protection of the privacy of citizens. It could imply that a collection of sensitive information, such as genetic information for non-medical purposes, could be authorized by an executive decree and thus be considered ‘legitimate.’ This means that if an administrative decree authorizes the collection of sensitive data, such a decree might be deemed ‘legal’ from a government perspective, but, at the same time, unreasonable from a citizen’s point of view. The decree, in other words, would interfere with the private life of the citizen in the ‘arbitrary’ fashion described in Chapter One. Moreover, this hypothetical privacy invasion might be antidemocratic because an administrative decree is usually issued by the executive branch of government, excluding the participation of elected representatives. Therefore, a broad interpretation of law, like the one put forward by A29WP, could have negative implications in the protection of the privacy of citizens.

With respect to the third element of the purpose limitation principle; that is, data shall not be further processed in a way incompatible with the purpose for which such data are originally collected, A29WP has interpreted ‘further processing’ as “any processing following collection,

392 Personal Information Protection and Electronic Documents Act, SC 2000, c5. s.5(3).
393 For A29WP, see supra note 370.
394 A29WP, supra note 384 at 20. Emphasis in original.
395 Ibid.
whether for the purposes initially specified or for any additional purposes.” The difficulty here, however, lies in the concept of ‘incompatibility.’ Bygrave highlights the fact that this criterion contains a double negative (“not incompatible”) and qualifies this standard as “slightly less stringent than that of straight compatibility.” A29WP, on the other hand, interprets “not incompatible” as allowing some “flexibility with regard to further use.” This latter interpretation means that further processing could be different from the initial purpose for the collection of data. As a result, if further processing serves a purpose different from the original, this processing should not necessarily be automatically considered incompatible. This observation leads us to the difficult question of how to determine when an ‘incompatible’ further processing is in front of us. According to A29WP, a formal and a substantive assessment may be possible. A formal assessment compares the original collection purposes (usually provided in writing by the party collecting the information) with secondary uses of data and it determines whether or not these uses were covered explicitly or implicitly. A substantive assessment not only compares the secondary uses of data with the original collection purposes, but also takes into account how these purposes are (or should be) understood, depending on context and other factors. Context thus brings to the assessment more flexibility and pragmatism, facilitating secondary uses of data that respond to contemporary society’s needs. At the same time, context could also be used to authorize further uses of personal data that may infringe upon the privacy of citizens. For this reason, additional criteria seem called for. In general, it could be argued that for a further processing not to be considered as “not incompatible,” secondary uses of personal data should be: 1) more or less implied in the initial purposes or assumed as a logical next step in the processing according to those purposes; 2) within the ambit of the reasonable expectations of the data subjects. Additionally, attention should be paid to the nature of data, to the relationship between the party collecting the data and the data subjects, and to the safeguards adopted by the former to ensure fair processing and to prevent undue impacts on the latter.

396 A29WP, supra note 384 at 21.
397 Lee A. Bygrave, supra note 325 at 156.
398 A29WP, supra note 384 at 21.
399 Ibid at 21.
400 Ibid.
401 Ibid at 23-27; Lee A. Bygrave, supra note 325 at 156; Lee A. Bygrave, supra note 215 at 340.
9.3 Minimality Principle

This principle stipulates that the amount of personal data gathered shall be kept at minimum; that is, not excessive in relation to the purposes for which the data are collected and further processed. The minimality principle is included in Art. 6(c) of the EU Data Protection Directive and in Art. 5(c) of Convention 108. The OECD Guidelines do not mention this principle, but it can be read into other provisions. The General Data Protection Regulation goes further by adding that personal data shall only be processed where the purposes of a data processing could not be fulfilled by processing information that does not involve personal data. A difference should be noted between the EU Data Protection Directive and Convention 108. While the former links the non-excessiveness requirement to the purposes for which personal data are ‘stored,’ the latter does so with the purposes for which data are “collected and furthered processed.” Moreover, Bygrave argues that both instruments include provisions that expand the minimality principle to subsequent stages of the collection of personal data. These provisions oblige data collectors to preserve personal information in a form which permits identification of data subjects for no longer than is required for the purpose for which the data are stored or further processed. The same provisions have been interpreted as an obligation for data collectors to destroy or anonymize data once they have accomplished the purposes for which such data was collected. In summary, the minimality principle puts data controllers under a two-fold obligation: they have to collect the least amount of personal data in support of their established goals and they have to erase such data when no longer needed.

9.4 Data Quality Principle

This principle maintains that personal data collected and further processed shall be accurate and up to date. Art. 5(d) of Convention 108, Art 6(1)(d) of the EU Data Protection Directive, and paragraph 8 of the OECD Guidelines enshrine this principle. The purpose is to avoid the loss of

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402 See Lee A. Bygrave supra note 325 at 151 (arguing that the Minimality Principle can be read into the general criterion of fairness implied by the Fair and Lawful Processing Principle.) See also Paul M. Schwartz and Joel R. Reidenberg, supra note 22 at 11 (maintaining that para. 8 of the OECD Guidelines preclude the collection of unnecessary personal information.)

403 See Lee A. Bygrave, supra note 325 at 151.

404 See art. 6(1)(e) of the EU Data Protection Directive and art. 5(e) of Convention 108.

405 Lee A. Bygrave, supra note 325 at 151.
accuracy that collections of personal data often experience over time. Other provisions are also grouped within this principle, such as those stipulating that personal data shall be adequate, relevant and not excessive in relation to the purposes for which the data are collected and processed. These provisions are Art. 5(c) of Convention 108, Art 6(1)(c) of the EU Data Protection Directive, and para. 8 of the OECD Guidelines. It should be noted that the latter instrument does not list ‘non-excessiveness’ as a criterion, but it does mention another one: completeness.

9.5 Data Security Principle

This principle stipulates that security measures shall be taken to ensure the integrity of personal data. This means that data have to be protected against accidental or unauthorized destruction, alteration or disclosure, as well as against unauthorized accesses. The principle is enshrined in Art 7 of Convention 108, para. 11 of the OECD Guidelines, and Art. 17 of the EU Data Protection Directive. In fact, this latter instrument describes in more detail the ways through which the processing of personal data shall be secured. The Directive specifies, for instance, that the measures taken shall be appropriate to the risks involved in the data processing and the nature of the data to be protected (Art. 17(1)). Moreover, if a third party undertakes data processing on behalf of a data collector, the collector has to ensure, by way of contract or other legal act, that the third party provides “sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out” (art. 17(1)(3)). For the purpose of keeping proof, both collector and third party shall set out in writing the relationship that exists between them and the security measures taken for the protection of personal data (Art. 17(1)(4)). The General Data Protection Regulation now provides that when a personal data breach takes place, the party in charge of the data processing must notify the national data protection authority of such a breach without delay (art. 31(1)). A similar notification must be made to those individuals whose privacy has been compromised by a personal data breach (art. 32(1)).

407 The GDPR defines personal data breach as a breach of security leading to accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed. See Article 4(8) of the GDPR, supra note 373.
9.6 Sensitivity Principle

This principle maintains that personal data revealing sensitive information shall be subject to rigorous controls. Art. 6 of Convention 108 and Art. 8 of the EU Data Protection Directive list special categories of sensitive information. While the latter considers racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health and sexual life as special categories of sensitive data, ethnic origin and trade-union membership are excluded from a similar list in the case of the former. Both Article 6 of Convention 108 and Article 8 of the EU Data Protection Directive consider criminal convictions to be a special category of sensitive data, but the Directive adds to this category information related to ‘offences’ and ‘security measures,’ and requires “official authority control” in the processing of this type of data (art. 8(5)).

The OECD Guidelines do not establish special protection for designated categories of sensitive data. The Expert Group responsible for drafting the Guidelines addressed this issue, but the Group argued it was impossible to define any set of data as universally sensitive. This may be true. Selecting a priori categories of special data for special protection seems a controversial task. No doubt there are certain classes of personal data like those related to race, religion, health or political beliefs that require additional safeguards when processed by public or private organizations. At the same time, types of personal data not listed in Convention 108 nor in the EU Data Protection Directive deserve today similar protection. This would the case with genetic information, biometric data as personal identifier or data associated with social welfare recipients. Although the Draft Protocol amending Convention 108 and the General Data Protection Regulation include new categories of sensitive data, like genetic data, these instruments have yet to come into force. In addition, personal information that seems innocuous at first glance may also be considered sensitive depending on the context in which such data is used and, thus, deserves special protection. Context, in other words, plays an important role in assessing the nature of personal data. Context may turn seemingly benign personal information into sensitive data. As Paul Schwartz and Joel Reidenberg argue, “the

408 See Supplementary Explanatory Memorandum, supra note 342 at para. 51.
409 It should be noted that the Draft Protocol amending Convention 108 includes genetic and biometric data under the list of special categories of sensitive data, but the General Data Protection Regulation only refers to genetic data, excluding biometric data from such a list.
technological ability to combine and share data makes impossible any abstract, non-contextual evaluation of the impact of disclosing a given piece of personal information.” Therefore, the protection of sensitive data depends not only on the creation of specified sub-sets of personal information, but also on taking into account the context in which personal data are used.

Finally, it should be noted that the EU Data Protection Directive has established a general rule that seems effective: the processing of ‘sensitive data’ shall be prohibited (Art. 8(1)). This rule, however, is subject to a wide range of exceptions that may render it null and void. One such exception is Art. 8(2)(a): the processing of sensitive data is allowed if the data subject consents to such processing. A problem arises, however, when citizens have no choice but to consent to the processing of their sensitive data. This includes instances where people are required to submit sensitive data as a condition for exercising a right or to claim a benefit. These real life situations make the Directive’s rule included in Article 8 ineffective. To address these situations of power imbalance, the General Data Protection Regulation now declares in Article 7(4) that consent shall not provide a legal basis for the processing of personal data where there is a significant imbalance between an individual and the party processing the data.

9.7 Individual Participation Principle

This is arguably the most important fair information practice principle. In general, it maintains that individuals have the right to participate in the processing of their personal information. Unlike the other principles, it is not enshrined in a single provision, but, rather, in different rules included in several articles of each of the three data protection instruments examined in this section. The principle gives rise to the following rights.

1) Right of access. Individuals must have a right to access their personal information. This right is enshrined in Art. 8 of Convention 108, Art. 12 of the EU Data Protection Directive, and para. 13 of the OECD Guidelines. Each of the three instruments provide data subjects with the right to obtain from data processors confirmation of whether or not such processors hold information related to them. Data processors must comply with this obligation within a reasonable period of time, in an intelligible form, and without excessive cost to the data subject. The Directive also

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410 Paul M. Schwartz and Joel R. Reidenberg, supra note 22 at 16.
provides that individuals have the right to be informed about the data processing purposes, sources and recipients of the data, as well as the logic involved in any automatic processing, at least in the case of the automated decisions related to the evaluation of their performance at work, their creditworthiness, reliability or conduct (art 12(a) and art. 15(1)).

2) **Right of rectification.** Individuals must have a right to request that their personal data be rectified, completed, amended or deleted by the data processor in cases where such data are incomplete, incorrect or outdated.

3) **Right of objection.** Individuals must have a right to object to the processing of their personal information carried out by data processors. This right is enshrined only in the EU Data Protection Directive, and can only be understood in conjunction with other Directive’s provisions. As Bygrave explains, “the ability to object is linked primarily to rules prohibiting various types of data processing without the consent of the data subjects.” Consent therefore plays an important role in exercising this right. If an individual has not consented to the processing of his or her personal data, for instance, he should be able to exercise the right to object, especially in cases where sensitive data is involved. The Directive understands an individual’s consent as “any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed” (art. 2(h)). In the case of sensitive data, consent must be ‘explicit’ (art. 8(2)(a)). The fact that the Directive does not stipulate written consent in either provision does not mean that consent can be obviated or implied. As Bygrave argues, “there has to be some sort of record made of the [consent] request and reply with measures in place to keep the record secure from unauthorized access and modification.” Although consent empowers individuals against data processors, it is by no means an absolute right or a prerequisite for the processing of personal data. Article 7 of the Directive defines situations where the processing of personal data may be carried out notwithstanding the consent of individuals. This may be the case, for instance, where data processing is necessary to protect the ‘vital interests’ of a person or for the performance of a task carried out in the public interest (Art. 7 (d) and(e)).

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411 Lee A. Bygrave *supra* note 325 at 160.
412 *Ibid* at 161.
The Directive provides that EU Member States shall provide several rights to object: a ‘general’ right to object to data processing (Art. 14(a)), a ‘specific’ right aimed at objecting to direct marketing (art. 14(b)), and a right to not be subject to automated decisions evaluating certain aspects of someone’s personality, such as performance at work, creditworthiness, reliability, conduct, etc. (Art. 15(1)). These rights are not absolute and can be limited or restricted by national legislation. The Directive, however, does not clarify if legislation implies only law enacted by parliaments or other legal sources, such as executive decrees or jurisprudence.

4) Right of information. Individuals must have the right to be informed of the processing of their personal information. Several sets of rules give shape to this right. They are aimed at promoting transparency and openness in the treatment of personal data, making individuals aware of this treatment. This right is of the utmost importance because it allows citizens full participation in social and political life. The first set of rules related to this right is the one requiring data processors to give individuals notice of a collection of personal information. This requirement is laid down in Articles 10-11 of the EU Data Protection Directive, and, to a lesser extent, in para. 12 of the OECD Guidelines. The revised version of this second instrument now adds that data processors need to notify affected individuals in those cases where a significant security breach affecting personal data has occurred. The second set of rules is also enshrined in the abovementioned Directive’s articles. Article 10 stipulates that when data are collected directly from individuals, individuals must be informed of the identity of the data processor and his or her representative; the intended purposes of the data processing; other relevant information such as the recipients of the data; the existence of the right of access and the right of rectification described above; and any other necessary information in the specific circumstances, to guarantee fair processing with respect to the data subject. Article 11 of the EU Data Protection Directive extends the same requirements to cases in which data are not collected directly from individuals. Article 10 of the Directive does not specify when all this information must be provided to

413 Paul M. Schwartz and Joel R. Reidenberg, supra note 22 at 15.
414 Whereas article 10 covers those cases where the information is collected directly from the individual, article 11 refers to situations in which personal data is not obtained from the data subject.
415 This paragraph does not require data processors to give notice to individuals of the collection of their data, but mandates that “means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.”
416 See para. 15(c) of the revised OECD Guidelines, supra note 341.
individuals, but it would, in practice, likely be before or at the time of collection, ensuring fair processing. By contrast, Article 11 specifies that information be given to individuals by data processors when personal data are recorded or, if disclosure to a third party is envisaged, no later than the time of the beginning of the first disclosure. In both cases, details of the data processing operations shall be shared with data subjects regardless even where the right of access is not exercised.

5) Right of recourse. Individuals must have the right of recourse to a public authority in the event that rights, obligations or responsibilities related to the processing of personal data are not observed. This right is included in Art. 10 of Convention 108, para. 13(c) of the OECD Guidelines, and Art. 28(3) of the EU Data Protection Directive. To warrant this right, most countries have established data protection authorities with oversight powers. As mentioned above, these authorities are public agencies operating independently of governments or legislatures. Data protection authorities monitor compliance with data protection law and handle complaints from those who believe their rights have been infringed upon by data processors.

Finally, it should be mentioned that the General Data Protection Regulation provides new rights for individuals, such as the right to be forgotten, the right to erasure and the right to have data processing restricted (Art. 17). Other rights include the right to data portability (Art. 18) and the right to not be subject to a measure based on profiling (Art. 20). Although some of these rights may already exist scattered throughout other European legal sources, they are now grouped together under this one data protection instrument.

9.8 Proportionality Principle

This principle has never been considered to be one of the classic ‘fair information practice principles.’ Therefore, it does not appear in the data protection instruments described in this section. Proportionality has, however, emerged as “a data principle in its own right” in this

\[\text{In regard to the right to be forgotten, see ECJ, Google Spain and Google y Agencia Española de Protección de Datos and Mario Costeja González, C-131/12, Judgment of the Court (Grand Chamber) of 13 May 2014, online: <http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0131&lang1=en&type=TXT&ancre=>. With respect to profiling, see Council of Europe, Committee of Ministers, Recommendation CM/Rec(2010)13 of the Committee of Ministers to member states on the protection of individuals with regard to automatic processing of personal data in the context of profiling, 23 November 2010, online: <https://wcd.coe.int/ViewDoc.jsp?id=1710949#P5_189>.}\]
decade. Bygrave explains that proportionality is a general principle firmly established in European Union law, usually found in legal instruments and judicial decisions. Proportionality was fully acknowledged as a data protection principle only recently by data protection and privacy authorities from over fifty countries in the Madrid Resolution. Adopted at the 31st International Conference of Data Protection and Privacy Commissioners in 2009, this non-legally binding document provides:

8. Proportionality Principle
(1) The processing of personal data should be limited to such processing as is adequate, relevant and not excessive in relation to the purposes set out in the previous section.
(2) In particular, the responsible person should make reasonable efforts to limit the processed personal data to the minimum necessary.

Even though section 8 of the Madrid Resolution describes a proportionality principle, nowhere in the body of this provision do the words ‘proportionate’ or ‘proportionality’ appear. This irony is far from being a novelty. Section 8 borrows concepts from the EU Data Protection Directive. This includes, for instance, Article 6(a), which states that “Member States shall provide that personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.” At the same time, the proportionality principle of the Madrid Resolution implies a criterion of necessity covered by other provisions of the

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418 Lee A. Bygrave, supra note 328 at 160.
419 Ibid at 149.
Furthermore, situations related to the application of the Madrid Resolution’s proportionality principle may be covered by other fair information practice principles such as fair and lawful processing and purpose limitation principles. For instance, unlawful data processing or data processing carried out for non-legitimate purposes would be disproportionate. The proportionality principle can thus be read into other provisions listed on the data protection instruments referred to in this section.

It is worth noting that the Madrid Resolution does not establish a proportionality test like those developed by most constitutional courts in the adjudication of human rights. Such a test, however, could be adopted by data protection authorities and/or courts, as has happened recently in both international and domestic jurisdictions. It remains to be seen if a proportionality test can be derived from the data protection instruments analyzed in this section. It further remains to be seen if such a test can be used to stop the collection, retention, use, or disclosure of personal data that interferes with the private lives of individuals or if such a test can only be used to reduce the amount of data collected or processed by a data processor.

The General Data Protection Regulation now provides for a proportionality principle, but the principle does not appear in the provision listing the fair information practice principles that public or private organizations must follow when processing personal data (Art. 5). Proportionality appears, rather, in provisions related to restrictions that Member States of the EU or the EU itself may impose on the rights, obligations and rules prescribed by the General Data Protection Regulation. Article 21 indicates that a restriction must come by way of legislative measure when it constitutes a necessary and proportionate measure in a democratic society for the purpose of safeguarding governmental objectives (e.g. public security, crime prevention, law enforcement) or to protect the data subject and the rights and freedoms of others. Similarly, proportionality is a parameter to be considered when a person does not consent to the data processing and such processing is, rather, authorized by law. In both cases, Art 6 of the General Data Protection Regulation mandates that laws authorizing data processing must meet an

421 As Lee Bygrave highlights, Articles 7, 8 and 13 of the EU Data Protection Directive embrace a criterion of necessity and, thus, of proportionality. See Lee A. Bygrave supra note 325 at 148.
422 See, respectively, Case C-70/10 Scarlet Extended v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) [2011] ECR I-0000 ruled by the Court of Justice of the European Union and Eastmond v. Canadian Pacific Railway 2004 FC 852 (2004). Please note that the latter case was not adjudicated by the Supreme Court of Canada, the highest judicial organ of this country.
objective of protecting public interest or must be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued.

The Draft Protocol amending Convention 108 also incorporates a notion of proportionality. The suggested wording for Article 5(1) of Convention 108 states that data processing shall be “proportionate in relation to the legitimate purpose pursued,” reflecting at all stages of the processing “a fair balance between all interests concerned, whether public or private, and the rights and freedoms at stake” (Article 7 of the Draft Protocol). The Draft Protocol also provides that data processing shall be carried out on the basis of the free specific, informed and unambiguous consent of the data subject or of some other legitimate basis laid down by law (Article 7). Therefore, where the data processing is carried out by the state on a mandatory basis and on grounds of public interest (e.g. public security, crime prevention or law enforcement), such processing must be authorized by the national legal order. The Draft Protocol mentions that restrictions on the rights of the data subjects and exceptions to the obligations of data processors must be established by law and constitute a necessary and proportionate measure in a democratic society for the purpose of protecting governmental objectives and/or the rights and freedoms of others (Article 14).

It remains to be seen which wording is used in the final texts of both the General Data Protection Regulation and the Draft Protocol amending Convention 108. From the drafts analyzed above, it follows that the notion of proportionality might be incorporated into the international data protection framework in the near future. We do not know, however, how this notion of proportionality would work in practice, and if this notion would be capable of preventing states from collecting, using, ensuring access to or disclosing personal information that unduly interferes with the private lives of individuals.

Finally, we must not lose sight of the fact that, although the drafts of the General Data Protection Regulation and the Draft Protocol amending Convention 108 bring the promise of introducing the notion of proportionality to the international data protection framework, the notion is conspicuously absent from the currently-in-force international data protection instruments.

In conclusion, the abovementioned fair information practice principles are included in most data protection and privacy laws worldwide. Although these principles, together with laws, provide
important safeguards for the protection of personal privacy, as argued in this chapter, such principles and laws are procedural and are not aimed at preventing unwarranted interference by the state. This means data protection laws may not cover situations where a citizen’s private life is invaded through the collection, use or disclosure of personal information, especially if the processing of data is mandatory and carried out by the state. The following section explains this and other limitations of data protection laws in greater detail.

10. The Limitations of Data Protection Laws

The fair information practice principles protect privacy by providing rules aimed at making the collection, use, storage or disclosure of personal information fair for both data subjects and data processors. The intent is to restrain the capricious processing of personal information and thereby reduce the erosion of privacy. The principles were not, however, conceived as mechanisms aimed at challenging or calling into question collections of personal data that may intrude arbitrarily into the private lives of citizens. Data protection principles and data protection laws have, in point of fact, encouraged the collection of personal information, rendering surveillance activities more open and fair.423

The first limitation of data protection laws is their inability to protect all dimensions of privacy. The fair information practice principles were specifically designed to address the problem of privacy invasions caused by the handling of personal information using information technology. The principles address no other privacy issues. As argued earlier, the fair information practice principles give individuals control over their personal information, but do not cover privacy invasions associated with the ‘right to be let alone.’ The rights and obligations prescribed by these principles are therefore not necessarily designed to keep a zone of personal liberty and autonomy free from the unwanted interference of the state and others. As we have seen, this particular dimension of privacy was deliberately excluded from the analysis elaborated by the Swedish Commission and the British and American Committees. Furthermore, this exclusion was remedied by none of the international data protection instruments outlined above. As argued, the bodies responsible for drafting the reports that led to the enactment of data protection laws and data protection international instruments assumed that issues related to other dimensions of

423 James B. Rule, supra note 21 at 27.
privacy (e.g. solitude and intimacy) would be protected by the courts of each country, using other areas of law such as civil actions, criminal offences or constitutional provisions. A problem can arise, however, where governmental organizations interfere substantially with the private lives of individuals through the mandatory collection, use or disclosure of personal information. Here, the personal zone of liberty and autonomy of the individual is made smaller. Individuals can no doubt resort to constitutional law to prevent state interference, but the effectiveness of this protection would depend on whether or not a constitutional framework provided for a right to privacy (explicitly mentioned in the constitution or created via jurisprudence) and how this framework addresses issues of privacy invasion committed by the state. Because this framework has mostly been developed from ‘search and seizure’ provisions and often within the context of criminal law, it may not cover all instances of privacy invasion committed by the state via mandatory data processing. Such would be the case with a state deciding to massively ensure access to the communications data of individuals not suspected of any wrongdoing. Processing of this kind of personal information clearly falls outside the criminal law context, making it difficult to be completely covered by search-and-seizure jurisprudence.

Public and private organizations do not find in data protection laws serious obstacles to their demands of personal information. These organizations are simply required to comply with the fair information practice principles enshrined in data protection laws to pursue any processing of personal data. In fact, determining the purposes, conditions and means of the processing of personal information is carried out unilaterally by organizations. Individuals can exercise their privacy rights, as Colin Bennett argues, only “if they so wish.” This means individuals can only use the procedures established by data protection laws to assert their privacy interests and claims and only if they are interested in doing so. The problem, however, is that none of the rights included in data protection laws gives individuals a right to withhold information whose collection, use or disclosure poses an arbitrary intrusion into their private lives. To prevent such an intrusion, an individual can choose to refuse services offered by an organization. This option may not, of course, be available if the state is the party collecting, using or disclosing personal information. Most data protection laws and international data protection instruments provide that data processing can be carried out by the state where authorized by law. While data protection

\[424\] Colin J. Bennett and Charles D. Raab, supra note 4 at 9
authorities have jurisdiction and, thus, can investigate cases of mandatory data processing allegedly posing the threat of privacy interference, the powers of these authorities are often limited. Most data protection commissioners only issue recommendations, meaning that they cannot prevent governmental authorities from collecting, using or disclosing personal information, especially when that data processing is authorized by law.

Data protection principles and data protection laws seem to treat personal information as a public good.\textsuperscript{425} This means that public and private organizations need only to establish a purpose they consider ‘legitimate’ to initiate the collection of personal information. As already stated, individuals do not participate in the formulation of the definition of a ‘legitimate’ purpose. This situation empowers data collectors over individuals. Data protection laws usually neutralize this empowerment through consent. As a general rule, an organization must first obtain the consent of an individual before undertaking the processing of his personal information. Where an individual finds the collection, use or disclosure of personal data too intrusive into his private life, he may not consent to such processing and, thus, protect his privacy. There are situations of power imbalance, however, where citizens have no choice but to consent to the collection of their data. This includes the submission of personal data as a condition for exercising a right, receiving a service or claiming a benefit.\textsuperscript{426} In such cases, a surrendering of an individual’s right to privacy per force occurs and none of the data protection instruments analyzed in this chapter can prevent this. That said, it should be noted that the General Data Protection Regulation addresses this issue, explicitly stating that consent cannot be the legal basis for the processing of personal data where there is a significant imbalance between an individual and a data processor.\textsuperscript{427} The General Data Protection Regulation thus holds the promise of restoring the balance of power that often exists between larger organizations and individuals.

\textsuperscript{426} Gary Marx has described that individuals in this situation are under a ‘coercive lack of choice.’ Under these circumstances, Marx argues, “choice always occurs within situations that are not fully free or within the making of the person choosing.” See Gary T. Marx, “Ethics for the New Surveillance” in Colin J. Bennett and Rebecca Grant, \textit{supra} note 44 at 51-52.
\textsuperscript{427} The General Data Protection Regulation now addresses this issue, stating that “consent shall not provide a legal basis for processing personal information where there is a significant imbalance between the position of the data subject and the controller.” See Article 7(4), \textit{supra} note 373.
The limited role that consent plays in certain types of data processing further limits the efficacy of data protection laws. As explained, consent is required for the processing of personal information. This rule, however, is subject to certain exceptions that nullify the neutralizing effect that consent may have in situations of power imbalance. The most common of these exceptions enables the state to carry out the mandatory collection, use or disclosure of personal information, provided that such collection, use or disclosure is authorized by law. The consent of individuals is not needed in this case and the state thereby increases its power over them. Given that individuals do not participate in determining the legitimate purpose of a data processing operation, the state alone determines the purpose and also the conditions and the means of the data processing. This places the state in a position of superiority. The state can request of individuals any information it considers necessary, regardless of the level of interference such a request may make into their private lives. Data protection instruments only indicate the data processing must be ‘fair and lawful’ or that it be kept at a ‘minimum.’ They do not specify to what extent the state may interfere with the private life of an individual through the mandatory collection, use or disclosure of his personal information. All that the state needs to undertake the collection, use or disclosure of any type of personal information is a law authorizing it to do so.

Chances substantially increase that the state will misuse its power over individuals when the state is the sole party to determine the purposes, conditions and means of the processing of personal information. As Adam Moore puts it, “…information control yields power and total information awareness radically expands that power…” Although data protection legislation can put constraints on the means used by the state when undertaking mandatory data processing, this legislation cannot forbid the state from conducting any such undertaking. In point of fact, laws can grant governmental agencies sweeping powers authorizing the collection, interception or retention of personal information. Agencies can be authorized to interfere with the private lives of individuals, augmenting the power of the state and reducing the sphere of liberty and autonomy of individuals. Data protection laws are unlikely to assist individuals in countering such interference. As mentioned, most of these laws provide individuals with procedural rights,

428 Adam D. Moore, “Why Privacy and Accountability Trump Security” in Adam D. Moore, supra note 37 at 171-172. Moore makes this argument as a reason for not trading privacy for security. Ibid. For a brief explanation of how the collection of personal information can empower states in undemocratic ways, see David Lyon, supra note 6 at 32.
but these rights are not designed to support the contesting of the purposes, conditions and means of the processing of personal data when such processing is prescribed by law and carried out by the state.

Yet another limitation of data protection laws arises with laws authorizing the state to collect, retain, use or disclose personal information for the public good. This includes the domains of national and public security, crime prevention or law enforcement. Here, Convention 108 (Art. 9, para.2), the OECD Guidelines (para. 4) and the EU Data Protection Directive (Art. 3, para. 2 and Art. 13) provide that states may restrict, through law, the fair information practice principles and the rights and obligations prescribed by data protection law. The implication of these restrictions is that, because there are no rights to exercise, the state may have unfettered power in determining the purposes, conditions and means of the processing of personal information. There is often a lack of transparency and oversight of this process. This means that, without any other legal/constitutional constraints in place, the state enjoys wide license for interfering with the private lives of individuals. In exercising this license, international data protection instruments only provide that the interference with the privacy of individuals “shall constitute a necessary measure in a democratic society.” It is up to states to determine what a ‘necessary measure’ means.

In the areas of national or public security, crime prevention or law enforcement, individuals are therefore forced to submit their personal information. Individuals can, of course, bring constitutional challenges in these cases, but the chances of preventing a state from interfering with the private life of an individual via data processing depends on how robust is the constitutional framework on privacy in the individual’s country. The more developed such a framework is, the greater the number of opportunities for an individual to stop or challenge privacy invasions committed by the state through mandatory data processing. The opposite also applies. If the framework is yet to be developed, opportunities for preventing privacy interference via data processing decrease.

In many cases, individuals are totally unaware that their personal information is being collected, retained, used or disclosed by the state or that the state requests information about them from third parties (e.g. telephone companies and Internet service providers). A curtailment of personal freedom usually occurs in these areas of state activity, reducing the sphere of fundamental rights.
As Eric Posner and Adrian Vermeule argue, “there is a straightforward tradeoff between liberty and security.” For these scholars, “any increase in security requires a decrease in liberty.”^429 This decrease, I would argue, affects the exercise of fundamental rights and freedoms, such as privacy. Therefore, when the processing of personal information is mandated by an act of parliament on grounds of national or public security, crime prevention or law enforcement, citizens will find no legal avenues in data protection laws for challenging or calling into question such collection, use or disclosure. Data protection principles and data protection laws simply do not apply. This means that data protection laws do not grant citizens rights that could empower them to challenge or call into question laws providing for the processing of personal data which arbitrarily intrudes into their private lives. This also means that mechanisms giving transparency and oversight to the processing of personal information, usually included in data protection laws, may not be applicable. As a result, without other adequate constitutional safeguards are in place, individuals will be left in a disadvantaged position before the state. As Daniel Solove argues, the problems of information processing “affect the power relationships between people and the institutions of the modern state.”^430

11. The Limitations of Data Protection Laws and the International Human Rights Law on Privacy

A few concluding ideas on the protection of privacy in data protection law can be articulated based on the limitations. Together with data protection laws, data protection principles no doubt provide important safeguards for the protection of privacy in cases of mandatory data processing carried out by the state. Indeed, as discussed earlier in this chapter, both principles and laws are intended to give individuals greater control over their personal information, assisting in the protection of personal privacy. Thanks to data protection laws, individuals can both access and amend their personal records held by both public and private organizations and, in some cases, request that records be deleted. The legal framework included in most data protection laws does not, however, empower individuals against the state where the state decides to conduct a mandatory collection, use or disclosure of personal information. Nor does such a framework


today provide for any form of proportionality that can be applied to the mandatory data processing carried out by the state. Two examples help illustrate this problem. First, data protection laws do not grant individuals a *right to withhold* their personal information in situations where data processing interferes arbitrarily with their private lives. Second, while data protection laws state that the collection, use or disclosure of personal information should be fair, have a legitimate purpose and be adequate, relevant and not excessive in relation to such purpose, such laws do not provide a legal framework that can be used to assess the legality, necessity and proportionality of, say, a bill authorizing the state to undertake mandatory data processing. If a state passes such a bill, it may arbitrarily interfere with the private life of an individual, increase its power over him and reduce his personal sphere of liberty and autonomy.

As discussed in the Introduction, many modern invasions of privacy are committed through the mandatory collection, retention, use or disclosure of personal information carried out by the state or by third parties at the state’s request. The state often justifies data processing on grounds of national or public security, crime prevention or law enforcement. Although data protection laws may still apply in these areas, the reality is that these laws are commonly subject to several exceptions that may render ineffective the rights and principles included in such laws. As a result, states have gained greater and increasingly unrestricted access to personal information in the past few years. This has augmented the surveillance of governments. Rapid advances in information and communication technologies have only heightened surveillance capabilities. Individuals now share, through WiFi-enabled devices, more personal information with their peers than ever before. Information can include not only sensitive details of their private lives, such as political beliefs, religion or sexual orientation, but also present and future actions. If the state gets unrestricted access to this information, without the individual having an opportunity for contesting such access, not only does the state arbitrarily interfere with the private life of the individual but it also increases its power over them and reduces his personal rights and freedoms.

Given that certain rights and principles included in data protection laws may not apply in the abovementioned situations, other areas of law must be used to prevent abuses of power that may be committed by the state through the mandatory collection, retention, use or disclosure of personal information. As already argued, other areas of law such as constitutional or tort law could be used to address the issue of privacy invasion. This protection would depend on how domestic legal frameworks and privacy jurisprudence have developed. If a country offers a legal
framework that can be used to assess the legality, necessity and proportionality of the mandatory collection, retention, use or disclosure of personal information carried out by the state, individuals in that country could use this framework to contest data processing operations that arbitrarily intrude into their private lives. In a country that has not developed privacy jurisprudence, individuals would have no grounds on which to base complaints against the mandatory data processing carried out by the state.

Such is the case with Mexico which would do well to consider the protection of privacy afforded by international human rights law. As analyzed in Chapter One, international human rights treaties frame the right to privacy as a clear, normative discrete entitlement. The legal frameworks developed by authoritative human rights interpreters further offer comprehensible tests, such as the ‘test of proportionality’ and the ‘meaning of law’ test, which can be used by national judges to examine the mandatory collection, retention, use or disclosure of personal information carried out by the state on grounds of national or public security, crime prevention or law enforcement.

Countries with strong jurisprudence on privacy may also make use of international human rights law. They may use the right to privacy included in international human rights treaties to examine their own conceptualizations of such a right and, thus, assess whether or not such conceptualizations are adequate in securing individuals a personal zone of liberty and autonomy free from the unwarranted interference of either the state or private parties. These countries may also use the legal frameworks developed by human rights interpreters to assess their own frameworks on privacy and to determine whether or not such frameworks are suitable for challenging the mandatory collection, storage, use or disclosure of personal information that, being prescribed by law and carried out by the state, allegedly interferes with the private lives of individuals.

In all cases, countries that have ratified or acceded to international human rights treaties like the International Covenant on Civil and Political Rights are expected to honor their commitments under these treaties. This means they are obliged to consider the international human rights law on privacy, including its implications for the processing of personal information. As discussed in Chapter One, countries which are a party to an international human rights treaty must verify that all data processing operations undertaken under their jurisdiction comply with international
human rights law. This includes the mandatory collection, storage, use or disclosure of personal information prescribed by law and carried out by the state. Complying with international human rights law means the processing of personal data carried out by the state must respect the rights and freedoms listed in such treaties, including the right to privacy. As also explained in Chapter One, respecting this right implies that the mandatory collection, storage, use or disclosure of personal information must not be unlawful or arbitrary. The data processing, in other words, must pass the ‘proportionality’ and ‘meaning of law’ tests also described in the first chapter. If the data processing passes both these tests, it meets the requirements of legality, necessity and proportionality and, therefore, is considered neither unlawful nor arbitrary. The data processing is thus in accordance with international human rights law.

The limitations of data protection laws do not mean that other areas of law cannot be used to protect individuals against the mandatory collection, storage, use or disclosure of personal information that arbitrarily intrudes into their private lives. As discussed, international human rights law may help compensate for such limitations, without derogating the protection of privacy offered through data protection law and other areas of law. In this way, the protection of the private lives of individuals with respect to the mandatory processing of personal information authorized by law and carried out by the state can be substantially improved if international human rights law is considered.

In the next chapters I examine the contributions that international human rights law could have in the Mexican legal system with respect to the central problem analyzed in this thesis—the mandatory collection, storage, use and disclosure of personal information authorized by law and carried out by the state. The Mexican constitution does not include a general right to privacy in its human rights catalog and such a right has yet to be thoroughly articulated through judicial interpretation. The next chapter explains how privacy is protected in Mexico through constitutional law.
Chapter 3
The Protection of Privacy in Constitutional Law in Mexico

1. Introduction

In the previous chapter I argue that data protection laws have certain limitations that, in certain cases, may not protect the private lives of individuals from the mandatory collection, retention, use or disclosure of personal information authorized by law and carried out by the state. I maintain that these laws do not provide individuals with a right to withhold personal data when the collection, use or disclosure of personal information may pose arbitrary intrusions into their private lives. Moreover, I contend that when the state is the party collecting, using or disclosing personal data, it may accumulate more power, affecting the relationships between the government and the citizenry. By the close of the chapter, I state that while constitutional law can be used to protect individuals from abuses of power committed through mandatory data processing, the protection of privacy depends on whether the constitution of a country includes either a general right to privacy or provisions aimed at protecting the private lives of individuals, and on whether the courts in that country have developed jurisprudence on these provisions.

This chapter examines the protection of privacy in Mexico through constitutional law. It advances the question of whether this law can adequately address privacy invasions committed through the mandatory collection, retention, use or disclosure of personal information authorized by law and carried out by the state. To fully understand the constitutional protection of privacy in Mexico, a brief historical account and analysis of the legal system is given in the first part of this chapter. Mexico’s constitutional drafting processes were influenced by both the U.S. and Europe. This is reflected in the constitutional provisions aimed at protecting the private lives of Mexicans. Regrettably, as discussed in the second part of the chapter, political and legal factors impeded both the articulation of a general right to privacy and the development of normative frameworks aimed at protecting privacy similar to those existing in international human rights law. This makes the constitutional protection of privacy inadequate in addressing privacy invasions committed through mandatory data processing. Two cases are examined to illustrate this point. They show the limitations of constitutional law in the protection of the private lives of Mexicans from the mandatory collection, retention, use and disclosure of personal information authorized by law and carried out by the Mexican state. The chapter closes by arguing how
international human rights law can compensate for these limitations in constitutional law, further improving the protection of privacy of Mexicans.

2. Conceptual References in Spanish

Similar to what happens in many Anglo-Saxon jurisdictions, the right to privacy does not have explicit recognition under the Mexican legal system. This fact, however, has not meant an absolute lack of privacy protection. In one way or another, Constitutional Law, Civil Law, Criminal Law and, lately, Data Protection Law have been used to address some privacy violations experienced by people in Mexico. Before I present each of the legal protections afforded by Mexican law, I would like to explain briefly some issues related to the terms used in Spanish to refer to the right to privacy.

‘Privacy’ and ‘right’ are translated into Spanish, accordingly, as privacidad and derecho. Therefore, the Spanish translation of the expression right to privacy would be derecho a la privacidad. 431 Although the Spanish Real Academy 432 lists the word privacidad in its dictionary, other terms are commonly used in the Spanish language to refer to privacy. Many commentators and legal scholars use the expression vida privada (private life) when referring to privacy. As a result, this expression has given us another name for the right to privacy: derecho a la vida privada. In fact, the Spanish versions of the Universal Declaration of Human Rights, of the International Covenant on Civil and Political Rights, and of the American Convention of Human Rights employ the term vida privada instead of privacidad in their official texts, unlike the English versions of the same documents, which never refer to ‘private life’ but rather to privacy. 433 Additionally, in some countries, namely Spain, legal academics often talk about derecho a la intimidad (right to intimacy), without defining it, further complicating the legal terminology of privacy. 434 This latter translation is actually used in the Spanish version of the

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431 All translations have been made by the author unless otherwise stated.
432 The Spanish Real Academy (Real Academia Española –RAE) was created in Madrid in 1713 following the model of the French Academy (L’Académie française.) The main objective of RAE was the elaboration of the Castilian language dictionary. Since then, RAE “ensures that the Spanish language, in its continuous adaptations to the speakers’ needs, does not break its essential unity.” See RAE’s official website: <http://www.rae.es>
433 See, respectively, articles 12, 17 and 11 of the English and Spanish versions of these documents.
434 In the case of Spain, see José Alfredo Caballero Gea, Derecho al honor, a la intimidad personal y familiar y a la propia imagen, derecho de rectificación, calumnia e injuria (Madrid: Dykinson, 2007) 632pp; Lucrecio Rebollo Delgado, El derecho fundamental a la intimidad (Madrid: Dykinson, 2005) 468pp. In the case of Argentina, see
European Data Protection Directive. The fact that three expressions *derecho a la privacidad, derecho a la vida privada* and *derecho a la intimidad* are used interchangeably, without consistency, in the Spanish privacy literature reveals that the right to privacy is a concept that is still under construction.

I will argue that *privacidad* does not equate to *intimidad* and both terms should not be used interchangeably. The word *privacidad* comes from the English *privacy* and the French *privacité*. Its use has been considered acceptable in the Spanish language. From a semantical perspective, I agree with Spanish morphologist José Antonio Díaz, who argues that *privacidad* “is constituted by those facets that form our personal life, against our public or professional dimensions.” For Díaz, *intimidad* “is the most internal aspect of a subject, his feelings and deeper thoughts.” Therefore, *intimidad* “is part of our *privacidad* but not vice versa.” Both words have different meanings. Because the Spanish Real Academy recognizes the latter, I would argue that the term *derecho a la privacidad* is an acceptable form to refer to the right to privacy in the Spanish language.

Further, the difference in meaning between *privacidad* and *vida privada* seems less significant, suggesting that both terms could be used as synonyms. In fact, in some contexts, one could replace the other. This interchangeability of words is possible because *vida privada* can also be defined as “the group of affairs and personal or particular facets of an individual.” Díaz argues, however, that there are contexts where substitutions may be forced. According to him, in

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437 Ibid

438 Ibid

439 Ibid
these cases, *privacidad* acquires an abstract meaning: “an individual’s property or condition of possessing a personal life outside the public, free from interferences.”\(^{440}\) For Díaz, a ‘semantic displacement from the sense of ‘sphere’ towards the intrinsic ‘property’ of all human beings seems to happen.’\(^{441}\) Therefore, in cases where *privacidad* denotes a ‘property’ rather than “an ambit or sphere of life”, Diaz argues, the substitution for *vida privada* would be inappropriate.

The differences explained above go beyond semantic curiosity. They are relevant because, as will be described in the following sections, *vida privada* and *privacidad* appear with more or less frequency in Mexican legal instruments, depending upon the legal period specifically referred to. In general, *vida privada* is the term that has been traditionally employed by Mexican legal instruments to safeguard some of the values associated with privacy. Not until recently has *privacidad* been slightly incorporated into the legal discourse in Mexico.\(^{442}\)

3. The Legal Influences in the Formation of Mexican Law

Before I explain the legal provisions aimed at protecting some of the values related to privacy, I would like to comment briefly on the legal doctrines and documents that had a strong influence in the formation of Mexican Law. This account will be useful later in explaining the origin of the legal understandings of privacy that currently exist in Mexico.

Mexico’s independence from Spain was proclaimed on September 16, 1810, but not fully consummated until September 27, 1821. Before this time, Mexico was part of New Spain, a former Spanish viceroyalty.\(^{443}\) Even though in popular parlance Mexico is referred to as a Spanish colony during pre-independence, from a legal perspective, the country was never a

\(^{440}\) Ibid

\(^{441}\) Ibid

\(^{442}\) As it will be discussed in the next sections of this chapter, the Mexican Supreme Court of Justice has recently started using the term *derecho a la privacidad*.

\(^{443}\) Known as *Virreinato de la Nueva España*, the Viceroyalty of New Spain was the first of the four viceroyalties that Spain created to govern its conquered lands in the New World. The Viceroyalty of New Spain was established in Central and North America in 1535, after the Spanish conquest of the Aztec Empire. Centered in present-day Mexico City, New Spain comprised the Upper and Lower California, the central and southwest parts of the United States, Mexico, all the land north of the Isthmus of Panama, the Spanish possessions in the Caribbean and the Philippines. For a brief explanation in English, see *Encyclopedia Britannica*, 15\(^{th}\) ed., s.v. “New Spain, Viceroyalty of.”
This particular status had an important legal implication: Mexico was considered a territory of Castile and therefore Castilian Law applied on its land. All the existing pre-Hispanic legal systems were abolished as a result. Therefore, from the sixteenth to the eighteenth century, the law of the land in Mexico was the law of Spain.

Although Mexico became independent in 1821, it went through a period of political unrest in the following five decades. Two groups with opposite ideas, Liberals and Conservatives, fought against each other, imposing their political models once they assumed power. Two forms of government were discussed throughout the nineteenth century: 1) a monarchy (absolute or moderate) and 2) a republic (federal or central). In 1822, a Mexican Empire was established, but it failed soon after, consolidating the republic as the new form of government for the country.

Liberals were the literate, bourgeois class who saw in liberalism a political doctrine that would help them in attaining religious freedom and equality before the law. Conservatives, on the other hand, belonged to the same bourgeois class, but they were aligned with the Catholic Church.

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444 Manuel Lucena Salmoral et al, Historia General de España y América. El descubrimiento y la fundación de los reinos ultramarinos, vol. 7 (Madrid: RIALP, 1982) at 601. The authors argue that “a colony implies the idea of a total dependency, with no self-government, which evidently was not the situation of the Hispanic New World.” Ibid at 603.

445 According to the law applied at that time, two forms of union for kingdoms and territories existed: principal and accessory. In the former, a kingdom or territory maintained their ‘peculiarities,’ including its own law. Such was the case of Navarra, the Netherlands, and Portugal. In the latter, a kingdom or territory lost its peculiarities and, hence, its own law, thereby adopting the law of the political entity to which it became annexed. See Miguel Angel González de San Segundo, Un mestizaje jurídico. El derecho indiano de los indígenas (Madrid: Universidad Complutense de Madrid, 1995) at 371.

446 Even though Castilian Law became the official Law in New Spain, the application of this law encountered certain difficulties. This fact was confirmed by the emergence of Indian Law, a special law aimed at regulating the ‘republic of Indians’, distinct from the ‘republic of Spaniards.’ Indian Law thus regulated situations not covered by Castilian Law. See Ignacio Cremades, “Derecho Romano y Limites de la Romanización en Iberoamerica” (Paper presented to the Segundo Congreso Iberoamericano de Derecho Romano, 1-3 February 1996), Actas del II Congreso Iberoamericano de Derecho Romano (Murcia, Spain: Universidad de Murcia, 1998) at 270.


448 Jaime Rodriguez, the Emergence of Spanish America (Los Angeles: University of California Press, 1975) at 47-48.

449 Agustín de Iturbide was Mexico’s first Emperor from 19 May 1822 to 19 March 1823.

They were interested in preserving the status quo, thus maintaining their privileges. For these reasons, the first group advocated the establishment of a liberal democracy through a federal republic with a presidential system of government. The second group, promoted a central republic. Conservatives considered the latter a form of government more aligned to the way Mexico was ruled before 1810. They occasionally suggested the establishment of a moderate, constitutional monarchy with a foreign prince.\textsuperscript{451} This suggestion eventually became true, and in 1864 a second Mexican Empire was established in the country.\textsuperscript{452} It was abolished soon after, when the Liberals restored the Republic in 1867. This system of government has been followed in Mexico since then.

The political battle described above was reflected in the constitutions that were in force in Mexico during the nineteenth century.\textsuperscript{453} Since Liberals and Conservatives had antagonistic points of view, every time they assumed power they changed the constitution. Under those political conditions, it was hard to speak about a corpus of Mexican Law. Law existed, for sure, but in a fragmented fashion and with a strong influence from Spain. Not until a political model finally crystallized in Mexico, during the last third of the nineteenth century, did Mexican Law as such start to emerge.\textsuperscript{454}

Liberalism was the political model adopted in Mexico. As was already said, Liberals and Conservatives belonged to the same bourgeois class, sharing the values of the Enlightenment.\textsuperscript{455} In fact, by that time, bourgeoisie from many countries—New Spain included—belonged to the same elite, creating an influential international community.\textsuperscript{456} These people had a tremendous

\textsuperscript{451} Ibid at 78-81
\textsuperscript{452} This empire occurred as part of the Second French Intervention in Mexico, which lasted from 8 December 1861 to 21 June 1867. Ferdinand Maximilian Joseph, archduke of Austria, assumed power, thus becoming Mexico’s second emperor. His reign went from 10 April 1864 to 1867.
\textsuperscript{453} These constitutions were: Federal Constitution of the United Mexican States of 1824 (liberal); Constitutional Acts of the Mexican Republic of 1836 (conservative); Organic Bases of the Mexican Republic of 1843 (conservative); Constitutive and Reform Act of 1847 (liberal; re-established the 1824 constitution) and the Political Constitution of the Mexican Republic of 1857 (liberal). The latter was derogated by the Political Constitution of the United Mexican States of 1917, currently in force. See Felipe Tena Ramírez, \textit{Leyes Fundamentales de México 1808 – 2009}, 25th ed (Mexico City: Porrua, 2008).
\textsuperscript{454} María del Regugio González, supra note 450 at 68.
\textsuperscript{455} Ibid at 68,70;
\textsuperscript{456} Jaime Rodriguez, supra note 448 at 49. He describes the elite as a community of “educated gentlemen whose interest and ability to participate in politics increased with the American, French and Spanish revolutions […]
influence on the formation of the Mexican state. New Spain bourgeoisie were thus exposed to European and American liberal thought, and this influence was reflected in both the political and legal orders that were created in Mexico in the nineteenth century. The major disagreement between Liberals and Conservatives was the role the Church should play in the newly formed Mexican society. By the end of this historical period, Liberals triumphed and a federal and democratic liberalism finally crystallized in Mexico.

Despite American and European influences, the liberalism adopted in Mexico acquired its own nuances. Mexican liberalism means constitutionalism, rule of law, representative democracy, protection of civil and political freedoms, equality before the law, division of powers, creation of law in accordance with the procedures established in the constitution, inviolability of private property, federalism and, perhaps the most distinctive feature, separation of Church and State. As one might suppose, the adoption of a political model had important implications in the legal order. Basically, it meant the substitution of the existing colonial laws by other laws aligned with the abovementioned liberal principles. To achieve this goal, Mexico followed the codification trend that began in Europe in the eighteen century.

Inspired by the ideas of rationalism, by the end of the eighteenth century, countries under the influence of Roman-canonical law (continental European countries) started collecting and restating by subject areas, their otherwise dispersed legislation, thus creating legal codes. This codification process assigned a prominent role to legislation, reducing the importance of other sources of law such as customs, jurisprudence, legal principles and doctrines. By creating codes, natural rights of individuals were clearly established, providing order and preventing

Although they came from many countries and spoke different languages, nearly all of them were conversant in French. Ibid. Francisco López Cámara, La génesis de la conciencia liberal en México (Mexico City: Universidad Nacional Autónoma de México, 1977) at 13.

María del Regugio González, supra note 450 at 70.

See Jesús Reyes Heroles, El liberalismo mexicano, 2nd ed (Mexico City: Fondo de Cultura Económica, 1974) at XVII; María del Refugio González, supra note 436 at 69.

Ibid at 63. 

Ibid at 63-64.

Ibid at 63.
abuses from public power. Under this understanding, constitutions were political codes. They established fundamental principles that were developed clearly, simply and systematically through other organic bodies of law –codes– divided by subject areas.\footnote{Maria del Refugio González, “La codificación en México. El proceso y sus influencias jurídicas e ideológicas,” unpublished paper, in file with autor.}

Europe and the United States exerted a strong ideological power in the Mexican codification process that occurred in the nineteenth century. In the specific case of its constitution, Mexico was influenced by the U.S., Great Britain, France and Spain.\footnote{Mario de la Cueva, “El constitucionalismo mexicano”, El constitucionalismo a mediados del siglo XIX, vol. II (Mexico City: Universidad Nacional Autónoma de México, 1957) at 1225.} Given that Mexico was exposed to Spain’s laws and institutions from the sixteenth to the eighteenth century, it is no surprise that the last Spanish constitution in force on Mexican land had some impact on the constitutional drafting process.\footnote{This was the Political Constitution of the Spanish Monarchy of 1812.} Further, Mexico needed foundational doctrines to achieve its independence. Since France and the U.S. had gone through revolutionary transformations by the end of the eighteenth century, their constitutions became instruments of obligatory reference. In the specific case of the U.S., Mexico’s first liberal constitution established in 1824 a presidential system of government and followed American federalism. Later, the liberal Constitution of 1857 reiterated this political choice but also included a charter of human liberties inspired by the 1789 French Declaration of the Rights of Man and of the Citizen.\footnote{Constitución política de los Estados Unidos Mexicanos, 14ª ed, vol 1,“Articulo 1” by Héctor Fix Fierro (Mexico City: Porrúa, UNAM, 1999) at 1-3.} The Constitution of 1917, currently in force, did not alter these American and French influences, but added some social rights.\footnote{Even though the Constitution of 1917 symbolizes the culmination of a social and political movement called Mexican Revolution, this document did not modified the liberal model adopted by the Constitution of 1857, keeping the American and French influences. The Constitution of 1917 introduced certain social rights such rights for peasants to own lands (article 27) and labor rights for workers (article 123) that were not included in the previous constitution. See Jorge Carpizo, La Constitución Mexicana de 1917 (Mexico City: Universidad Nacional Autónoma de México, 1969) at 12-13.}

In other legal areas such as civil law, penal law and civil and criminal procedure law, Europe exerted a stronger influence in the Mexican codification than the U.S.\footnote{María del Refugio González, supra note 450 at 63. The author argues that the European influence in the Mexican codification, especially the civil code, includes the French codes and the ideas of Bentham and Bacon. See particularly her endnotes 23 and 42 and accompanying texts.} The eighteenth century codification movement did not penetrate the Common Law world as it did in continental
Therefore, the U.S. legal order never developed codes that could be used as models by other countries. In this way, France and Spain played a significant role in the Mexican codification process, at least in the case of the civil code. The influence of the former, however, came through the latter. The Napoleonic Code of 1804 was annotated by a Spanish legal scholar, Federico García Goyena, who adapted it to the Spanish legal tradition. His book formed a bridge between Mexico’s legal tradition and the French institutions that Mexicans wanted to incorporate into their mutable legal system. Mexico thus adopted French institutions that were adjusted to the Spanish legal tradition. This French-Spanish influence is reflected in the first civil code enacted in Mexico in 1870. The Mexican codification process culminated during the first decade of the twentieth century, with the expediting of the penal code, and the civil and criminal procedure codes. The enactment of all these codes marked the emergence of Mexican law, ending the Spanish colonial legal regime that existed in Mexico for more than 300 years. Finally, it should be noted that because Mexico adopted a federal system of government, with each state and the federation having their own codes in civil law, criminal law, civil procedure law, and, until 2014, criminal procedure law.

The codification process is important because it situates the protection of privacy that currently exists in Mexico. As we will see in the next two chapters of this thesis, while Mexican law does

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470 Ibid at 84.
471 Germany did not exert a big influence in Mexico during the nineteenth century due to the German’s Historical School (Historische Rechtsschule) opposition to the codification process. Ibid at 66. However, the Bürgerliches Gesetzbuch (BGB), that is, the German Civil Code enacted in 1900 did have an impact in the 1928 Federal Civil Code currently in force in Mexico. See José Ramón Narváez, “El Código Civil en México: entre la forma y la tradición” (2012) 1 Precedente 149 at 162-163.
472 María del Refugio González, supra note 447 at 204-207. Florentino García Goyena authored Concordancias, motivos y comentarios de Código civil español. Por el Excmo. Sr..., Senador del reino, magistrado del Supremo Tribunal de Justicia, Vice-presidente de la Comisión General de Códigos, y presidente de la Sección del Código civil. This book, also known as “Concordancias”, served as a model for Mexican legislators when they enacted the first Federal Civil Code in 1870. Ibid, particularly, her endnote 27 and accompanying text.
473 This name of this code was Código civil para el Distrito y Territorios Federales. Even though it only applied to the federal district and federal territories, it was copied by all the states.
474 For a general overview of the Mexican codification see Oscar Cruz Barney, La codificación en México: 1821-1917. Una Aproximación (Mexico City: Universidad Nacional Autónoma de Mexico, 2004) at 49-97.
475 María del Refugio González, supra note 447 at 204.
476 On February 10, 2014, the Mexican Constitution was amended and criminal procedural law became under the jurisdiction of federal congress. On March 5, 2014, a national code of criminal procedural was enacted, abrogating all the criminal procedural state codes that were in force in Mexico. See Article 73, fr. XXI, c) of the 1917 Constitution.
not establish a ‘right to privacy’ as such, some privacy values have been protected through other legal areas, especially through Constitutional Law, Civil Law, Penal Law and Data Protection Law. Therefore, the privacy protections that currently exist in Mexico are regulated in the Constitution, the Civil and Penal Codes.

4. The influences of Europe and the U.S. in Mexican Constitutional Law

As mentioned in the previous section, the constitutions of the U.S., France and Spain exerted strong influences on the constitutional drafting process that took place in Mexico during the nineteenth century. Different factors explain these influences. Early in this century, Mexico was fighting for independence, trying to eradicate Spanish despotism.\footnote{Ernesto de la Torre Villar and Jorge Mario García Laguardia, Desarrollo Histórico del Constitucionalismo Hispanoamericano (Mexico City: Universidad Nacional Autónoma de México, 1976) at 31.} All that existed in the former colony was an elite that concentrated all the power and a majority living under conditions of slavery, racial discrimination and exploitation.\footnote{Francisco López Cámara, supra note 457 at 234.} A social, economic and political change was needed. A new legal regime had to be adopted, one that guaranteed the division of power, liberty and equality for all people. Mexico sought to create a constitutional democracy that reflected the liberal model that was proclaimed in Europe and in the U.S. by the end of the eighteenth century.\footnote{Mario de la Cueva, supra note 465 at 1231.}

When Napoleon invaded Spain in 1808, New Spain (Mexico) saw this political moment as an opportunity to become independent. There were no clear ideas, however, about how the new country should be organized. Some groups even considered calling the overthrown King of Spain, Ferdinand VII, to assume power, but this thought never crystallized because people were tired of Spanish despotism. The only precise idea that existed at that time was “the desire for independence.”\footnote{Ibid at 1228.} The lack of clarity about how Mexico should be politically organized explains why Europe and the U.S. exerted a strong influence among insurgent groups. In the case of the latter, Mario de la Cueva argues that fears of political centralism made people in Mexico pay attention to the American constitution because this document had created a new political model (the federal state), conciliating the common interest with the needs of local communities in a
particular country.\textsuperscript{481} Meanwhile, France provided different constitutional doctrines such as sovereignty of the people, division of powers and natural rights,\textsuperscript{482} and the French constitutions of 1791, 1793 and 1795 proved to be very influential documents.\textsuperscript{483} Spain’s influence might seem contradictory at first glance given that Mexico was seeking its independence from this country. An important fact, however, explains this dominance. During 1811 and 1812, people from all Hispanic-America\textsuperscript{484} participated for the first time in a Constitutional congress that promulgated the Spanish Constitution of 1812. This liberal document declared that sovereignty “resides in the nation”, not in the king, and established a separation of powers, thereby limiting the absolute monarchy.\textsuperscript{485} In addition, the constitution extended citizenship to all natives born free in the Spanish territories located in both hemispheres,\textsuperscript{486} and reorganized the government in the colonies.\textsuperscript{487} Because Hispanic-Americans were represented in the 1811-1812 Constitutional congress, and given the liberal nature of the 1812 Spanish Constitution, this document became very influential in the constitutional processes that took place in the emerging states of Latin America during the first decades of the nineteenth century.\textsuperscript{488}

Mexico’s first constitutional document, the 1814 Constitutional Decree for the Liberty of Mexican America –also known as Apatzingán Constitution– reflects the influence of the American, French and Spanish constitutionalism.\textsuperscript{489} This influence did not consist in the mere translation of some relevant parts of the constitutional texts of these three countries, but rather in

\textsuperscript{481} \textit{Ibid} at 1124.
\textsuperscript{482} \textit{Ibid} at 1124-1125.
\textsuperscript{483} Ernesto de la Torre Villar and Jorge Mario García Laguardia, \textit{supra} note 477 at 39-40.
\textsuperscript{484} Mario de la Cueva argues that seventeen delegates from New Spain participated in the Congress. Mario de la Cueva, \textit{supra} note 465 at 1230.
\textsuperscript{485} See Articles 3, 15, 16 and 17 of the 1812 Spanish Constitution, online <http://www.congreso.es/constitucion/ficheros/historicas/cons_1812.pdf>
\textsuperscript{486} \textit{Ibid}, Articles 5 and 18.
\textsuperscript{487} \textit{Ibid}, Articles 309, 310, 324 and 325.
\textsuperscript{488} Mario de la Cueva, \textit{supra} note 465 at 1243 -1244; Ernesto de la Torre Villar and Jorge Mario García Laguardia, \textit{supra} note 477 at 43-44.
\textsuperscript{489} Jaime del Arenal Fenochio, “De la “apacible serenidad a la borrasca espantosa”: el entrono jurídico de la Constitución de Apatzingán y de su Manifiesto” (2014) 113 Quórum Legislativo 55 at 57. Del Arenal specifies that the constitutional documents that were examined by the drafters of the Apatzingán Constitution were the 1812 Spanish Constitution, the 1787 American Constitution, the French Constitutions of 1791,1793 and 1795, and the 1789 French Declaration of the Rights of Man and of Citizen. \textit{Ibid} at 61; Ernesto de la Torre Villar and Jorge Mario García Laguardia, \textit{supra} note 477 at 31. These authors argue that the Apatzingán Constitution also reflects the influence of the 1780 Massachusetts Constitution, and the 1790 Pennsylvania Constitution, especially, the declaration of rights included in these documents. \textit{Ibid} at 37-38.
the adoption of certain formulas that were developed in one or more provisions of the Mexican constitution.\textsuperscript{490} The drafters of the Apatzingán Constitution adapted the liberal institutions that were emerging both in Europe and in the U.S to the specific needs of Mexico at that time.\textsuperscript{491} As Daniel Barceló argues, this constitution established, for the first time in Mexico, fundamental political choices that shaped the political institutions that exist until today: 1) national independence; 2) popular sovereignty; 3) ‘human rights’ for all without race distinctions; 4) representative democracy; 5) republican form of government with a division of powers and public officials elected for limited periods of time; 6) self-government of the provinces and also a common government shared equally by them and exercised through a Supreme Congress; 7) a written constitution as the supreme law of the land that applies to both citizens and public officials.\textsuperscript{492}

The Apatzingán Constitution was drafted by members of insurgent groups\textsuperscript{493} and, for the same reason, it only applied in territories occupied by these groups for a short period of time.\textsuperscript{494} Although it was conceived as a provisional constitutional document by its own drafters since the beginning,\textsuperscript{495} it was formally declared ‘invalid’ by the viceroy on May 15\textsuperscript{th}, 1815.\textsuperscript{496} Notwithstanding its short life, the Apatzingán Constitution is a very important document in Mexican Law because it represents the introduction of a modern legal regime never before seen in the Spanish colony.\textsuperscript{497} It ‘dismantled the old, colonial institutional-political framework that

\textsuperscript{490} Ernesto de la Torre Villar and Jorge Mario García Laguardia, \textit{supra} note 477 at 40.
\textsuperscript{491} \textit{Ibid} at 50. One example of the adaptations made by the drafters is Article 1. It declares that Catholicism will be the official religion of the new state. This religious intolerance contrasts with the liberal institutions created through the same constitution.
\textsuperscript{492} Daniel Barceló Rojas, “La Constitución de Apatzingán y su influencia en la primera generación de constituciones de la República Federal Mexicana” in Ana Carolina Ibarra, et al (ed.), \textit{La insurgencia mexicana y la Constitución de Apatzingán} (Mexico City: Universidad Nacional Autónoma de México, 2014) at 274.
\textsuperscript{493} Jaime del Arenal Fenochio, \textit{supra} note 489 at 59-60. He explains that the drafters included theologists, lawyers, jurists and priests.
\textsuperscript{495} Jaime del Arenal Fenochio, \textit{supra} note 489 at 62-63; Ernesto de la Torre Villar and Jorge Mario García Laguardia, \textit{supra} note 477 at 29. See also art. 237 of the Apatzingán Constitution.
\textsuperscript{496} On May 24th, 1815, Viceroy Félix María Calleja issued a proclamation that ordered “the burning of the Apatzingán Constitution in the main square of Mexico City, and the burning of all the copies of the document in the public squares of the territories where it was in force. See Jaime del Arenal Fenochio, \textit{supra} note 489 at 66; María del Refugio González, \textit{supra} note 494 at 305.
\textsuperscript{497} Jaime del Arenal Fenochio, \textit{supra} note 489 at 64.
was in force for centuries and introduced the social, legal and political institutions that had appeared in Europe and in the U.S by the end of the eighteen century. For some, the Apatzingán Constitution represents the “most courageous and vigorous revolutionary legislative effort that has ever been done in Mexican history,” and its constitutional principles are present in the subsequent Mexican constitutions, especially, in the federal constitutions of 1824, 1857 and the 1917 Constitution currently in force.

Finally, it should be noted that the Apatzingán Constitution brought an important change in the then current legal order and legal culture of Mexico: the supremacy of legislation over other sources of law such as case law or customary law. Before the Apatzingán Constitution was drafted, the legal order in the New Spain was formed by the *Ius Commune*, customary law from indigenous communities, mercantile law practiced by consulates and canonical law. Since “legislation is the expression of the general will (*volonté générale*), enacted to achieve the common happiness of people” (Art. 18), the Apatzingán constitution stated that “all people are subjected to it” (Art. 41). For this reason, legislation took precedence over other types of law, eclipsing the role of judges as creators of law. Judges were thus subjected to legislation passed by Congress and their role was limited to applying the law to cases that were brought before them. This particular understanding of the law and the role of judges was not exclusive to Mexico; it was the one that existed in continental Europe by the end of the eighteenth century. While this role of legislation as the main source of law has been very useful to limit the power of public authorities in Mexico, it has also had one important effect: it has curtailed judges’ ability to create new law through jurisprudence. Judges in Mexico were trained—and still are—to interpret legislation and to create law within the parameters of legislation. Regrettably, the role

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498 Jaime del Arenal Fenochio, “Tradición y modernidad jurídicas en el Decreto constitucional de Apatzingán y en la Constitución del Estado de Quito” in Ana Carolina Ibarra, et al (ed.), *supra* note 492 at 226. The author claims that the Apatzingan Constitution shows a tension between modernity and tradition because even though this document started the construction of a new constitutional order, this order also had to respect the old colonial regime, but without sacrificing the revolutionary task started by the men of Apatzingán. *Ibid.*

499 Alfonso Noriega Cantú, *Las ideas políticas en las declaraciones de derechos de las constituciones políticas de México (1814-1917)* (Mexico City: Universidad Nacional Autónoma de México, 1978) at 40.

500 Mario de la Cueva, *supra* note 465 at 1232.


502 *Ibid* at 228.

503 *Ibid* at 228-230.

504 *Ibid*.

505 *Ibid* at 230.
of judges in Mexico as creators of rights that were not included in the Constitution or in legislation has been very limited. As will be discussed in the next section of this chapter, this limitation of the judges’ role might explain why the right to privacy did not emerge through judicial interpretation of constitutional provisions as happened in other countries, for instance, in the U.S.\textsuperscript{506}

5. The Protection of Privacy according to the American and European Influences in Mexican Constitutional Law.

The influences outlined above are useful in identifying the protection of privacy afforded by Mexican law. While a right to privacy does not appear as such in the Mexican Constitution or the Mexican codes, privacy interests have been protected since the emergence of Mexico as an independent country. These interests have not changed dramatically since the enactment of the Apatzingán Constitution. To present the privacy interests protected by Mexican law, I will draw on a distinction made by James Whitman.\textsuperscript{507} He draws very clear, though not absolute, lines between two different values protected through privacy law in Continental Europe and in the U.S.

James Whitman maintains that there are “two cultures of privacy, which are home to “different intuitive sensibilities, and which have produced two significantly different laws of privacy”.\textsuperscript{508} These cultures, Whitman claims, have produced two conceptions of privacy: privacy as an aspect of dignity, and privacy as an aspect of liberty. Whitman identifies the first one with continental European privacy protection: “a form of protection of a right to respect and personal dignity”. “The core continental privacy rights are, Whitman argues, rights to one’s image, name and reputation and what Germans call the right to informational self-determination—the right to control the sorts of information disclosed about oneself”.\textsuperscript{509} Whitman describes these rights give the individual control over his or her public image: “rights to guarantee that people see you the way you want to be seen”.\textsuperscript{510} Moreover, Whitman argues that “rights [are] to be shielded against

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\textsuperscript{506} Philippa Strum, \textit{supra} note 45.
\textsuperscript{508} \textit{Ibid} at 1160.
\textsuperscript{509} \textit{Ibid} at 1161. Emphasis in original.
\textsuperscript{510} \textit{Ibid}. 
unwanted public exposure—to be spared embarrassment or humiliation”.\footnote{Ibid.} Thus, the underlying political and social values of these rights are dignity, respect and honor.\footnote{Ibid at 1164.}

Privacy as an aspect of liberty is identified by Whitman as the American privacy protection, which is “much more oriented towards values of liberty, and especially liberty against the state”.\footnote{Ibid.} This understanding of privacy is rooted in an eighteenth century freedom: the right to be free from state intrusions, especially, in one’s own home. For Whitman, the underlying value of this right is the granting to the individual of an opportunity to maintain “a kind of private sovereignty within [his or her] own walls”.\footnote{Ibid at 1162.}

In the case of continental European privacy protection, Whitman also argues that “as a species of personal honor” privacy has been treated “as a value primarily threatened by two forces: the excesses of the free press and the excesses of the free market”.\footnote{Ibid at 1171.} In France, freedom of the press and privacy have been grouped together since the end of the eighteenth century. The 1791 French Constitution guaranteed a free press, but also provided “private life as an integral part of personal honor” as one of the limits for the exercise of this freedom. Private life was thus protected against calumnies and insults uttered in the name of freedom of the press.\footnote{Ibid at 1172.} In the case of Germany, Whitman argues that by 1880 German lawyers treated privacy “as one aspect of the protection of personality more broadly: Privacy, for Germans, became one part of free-realization”.\footnote{Ibid at 1182.} Whitman maintains that just like their French counterparts, Germans also conceived privacy as “a problem of honor, to be dealt with through the law of insult, in coordination with the law of artistic property”.\footnote{Ibid.} Both laws created a solid foundation for a law of personality, affording protections related to honor,\footnote{Ibid at 1185-1186.} and, according to Whitman, personality

remains the foundation of the protection of privacy in Germany until today.\textsuperscript{520} Dignity, honor and personality are the values that animated the protection of privacy in these two countries of continental Europe in the nineteenth century and they have not changed since then.\textsuperscript{521}

In contrast to the honor-oriented values of Europe, Whitman identifies suspicion of the state as “the foundation of American privacy thinking”.\textsuperscript{522} According to Whitman, fear of the exercise of state power date back to the eighteenth century, when the Fourth Amendment to the U.S. Constitution granted the right to all Americans to be free from unlawful searches and seizures. Thus, the right to be free in one’s own home without state intervention lies at the core of privacy protection in the U.S., but the same right has matured, as Whitman explains, “into a much more far-reaching right against state intrusion into our lives”.\textsuperscript{523} Therefore, privacy protects citizens’ liberty from state interventions not only into their private homes but also into their private lives.\textsuperscript{524}

To sum up, for Whitman, two sets of values are at stake in the protection of privacy. In continental Europe, an interest in personal dignity, threatened primarily by the mass media; in the U.S., an interest in liberty, threatened primarily by the government.\textsuperscript{525}

Some have suggested that this distinction by Whitman is problematic because the ‘liberty value’ of privacy is equally cherished in both Europe and the U.S.\textsuperscript{526} But even if Whitman is wrong about the existence of two different ‘cultures of privacy,’ the set of values identified by him are very useful. They help show that Mexico has protected privacy as an aspect of both liberty and dignity since its emergence as an independent state. The Apatzingán Constitution provided that “the freedom to talk, to reason and to manifest one’s opinions through the press shall not be prohibited to any citizen, unless his productions attack the [Catholic] dogma, disturb the public

\begin{itemize}
\item \textsuperscript{520} \textit{Ibid} at 1189. Whitman describes how personality law navigated from the pre-War era, crossed the Nazi period and arrived to the post-War II legal era, where a ‘right to free development of every one’s personality’ was finally incorporated in Article 2 of Germany’s Basic Law of 1949.
\item \textsuperscript{521} \textit{Ibid} at 1190, 1197.
\item \textsuperscript{522} \textit{Ibid} at 1211.
\item \textsuperscript{523} \textit{Ibid} at 1212.
\item \textsuperscript{524} \textit{Ibid} at 1214.
\item \textsuperscript{525} \textit{Ibid} at 1219.
\item \textsuperscript{526} For a criticism of this distinction in the context of regulations for antiterrorism data mining in the European Union and the U.S., see Francesca Bignami, “European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining” (2007) 48 Boston College L Rev 609 at 612.
\end{itemize}
peace, or offend the honor of the citizens”. In addition, the constitution declared that “the house of any citizen is an inviolable asylum, which can only be entered when a fire, flood, or the reclamation of the same house renders necessary this act”, and also mandated that home visits “shall only be made during the day”. Although the constitutional text did not mention the word privacy, it is clear that the provisions were aimed at protecting the values of dignity and honor, on the one hand, and of liberty, on the other. Another important constitutional provision was the one that declared “public employees must function temporarily, and the people have the right to bring them back to the private life, providing vacancies by elections and nominations, according to the constitution”.  

If, as already argued, the French constitutions of 1791, 1793 and 1795 and the American constitution exerted important influences over the drafters of the Apatzingán Constitution, it comes as no surprise that the 1814 document incorporated the values of dignity, honor and liberty protected in Europe and the U.S through privacy law. Moreover, the fact that the Apatzingán Constitution mentions the words ‘private life’ means that an idea of privacy existed in the mind of the drafters.

After the Apatzingán Constitution, not all subsequent constitutions included references to the terms privacy or private life. The 1824 Federal Constitution of the United Mexican States did not mention these words or any other honor-related values, but provided certain protections for people’s homes, documents and other effects. The Constitutional Laws of 1836, which established a centralized system of government, granted similar safeguards, and the 1843

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527 See Article 40. Emphasis added.
528 See Article 32 and Article 33. Emphasis added.
529 See Article 26. Emphasis added.
530 Article 152 declared: “No authority shall issue an order to search in houses, papers and other effects of the inhabitants of the Republic, but only in the cases expressly provided by law and in the forms that the latter mandates”. A copy of the 1824 Federal Constitution of the United Mexican States could be found in Felipe Tena Ramírez, Leyes Fundamentales de México (1808-1975) (Mexico City: Porrúa, 1975) at 190. All the references to the historical constitutions are taken from this legal compilation unless otherwise specified.
531 Article 2, fr. IV, of the First Constitutional Law proclaimed that all Mexicans have a right to: “Not having his home or papers searched, but only in the cases and with the requirements literally provided by laws.” Ibid at 206. Emphasis in original. It should be noted that Article 39 and Article 40 of the Fifth Constitutional Law mentioned the expression ‘mere personal injuria,’ but it is not clear if these provisions used the word injuria as meaning only honor-related harms or if they were meant to include other broader harms. Ibid at 237-238.
Organic Bases of the Mexican Republic did the same. This latter document, however, reintroduced private life as a limit to freedom of expression. Although it was in force for a very short period of time, the Organic Statute of the Mexican Republic of 1856 did not reinforce this limit, but introduced a new protection associated with privacy: immunity of correspondence, allowing search only by warrant. Just as its predecessors did, this constitution also included home-related protections in its text. The relevance of the latter constitutional document lies in the fact that it set the path for the enactment of a charter of rights and freedoms in the following constitution.

The 1857 Political Constitution of the Mexican Republic, following Natural Law theory, was the first to adopt a charter of rights and freedoms, following the 1789 French Declaration.

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532 Article 9, fr. XI, provided: “An individual’s house shall not be searched nor his papers examined, but only in the cases and with the requirements literally provided by laws. Ibid at 407.

533 Article 9, fr. III, provided: “The writings that deal with the religious [Catholic] dogma or the Holy Scriptures shall be subjected to the provisions of the existing laws: in no case shall it be permitted to write about the private life”. Ibid at 407. Article 185 and Article 186 of this constitution also included injuria provisions that were identical to the ones provided in the 1836 Constitution. See supra note 131.

534 From May 15th, 1856 to October 8th, 1857. See Raymundo García García, “José María Lafragua. Aportación Constitucional” in Oscar Cruz Barney, Héctor Fix Fierro and Elisa Speckman Guerra, Los abogados y la formación del Estado Mexicano (Mexico City: Universidad Nacional Autónoma de México, 2013) at 559.

535 See Article 35. Felipe Tena Ramírez, supra note 530.

536 Article 36 provided: “Private correspondence is immune, and it and private papers shall only be searched by a warrant. Judicial authority shall not issue warrants in criminal cases, but only in those cases where there is enough data to make a judge believe that the letters or papers contains crime evidence. In these cases, the search shall be done in the presence of the interested party or his representative, to whom the letter or paper shall be returned at the same moment, giving testimony of what it was found; in addition, the interested party has the right to supplement this testimony. The written correspondence of persons held in solitary confinement and the one seized on an enemy’s point shall be registered by the political authorities in absentia of the interested party. In any case, the respective authority shall be required to keep secret the private affairs”. Ibid at 503.

537 Article 59 declared: “The search of rooms shall only by made by the superior political authority of each place, or by the judge of the jurisdiction to which the dweller belongs, or by virtue of a writ based on a summary formation or on enough data to make someone believe that in those rooms a criminal or the evidence of a crime may be found”. See Section Five of the document. It classifies the rights and freedoms under four categories: liberty, security, property and equality; Raymundo García García, supra note 533 at 558; 562.

538 The official name of this constitution is “Political Constitution of the Mexican Republic, based on its indestructible basis of its legitimate independence, which was proclaimed on 16 September 1810 and consummated on 27 September 1821, of 5 February 1857”. María del Refugio González argues that the enunciation of the “lineage” of the constitutional text in its title was not a random fact but, rather, a “voluntary decision to connect with the most fortunate days of the young nation.” María del Refugio González, “Los abogados y la Constitución de 1857” in Oscar Cruz Barney, Héctor Fix Fierro and Elisa Speckman Guerra, supra note 533 at 254.

539 By Natural Law theory here I mean the idea that natural rights are inherent to the human being and, for this reason, the state only ‘recognizes’ them. This idea can be inferred from Article 1 of the 1857 Constitution, which proclaimed that “the Mexican people recognize that the rights of the man are the basis and the objective of social institutions”, Felipe Tena Ramírez, supra note 530 at 607. On the adoption of Natural Law theory by the drafters of the 1857 constitution, see Héctor Fix Fierro, supra note 467 at 3; Mario de la Cueva, supra note 465 at 1285-1287.
The 1857 Constitution called this section “Of the Rights of Man” (*De los derechos del hombre*). Not only had this charter reinforced the privacy values related to home and correspondence protected in earlier constitutions, but also reintroduced private life as a limit to freedom of the press, and added protections against quartering of soldiers in private homes. The charter also declared that “No one shall be molested in his person”. Because this constitution is the culmination of an armed movement known as the Ayutla Revolution, which vindicated the “liberty and human dignity” lost in previous years, where a dictator ruled and only few groups (including the Catholic church) concentrated national wealth and political power, it comes as no surprise to find a charter of rights and freedoms in this document. With the exception of the political liberties, all rights and freedoms were granted to Mexicans and non-Mexicans alike.

The 1857 Constitution is important to Mexico’s history. Not only did this document settle some of the most important ideological disputes, it also shaped the political institutions currently in force in the country: popular sovereignty, division of powers, federalism, representative democracy with a presidential system of government, and a charter of rights and freedoms.

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541 Article 16 provided: “No one shall be molested in his person, family, domicile, papers or possessions except by virtue of a written order issued by competent authority, stating the grounds and reasoning for the legal cause of a procedure”. Felipe Tena Ramírez, *supra* note 530 at 608-609.

542 Article 25 provided: “Sealed correspondence that circulates through sub-post offices shall be exempt from search. A violation against this guarantee is an affront that the law will punish severely”. Felipe Tena Ramírez, *supra* note 530 at 610.

543 Article 7 provided: “Freedom to write and publish writings on any subject is inviolable. No law or authority may establish previous censorship, require bonds from authors or printers, or restrict the freedom of the press, which shall admit no more limits than respect to private life, to morals and to public peace. Press offenses shall be judged by a jury that qualifies the facts and by another jury that applies the law and specifies the punishment”. Tena Ramírez, *supra* note 530 at 607-608. Emphasis added.

544 Article 26 provided: “In time of peace, no soldier shall demand lodging, baggage, or personal services without the consent of the owner. In time of war, he may demand them but in the manner prescribed by law”. Tena Ramírez, *supra* note 530 at 610.

545 See *supra* note 541.

546 Mario de la Cueva, *supra* note 465 at 1265-1266

547 The major ideological difference that was not addressed by this constitution was the separation between the Church and the State. After a civil war (Reforma war, 1858-1861), a French intervention (1862-1867) and a Second Empire with Ferdinand Maximilian Joseph as the emperor (1864-1867), the issue became finally settled in 1873. Through a constitutional amendment, several laws (known as Reforma Laws) were incorporated into the 1857 Constitution, rendering Mexico into a secular state. See Felipe Tena Ramírez, *supra* note 530 at 682; For the Reforma Laws, see Felipe Tena Ramírez, *supra* note 530 at 638-667.
The current constitution, the 1917 Constitution, was actually promulgated as an amendment to the 1857 Constitution. This fact has important implications in the case of human rights protections: with only some minor differences in wording, the charter of rights and freedoms enacted in 1917 was almost identical to the one included in the 1857 Constitution. It should be noted, however, that the 1917 Constitution called this section “Of Individual Guarantees” (De las garantías individuales), and provided that “every individual shall enjoy the guarantees granted by the Constitution…”. For some scholars, this provision suggested that the drafters of the 1917 Constitution endorsed Positive Law theories, as opposed to their predecessors who followed doctrines of Natural Law. Other authors have maintained that despite the change in wording, the drafters of the 1917 Constitution were also committed to protecting the human being. In any case, the similarities of the two charters suggest that the conceptual differences between Positive Law and Natural Law were far from clear to the drafters of the 1917 Constitution.

The 1917 Constitution –currently in force– reiterated private life as a limit to freedom of the press and endorsed the protections related to the person, home, correspondence, and against the quartering of soldiers. In 1996, through a constitutional amendment, private

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548 The official name of this constitution is “Political Constitution of the United Mexican States, which reforms the Constitution of 5 February 1857”.
549 About this debate, see Alfonso Noriega Cantu, La naturaleza de las garantías individuales en la Constitución de 1917 (Mexico City: Universidad Nacional Autónoma de México, 1967.)
550 Mario de la Cueva, supra note 465 at 1287.
551 Héctor Fix Fierro, supra note 467 at 3.
552 See supra note 543. Article 7 also incorporated certain changes related to the prosecution of offenses committed through the press: “In no case may a printing press be sequestrated as an instrument of an offense. Organic laws shall contain whatever provisions are necessary to prevent, under pretext of a denunciation of press offenses, the imprisonment of vendors, newsboys, workmen and other employees of the establishment publishing the work denounced, unless their guilty is previously established”. Tena Ramírez, supra note 530 at 820.
553 See supra note 541. Article 16 also incorporated certain rules related to search warrants and private homes visits carried out by public authorities: “Every search warrant, which can be issued only by judicial authority and which must be in writing, shall specify the place to be searched, the person or persons to be arrested, and the objects sought, proceedings to be limited thereto, at the conclusion of which, a detailed statement shall be drawn upon in the presence of two witnesses proposed by the occupant of the place searched, or in his absence or his refusal, by the official making the search. Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with; and may demand to be shown the books and papers required to prove compliance with fiscal rulings, in the latter cases, they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search.”. Tena Ramírez, supra note 530 at 822.
554 See supra note 542 and 528. Article 25 and Article 26 contained little variations in wording. See Tena Ramírez, supra note 530 at 825. It should be noted, however, that on February 3, 1983, a constitutional amendment grouped the provisions contained in these articles in Article 16 of the 1917 Constitution.
communications achieved constitutional protection, and rules related to the interception of those communications were established as well. A distinguished feature of this amendment was that, for the first and only time, a word in Spanish, close to the word privacy (privacía), was included in the constitutional text. Finally, in 2009, the European ‘right to the protection of personal data’ achieved constitutional protection through another amendment to the 1917 Constitution.

The historical development outlined above shows important issues related to the protection of privacy in Mexico. First, a nascent idea of privacy existed when Mexico started to emerge as an independent state. This fact becomes evident in the 1814 Apatzingan Constitution, which included the expression ‘private life’ in its text. Second, Mexico has followed both the European and American traditions of privacy. As described above, French and American constitutionalism exerted an important influence on the constitutional processes that took place in Mexico during the nineteenth century. Therefore, the honor-related and liberty values identified by James Whitman as the western values protected through privacy law have consistently appeared in the Mexican constitutions since 1814. Third, while several constitutions have been enacted in the country since its independence from Spain, none of them has established a right to privacy. As a result, privacy has been protected through provisions whose goals are to protect other important values in a free and democratic society, but these provisions do not provide a right to privacy per se. For instance, in Article 6 of the 1917 Constitution ‘private life’ acts as a limit to freedom of expression and freedom of the press (Article 7), but it is not necessarily considered a right on its

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555 Article 16, paragraph 12º of the 1917 Constitution now declares: “Private communications are inviolable. The law shall penalize any act that attempts on the liberty and privacy of such communications, except when they are voluntarily given by any of the individuals that participated in them. A judge shall asses the implications of such communications, provided that they contain information related to the perpetration of a crime. In no case, communications that violate a confidentiality duty established by law shall be admitted”. Emphasis added. See the 1917 Mexican Constitution, online: <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm>

556 Article 16, paragraph 13º of the 1917 Constitution now declares: “Only the federal judicial authority, upon request of the appropriate federal authority or the Public Prosecutor [Ministerio Público] of a state, can authorize an interception of a private communication. The competent authority shall state the grounds and reasoning for the request, describing therein the type of interception required, the individuals subjected to the interception and the term thereof. The federal judicial authority shall not grant any authorization of interception of private communications in matters of electoral, fiscal, mercantile, civil, or administrative nature, nor in cases related to communications between a defendant and his legal counsel […] Authorized interceptions shall be subject to the requirements and limitations set forth in law. The results of interceptions that do not comply with the aforesaid requirements shall have no evidentiary value. See <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm>

557 See supra note 555.

558 See Article 16, second paragraph of the 1917 Constitution, supra note 205 and accompanying text.
own. This is confirmed by the fact that the constitution does not include any indication of what should be understood as private life. The Press Offences Act of 1917 (POA) (*Ley sobre Delitos de Imprenta*) addressed this lack of definition. In a country that follows codification processes, Acts of Congress elaborate on constitutional provisions. This was the case with POA. It contained a description of what constitutes an attack to someone’s private life, thereby criminalizing any person who, through the press, exposed another to “hate, disdain and ridicule” or “caused a discredit in the latter’s reputation” (Article 1.) Although the provision established an important protection to someone’s privacy, it restricted the understanding of private life to honor-related values. Therefore, POA did not establish a general right to privacy. Finally, it should be noted that Article 1 of the POA was repealed in 2012, in an attempt to remove any legal obstacles for the exercise of freedom of expression.

Another important aspect of the privacy protection in Mexico that needs to be highlighted deals with the exercise of state power in spaces usually considered as ‘private’. According to Article 16 of the 1917 Constitution, an individual’s person, home, correspondence and communications are ‘inviolable’, but this inviolability tends to be more associated with *personal security*; that is, with ensuring that public authorities comply with the law every time they break into a citizen’s home, examine his papers or wiretap his telephones or any other private communication. This particular understanding stands in contrast to what has happened in the U.S, where ‘liberty’ and not personal security has been the value traditionally protected through privacy. Moreover, in the U.S, several amendments to the Constitution –such as the Fourth, Fifth and Fourteenth Amendments– have been interpreted through the jurisprudence as encompassing a ‘right to privacy’. This right has been used by Americans to protect themselves against government intervention not only in their homes, personal papers and communications, but also in other spaces related to their private lives such as the use of contraception, access to

559 The repealed Article 1 is available online: <http://www.diputados.gob.mx/LeyesBiblio/ref/ldi/LDI_orig_12abr17_ima.pdf>
561 Mario de la Cueva, *supra* note 465 at 1301-1302.
562 See *supra* notes 523 and 524 and accompanying text.
abortions,\textsuperscript{564} or sexual intimacy.\textsuperscript{565} Therefore, the constitutional amendments to the U.S. Constitution have been expanded by to protect other values that the ones expressly mentioned by the Founding Fathers.

Article 16 of the 1917 Constitution reveals an important influence of the Fourth Amendment to the U.S. Constitution. This influence goes back to Article 16 of the 1857 Constitution, with wording identical to the first paragraph of the provision drafted in 1917. In fact, the 1857 original draft of Article 16 was “a prolix translation” of the said Amendment, but that draft was disregarded by the Constituent Congress because it contained unfamiliar terms such as ‘reasonable’ or ‘probable cause’.\textsuperscript{566} This Congress thus suggested a new wording which captured the spirit of the Fourth Amendment—the protection of the sanctity of the home and other related issues such as the person, family, papers and personal possessions. In 1917, the original draft of the Constitution suggested a different writing for Article 16, but it was discarded by the Constituent Congress, thus adopting the exact wording of Article 16 of the 1857.\textsuperscript{567}

Therefore, despite the similarities in wording between the Fourth Amendment and Article 16 of the 1917 Constitution, the latter has not been used in Mexico to construct a right to privacy in the way it has been developed in the U.S. As a result, the conception of privacy “as liberty within the sanctity of the home” has remained limited to guarantee the inviolability of the spaces expressly enumerated in Article 16—person, domicile, papers, personal possessions, correspondence and private communications—and to ensure that those spaces will be exceptionally invaded by following the requirements and limits prescribed by law. This particular understanding of Article 16 means that this provision has not been extended to protect individuals from state intervention in areas that are not expressly covered by Article 16. The implication of this lack of development is that privacy, for instance, has not been necessarily considered as a right that gives individuals control over physical access to themselves, over their possessions or information about

\textsuperscript{564} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{565} Lawrence v. Texas, 539 U.S. 558 (2003).
\textsuperscript{567} For the discussions of the 1917 Constituent Congress see Ignacio Marvan Labore, supra note 566 at 737-739.
themselves. Therefore, the constitutional provisions related to the protection of privacy have not received an extensive interpretation.

6. Legal and Political Factors that Explain the Lack of Development of a Right to Privacy in Mexico

At least two factors could explain why a right to privacy has not been articulated through an expansive interpretation of constitutional provisions in Mexico as happened in other jurisdictions. These factors are somehow connected to a lack of development of other fundamental rights and freedoms in the country as well. The first is related to the kind of legal sources that exist in Mexico. The second deals with the political ideology that prevailed in the country from the adoption of the current Constitution in 1917 and until 2000.

6.1 Legal Sources in Mexico

The first of these factors is connected to the position that legislation has had in the Mexican legal system. As it was explained in the codification history outlined above, Mexico belongs to the Roman law tradition, which gives a prominent role to law created by legislatures as opposed to the one created by courts. Since its emergence as an independent country, Mexico has struggled to create a rule of law in which all public authorities are required to comply with the law enacted by both federal and state legislatures. Since judges are grouped within this class of authorities, they are required to comply with legislation, thus assuming a secondary position within the sources of law that exist in the Mexican legal system. This position is nicely reflected in the Amparo Act, which describes the way jurisprudence should be created and become mandatory for all judges, establishing a hierarchy within the Mexican legal system. In this way, it could be argued that what gives legal authority to the rulings created by judges is not the ruling per se but an Act passed by the Federal Congress. In other words, law created by judges has legal authority because a piece of legislation bestows such authority. The result of this secondary position of jurisprudence as a source of law within the Mexican legal system is that, for decades, the role of judges in Mexico was confined to ‘apply’ the law to the cases that were brought to them. Judges were not supposed to create new law, just to apply it.

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568 See Ruth Gavison, supra note 43; Philippa Strum, supra note 45 at 4.
In the case of Constitutional law, things were not different. For many decades, the role of the Supreme Court of Mexico was to apply the Mexican Constitution to cases that were brought before them, but without creating or expanding its text. As will be explained below, this role created, as a result, a strong originalism and textualism in the judicial reasoning that did not create a space for adapting the Constitution to different social realities. This does not mean that these realities were not considered in Mexico. They were addressed through other mechanisms, namely, through the constitutional amendment process. As Manuel González Oropeza explains, in contrast to what has happened in other jurisdictions, the constitutional amendment process has been used in Mexico to keep the Constitution up to date. 569

A complete system of judicial review did not properly exist in the country until 1994. Before that year, Supreme Court judges were not necessarily focused on declaring invalid those laws created by legislatures that were against the Constitution. The only mechanism that existed—and still exists today—to protect an individual both from legislation and acts of public authorities that were considered unconstitutional was a judicial procedure called juicio de amparo. 570 Created by the 1857 Constitution, this procedure could be used by any individual in cases where a piece of legislation or act of public authority infringed upon his or her fundamental rights and freedoms established by the Constitution.

569 The author refers specifically to the United States where the Supreme Court has ‘modified’ the American Constitution through judicial review. For González Oropeza, in Mexico, the legislator is the supreme political organ, and, for this reason, legislation is the expression of its supremacy. Since the Constitution is the supreme law, all fundamental political decisions have to be incorporated into its text by the Permanent Constituent Congress [i.e. the legislatures responsible for the amendment processes] and not by a different power. See Mariano González Oropeza, “Foreword” in Colección de Leyes Fundamentales que han regido en la República Mexicana y de los Planes que han tenido el mismo character 1821-1857 (Mexico City: Miguel Angel Porrúa, 2009) at xlv.

570 The origins of juicio de amparo date back to the Middle Ages in the Kingdom of Aragón (Spain). A magistrate called “Justicia Mayor” had the power to protect the Aragonese aristocracy against the infringement of their personal liberties contained in a Charter called “Privilegio General”, a document similar in nature to the Magna Carta. See Eduardo Ferrer Mac-Gregor, La acción constitucional de amparo en México y España (Mexico City: Porrúa, 2002) at 6-7. The influence of Spain is unavoidable, and it becomes evident with the name given to this judicial procedure. The word amparo comes from the verb amparar, which means to protect. The Justicia Mayor protected (amparaba) people in their persons and possessions through especial procedures called procesos florales. While Aragón law never applied in New Spain, Castile law used the same expression, introducing the term to Mexico. Ibid at 115-116. It should be noted, however, that in juicio de amparo there is a notorious influence from the Anglophone writs, specifically, the writ of habeas corpus, ibid at 109-112; Héctor Fix Zamudio, El juicio de amparo, (Mexico City: Porrúa, 1964) at 371-372. Some French influences are present as well; see Eduardo Ferrer Mac-Gregor, ibid at 112-113.
The *juicio de amparo* had, however, certain limitations. If a judge found that the alleged piece of legislation or act of public authority was in fact against the constitution, his ruling was restricted to only protecting the party that brought the case before him. In other words, a ruling did not have general effects. This means that it did not reach other people situated in the same or similar situation. Moreover, since the ruling was limited to the facts of the case that was brought before the judge, it did not include a general declaration of unconstitutionality. These limitations had a two-fold purpose. On the one hand, *juicio de amparo* did protect people whose rights were infringed upon by legislation or acts of public authorities, but on the other hand, this judicial procedure was not used to declare void any Act passed by federal congress.\(^{571}\)

From 1857 to 1917 *juicio de amparo* was the only legal mechanism that individuals could use to seek redress in cases where federal or state authorities infringed upon their fundamental rights and freedoms. In 1917, not only had the Constituent Congress of 1917 maintained *juicio de amparo* and its limitations described above, but also accepted that rulings of other state judges could be reviewed by the Supreme Court of Justice. The result of this political decision was that the Court began hearing many cases ruled by lower courts, thereby reviewing how these judges applied the law to the specific cases that were brought before them. The Supreme Court thus became more an appellate court of the highest authority (Cassation Court) as opposed to a constitutional court per se.\(^{572}\) Moreover, not only was *juicio de amparo* used to protect the fundamental rights and freedoms contained in the charter but also other constitutional provisions as well. Therefore, through *juicio de amparo*, the Supreme Court of Mexico reviewed the constitutionality and legality of any act of all public authorities (judges included),\(^{573}\) but, as mentioned above, the Court’s rulings were limited to the party that brought the case before the Court’s attention, without containing any general declaration of unconstitutionality.\(^{574}\) Only

\(^{571}\) According to Mario de la Cueva, Ponciano Arriaga, one of the drafters of the 1857, said that the purpose of the limitations of the *juicio de amparo* was to avoid declaring void any act of congress, because these declarations were the cause of many fights between the branches of government in the past. Mario de la Cueva, *supra* note 465 at 1330.


\(^{574}\) See Article 76 of *Amparo Act* of 1936 now repealed. (*Ley de Amparo reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*), online: <http://www.diputados.gob.mx/LeyesBiblio/abro/lamp/LAmp_abro.pdf> It should be noted that this rule was recently changed in 2014. See *infra* note 579.
after five cases were ruled in the same way, using the same reasoning, without interruptions, and
the rulings approved by a majority of eight votes, the Supreme Court was able to create
jurisprudence, which became mandatory to all courts in Mexico. This particular way of
creating jurisprudence meant that Mexicans had a long wait (five cases) before an Act passed by
Congress that was deemed unconstitutional ceased to have effects in their lives. Finally, I should
mention that juicio de amparo and jurisprudence rules are still in force until today, but with
several variations. For instance, other federal courts are now allowed to create jurisprudence, and
if a contradiction in opinion arises between courts, the Supreme Court resolves the issue.

In 1994, a constitutional amendment granted the Supreme Court of Mexico new powers,
consolidating it as a constitutional court—as opposed to a cassation court—similar to the ones that
exist in Europe. The same amendment added a new system of constitutional review which
included two new judicial procedures in addition to juicio de amparo. The first one is called
‘constitutional dispute’ and it takes place when a branch of government acts ultra vires. In the
second procedure, an ‘unconstitutionality lawsuit’ is brought before the Supreme Court by
certain public authorities, where a contradiction between a general regulation (including Acts
passed by Congress) and the Constitution is claimed to exist. The relevance of these two judicial
proceedings is that, in contrast to what happened with juicio de amparo, if the Supreme Court of
Mexico finds that there is a constitutional violation, its ruling can have general effects when it is

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575 A majority of 4 votes was necessary if the jurisprudence was created by either of the two chambers of the Superme Court.
576 Another form to create jurisprudence occurred when the Supreme Court resolved a contradiction of rulings. In
this case, there was no need to wait until five rulings were completed. See Article 192 of Amparo Act of 1936. It
should be noted that besides the Supreme Court, federal courts could also create jurisprudence but these courts in no
case were allowed to contradict Supreme Court jurisprudence.
577 See Articles 215-230 of the new Amparo Act of 2014 (Ley de Amparo reglamentaria de los artículos 103 y 107
de la Constitución Política de los Estados Unidos Mexicanos ), online:
<http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_140714.pdf>
578 The amendment was published in the Official Gazette [Diario Oficial de la Federación] 31 December 1994.
approved by a majority of eight votes. If the ruling is approved with fewer votes, the ruling’s effect is limited to the parties that brought the case before the Court.

It should be noted that in 1999, through an interpretation of Article 133 of the 1917 Constitution, the Supreme Court of Mexico ruled that it was itself the only court within the Mexican judicial system that could examine and declare unconstitutional any act passed by congress, or any other act of a public authority. This jurisprudence was in force until 2011, and even though this interpretation of Article 133 is now less rigorous today, the Supreme Court remains as the only court in Mexico that can declare unconstitutional an Act passed by federal or state legislatures.

The Mexican judicial review system reveals a mechanism highly concentrated in the hands of the Supreme Court, and, for the same reason, limited in its effects. While it cannot be argued that the fundamental rights and freedoms established in the 1917 Constitution were not protected by the Supreme Court and other federal courts, the effects of this protection have been restricted to the parties that brought a case before these courts. As a result, non-parties of a case did not receive the benefits of a ruling that was found unconstitutional, say, an act passed by Congress. The general effect of the particular design of the Mexican judicial review has been that case law does not have the same relevance as legislation has had within the Mexican legal sources. Only since 1994, when non-parties of cases began receiving the benefits of a general declaration of unconstitutionality has case law started to assume a more relevant role as a legal source in

579 Under the new Amparo Act of 2014, the Supreme Court can now declare unconstitutional any legal norm (including Acts passed by Congress) through a juicio de amparo. A general declaration of unconstitutionality will be issued by the Supreme Court once it has heard two cases in which the same legal norm has been found to be against the 1917 Constitution. Before the Supreme Court publishes a general declaration of unconstitutionality in the official gazette (and hence the declaration has general effects), the Court should grant the legislature or authority that issued the legal norm a period of 90 days to modify or repeal such norm.

580 See Article 105 of the 1917 Constitution.

581 See tesis jurisprudenciales P.J.73/1999 and P.J.74/1999 which headings are, respectively, “CONTROL DIFUSO DE LA CONSTITUCIÓN DE NORMAS GENERALES. NO LO AUTORIZA EL ARTÍCULO 133 DE LA CONSTITUCIÓN” and “CONTROL JUDICIAL DE LA CONSTITUCIÓN. ES ATRIBUCIÓN EXCLUSIVA DEL PODER JUDICIAL DE LA FEDERACIÓN” (Semanario Judicial de la Federación y su Gaceta, Novena Época, Pleno, Tomo X, agosto de 1999, at 5 and 18).

582 Today, other courts than the Supreme Court shall not apply a legal norm that is unconstitutional or that contradicts a human rights treaty ratified by Mexico, but these courts cannot declare a norm unconstitutional. This declaration remains under the exclusive control of the Supreme Court. For this new criterion, see tesis aislada P. LXVII/2011 (9ª) which heading is “CONTROL DE CONVENCIONALIDAD EX-OFFICIO EN UN MODELO DE CONTROL DIFUSO DE CONSTITUCIONALIDAD” (Semanario Judicial de la Federación y su Gaceta, Décima Época, Pleno, Libro III, Tomo 1, diciembre de 2011 at 535).
Mexico. But even in some of these cases, the response of federal Congress has been the enactment of new laws or the amendment of the constitution, thus having the “last word”.

Moreover, this design of the Mexican judicial review has had an important effect on the development of human rights jurisprudence in Mexico. Since the effects of the Supreme Court’s rulings in the *juicio de amparo* were restricted to the parties in cases where human rights violations were proved, individuals other than the parties did not receive the benefits of the Court’s rulings. Sometimes, individuals were not even aware that such effects existed until jurisprudence was created. This was true with cases related to the protection of privacy. The interpretation that the Supreme Court has given to the constitutional provisions aimed at protecting the inviolability of home, papers, possessions has been limited to the parties at trial. Therefore, if the Court had acknowledged or had created a ‘right to privacy’, this right would have applied only to those parties, and such right would have not being available to other individuals. Not until recently (2009), has the Supreme Court begun ruling some cases in which a right to privacy has been acknowledged. A right to privacy jurisprudence, however, is still under construction. In the case of the two other constitutional procedures (constitutional disputes and unconstitutionality lawsuit), the Supreme Court has not yet declared unconstitutional any Act passed by legislatures (federal o state) on grounds of a right to privacy violation.

### 6.2 Political Ideology that Existed in Mexico

The second factor that explains the lack of development of a right to privacy in Mexican law is related to how law was created, interpreted, applied and studied in Mexico. This particular understanding of Mexican law has to be associated with the political system that existed in Mexico from the enactment of the 1917 Constitution and until 2000. During this time, Mexico lived under an authoritarian regime\(^{583}\) that had “much of the institutionalization, breadth, forms,

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\(^{583}\) When making this political assessment, one should pay attention to the specific period of time in which such an assessment is done. Mexico’s authoritarianism varied throughout the twentieth century, reaching its peak in the 1950s and finally vanishing in 2000, when an opposition party won, for the first time and after 71 years of a one-party system government, the presidency of the Mexican Republic. For a classification of the Mexican authoritarianisms, see Jaime F. Cárdenas García, *Transición política y reforma constitucional en México* (Mexico City: Universidad Nacional Autónoma de México, 1994) at 58-63.
pacts, and legitimacy often associated with democratic government”. Therefore, Mexico had democratic institutions, but they were not functioning in the same way they were working in other western democracies. According to Daniel Levy, Mexico 1) lacked meaningful and extensive competition among organized groups for major government office; 2) participation did not extend to leadership selection through fair elections; and 3) civil and political liberties were insufficient to guarantee the integrity of competition and participation. These political conditions created a “civilian rule without democracy”, which provided political stability to the country.

The political conditions described above had an important effect on Mexican law. José Ramón Cossio, a constitutional scholar and now judge of the Supreme Court, argued that, during the period from 1917 to 2000, “the Mexican legal order may be characterized as authoritarian.” This was possible because the elite in power, following the rules established by the 1917 Constitution, managed to control the elections through which the President, State Governors and legislatures were elected by the citizenry. By assuming this control, the elite in power also conducted the legislative process, thus regulating the content of legislation. Moreover, since the Supreme Court judges were appointed by the President and the Senate (and by Governors and

585 Any definition of democracy may be be contested. For the purposes of this argument, however, the definition articulated by Phillippe C. Shmitter and Terry Lynn Karl in 1991 illustrates how western countries understood democracy during the time Mexico was living under an authoritarian regime. For these authors, modern political democracy is “a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting directly through competition and cooperation of their elected representatives” See Phillippe C. Shmitter & Terry Lynn Karl, “What Democracy Is…and Is Not” (1991) 2:3 Journal of Democracy 75 at 76.
Another widely accepted form to define democracy is the one given by Robert Dahl, who maintains that at least eight guarantees must be present in a society to be considered a democracy (he calls it “polyarchy”): 1) freedom to form and join organizations; 2) freedom of expression; 3) right to vote; 4) eligibility for public office; 5) right of political leaders to compete for votes; 6) alternative sources of information; 7) free and fair elections; 8) institutions for making government policies depend on votes and other expressions of preference. See Robert A. Dahl, Polyarchy: Participation and Opposition (New Haven: Yale University Press, 1971) at 2-3.
586 Daniel C. Levy, supra note 584 at 137.
587 Ibid at 142.
588 For Daniel Levy, the features of the Mexican authoritarianism were: the existence of corporatism instead of pluralism; centralization of power in the presidency; the absence of institutionalized competitive political parties due to the dominance of the hegemonic Institutional Revolutionary Party (PRI); elections were used not to select parties, leaders and policies, but rather to offer the hope, mobility, and regularized renewal necessary to maintain support for the regime. Daniel C. Levy, supra note 584 at 141, 146, 148,153.
589 José Ramón Cossio D., Cambio social y cambio jurídico (Mexico City: Instituto Tecnológico Autónomo de México-Miguel Angel Porrúa, 2001) at 25.
legislatures in the case of state judges), the elite also had power in choosing those in charge of reviewing the legality and constitutionality of legislation and acts of public authorities. Finally, as Cossio points out, the chances of appointing judges—especially Supreme Court judges—belonging to the elite were extremely high.  

In this way, the Mexican legal order was not undemocratic per se. An entrenched constitution existed, and the Executive (President and Governors) and Legislative (federal and state legislatures) were elected through periodic elections. Since these branches of government were responsible of the legislative process, legislation was created under ‘democratic’ rules. Therefore, the problem was not the existence of undemocratic norms, but rather a political regime that did not allow the emergence of more democratic dynamics.

The consequences of the authoritarian Mexican legal order were also reflected in the judiciary, and to some extent, in academia. In the first case, judges interpreted legislation and constitutional provisions using mainly historical and textual arguments. This means that judges read the Constitution and legislation narrowly. Basically, they marshaled the intent of the drafters of the Constitution or of the legislature that passed the Act (historical argument), or they drew their arguments from the present sense of the words of the constitutional or legal provisions (textual argument). Cossio argues that since these two arguments are very formalistic, “they did not “affect” or “distort” the rules of the authoritarian game, nor contravene everyday forms of action of authority”.

Given that the elite in power not only controlled the legislative process but also the interpretation of legal norms, the Mexican legal order achieved a high degree of homogeneity, nullifying alternative interpretations of legal norms. Cossio argues that this homogeneity also created an authoritarian legal culture: since individuals were unable to propose different legal interpretations, people did not challenge legislation and, thus, complied.

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590 *Ibid* at 29-32.
591 *Ibid* at 25.
592 For an explanation of different forms of argumentation, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) at 7.
593 José Ramón Cossío D., *supra* note 589 at 70. Emphasis in original.
594 *Ibid* at 73.
The judiciary read the fundamental rights and freedoms enshrined in the 1917 Constitution narrowly. Cossío argues that judges achieved a two-fold purpose by doing this. On the one hand, they protected individuals whose rights were infringed upon; on the other hand, by adopting a limited interpretation of rights, judges were able to declare constitutional many acts of public authorities, thus facilitating the workings of the authoritarian regime. Therefore, the chances in Mexico of having a judiciary that could expand the content of the rights and freedoms included in the constitution were almost non-existent. The understanding of the fundamental rights and freedoms in Mexico was limited to the way they were defined in the 1917 Constitution.

In the case of academia, Cossio argues that during the Mexican authoritarianism, the Constitution was conceived not so much as a normative but as a political constitution; that is, a constitution created by the group in power – the group that consummated the Mexican Revolution in 1917 – and was accepted as legitimate by all people. For Cossio, this political understanding of the constitution was the legal style through which many Mexican scholars studied – and some still study – the 1917 Constitution. This meant that scholars constructed a concept of constitution that helped the authoritarian regime to justify its political domination. The effect of this legal perspective was similar to what happened with judges: they read the constitution narrowly, using historical and textual arguments sometimes without considering the jurisprudence of the Supreme Court. Since these interpretations also helped to legitimize the political project of the authoritarian regime, the elite in power rewarded scholars by granting them prizes, awards, funding for publications and conferences, etc.

The net effect of the political conditions under which Mexican law was created, applied and studied from 1917 to 2000 had a tremendous impact in the development of the fundamental rights and freedoms enshrined in the 1917 Constitution. Supreme Court judges and academics did not necessarily view the Constitution as a document that could be expanded through the use of other constitutional argumentations such as those explored by Philip Bobbitt. This author

595 Ibid at 76.
596 Ibid at 98-103.
597 Ibid at 104.
598 Ibid at 117.
599 Ibid at 119.
identifies other arguments used in constitutional interpretation such as one that considers the costs and benefits of an impugned governmental action (prudential argument)\textsuperscript{600} or one whose force relies on a characterization of the particular institutions of a country and the role within them of its individuals (ethical argument)\textsuperscript{601} or one that is based on inferences from the existence of constitutional structures and the relationships which the Constitution ordain among these structures (structural argument).\textsuperscript{602} Given the absence of these constitutional interpretations, analytical frameworks for the exercise of the rights and freedoms included in 1917 Constitution have yet to be developed or fully developed. Therefore, the understanding of these rights has been very limited.

6.3 The Effect of the Political and Legal Factors on the Right to Privacy

The political conditions described above and the effects they had on the Mexican legal order have had an important impact on the development of a right to privacy. Even though some privacy protections were enshrined in the early constitutions of Mexico and are still present in the 1917 Constitution as it was described above, the constitutional provisions that contain those protections have never been expanded or have been expanded narrowly by the Supreme Court. One example that supports this argument is the fact that in Mexico, contrary to what happened in other countries,\textsuperscript{603} protections against wiretapping came through a constitutional amendment process in 1996 and not through the interpretation of the constitutional provision that contains the main privacy protections (Article 16).

Therefore, it could be argued that given our Roman law legal tradition, and the political context that existed in Mexico until 2000, the Supreme Court was not able to create a right to privacy similar to the one that exists in other jurisdictions. As was argued above, since the 1917 Constitution does not mention a right to privacy as such in its text, and given the dominant use of historical and textual arguments, there was no chance for the Court to create such a right. At the same time, and for the same reason, academics and litigants did not advocate for a right to privacy because in the legal culture that prevailed in Mexico such a right simply did not exist.

\textsuperscript{601} Philip Bobbitt, supra note 592 at 94.
\textsuperscript{602} Philip Bobbitt, supra note 592 at 74.
\textsuperscript{603} See, for instance, Katz v. United States 389 U.S. 347 (1967).
The only right that was available for judges, litigants, and scholars was the right enshrined in Article 16 of the 1917 Constitution; that is, the right of an individual to not be molested in his person, domicile, papers and possessions. An individual also had the constitutional declaration that correspondence, private communications and homes were inviolable, but that declaration did not lay out any analytical framework that could be used to construct a right to privacy that was not previously granted by the drafters of the Constitution.

Only as late as 2009, did the Supreme Court read in a right to privacy in Article 16 of the 1917 Constitution. The Court has yet to define a right to privacy nor has it provided any analytical framework for this right. Cases that have been brought before the Supreme Court have been mainly related to privacy in terms of limits to the exercise of freedom of expression and freedom of the press. In none of these cases has the right to privacy triumphed. In cases where the exercise of state power is involved, the Supreme Court has only marginally recognized a right to privacy while deferring more to legislatures and governments, without developing an analytical framework for this right. To make this point clear, the following section presents two cases related to the main problem analyzed in this thesis—the mandatory collection, retention, use and disclosure of personal information authorized by law and carried out by the state. These cases demonstrate the difficulties of protecting individuals from interferences with their private lives carried out by the state by way of data processing.

7. Two Cases Showing the Limitations of the Constitutional Protection of Privacy

7.1 The RENAUT Case

A couple of cases illustrating the limitations of the constitutional protection of privacy described above occurred a few years ago in Mexico. They attracted significant attention from the media, political actors and the general public. The first such case dealt with the formation of a massive database containing personal information. In an attempt to tackle organized crime, the Calderon administration (2006-2012) in 2008 announced the creation of a non-public National Cell-Phone Registry called RENAUT. To be included in RENAUT, users were required to send their

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604 RENAUT (Registro Nacional de Usuarios de Telefonía Movil) was established through the publication of a political agreement called Acuerdo Nacional por la Seguridad Jurídica, la Justicia y la Legalidad (National Agreement for Legal Certainty, Justice and Legality), published in the Official Gazette (Diario Oficial de la
telephone companies a text message indicating their full names, cell phone numbers and CURPs; otherwise, their cell phone lines would be suspended. A CURP is a unique alphanumeric number identity code for citizens and legal residents alike. RENAUT also called for other personal information, such as fingerprints, a copy of a user’s photo-voting card and proof of address. RENAUT also required that telephone companies collect and retain for at least twelve years all data associated with the communications of users, such as traffic data and geographic location.\footnote{See Article 44, fr. XI-XII of the Decree amending the Federal Telecommunications Act (repealed today) published in the Official Gazette [Diario Oficial de la Federación] on 9 February 2009, online: <http://www.dof.gob.mx/nota_detalle.php?codigo=5079751&fecha=09/02/2009>}

The Ministry of the Interior was given responsibility for RENAUT along with the telephone service providers.

The official announcement of RENAUT provoked an immediate and general outcry in the whole country. The public questioned the effectiveness of the registry without, however, arguing that RENAUT was posing an invasion to the private life of individuals. Instead of arguing an infringement to their right to privacy, thousands of citizens sent text messages to their telephone companies using either false names or false CURPs or both.\footnote{It was estimated that between ten thousand and fifteen thousand cell-phone lines were registered using false data. Miriam Posada García, “Provisional la suspensión a Telcel para no cortar servicio: Cofetel”, La Jornada (15 de abril de 2010), online: <http://www.jornada.unam.mx/2010/04/15/economia/024n1eco>.} The RENAUT case thus illustrates the complexities of defending privacy in a country with no right to privacy in its constitution and with scarce privacy jurisprudence. Individuals wanted to protect their privacy without giving up their cell phones. Given that there were no clear legal grounds on which individuals could base a complaint for privacy invasion, many of these individuals opted for protecting their privacy by sending text messages with false information. Individuals, in other words, found an ‘alternative’ way to protect their privacy while complying with the mechanics of RENAUT.\footnote{See Suprema Corte de Justicia de la Nación [Supreme Court], 7 July 2010, Amparo en Revisión 482/2010 (Mexico), online: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=118263>}

RENAUT was brought before the Supreme Court of Mexico through the abovementioned juicio de amparo. A small company considered that RENAUT violated Article 16 of the Mexican


\footnote{It was estimated that between ten thousand and fifteen thousand cell-phone lines were registered using false data. Miriam Posada García, “Provisional la suspensión a Telcel para no cortar servicio: Cofetel”, La Jornada (15 de abril de 2010), online: <http://www.jornada.unam.mx/2010/04/15/economia/024n1eco>.}

Constitution which, as explained, protects, among other things, the privacy of communications. In 2010, the Supreme Court of Mexico used historical and textual arguments to uphold the legislation providing for RENAUT. The Court argued that the intent of the drafters of the 1996 amendment, which incorporated the protection of communications privacy into the Mexican Constitution, was to guarantee the “inviolability of private communications.” Given that RENAUT did not require the storage of telephone calls or text messages, but only traffic data, the Court concluded that RENAUT did not amount to an intervention of private communications.608

The ruling of the Supreme Court of Mexico in the RENAUT case shows the limitations constitutional law in Mexico has in the protection of privacy for at least two reasons. First, the analysis of the constitutionality of RENAUT was shaped not by the right to privacy, but, rather, by one of the constitutional provisions aimed at protecting the privacy of individuals—communications privacy. This made the Supreme Court’s analysis centered on whether RENAUT violated the privacy of communications. The problem, however, was that the issue at stake was not an issue of communications privacy, but, rather, one of data processing. The question the Supreme Court of Mexico was supposed to address was whether the mandatory collection, retention and use of personal information required by the government, along with the aggregation of such information into a single massive database, posed an undue interference with the private lives of Mexicans. By focusing on communications privacy, the Court ruled out any possibility of analyzing the privacy-invasive nature of RENAUT.

The type of arguments used by the Mexican Supreme Court is a second reason for arguing that constitutional law has limitations in protecting the privacy of Mexicans in cases of mandatory collection, retention and use of personal information. As said, the issue at stake was whether the data processing carried out by the state through RENAUT posed an undue interference with the private lives of individuals. To address this problem, the Court took recourse to textual and historical arguments. This means the Court looked back to the legislative debates preceding the 1996 amendment, instead of articulating a right to privacy that would have enabled greater flexibility for examining the privacy-invasive nature of the data processing posed by RENAUT.

608 Ibid at 45.
The Supreme Court of Mexico thus addressed a 2008 issue of privacy invasion using arguments belonging to a previous time and context (the Mexico of 1996)—the incorporation of rules authorizing the interception of private communications into the Mexican Constitution.609

Finally, it should be noted that while the Supreme Court of Mexico invoked its own jurisprudence in its ruling, such jurisprudence was developed from the provisions aimed at protecting the privacy of communications and, therefore, was of little help in examining the privacy invasion posed by RENAUT.610 Two years after the Supreme Court’s ruling, RENAUT was cancelled by the Mexican Congress given its lack of results.611

7.2 The National Identity Card Case

The case of the National Identity Card also shows the limitations of constitutional law in protecting the private lives of individuals in cases of mandatory collection, retention, use or disclosure of personal information carried out by the state. In 2009, the Calderon administration (2006-2012) announced a plan to create a National Identity Card (NIC). The NIC would include biometric information of individuals such as bilateral fingerprints and iris scans and a face photograph. Purposes for the adoption of the NIC included the creation of a national identity system, the prevention of crime and/or identity fraud and the provision of efficient public services. The National Identity Card registry was administered by the Ministry of the Interior.

Many citizens rejected the NIC. They felt uneasy with the idea of providing the state with personal information of a sensitive nature such as iris scans and fingerprints. Their uneasiness was reasonable. Iris scans, for instance, can disclose sensitive information such as whether a person is blind, has glaucoma or has or has had cataracts. In countries where iris scans have been considered for the issuance of national identity cards, researchers have shown that iris

609 Ibid at 12-41
610 Ibid at 44.
611 The decree derogating RENAUT was published in the in the Official Gazette [Diario Oficial de la Federación] on 17 April 2012, online: <http://www.dof.gob.mx/nota_detalle.php?codigo=5243973&fecha=17/04/2012> The Ministry of Interior published a final report on the procedures that were followed for the blocking, erasure and destruction of the data held in RENAUT. See, Secretaría de Gobernación, Informe sobre el uso de los datos contenidos en el Registro Nacional de Usuarios de Telefonía Móvil y las medidas destinadas a garantizar su debido resguardo y eventual cancelación (Mexico City: Dirección General de Registro Nacional de Población e Identificación Personal, 2012), online:<http://sil.gobernacion.gob.mx/Archivos/Documentos/2012/05/asun_2883211_20120509_1336572678.pdf>
recognition systems may not work properly with visually impaired individuals. As a result, these individuals may be denied access to services because they are physically unable to register for a biometric identity card and/or they may encounter discrimination in the use of identity systems. Fingerprinting too presents difficulties. Individuals are afraid to be fingerprinted because the police can use their fingerprints to create a national registry and use such a registry for watch-listing purposes. Furthermore, fingerprints tend to blur when individuals do extensive manual labor or are exposed to corrosive chemicals. These problems may exclude some individuals from the national identity systems, thereby denying them access to public services. In any case, a national identity card system based on fingerprinting and iris scanning does pose an interference with the privacy of individuals. It means that the state crosses the natural border (body) of an individual when collecting his fingerprints and iris scans.

There was a general outcry when the National Identity Card project was launched in Mexico. As in the case of RENAUT, the NIC provoked strong criticism from the media, political actors and the general public. The Mexican Congress requested the Calderon administration to provide further information about the NIC such as costs, reasons and legal grounds for adopting it. Opposition parties condemned the NIC arguing it was “onerous and unnecessary.” It was difficult to understand why the Calderon administration was launching the NIC if a photo-voting card, first issued in the early 1990s, usually used by Mexicans to identify themselves in elections had become the de facto the national identity card in Mexico.

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612 For the implications of using iris scans and fingerprints in national identity cards, see London School of Economics (LSE), *The Identity Project: an Assessment of the UK Identity Cards Bill and Its Implications*, June 27, 2005 at 177-181, online: <http://www.lse.ac.uk/management/research/identityproject/identityreport.pdf>
613 Ibid at 181.
614 Ibid. at 176.
615 For invasions of privacy by way of breaching a ‘natural’ border, see Gary T. Marx, *supra* note 426 at 48-49.
617 Andrea Becerril, “Senadores de PRD, PRI y PT se oponen al nuevo documento de identificación”, *La Jornada* (1 August 2009) 10, online: <http://www.jornada.unam.mx/2009/08/01/politica/010n2pol>
618 When a Mexican reaches eighteen years of age, he or she must enroll in the national electoral register and obtain his or her voting card. He or she must show this card before casting a vote in all elections at the federal, state or municipal level. Given that the voting card includes personal information such as an individual’s full name, photograph, signature and fingerprint of his/her right thumb, the voting card is used as an identity card for accessing to services provided by public and private organizations.
The Federal Electoral Institute (IFE), the non-government public agency in charge of the electoral registry and issuing the photo-voting card, protested against the adoption of the NIC. IFE feared that the NIC would discourage citizens from enrolling in the electoral registry, diminishing their participation in elections. The Federal Institute for Freedom of Information and Data Protection (IFAI) questioned the necessity of the NIC and required the Ministry of the Interior to conduct a privacy impact assessment. After a period of intense negotiation, IFE and the Ministry of the Interior reached an agreement on the subject. There would be no NIC (thus keeping the photo-voting card as the national identity card), but the Ministry of the Interior would collect the iris scans and fingerprints of individuals and integrate these biometrics into the National Population Registry.

Despite the agreement, the Calderon administration relaunched the NIC in 2011. This time the target of the campaign was individuals under the age of eighteen. The government argued, among other things, that the NIC would help in its fight against the trafficking of minors. The relaunching of the card once again provoked strong criticism from the media and political actors. IFE argued that the Ministry of the Interior breached the agreement they had previously reached. IFAI deemed excessive the collection of fingerprints and iris scans for the purpose of issuing identity cards to minors. The Mexican Congress exhorted the government to suspend the NIC until new legislation was passed, but the Ministry of the Interior ignored the petition. The Mexican Congress then filed a ‘constitutional dispute’ lawsuit (explained above) in the Supreme Court of Mexico, alleging that the Executive acted ultra vires. Despite the pressing and important nature of the issue, the Supreme Court dismissed the lawsuit on procedural

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620 Alfonso Urrutia, “Pactan Gobernación e IFE registrar las huellas dactilares y el iris de los electores”, La Jornada (13 January 2010) 10, online: <http://www.jornada.unam.mx/2010/01/13/politica/010n1pol>.
grounds. The government thus went on collecting the fingerprints and iris scans from individuals below the age of eighteen. The NIC program lasted until the end of the Calderon administration. When the Peña Nieto administration (2012-2018) assumed power in December 2012, it suspended the NIC program. It is estimated that the Calderon administration captured 6.8 million records and issued 1.3 million cards. The NIC was finally cancelled in 2015.

As with the case of RENAUT, the National Identity Card project illustrates the limitations constitutional law has in the protection of privacy in Mexico. The issue at stake was, again, whether the mandatory collection, retention, use and disclosure of personal information (biometric information) carried out by the state posed an interference with the privacy of individuals and whether such interference should be acceptable in a democratic society. Despite the privacy-invasive nature of the NIC, the attention of the media and political actors was not drawn to the collection of biometrics and how this collection infringed upon the right to privacy of Mexicans. Rather, dispute centered on the fact that the NIC overlapped with an existing photo-voting card. Several things can explain this. First, as already explained in this chapter, the Mexican Constitution does not include a general right to privacy. This meant there was no clear right to point to and upon which to base a complaint for privacy invasion. It was difficult to argue that the NIC violated the right to privacy if such a right was not explicitly mentioned in the Constitution. Second, as also explained above, the Mexican constitution includes provisions aimed at protecting privacy, but these provisions deal with the inviolability of the person, home, correspondence and communications. In the case at hand, the NIC did not amount to a violation of any of these zones, rendering these provisions inapplicable. Third, given that the Supreme Court of Mexico has yet to articulate a right to privacy as a discrete entitlement in its jurisprudence, the interpretation of the constitutional provisions aimed at protecting privacy was of little help for arguing that the NIC infringed upon the privacy of Mexicans. The National Identity Card case thus shows us that the media, political actors and the general public understood that the NIC posed a threat of invasion to the privacy of Mexicans. Even if these actors had argued that the NIC violated the right to privacy, it would have been difficult to point

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627 Antonio Baranda, “Tiran Cédula…y millones”, Reforma (2 October 2015) 1, online: <www.reforma.com>
out which legal right was being infringed upon by the NIC. While it would be dangerous to conclude that the NIC would have been stopped if a stronger constitutional protection of privacy had existed in Mexico, such protection would have given Mexicans the opportunity to challenge a mandatory data processing that posed a potentially unwarranted interference into their private lives.  

8. International Human Rights Law on Privacy as a Means of Compensating for the Limitations of Constitutional Law

The RENAUT and the NIC cases clearly show us the limitations of constitutional law in Mexico. The absence of a general right to privacy in the Mexican Constitution and the lack of normative frameworks aimed at protecting privacy have made difficult the articulation of arguments against the mandatory collection, retention, use or disclosure of personal information carried out by the Mexican state. Both cases make clear the difficulties individuals have endured when resisting state programs posing substantial interferences with their private lives. Instead of contesting such programs through legal arguments, several individuals turned to non-institutional mechanisms to protect their privacy. Furthermore, in the case of RENAUT, the ruling of the Supreme Court of Mexico clearly shows us the Court did not even consider that the mandatory collection, retention, use or disclosure of personal information carried out by the Calderon administration posed a threat of interference with the private lives of individuals. As argued before, the Court was mired in historical and textual interpretations of constitutional provisions, losing an opportunity to expand the content of Article 16 of the Mexican Constitution. The Court, in other words, missed an opportunity to articulate a right to privacy that could have been used to protect individuals from interferences with their private lives carried out by the state by way of data processing.

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628 It should be noted, however, that a stronger constitutional protection of privacy does not necessarily prevent the adoption of national identity cards. Article 18 of the 1978 Spanish Constitution, for instance, provides that “the right to honour, to personal and family privacy and to the own image is guaranteed” and that “the law shall limit the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.” Despite this provision, Spain adopted in 2005 a ‘smart’ national identity card. The card includes a chip containing sensitive personal data, such as a face photograph, the fingerprint of the right forefinger, and personal signature. See Real Decreto 1533/2005, de 23 de diciembre, por el que se regula la expedición del documento nacional de identidad y sus certificados de firma electrónica published in the Official Gazette [Boletín Oficial del Estado] number 307 on 24 December 2005, online: <https://www.boe.es/buscar/doc.php?id=BOE-A-2005-21163>. For an English version of the Spanish Constitution, see Spanish Constitution of 1978, online: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>
It should be noted that when the RENAUT and the NIC cases took place, public-sector data protection legislation was in force in Mexico. This legislation, however, could not prevent the creation of RENAUT and the collection of the biometrics prescribed by NIC. As explained in Chapter Two, data protection laws do not give individuals a right to withhold personal information. The rights included in the Mexican statute can be enforced once the information is collected, but they cannot stop the creation of massive databases such as RENAUT or new biometrics-based registries.

I would argue that the international human rights law on privacy analyzed in Chapter One could compensate for these limitations of constitutional law, improving the law in Mexico and further protecting the privacy of individuals, especially in cases similar to those described above. The fact that international human rights treaties articulate a right to privacy as a discrete entitlement could be of great help in assisting individuals to make their privacy claims. It means that these treaties can be used to point to a clear and normative right to privacy that might be violated through the mandatory collection, retention, use or disclosure of personal information carried out by the state. In the cases examined so far, it could have been argued that both RENAUT and NIC posed an infringement upon the right to privacy included in Article 17 of the International Covenant on Civil and Political Rights and in Article 11 of the American Convention on Human Rights. In this way, both articles could have been used as legal grounds to base a complaint for privacy invasion.

A further reason for arguing that international human rights law could improve privacy protection in Mexico relates to normative frameworks developed by authoritative interpreters of human rights treaties. As discussed in Chapter One, these frameworks can be used to examine the legality, necessity and proportionality of the restrictions on the human right to privacy. Although these frameworks were not yet developed when the RENAUT and the NIC cases took place, similar normative frameworks aimed at examining restrictions on human rights could have been used to examine both RENAUT and NIC. A proportionality test, for instance, could have been used in the RENAUT case to determine whether the aggregation of cell phone numbers, names and CURPs in a single database was indeed necessary to tackle organized crime. The very same test could have been used in the NIC case to examine whether the fingerprints and iris scans of individuals were the least intrusive available option for creating a national identity registry. The use of human rights normative frameworks could have thus been used for
determining whether RENAUT and the NIC implied an interference with the private lives of individuals. If such interference did take place, the frameworks could also have been used to determine whether the interference was proportionate to the end sought by the Mexican government.

This analysis simply did not take place in Mexico. This does not mean we cannot do it now. It is through the aid of the international human rights law on privacy that Mexico can compensate for its current limitations in constitutional law, improving the protection of privacy for Mexicans.

9. The Adoption of a Human Rights Approach in Mexico

Given the particularities of the Mexican political and legal system described in this chapter, can the use of the fundamental rights and freedoms vested in human rights treaties improve the protection of privacy in Mexico? I believe the answer is yes. First, almost all human rights treaties, universal and regional, expressly recognize a discrete right to privacy. These treaties include a normative standard that could be used by Mexican judges, litigators and scholars to overcome the textual limitations of the 1917 Constitution. Given Mexico’s civil law legal tradition and the legal sources of its legal system, the right to privacy articulated in human rights treaties could be very useful. By using this right, Mexican judges, litigators and scholars could better articulate their claims and advance the protection of other values and interests that have been protected through a right of privacy by international tribunals and human rights bodies. Second, by using the right to privacy included in human rights treaties, Mexican judges, litigators and scholars could also use the jurisprudence of human rights tribunals to support their claims. The analytical frameworks of the right to privacy developed by these tribunals would also be available for those judges, litigators and scholars to support their arguments. As will be discussed in Chapter Five, Mexico accepted the jurisdiction of the Inter-American-Court of Human Rights in 1998, establishing its rulings as a legal source within Mexican law. Third, by using the right to privacy included in human rights treaties, and the jurisprudence and principles developed by authoritative human rights interpreters, the Supreme Court of Mexico could choose to begin creating a clearer right to privacy and right to privacy jurisprudence, bypassing some of the constraints imposed by the text of the 1917 Constitution. Fourth, a right to privacy like the one included in human rights treaties could further promote a culture of privacy protection in
Mexico. Scholars would have yet another normative concept that could improve the privacy scholarship that has somehow remained largely absent.

The adoption of the right to privacy included in human rights treaties such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights seems a true alternative following the 2011 constitutional amendment to Article 1 of the 1917 Constitution. As will also be explained in Chapter Five, this amendment has incorporated into the constitutional text the rights and freedoms included in the human rights treaties that Mexico has ratified, thus expanding the number and content of the fundamental rights and freedoms already established in the 1917 Constitution. This means the international human right to privacy could be used now by judges, litigators and scholars as a normative standard to protect the privacy of Mexicans.

Before I explain how the international human rights on privacy can be incorporated into the Mexican legal order, in the next chapter I examine the protection of privacy afforded by Mexican civil law. While this law mostly governs relations between private individuals, its provisions may be applicable to relations where the Mexican state is a party. This includes provisions aimed at protecting the privacy of individuals. Can these provisions be used to contest the mandatory collection, retention, use or disclosure of personal information carried out by the state that poses an undue intrusion upon the private life of Mexicans? This is the subject of the next chapter.
Chapter 4
The Protection of Privacy in Civil Law in Mexico

1. Introduction

As mentioned in the previous chapter, legal codification occurred in continental Europe during the nineteenth century. Countries that followed this movement have enacted several codes, thereby establishing many rights and obligations classified in different subject areas. Of all these normative instruments, the civil code occupies a prominent role. This is because it is the main source of civil law—law governing relations between private individuals, citizens or not, usually excluding relations in which the government is a party. Civil law is based on the Roman tradition and has been developed through the ages, attaining increased technical refinement and stability than public law. For this reason, some scholars consider that civil law “is the center, the very heart” of law in civil-law jurisdictions. This is the case with Mexico. The 1928 Civil Code plays an important role in the Mexican legal system because it regulates basic relations between individuals: birth, marriage, divorce, inheritance, personal contracts and other obligations.

Despite the fact that the Mexican Civil Code mostly governs relations between private individuals, its provisions may still apply, in certain situations and under specific conditions, to relations where the Mexican state is a party. This is the case of the civil law protection of privacy. As this chapter explains, following a 1982 amendment to the Civil Code, an action for compensation for moral damage caused by privacy invasion was introduced into Mexican law. This action is usually brought by an individual who suffers an intrusion upon his private life by another individual and/or legal person. The same action, however, can be brought against the state where the state and/or its officials are responsible for moral damage. This chapter examines this protection of privacy provided by Mexican law. While the Civil Code does not include a right to privacy as such, it contains certain provisions aimed at protecting an individual’s private life. The problem is, however, that such provisions have several limitations, making the civil law

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630 Ibid at 110.
protection of privacy unsuitable for challenging the mandatory collection, use or disclosure of personal information that poses an invasion to an individual’s privacy. This chapter explores these limitations, especially in those cases where the state is the party carrying out the data processing, and closes by arguing that Mexico could use international human rights treaties to strengthen its civil law protection of privacy, just like other civil-law countries have done in this matter.

2. Codification in Mexico

Codification is “the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code”.632 This definition may vary over time and legal system.633 In continental European countries that followed the Roman-canon law tradition,634 codification meant the collection of legal rules by subject area, arranged in a systematic, organized, comprehensive and logical form.635 The codification movement was inspired by the doctrines of the school of natural law,636 a school that proclaimed that through human reason, a complete, concise and perfect code could be developed. Such a code “would be of universal application and would meet the demands of justice in every case.”637 Codification assigns a prominent role to legislation,638 rendering other sources of law such as customs, jurisprudence, or legal principles supplementary.639 They only apply if legislation authorizes so.

632 Black’s Law Dictionary 10th ed, sub verbo “codification”.
633 For a history of codification, see Roscoe Pound, “Sources and Forms of Law” (1946) 22 Notre Dame Lawyer 1 at 41-80.
636 John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 29; René David, supra note 629 at 15.
637 Roscoe Pound, supra note 633 at 53-54; see also José Castán Tobeñas, Derecho Civil Español, vol 1, 8th ed (Madrid: Reus, 1951) at 142-143.
638 Roscoe Pound, supra note 633 at 59, 71;
639 S.A. Baytich, “La codificación en el derecho civil y en el common law (Estudio Comparativo)” (1970) 7 Boletín Mexicano de Derecho Comparado 3 at 10.
640 María del Refugio González, supra note 635 at 99. As John Herryman and Rogelio Pérez-Perdomo relate “judicial decisions [were] not law […] and in the nineteenth century law became synonymous with legislation. The legislature could delegate some of that power […] but such “delegated legislation” was in theory effective only
Although Latin America understood codification in the European terms described above, codes played a different role in the region. They served as the basis for the development of the Latin American legal systems. In the case of Mexico, there was no law or legal system as such when the country finally became independent from Spain in 1821. Colonial laws coexisted with legislation enacted by Mexican congresses, adding confusion when choosing an applicable law. Given that Spanish colonial laws were not immediately replaced by Mexican laws, it was often unclear if colonial laws were still in force and, if they were, in which order and to what extent. This chaos in legislation lasted almost fifty years, culminating with the codification process toward the end of the nineteenth century.

Codification was therefore necessary to achieve faster, forceful and more efficient justice in Mexico. This particular need did not, however, make the Mexican codification a mere process of systematizing laws. Codification in Mexico was similar to that which occurred in Europe in the early nineteenth century. As a former European colony, Mexico was exposed to the ideas of rationalism that influenced the codification movement in Europe. The assumption under this movement, as John Merryman and Rogelio Perez explain when referring to French codification, was that “by reasoning from basic premises […] one could derive a legal system that would meet the needs of the new society and the new government.” Given that Mexico was emerging as an independent nation and planning its new society and government, it is no surprise that the

within the limits provided in the delegating legislation. The legislative power was supreme.” John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 23-24.
642 Roscoe Pound, supra note 633 at 61.
643 For the Spanish colonial legislation that applied in Mexico until the Mexican codes were enacted by the end of the nineteenth century, see María del Refugio González, Historia del Derecho Mexicano (Mexico City: Universidad Nacional Autónoma de México, 1983) at 46-48.
645 María del Refugio González, supra note 635 at 97-98.
647 John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 29
country strongly borrowed from the European codification movement, in particular the French movement. As a result, during the last part of the nineteenth century and into the following century, Mexico enacted the five codes prescribed by the French codification model—civil, criminal, mercantile, civil procedure and criminal procedure. In all these codes, Mexico adopted the broad European codification principles: equality before the law, respect for private property, the existence of individual rights against the state. In following the European codification movement, Mexico structured its legal system guided by the civil law tradition.

Many legal rights and obligations are included today in the Mexican codes. At the federal level, these codes are: 1) the civil code; 2) the code of civil procedure; 3) the penal code; 4) the code of criminal procedure; 5) the tax code; 6) the code of commerce; and 7) the code of military justice. Similar codes exist at the state level with the exception of the last two, which subject matter falls under federal jurisdiction. Even though no right to privacy is referred to in these bodies of law, some codes afford important privacy safeguards. As already stated, this chapter sets aside other codes, focusing on civil code. This is precisely because, as will be explained, its provisions may apply to the state and its public servants, leaving the door open to covering cases of private life invasions through mandatory collections, uses or disclosures of personal information.

3. The Mexican Civil Code

As stated previously, Mexico’s first civil code appeared in 1870, replacing the former Spanish colonial legislation. It was modeled upon the French Code Civil of 1804, but also incorporated the Spanish legal tradition. This first Mexican civil code was replaced by the 1884 Civil Code,

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649 A legal tradition is understood here in the form described by John Merryman and Rogelio Pérez-Perdomo as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught”. The civil law tradition originated in 450 B.C. with the publication of the XII Tables in Rome. See John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 2.

650 After an amendment to the Mexican Constitution published in the Official Gazette [Diario Oficial de la Federación] on 10 February 2014, criminal procedure now falls under federal jurisdiction. See Article 73, fr. XXI, c) of the 1917 Constitution. As a result, federal congress enacted the National Code of Criminal Procedure, abrogating all codes of criminal procedure that were in force both at the federal and state level. See the Transitory Third Article of the National Code published in the Official Gazette [Diario Oficial de la Federación] on 5 March 2014, online: <http://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP_291214.pdf>

651 See Chapter Three. See also María del Refugio González, supra note 447 at 204-207.
which did not change the French and Spanish influences, but rather reinforced the liberal nature of its predecessor. Another code was enacted in 1928, taking effect in 1932. Although this code kept most of the existing liberal tenets, it also introduced some of the social rights and principles advocated during the Mexican Revolution (1910-1917). This revolution vindicated rights for two groups of people, workers and peasants, who were oppressed during the dictatorship of Porfirio Díaz (1876-1911). When the Mexican Revolution ended, social rights were entrenched in the 1917 Constitution (still in force today), and new legal statutes (codes included) had to be enacted as a result. The 1928 Civil Code is one of those statutes. It contains several norms intended to protect people situated in a vulnerable position—not just workers and peasants—by imposing certain limits on individual rights, such as the right to property or freedom of contract. In this way, the civil code “harmonized individual interests with those of society, thus correcting the excess individualism permitted by the Civil Code of 1884.”

Originally promulgated both as a local code for Mexico City (Federal District) and as a federal code, the 1928 Civil Code applies today to Mexicans and foreigners alike in federal matters only. Its long-standing historical tradition has exerted a strong influence in Mexican state law to the extent that almost all state civil codes are copies of the now Federal Civil Code.

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652 See Ignacio Galindo Garfias “El Código Civil de 1884, del Distrito Federal y Territorio de la Baja California” in Un siglo de derecho civil mexicano. Memoria del II Coloquio Nacional de Derecho Civil (Mexico City: Universidad Nacional Autónoma de México, 1985) at 9-10. The author argues that, just as its predecessor (1870 Civil Code), the 1884 Civil Code is an expression of constitutional federalism, political individualism and economic liberalism. Given its liberal nature, one novelty of the 1884 Civil Code is the derogation of the provisions related to forced heirship and the introduction of total freedom of testation. Ibid at 13.

653 Sara Montero Duhalt, “La socialización del derecho en el Código Civil de 1928” in Un siglo de derecho civil mexicano. Memoria del II Coloquio Nacional de Derecho Civil, supra note 652 at 158.

654 For an example of a limit on the right to property, see Title Twelfth “Of the Homestead [Patrimonio de Familia]” of the1928 Civil Code. For an example of a limit on freedom of contract, see Article 17 of the1928 Civil Code. For an English translation of these provisions, see The Mexican Civil Code trans. by Michael Wallace Gordon (New York: Oceana Publications, 1980) at 152-157 and 4, respectively. For a thorough discussion of the social rights introduced by the 1928 Civil Code, see Sara Montero Duhalt, supra note 653 at 162-175.


657 For the purposes of this chapter, the terms 1928 Civil Code and Federal Civil Code will be used interchangeably
Therefore, by studying this document, one would acquire a fairly, accurate description of how civil law works in Mexico at the federal and state levels.

The civil law tradition commonly distinguishes between public and private law. Civil law in Mexico is grouped, along with commercial law, in the latter category. The 1928 Civil Code follows the Roman civil law model and thus regulates the law of persons and family (Book First), of property (Book Second), of succession (Book Third), and of obligations (Book Fourth). Privacy safeguards are contained in the last book as will be discussed below. In order to understand these safeguards, some notions related to civil liability and moral damage must first be explained.

4. Civil Liability, Patrimonial Liability, and Moral Damage in Mexican Law

4.1 Civil Liability

The Fourth Book of the 1928 Civil Code contains what is traditionally called the “Law of Obligations” in the civil law tradition. The First Title in this Book includes six chapters, all aimed at regulating different sources of obligations. Chapter V entitled “Of Obligations which Arise from Illicit Acts” lists the principles that are applied in cases of civil liability. This liability is imposed on a person when he, acting illicitly or against good customs, causes damage to another. The person who causes the damage is obliged to repair it unless he proves that it occurred as a consequence of the fault or inexplicable negligence of the victim. Chapter V thus contains what could be considered the tort law in Mexico.

Civil liability in Mexico requires three elements: 1) the commission of an illicit act; 2) the causation of damage to the plaintiff and 3) a causal relationship between such commission and

658 Roman law regulated the law of persons, the family, inheritance, property, torts, unjust enrichment, contracts and the remedies by which interests falling within these categories are judicially protected. See John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 6, 68.


660 Article 1910 of the Civil Code provides: “He who acting illegally or against good customs causes damage to another, is obliged to repair it, unless he proves that the damage was caused in consequence of the fault or inexcusable negligence of the victim.”

causation. An illicit act is not a criminal offence but rather any “act that is contrary to the laws of public policy (orden público) or to good customs.”662 The plaintiff has to prove that the defendant committed an illicit act intentionally or negligently and the act caused him damage.663 Furthermore, damage has two components: a) damages, the loss or diminution of assets suffered as a result of the failure to comply with an obligation;664 and b) losses, the deprivation of any legal gain which should have been obtained from the fulfillment of an obligation.665 Finally, damages and losses must be the direct and immediate consequence of the failure to comply with an obligation,666 which, in this case, is a negative duty—the duty of not committing an illicit act.

4.2 Patrimonial Liability

The rules of civil liability apply to the state. Since its enactment in 1928, and until 2002, the civil code established that the state was liable for damages caused by its officials in the exercise of their duties. This civil liability of the state, however, had a subsidiary nature: the state would only pay for damages if the official responsible had no property, or that which he had was insufficient to cover the damage caused. Only in those cases where an official acted both unlawfully and maliciously, the liability of the state was joint and several.667

In 2002, through a constitutional amendment, state civil liability was incorporated into the 1917 Constitution under the name ‘patrimonial liability.’ This amendment marked an important change in the nature of state liability. It went from being subjective and subsidiary to objective

662 Article 1830 of the Civil Code provides: “An act is illicit when it is contrary to the laws of public policy (orden público) or to good customs”.
663 Jorge A. Vargas, supra note 661 at 193.
664 Article 2108 of the Civil Code provides: “By damages is understood the loss or diminution of assets suffered as a result of the failure to comply with an obligation.”
665 Article 2109 of the Civil Code provides: “The deprivation of any legal gain which should have been obtained from the fulfillment of the obligation is considered as a loss.”
666 Article 2110 of the Civil Code provides: “The damages and losses must be the immediate and direct consequence of the failure to comply with the obligation, whether they have been caused or must necessarily be caused”.
667 The joint and several liability of the state was incorporated into the Civil Code through an amendment published in the Official Gazette [Diario Oficial de la Federación] on 10 January 1994. Article 1927 then provided: “The State is liable for the damages caused by its officials in the exercise of the functions confided to them. This liability shall be joint and several in the case of intentional illicit acts, and subsidiary in all other cases, in which event it can be enforced against the State only if the official directly responsible has no property, or that which he has is insufficient to cover the damage caused”. Article 1927 was repealed by the Patrimonial Act, see infra note 671.
This meant the state could be held directly liable for damages caused by its officials in the exercise of their duties, regardless of whether such officials acted unlawfully and maliciously. As a result of this amendment, the 1917 Constitution today declares that the state has direct and objective liability in cases where individuals suffer damage to their assets and/or rights as a result of ‘irregular administrative action.’ If such damage is caused, individuals are entitled to indemnification. Furthermore, the Supreme Court of Mexico has interpreted the patrimonial-liability constitutional provision as stipulating a legal obligation on the part of the state (to indemnify) and, at the same time, a subjective right (to receive an indemnification) for individuals affected by state-caused damage.

In 2004, the Federal Congress enacted the Federal Act on Patrimonial Liability of the State, detailing the legal framework applicable to cases where individuals suffer damage to their assets or rights as a result of irregular administrative action on the part of the federal state. The Patrimonial Act did not change the three-element requirement of civil liability described above. This means that in order to obtain an indemnification a plaintiff must show that the damage he suffered to his assets and/or rights is a direct consequence of an ‘irregular administrative action.’ The Patrimonial Act defines ‘irregular administrative action’ as any action causing

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669 The constitutional amendment was published in the Official Gazette [Diario Oficial de la Federación] on 14 June 2002. Article 113 of the 1917 Constitution at the time provided: “[…] The State shall have direct and objective liability in cases where individuals suffer damage to their assets and rights as a result of irregular administrative action. Individuals shall be entitled to indemnification according to the bases, limitations and procedures established by law”. This provision is now under Article 112 of the 1917 Constitution, following an amendment published in the Official Gazette [Diario Oficial de la Federación] on 27 May 2015, online: <http://www.dof.gob.mx/nota_detalle.php?codigo=5394003&fecha=27/05/2015>

670 See tesis aislada 1a. LII/2009 which heading is RESPONSABILIDAD PATRIMONIAL DEL ESTADO. EL ARTÍCULO 133, SEGUNDO PÁRRAFO, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS ESTABLECE UN DERECHO SUSTANTIVO A FAVOR DE LOS PARTICULARES (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXIX, abril de 2009 at 592.) For the meaning of tesis aislada, see infra note 698.


672 Some states in Mexico have followed the path taken by the federation, enacting similar Patrimonial Acts within their own jurisdictions. If such an Act has not yet been enacted by a state, the civil-liability rules of its state civil code remain in force.

673 See Article 21 and Article 22 of the Patrimonial Act, supra note 671.
damage to the assets and/or rights of an individual and where the individual is under no legal obligation to bear such damage (Article 1). Additionally, the Supreme Court of Mexico has stated that an ‘irregular administrative action’ is “an irregular activity of the State, understanding this activity as the acts of the Administration performed in an illegal or abnormal form; that is, without regard to the normative conditions or parameters created by the Administration itself.” Although the Court’s interpretation of ‘irregular administrative action’ seems broad, the Court has nevertheless made clear that there will be no state liability in cases where damage to the assets or rights of an individual is the result of the “regular or licit functioning of the Administration.”

In summary, for the state to be liable for damage caused to the assets and/or rights of an individual (patrimonial liability) several conditions must be met: 1) the commission of an irregular administrative action; 2) the causation of damage to the plaintiff; 3) a causal relationship between an irregular administrative action and the damage; and 4) the plaintiff is under no legal obligation to bear the damage.

4.3 Moral Damage

Civil liability and patrimonial liability cover not only material or physical damage but also non-patrimonial damage. This latter damage, known as moral damage, is covered by both the Civil Code and the Patrimonial Act. The Patrimonial Act does not regulate moral damage, but, rather, refers to the relevant provisions of the Civil Code (Chapter V). This means that in order to understand moral damage in cases of patrimonial liability one must understand how moral damage is regulated by the Civil Code. As will be explained below, moral damage is caused when someone infringes upon the ‘personality rights’ of another. Among these rights, the right to

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674 See tesis de jurisprudencia P.J.42/2008 which heading is RESPONSABILIDAD PATRIMONIAL DEL ESTADO OBJETIVA Y DIRECTA. SU SIGNIFICADO EN TÉRMINOS DEL SEGUNDO PÁRRAFO DEL ARTÍCULO 113 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXXII, junio de 2008 at 722.) For the meaning of tesis de jurisprudencia, see infra note 698.

675 See tesis de jurisprudencia 2a./J.99/2014(10a.) which heading is RESPONSABILIDAD PATRIMONIAL DEL ESTADO. SU REGULACIÓN CONSTITUCIONAL EXCLuye A LA ACTIVIDAD ADMINISTRATIVA REGULAR O LÍCITA DE LOS ENTES ESTATALES (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 13, diciembre de 2014, t.1 at 297). For the meaning of tesis de jurisprudencia, see infra note 698.

676 See tesisaislada 1a. CLXXI/2014 which heading is RESPONSABILIDAD PATRIMONIAL DEL ESTADO. REQUISITOS PARA QUE PROCEDA (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 5, abril de 2014, t.1 at 820). For the meaning of tesisaislada, see infra note 698.
respect of private life exists. When an individual suffers a privacy invasion, he may therefore file a lawsuit for moral damage and obtain a monetary indemnification. To fully understand the concepts of private life and moral damage in Mexican civil law, a few other concepts need to be understood about the European doctrine of personality rights.

5. The Doctrine of Privacy as Personality Rights in Europe

Two important distinctions are basic in civil law: objective law and subjective right. The former is “the rule to which the individual must make his conduct conform”; the latter is “the power of the individual that is derived from the norm”. Subjective rights are divided in 1) absolute rights: rights that guarantee to the owner a power that he can exercise against all others (erga omnes), and 2) relative rights: rights that give him a power that he can exercise only against one or more determined person. The right to property is an absolute right. A contract creates relative rights. 677

There is a group of rights within absolute rights called personality rights. These rights date back to early twentieth-century continental Europe. Les droits de la personnalité were characterized by French authors as non-patrimonial rights; that is, rights that could not be estimated in money. 678 For this reason, “they were inalienable, imprescriptible and undescendible and could only be exercised and enforced by the owner himself and not by another.” 679 The extrapatrimonial nature of personality rights remains in France today, where these rights are intended to protect the person “in his individuality; they only confer upon their owner the power to defend himself against publication of his image, a disclosure of his private life or a use of his name without his consent.” 680

Similar rights have been protected in Germany, although that country has developed a complete, general personality right. 681 While the 1900 German Civil Code (Bürgerliches Gesetzbuch-BGB) does not include such a right, it embraces other personality rights such as protections for life,

677 John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 70-74.
680 Ibid at 154. The authors, however, recognize a trend in French courts to recognize some commercial exploitation of personality rights. Ibid at 154-156.
681 Ibid at 96-105
body, health, freedom and against the appropriation of one’s name. Moreover, legislation protecting one’s image was enacted in 1907, but honor and reputation were excluded from it because they were protected through criminal law. Finally, a general personality right in private law was interpreted in 1954 by the Federal Supreme Court (Bundesgerichtshof) from Article 1(1) and Article 2(1) of the Basic Law (Grundgesetz), the 1949 German Constitution. The Constitutional Court (Bundesverfassungsgericht) of this country ratified this interpretation in 1973. The general personality right has been used by German courts as a basis for the protection of privacy. An important example of this use is the Census case, in which the Constitutional Court interpreted the general personality right and the human dignity principle as granting a ‘right to informational self-determination,’ substantiating the protection of data privacy.

Therefore, rights to a name, to one’s image, to one’s honor, and especially to respect of one’s privacy are examples of personality rights in continental Europe. Given that these rights do not have an economic nature per se, they compose the moral patrimony of any person. Personality rights are also considered absolute rights, thus having erga omnes effect. This effect means they presuppose a duty by others—a negative duty of abstention in the right. For this reason, people have an obligation to refrain from interfering with one’s personality rights. If someone fails in this duty, he or she 1) commits an illicit act, 2) causes moral damage and 3) is subject to civil liability.

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682 See §831 of the BGB.
683 See §12 of the BGB.
684 See §22 of the Kunsturheberrechtsgesetz (Act on Copyright in Works of Visual Arts).
685 Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, supra note 679 at 98.
689 See Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, supra note 679 at 151 (noting that French courts started using the term moral patrimony in the 1960s.)
690 John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 74.
691 John Henry Merryman & Rogelio Pérez-Perdomo, supra note 634 at 76.
Therefore, as a personality right, privacy offers the following legal protection: if a person intrudes into the private life of another, the latter may suffer moral damage, thus having the right to be compensated for such damage in the terms prescribed by civil law.

6. Personality Rights in Mexico

Mexico incorporated the personality rights doctrine in its civil law during the second half of the twentieth century. Scholars from continental Europe have defined these rights extensively, exerting an important influence on Mexican civil law specialists. In general, it could be argued that Mexican academia has understood personality rights as rights intended to protect the essential ‘goods’ or ‘assets’ of any individual in order to assure him respect for his dignity as a human being. For one scholar, the goal of these rights is “the enjoyment of goods (or assets) that are essential or fundamental to the physical and spiritual life of an individual”.

Although the 1928 Civil Code does not expressly recognize personality rights, it lists certain values that are protected through these rights. These values were introduced into the Code in 1982 through a provision that describes moral damage:

Article 1916. For moral damage it should be understood the disruption (non-physical injury) a person suffers in his feelings, affections, beliefs, decorum, honor, reputation, private life, configuration and physical aspect, or in how he is perceived in the opinion of others. It is presumed that moral damage is inflicted when the

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694 Ignacio Galindo Garfías, *supra* note 693 at 330.

695 Several states in Mexico have recently incorporated into their Civil Codes a specific chapter containing personality rights. For a recent overview of these codes, see Lucía Alejandra Mendoza Martínez, *La acción civil del daño moral* (Mexico City: Universidad Nacional Autónoma de México, 2014) at 38-47.

696 The amendment was published in the official gazette [*Diario Oficial de la Federación*] on 31 December 1982, online: <http://www.diputados.gob.mx/LeyesBiblio/ref/cct/CCF_ref27_31dic82_ima.pdf>
liberty or physical or psychological integrity of individuals is illegitimately violated or deteriorated […] (emphasis added)

As said, the article does not mention the term personality rights, but rather lists values such as honor, reputation, private life or physical appearance (image) that have been traditionally considered as personality rights in continental Europe.\textsuperscript{697} Therefore, Article 1916 has become the basis for the development of a personality rights doctrine in Mexico notwithstanding that this provision only defines moral damage.

In 1987, the Supreme Court of Mexico interpreted Article 1916 as containing personality rights. The Court did not describe these rights, but rather provided a broad recognition through the following criterion:\textsuperscript{698}

MORAL DAMAGE. ITS REGULATION. The amended Article 1916 of the Civil Code of the Federal District [Federal Code] states that the feelings, affections, beliefs, decorum, honor, reputation, private life, configuration and physical aspect, or the opinion that others have about a person are the so called personality rights […] (emphasis added).\textsuperscript{699}

\textsuperscript{697} See Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, supra note 679 at 153, 94.  
\textsuperscript{698} For the purposes of this chapter I am using the word criterion to refer to either a ‘jurisprudencia’ or an ‘isolated thesis’. These concepts need to be explained briefly. Mexico has not adopted the rule of stare decisis as it is followed in common law jurisdictions. This does not meant, however, that judicial decisions are unimportant. They have been used as an instrumet for clarifying the ambiguities of the Constitution and other legal statutes, and for filling the gaps that are unavoidably left by legislative drafting processes. There are two types of federal judicial criteria in Mexico: 1) jurisprudencia (\textit{tesis de jurisprudencia}) and 2) ‘isolated thesis’ (\textit{tesis aislada}). The former is created by five consecutive decisions, sharing the same legal holding, uninterrupted by any incompatible ruling. Each of the decisions should be approved by a majority of eight Justices if the jurisprudencia is established by the Supreme Court \textit{en banc}, by four Justices if it is established by a Supreme Court chamber, or by the unanimous approval of all three magistrates if it is generated by a Circuit Collegial Tribunal. When jurisprudencia is established by the Supreme Court \textit{en banc}, it is legally binding to Supreme Court’s chambers, to all federal and state lower courts, and to administrative, military and labor courts. An ‘isolated thesis’ is a federal judicial resolution of the Supreme Court (\textit{en banc} or chambers), or of a Circuit Collegial Tribunal that decides a specific legal issue or question. When five of these ‘isolated thesis’ are consecutively rendered, adopting the same legal holding, uninterrupted by any incompatible ruling, a jurisprudencia emerges. For a brief explanation in English about the rules of jurisprudencia and ‘isolated thesis’ see John Henry Merryman, David S. Clark & John O. Haley, The Civil Law Tradition: Europe, Latin America, and East Asia (Charlottesville, Virginia: Michie Co., 1994) at 959-961; Jorge A. Vargas, supra note 661 at 241-243. For the current legal rules on ‘jurisprudencia’ and ‘isolated thesis’ in Spanish, see the Amparo Act of 2014 (\textit{Ley de Amparo reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos}), online: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_140714.pdf>  
\textsuperscript{699} See \textit{tesis aislada} which heading is DAÑO MORAL. SU REGULACIÓN (Semanario Judicial de la Federación, Séptima Época, Tercera Sala, Volumen 217-228, Cuarta Parte at 98.)
By not articulating any concept of personality rights, the Court left the door open to further judicial interpretations. Furthermore, in this criterion, the Supreme Court also declared that personality rights are important because they are prerogatives and powers that guarantee any individual “the development of his physical and moral personality.” The Court also stated that the values listed in Article 1916 are “inherent attributes of the human being.” These attributes are ‘assets or qualities of the personality’ that the legal order protects by conferring a ‘domain of power’ on individuals and by imposing on others a ‘duty to respect’ such assets. The Court concluded that the domain of power and the duty to respect are both embodied in a subjective right—the right to obtain reparation for moral damage.

Therefore, despite a lack of definitions, based on this judicial criterion, it could be said that the right to the respect of private life is a personality right under Mexican civil law.

7. Moral Damage in Mexico

According to Article 1916 of the Civil Code, if someone violates the personality rights of another, the former will inflict moral damage upon the latter. As with continental Europe, moral damage is thus an immaterial harm caused to an individual’s ‘moral patrimony’, which is made up of personal assets such as his feelings, affections, beliefs, decorum, honor, reputation, private life, configuration and physical aspect, or the opinion that others have about him. Consequently, an infringement to someone’s private life may cause moral damage in Mexico.

Article 1916 specifically lays out the steps for what happens when moral damage is caused. This provision follows the same civil-liability rules described above. If someone inflicts moral damage upon another by virtue of an illicit act or omission, the former has the obligation to repair such damage through a monetary indemnification. Article 1916 Bis specifies that the

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701 Ibid.
702 Article 1916 provides: “[…] If an illicit act or omission produces moral damage, the person responsible shall be liable for monetary damages, independent of any other liability for material damage by virtue of a contract (ex contractu) or law (ex lege). He shall also be liable for moral damage when objective liability occurs pursuant to Article 1913, including the State and its public servants, in accordance with Article 1927 and 1928 of this Code […]”
703 Article 1830 provides: “An act is illicit when it is contrary to the laws of public policy (orden público) or to good customs.”
plaintiff who sues for moral damage shall prove the defendant’s illicit act and the damage directly caused to him by such act. Mexican courts have read the moral-damage definition of Article 1916 textually and have interpreted this Article and Article 1916 Bis as establishing a three-part test: 1) the existence of an illicit act or omission, 2) an injury to the personality ‘assets’ (the values listed in Article 1916) caused by such illicit act or omission, 3) a cause-and-effect relationship between 1) and 2). If a plaintiff does not pass this test, no monetary indemnification will be awarded to him.

Article 1916 also provides the rules that apply to moral damage cases. A monetary indemnification shall be determined by the judge taking into account the injured rights, the degree of responsibility, the economic situation of the person responsible and that of the victim, as well as other circumstances of the case. Judges have thus a wide discretionary power when calculating indemnifications, but such power does not necessarily mean arbitrariness according to the Supreme Court. Other principles such as congruence, impartiality and prudence, equity, and the “rules of logic and experience” may be considered as well.

704 Article 1916 provides: “[…] In any event, who files for the reparation of moral damage for contractual or extra-contractual liability shall fully prove the illicit nature of the defendant’s conduct and the damage directly caused to him by such conduct.”

705 See tesis de jurisprudencia I.3.o.C.J/71 (9a.) which heading is DAÑO MORAL. ES LA ALTERACIÓN PROFUNDA QUE SUFRE UNA PERSONA EN SUS SENTIMIENTOS, AFFECTOS CREENCIAS, DECORO, HONOR, REPUTACIÓN, VIDA PRIVADA, CONFIGURACIÓN Y ASPECTOS FÍSICOS, O BIEN, EN LA CONSIDERACIÓN QUE DE SÍ MISMA TIENEN LOS DEMÁS, PRODUCIDA POR HECHO ILICITO (Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro IV, enero de 2012, t.5 at 4036).

706 See tesis de jurisprudencia I.3.o.C.J/56 which heading is DAÑO MORAL. PRESUPUESTOS NECESARIOS PARA LA PROCEDENCIA DE LA ACCIÓN RELATIVA (LEGISLACIÓN DEL DISTRITO FEDERAL.) (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXIX, marzo de 2009 at 2608); tesis de jurisprudencia I.11o.C.J/11 which heading is DAÑO MORAL. HIPÓTESIS PARA LA PROCEDENCIA DE SU RECLAMACIÓN. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXVIII, marzo de 2008 at 1556); tesis de jurisprudencia I.5o.C.J/39 which heading is DAÑO MORAL. REQUISITOS NECESARIOS PARA QUE PROCEDA SU REPARACIÓN. (Semanario Judicial de la Federación, Octava Época, num. 85, enero de 1995 at 65.)

707 See tesis aislada which heading is DAÑO MORAL. FIJACIÓN DEL. (Semanario Judicial de la Federación , Octava Época, t.XIV, julio de 1994 at 527): “the amount of the compensation shall be facultatively determined by the ordinary judge.”

708 See tesis aislada 1a.CCLV/2014 (10a) which heading is PARAMETROS DE CUANTIFICACIÓN DEL DAÑO MORAL. FACTORES QUE DEBEN PONDERARSE (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 8, julio de 2014, t.1 at 158): “several factors shall be considered when determining an indemnification for moral damage and can be classified according to their level of intensity in high, medium or low. In the case of the victim, such factors are: 1) qualitative ((a) the kind of right or interest that is deteriorated, (b) the existence of the damage and its level or gravity); 2) quantitative ((a) expenses caused by the moral damage, (b) pending expenses for such damage. In the case of the person who inflicts the moral damage, the factors are: 1) his degree of responsibility; 2) his economic situation.”
The Supreme Court has recently distinguished between “assessing the damage” and “determining the indemnification” in cases of moral damage. In the former, the judge establishes “the deteriorated right or interest and the degree of disruption caused by the damage”; in the latter, the judge determines how much money shall be awarded to the injured party as ‘indemnification for the damage’ and as ‘reproach’ for the wrong conduct of the defendant. In general, it could be said that the Supreme Court does not deem indemnifications as money-making mechanisms, but rather as a means to mitigating the effects caused by moral damage.

According to the abovementioned, under Mexican civil law, if an individual suffers an invasion of his private life, he can file a lawsuit for moral damage, and if he passes the test, a judge will award him a monetary indemnification. The indemnification will not restore the privacy invasion, but rather repair the ‘moral injury’ that was caused to him by such invasion. For this reason, some scholars consider that “an indemnification would palliate the prejudice with pleasures or advantages that will diminish in the plaintiff’s feelings or spirit the invaluable situation he suffered.” Several problems can be identified with this particular protection of privacy afforded by Mexican civil law.

709 See tesis aislada I.8o.C.34 C which heading is DAÑO MORAL. EN LA DETERMINACIÓN DE SU MONTO, TRATÁNDOSE DE DERECHOS DE AUTOR, LA ATORIDAD JUDICIAL DEBE RESPECTAR EL PRINCIPIO DE CONGRUENCIA Y NO PUEDE REBASEAR EL LÍMITE DE LAS PRETENSIONES DE LAS PARTES. (Semanario Judicial de la Federación, Octava Época, t.XIII, marzo de 1994 at 339): “judges cannot go beyond the claims asserted in the lawsuit.”
710 See tesis aislada I.8o.C.34 C which heading is DAÑO MORAL. LA CUANTÍA DE LA INDEMNIZACIÓN DEBE DETERMINARSE POR EL JUEZ, INDEPENDIENTEMENTE DE LA CANTIDAD PERDIDA EN LA DEMANDA (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXIX, febrero de 2009 at 1849): “the valuation of all elements shall be left to the prudent judgment of the court…which should reach an impartial and objective decision”.
711 See tesis aislada I.6o.C.410 C INDEMINIZACIÓN POR DAÑO MORAL Y RESARCIMIENTO POR DAÑOS MATERIALES. DISTINCIÓN ENTRE SU FINALIDAD Y CUANTIFICACIÓN. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXV, febrero de 2007 at 1849.)
712 See tesis aislada 1a.CCXLV/2014 (10a.) which heading is DAÑO MORAL. DIFERENCIA ENTRE LA VALORACIÓN DEL DAÑO Y SU CUANTIFICACIÓN PARA EFECTOS DE LA INDEMINIZACIÓN. (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 7, junio de 2014, t.I at 445).
713 See tesis aislada 1a.CCLIV/2014 (10a.) which heading is PARAMETROS DE CUANTIFICACIÓN DEL DAÑO MORAL. LOS INTERESES EXTRAPATRIMONIALES DEBEN SER REPARADOS. (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 8, julio de 2014, t.I at 159).
8. Problems with the Protection of Privacy under Mexican Civil Law

8.1 No Single Definition of the Right to Privacy

Although Mexico has adhered to the European personality rights doctrine, its civil law has yet to articulate a clear right to privacy. In other European jurisdictions such as France, the Civil Code was amended in 1970 precisely to introduce ‘a right to respect for one’s private life’.

Some authors suggest that the wording of the French provision (Article 9) “is almost identical to that of Article 8 of the European Convention on Human Rights.” Since Mexico has not defined such a right in its Civil Code, individuals find difficulties in articulating invasions to their private lives. The focus thus shifts toward the demonstration of moral damage, but, again, the Mexican Civil Code provides no indication of what could be considered a disruption into someone’s private life. Article 1916 was amended in 2007 and now declares that when someone “attacks” the private life of others, his conduct is as an “illicit act” and thus he has to repair the moral damage (fr. IV.).

This amendment, however, does not answer the question, when does someone disrupt into the private life of others or when does someone attack the private life of others?

It can be argued that a precise definition of a right to privacy might not be necessary if the legal system fully defines what an invasion of someone’s private life is. The Argentine Civil Code is a good example of this:

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715 See Article 22 of Loi n° 70-643 du 17 juillet 1970 tendant à renforcer la garantie des droits individuels des citoyens (Act of 17 July 1970 intending to reinforce the guarantee of individual rights of citizens.) Article 9 of the French Civil Code now provides in its first part: “Chacun a droit au respect de sa vie privée” (“Every one has the right to respect for his private life”), online: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20150326> For the English version, see, online: <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

716 Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, supra note 679 at 153. Article 8 of the European Convention on Human Rights states: “Everyone has the right to respect for his private and family life, his home and his correspondence.”


718 Article 1916 provides: […] “They shall be subject to repair moral damage according to the provisions of this code and, therefore, the following conducts shall be considered illicit acts: […] IV. He who offends the honor, attacks the private life or the image of a person.”
Art. 1.071 bis. He who arbitrary intrudes into someone else’s life, by publishing portraits, disseminating correspondence, mortifying others in their customs or feelings, or disrupting in any way his privacy[...]

Since this Article includes a clear indication of what could be considered an infringement of some one’s private life, it is not difficult for a plaintiff to bring a case before a court of law. Similar to the Mexican Civil Code, the Argentine Civil Code requires a privacy invader to pay an indemnification to compensate the person whose private life is invaded, but the Argentine Civil Code includes additional remedies such as injunction, explained in the next section.

8.2 Remedies afforded by the Mexican Civil Code

8.2.1 Indemnification but No Injunction for Privacy Invasion

The remedy granted by the Mexican Civil Code in the case of infringement of personality rights is an action to seek redress for the moral damaged inflicted by others. As discussed, a person may file a lawsuit for moral damage in cases where his privacy has been invaded, and if he passes the test, an indemnification will be awarded to him. The Civil Code does not, however, provide an action to prevent or stop the privacy invasion. No injunctive relief exists under Mexican civil law in cases of personality rights infringements. This means that civil law

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720 For some of these cases see Julio César Rivera, Gustavo Giatti & Juan Ignacio Alonso, supra note 714.

721 The Supreme Court of Mexico confirmed this assertion in 2012, in a case involving the undue circulation of a person’s image. The Court ruled that Article 20 of Mexico’s City Civil Liability for the Protection of the Right to One’s Private Life, Honor and Own Image Act cannot be interpreted as providing a precautionary measure aimed at ceasing the circulation of an image. The Court held that such Article provides a ‘restitutory measure’ that could only be used by a judge at the time he issues his ruling. See tesis aislada 1a.CLXXIV/2012 (10a.) which heading is LEY DE RESPONSABILIDAD CIVIL PARA LA PROTECCIÓN DEL DERECHO A LA VIDA PRIVADA, EL HONOR Y LA PROPIA IMAGEN EN EL DISTRITO
judges cannot adopt measures aimed at preventing or stopping an intrusion upon someone’s private life. This gap opens the possibility of extending the invasion of someone’s privacy over time. In other jurisdictions such as France\textsuperscript{722} or Argentina,\textsuperscript{723} injunctive relief is provided by the civil codes on the basis that a later award for moral damage cannot adequately redress the harms.\textsuperscript{724} An injunction might impose restrictions on other fundamental rights and freedoms, especially freedom of expression. The most common case is when the media discloses affairs that belong to someone’s private life. It is true that a restriction to freedom of the press is not desirable in any democratic society, but neither is a violation of someone’s privacy through the public exposure of his private affairs. A balance between these two rights must be achieved. A preliminary injunction is a useful legal mechanism aimed at achieving such balance. It can prevent or stop harm caused to an individual when others intrude into his private life. At the same time, such injunction will not resolve the question of whether or not the publication of private affairs should ever be banned. This difficult issue ought to be resolved by a judge after listening to the parties and examining the evidence. Notwithstanding these difficulties, it could be argued that individuals are better off when a legal system provides injunctive relief for cases of privacy invasions, even if such remedy is used in exceptional cases.

By not including injunctive relief in the Civil Code, Mexico lacks an effective tool for making a difference in the protection of the private lives of individuals.

8.2.2 Obligation to Rectify

Article 1916 of the Mexican Civil Code also provides that reparation for moral damage shall include an obligation to ‘rectify’ or ‘respond to’ information published in the media about

\textsuperscript{722}Article 9 provides: “[…] Without prejudice to the right to recover indemnification for injury suffered, judges may prescribe any measures, such as sequestration, seizure and others, suited to the prevention or the ending of an infringement of the intimate character of private life; in case of emergency those measures may be provided for by summary proceedings.”

\textsuperscript{723}Article 1071 Bis provides: “He who arbitrary intrudes in someone else’s life by publishing portraits, disseminating correspondence, mortifying others in their customs or feelings, or disrupting in any way his privacy […] shall be required to cease in such activities, if they have not ceased before […]”

\textsuperscript{724}Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, \textit{supra} note 679 at 182.
someone. The Code mandates that the rectification or response shall be published to the same extent as the original (i.e. same space, circulation and audience.) The measure, aimed at restoring “the authenticity of the personality in the public’s eye,” may contribute to effectively redress an individual whose honor, reputation or decorum was harmed by the media. The utility of this remedy seems dubious in cases of privacy invasions committed through revelation of private affairs. This is because rectification may further publicize such affairs.

This remedy must not be confused with the ‘obligation to publicize a judicial decision’ in cases where personality rights are at stake. In the latter, a judge requires the person who infringed upon another’s personality right to cover the expenses of the publication in the mass media of the judicial decision of the case. This remedy only proceeds at the victim’s request, and although it is included in Article 1916, it only applies in cases of defamation and misrepresentation, excluding invasions of someone’s private life.

8.3 Freedom of Expression Exception

Article 1916 Bis of the Mexican Civil Code provides that whoever exercises his rights of opinion, criticism, expression and information shall not be obligated to repair the moral damage, provided that he exercises his rights under the terms and with the limitations prescribed in Articles 6 and 7 of the Mexican Constitution. These articles are the constitutional guarantees of freedom of expression and freedom of the press. This exception means that if an individual discloses private facts of a person in exercise of his freedom of expression, he may not be required to repair the moral damage caused to that person through the disclosure. Although some courts have not interpreted Article 1916 Bis as giving a blank check to freedom of expression, the reality is that neither the Civil Code nor any other federal statute indicates what could be considered an invasion of someone’s private life. Article 1 of the 1917 Press Offences Act (still in force) used to include four definitions of what could be considered an ‘attack’ to someone’s

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725 Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, supra note 679 at 186.
726 Ibid.
727 See tesis aislada I.10o.C.14 C which heading is DAÑO MORAL. LIBERTAD DE IMPRENTA O PRENSA. LIMITANTES ESTABLECIDAS EN EL ARTICULO 7º CONSTITUCIONAL (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XIII, mayo de 2001 at 1120): “the publication of ideas or opinions is not unlimited […].”
private life. This provision, however, was repealed in 2012 in an attempt to remove any legal obstacles for the exercise of freedom of expression. Therefore, since no legal provision describes now what a privacy attack is, Article 1916 Bis may be interpreted broadly, precluding individuals from bringing before the courts cases where their privacy has been infringed by others through the disclosure of private facts.

8.4 Standard of Proof Required for Awarding Moral Damage Indemnification

As discussed, to award an indemnification for moral damage under Mexican Civil Law, the person whose privacy is invaded must prove the illicit act, moral damage and a causal link. Contrary to what happens in other jurisdictions, such as France where “‘fault’ and ‘non-material prejudice’ are held to be made out by the fact that the “right” to privacy has been infringed,” privacy-injured individuals in Mexico have to show these three elements. According to the abovementioned amendment of Article 1916 of the Civil Code, a person commits an illicit act when he “attacks someone’s private life.” Given that the Code does not define private life, it remains unclear what such an attack would be. As for the damage, it is difficult to prove the existence of pain, suffering or distress caused to someone through an invasion of his private life.

An ‘illicit act’ and an ‘attack to someone’s private life’ are thus key elements for awarding an indemnification for moral damage. The problem is, however, that these expressions are either defined broadly or not at all defined in Mexican law. As said, the Civil Code generally defines an illicit act as any act that is contrary to the laws of public policy (orden público) or to good customs. In 2014, the Supreme Court of Mexico described an illicit act as “the unlawful conduct of a person that unjustly injures the legal sphere of someone.” The Court defined ‘unlawful

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728 In general, Article 1 of the 1917 Press Offenses Act (Ley sobre Delitos de Imprenta) considered an attack to someone’s private life “any malicious manifestation or expression that, through the press or other media, exposed a person to “hate, disdain and ridicule” or “caused a discredit in his reputation”. Article 31 of the same Act provided different penalties, such as fines, arrest, and prison up to two years for those who attacked someone’s private life. For the repealed Articles, see, online: <http://www.diputados.gob.mx/LeyesBiblio/ref/ldi/LDI_orig_12abr17_ima.pdf> For the decree that repealed both articles, see, online: <http://www.diputados.gob.mx/LeyesBiblio/ref/ldi/LDI_ref01_11ene12.pdf>
731 See tesis aislada 1a. LI/2014 (10a.) which heading is HECHO ILÍCITO. SU DEFINICIÓN (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 3, febrero de 2014, t.1 at 661).
conduct’ as conduct contrary to the law that causes damage to others.\textsuperscript{732} If we follow the Court’s definition of an illicit act and the amendment of Article 1916 of the Civil Code, we can infer that when a person attacks someone’s private life, he commits an illicit act because he unjustly injures the legal sphere of another. The Supreme Court of Mexico has yet to interpret what ‘an attack to someone’s private life’ means in Article 1916 of the Civil Code. This means that, today, the expressions ‘illicit act’ and ‘an attack to someone’s private life’ do not provide clear parameters to be used for identifying situations of privacy invasion. As a result, a plaintiff will face challenges in meeting the standard of proof required to receive indemnification for moral damage caused through privacy invasion.

Additionally, judicial interpretations on the standard of proof required for awarding moral damage indemnifications have varied over time. These interpretations tend to focus not on violations of privacy, but, rather, on the general infringements of personality rights. In the late 1980s, the Supreme Court of Mexico considered moral damage to be “something subjective” that cannot be objectively proved as “it is difficult to prove the existence of pain or damage caused to someone’s feelings by a disruption to his honor or reputation.” An injured person therefore only needed to prove the “reality of the attack.”\textsuperscript{733} In the 1990s, several federal courts strengthened the abovementioned causal-link element by stating that in a moral damage trial, it has to be proved that an illicit conduct caused damage and vice versa.\textsuperscript{734} In the 2000s, some federal courts argued that the Mexican legislation adopts the ‘theory of proving the damage objectively.’ This means that in a moral damage case “it is not required to justify the effective existence of, nor the extension or gravity of the damage, which would lead us to an impossible proof. The corresponding demonstration and assessment [of the damage] are left to the wise discretion of the judge.”\textsuperscript{735} For this reason, an indemnification for moral damage will be justified “at the very moment when an illicit conduct and the reality of the attack are proved as both show the link

\textsuperscript{732} Ibid.
\textsuperscript{733} See tesis aislada which heading is DAÑO MORAL. PRUEBA DEL MISMO (Semanario Judicial de la Federación, Séptima Época, Tercera Sala, Volumen 217-228, Cuarta Parte at 98.)
\textsuperscript{734} See tesis de jurisprudencia which heading is DAÑO MORAL. REQUISITOS NECESARIOS PARA QUE PROCEDA SU REPARACIÓN, supra note 706.
\textsuperscript{735} See tesis aislada I.4o.C.58 C which heading is DAÑO MORAL EN EL DERECHO POSITIVO MEXICANO. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XVII, abril de 2003 at 1073.)
between the attacker and aggrieved person.”

The ‘theory of proving the damage objectively’ was later narrowed to apply only to cases where damage can be presumed; that is, where personality assets are intangible in nature, such as in the case of feelings, dignity and self-esteem. In these cases, the demonstration of the illicit act itself entails the exhibition of the damage.

In 2014, the Supreme Court of Mexico established new rules for the purpose of proving moral damage. The Court stated that moral damage needs to be proved directly or indirectly; the former through expert opinion, the latter through judicial inference. The Court also declared that only in those cases where the moral damage is presumed, a plaintiff has no obligation to prove such damage. Finally, the Court stated that in these cases, plaintiffs can provide additional evidence.

It remains unclear if an infringement of someone’s private life can be considered a case where moral damage can be presumed. Given the provisions of Article 1916 of the Civil Code and the moral-damage jurisprudence, this scenario seems possible, especially in cases where the invasion of privacy is committed through the revelation of private facts. This argument is based on the fact that Mexican courts have recognized that moral damage is presumed when someone disseminates via mass media information aimed at violating the respect owed to a person, the respect that makes him worth of esteem and credibility. At the time of writing this thesis,

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736 See tesis aislada I.7o.C.71 C which heading is DAÑO MORAL EN EL DERECHO POSITIVO MEXICANO. PRUEBA DEL. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXIII, junio de 2006 at 1147.)
737 See tesis aislada I.4o.C.300 C which heading is TEORÍA DE LA PRUEBA OBJETIVA DEL DAÑO MORAL. SÓLO ES APLICABLE CUANDO EL DAÑO SE PRESUME. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXXII, septiembre de 2010 at 1525.)
738 See tesis aislada I.5o.C.21 C (10a.) which heading is TEORÍA OBJETIVA DE LA PRUEBA DEL DAÑO MORAL. SU APLICACIÓN CUANDO SE AFECTA EL HONOR Y LA REPUTACIÓN DE UNA PERSONA POR INFORMACIÓN DIVULGADA A TRAVÉS DE INTERNET. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XXXII, septiembre de 2010 at 1525): “the dissemination of information through the internet aimed at harming the honor and reputation of a person is enough to prove the moral damage”.
739 See tesis aislada 1a.CCXLI/2014 (10a.) which heading is DAÑO MORAL. POR REGLA GENERAL DEBE PROBARSE YA SEA DE MANERA DIRECTA O INDIRECTA. (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 7, junio de 2014, t.1 at 447.)
740 See tesis aislada 1a.CCLXXIII/2014 (10a.) which heading is DAÑO MORAL. LAS PARTES PUEDEN ALLEGAR PRUEBAS AL JUZGADOR PARA ACREDITAR UNA MAYOR O MENOR GRAVEDAD DE ÁQUEL (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 8, julio de 2014, t.1 at 142.)
741 See tesis aislada I.10o.C.15 C which heading is DAÑO MORAL. EXPRESIONES CUYA PUBLICACIÓN ACREDITAN EN SI MISMAS QUE SE PRODUJO. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.XIII, mayo de 2001 at 1119): and tesis aislada I.5o.C.21 C (10a.)
however, a criterion establishing that moral damage is presumed in cases of invasion of privacy or disclosure of private facts has not been issued by Mexican courts.

9. The Role of the Civil Law Protection of Privacy in Mexico

As is made clear in the preceding section, privacy in Mexico is protected through the Civil Code, but this protection needs to be analyzed from a civil liability perspective. Although the Mexican Civil Code does not include a tort of invasion of privacy, privacy is protected under ‘tort logic’: a plaintiff needs to prove an illicit act, (moral) damage and a link between these two before he is awarded with an indemnification. This tort logic is consistent with the purpose of a Civil Code: the regulation of relations between private individuals. The product of the tort logic, however, is that an individual is protected mostly in cases where the invasion of his privacy results from the disclosure of his private affairs. This is because the dissemination of a person’s private affairs without his consent can demonstrate ‘with facts’ that an invasion of his privacy indeed occurred. The Mexican Civil Code does not include a right to privacy as such, nor does it describe conduct that may constitute an invasion of someone’s privacy. Given this, the chances of expanding the moral damage protection to non-disclosure-of-private-facts cases remain limited. For instance, an intrusion upon someone’s seclusion, which is privacy invasion because someone breaches upon the free-from-interference personal zone of another, might be a hard case to prove before a Mexican court for the purpose of getting an indemnification for moral damage. In this case, a plaintiff would find it difficult to prove ‘with facts’ the damage he experienced when someone disrupted his solitude or reserve.

The civil law protection of privacy in Mexico has therefore mainly been used to cover invasions of privacy through the dissemination of private facts. These invasions commonly involve the media, but given the freedom of expression exception described above, courts have been reluctant to protect privacy. This seems logical since this freedom is essential in any democratic society. In fact, in cases of conflict between freedom of expression and other personality rights,
Mexican courts have tended to favor the former. Most of these cases have involved politicians such as the president of a municipality in a state of Mexico or the first lady of the country. The Supreme Court of Mexico acknowledged that the media invaded the privacy of these persons, but since they were public figures, they had to give way to ‘society’s right to information.’ The Court clarified that these persons do not waive the legal protection of their private lives, but they need to “tolerate” a higher level of invasion because society has a legitimate interest in receiving information about them. Therefore, when a conflict between freedom of expression and privacy arises, the tendency is for an individual interest (i.e. personal privacy) to become subordinated to a general interest (e.g. society’s right to information.)

The evolution of the civil law protection of privacy is slowed because few civil-liability cases are brought before the Mexican courts. The fact is that Mexico has no long-standing tradition in civil-liability litigation. This includes not only moral-damage but also non-moral-damage cases, like those involving personal injury or wrongful death. In the case of the latter, some scholars argue that economic, professional and cultural reasons might explain the lack of civil-liability litigation. Monetary indemnifications tend to be very low, preventing attorneys from becoming interested in civil-liability cases. Injured parties thus opt for extrajudicial settlements as these tend to be more expedient and practical than bringing cases before a court of law. If non-moral-damage cases are infrequently brought before the Mexican courts, moral-damage cases, especially the ones related with privacy invasions, are less frequent because they are harder to prove.

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744 See tesis aislada 1a. CCXIX/2009, which heading is “DERECHO AL HONOR Y A LA PRIVACIDAD. SU RESISTENCIA FRENTE A INSTANCIAS DE EJERCICIO DE LA LIBERTAD DE EXPRESIÓN Y EL DERECHO A LA INFORMACIÓN ES MENOR CUANDO SUS TITULARES TIENEN RESPONSABILIDADES PÚBLICAS” (Semanario Judicial de la Federación y su Gaceta, Novena Época, Primera Sala, t. XXX, diciembre de 2009, página 278.)
745 Jorge A. Vargas, supra note 661 at 251
746 Jorge A. Vargas, supra note 631 at 86.
10. Limitations of Mexican Civil Law in Cases of Privacy Invasion through Data Processing Carried Out by the State

As has been explained in this Chapter, although the 1928 Civil Code is aimed at regulating relations between private individuals, an action for moral damage can still be brought against the Mexican state. Article 1916 of the Civil Code provides that “the State and its public servants” may be held responsible for repairing the moral damage caused to an individual. In these cases, Mexican jurisprudence has established that not only must a plaintiff pass the three-part test described above but he has also to show that the illicit act that caused him moral damage was committed by a public servant.747 Furthermore, in 2015 the Supreme Court of Mexico interpreted the Patrimonial Act to mean that, when a judge awards an indemnification for moral damage to a plaintiff, the judge “must hear expert opinions submitted by a plaintiff.”748 This means that if a plaintiff expects an indemnification for moral damage, he must obtain the opinion of a professional (e.g. psychiatrist or psychologist) confirming the damage he experienced in the values outlined in Article 1916 of the Civil Code (feelings, honor, reputation, private life, etc.) The Patrimonial Act further limits indemnification amounts in cases of moral damage committed by the state, thereby preventing money-making cases.749 While the Supreme Court of Mexico has considered that legislative limitations aimed at preventing abusive lawsuits in state liability cases are allowed by the 1917 Constitution, in 2009 the Court found the maximum amount prescribed by the Patrimonial Act for indemnification in cases of moral damage overly restricted.750 It remains to be seen if this latter opinion of the Court will increase litigation involving moral damage in the coming years.

747 See tesis de jurisprudencia I.11o.C.J/11 which heading is DAÑO MORAL. HIPÓTESIS PARA LA PROCEDENCIA DE SU RECLAMACIÓN, supra note 706.
748 See tesis aislada 2a. LIV/2015 (10a.) which heading is RESPONSABILIDAD PATRIMONIAL DEL ESTADO. PARÁMETROS PARA CUANTIFICAR EL DAÑO MORAL CAUSADO POR LA ACTIVIDAD ADMINISTRATIVA IRREGULAR (Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 19, julio de 2015, t.1 at 1080.)
749 See Article 14, fr. II of the Patrimonial Act, online: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFRPE.pdf> (placing the limit at a maximum of 20,000 times the daily wage in Mexico City. As of March 2015, the daily wage in Mexico City was $68.33 pesos. Therefore, the maximum would be $1, 366,600 pesos. The equivalent in U.S dollars would be $89,907.
750 See tesis aislada 1a. CLIV/2009, which heading is “RESPONSABILIDAD PATRIMONIAL DEL ESTADO. EL ARTÍCULO 14, FRACCIÓN II, SEGUNDO PÁRRAFO DE LA LEY FEDERAL RELATIVA, AL ESTABLECER UN TOPE MÁXIMO PARA LAS INDEMNIZACIONES POR DAÑO MORAL, VIOLA EL ARTÍCULO 113 SEGUNDO PÁRRAFO DE LA CONSTITUCIÓN GENERAL DE LA REPÚBLICA” (Semanario Judicial de la Federación y su Gaceta, Novena Época, Primera Sala, t. XXX, septiembre de 2009, página 454.)
Given its features, the civil law protection of privacy seems inadequate for challenging privacy invasion committed through the mandatory collection, use or disclosure of personal information (i.e. data processing) carried out by the state. Several reasons support this claim. First, it is difficult to imagine how the state would commit an illicit act simply by collecting, using or disclosing personal information. Given that the data processing carried out by the state is not itself against the law or good customs, it is highly unlikely that such processing will be considered an illicit act. Second, since the 1928 Civil Code does not provide a right to privacy on its own, no right is infringed when a government agency makes mandatory the collection, use or disclosure of personal information. Third, because the 1928 Civil Code does not define private or confidential information, the government can collect, use or disclose any personal data without infringing upon the Civil Code. Fourth, given that the Civil Code does not provide for injunctive relief, a citizen cannot stop or prevent data processing that infringes upon his private life. Such would be the case with a mandatory collection of DNA information. The collection of this type of information constitutes an infringement of an individual’s privacy which he has no legal recourse to stop or prevent under Mexican civil law. The focus thus needs to shift towards the infliction of moral damage caused by the collection, use or disclosure of personal information, but such focus also poses certain difficulties.

As described above, the 1928 Civil Code provides a remedy (monetary indemnification) for those cases where an invasion of someone’s privacy causes moral damage. The problem with this legal remedy is that civil-liability rules have been interpreted by the Mexican courts as establishing a test that seems difficult to pass. The test only gets harder to pass in cases where the state is the party collecting, using or disclosing personal information. Most of the time, harms caused to an individual’s privacy by data processing are not immediately evident. Worse yet, people often do not realize that their privacy is being invaded until bigger issues arise. Aggregation of personal data, for instance, does not show privacy harms until problems such as profiling appear. Profiling is the practice of categorizing people and attempting to predict their behavior based on their personal data. 751 While this practice can be inoffensive in some cases, it can also be unethical or negatively discriminatory when using race, ethnicity or national origin as

a key factor in determining the enforcement of law. But even in profiling cases, to prove moral damage can be difficult. In most of these cases there is no transparency in the handling of personal information. An individual may thus have little or no evidence that he can use to show that the ‘simple’ aggregation of personal data has caused him moral damage. Therefore, since he may not be able to prove the harm caused to his privacy by the collection, use or disclosure of personal information, no monetary indemnification will be awarded to him.

A further difficulty in passing the moral damage test established by Mexican courts is the requirement prescribed by both the 1917 Constitution and the Patrimonial Act. As explained, these documents stipulate that the state may be held liable for any damage caused to an individual’s assets or rights when such damage is a direct consequence of an irregular administrative action and the individual is under no legal obligation to bear the damage. Given this requirement, it seems difficult to characterize a collection, use or disclosure of personal information carried out by the state as an ‘irregular administrative action.’ In most cases, such collection, use or disclosure of personal information is authorized by law, meaning that the data processing would be considered a regular activity of the state and all individuals would be under legal obligation to comply with the data processing request. To meet the Patrimonial Act requirement, an individual would have to prove that the state carried out the data processing without legal basis and that such processing caused him moral damage. There are, therefore, limited possibilities for an individual to receive an indemnification for moral damage caused by privacy invasion committed by the state via mandatory collection, use or disclosure of personal information.

For all these reasons, it could be concluded that civil law in Mexico may not be the most suitable legal avenue for contesting privacy invasions carried out by the state through the mandatory collection, use or disclosure of personal information.

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752 David Lyon, supra note 6 at 185.
11. The Incorporation of a Human Rights Approach to the Protection of Privacy in Mexican Civil Law

Although Mexican civil law may not be the most adequate legal channel for contesting privacy invasions carried out by the state through mandatory data processing, Mexico could follow a human rights approach to overcome its civil law limitations in the protection of privacy. There are several reasons for this. First, Mexico has ratified almost all international human rights treaties and declarations such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (ACHR). These instruments include a right to privacy worded in similar terms. Given these ratifications, Mexico could use any of these instruments to strengthen the protection of privacy in the country. Article 17 of ICCPR, for instance, provides a clear, normative entitlement: “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”. Given its clarity, Article 17 could be used in Mexico to protect an individual’s privacy from unlawful or arbitrary interferences. The civil code limitations described above could thus be narrowed by adopting this normative entitlement, enhancing the protection of privacy in relations covered by civil law (i.e. between private individuals.)

Countries belonging to the civil law tradition have followed this approach. As mentioned above, France amended its Code Civil in 1970 and incorporated into Article 9 a provision stating that ‘everyone has the right to respect of his private life.’753 Several scholars and commentators have pointed out the similarity between the wording of this amendment and Article 8 of the European Convention on Human Rights of 1950.754 For Walter van Gerven, Jeremy Lever and Pierre Larouche the incorporation of an explicit right to privacy into the French civil code “has made not only a psychological impact, but also a legal impact.”755 Whereas the former means that individuals “do not baulk at requiring that [their rights] be judicially enforced,”756 the latter has

753 See supra note 715 and accompanying text.
simplified the rules of tort law established in Article 1382 of the French Civil Code. Similar to the Mexican action for moral damage, these rules require proof of fault, damage and a causal link. But Van Gerven, Lever and Larouche assert that the rules have been simplified “to the point of becoming purely formalistic, as both fault and non-material prejudice are held to be made out by the fact that the “right” to privacy has been infringed.”

Moreover, while these authors do not mention if French courts have articulated a definition for the right to privacy, they suggest that as a direct consequence of the elevation of privacy to the status of an autonomous right, “the link with the tortuous liability rules of Article 1382 C.civ. was loosened.”

The incorporation of a right to privacy similar to the one included in international human rights treaties is thus a possible path to follow by a country who wishes to overcome privacy-protection limitations in civil law. As the French case illustrates, once the right to privacy was incorporated into the Code civil, not only did individuals become more empowered to exercise such a right but the rigid rules of civil-liability were loosed to the extent that in France fault and non-material prejudice are now presumed in cases of infringements to the right to privacy. Therefore, a right to privacy like the one included in the international human rights treaties can make a difference in an individual’s life if a country incorporates such right in its domestic law.

Argentina has somehow followed a path similar to that of France. In 1975, the Civil Code was amended to introduce Art. 1.071 Bis, a provision describing what constitutes an invasion to an individual’s private life. While the amendment did not incorporate a right to privacy as such, it provided an action for reparation in cases of private life invasions, enhancing the protection of privacy in the country. In 2014, Argentina promulgated a new Civil and Commercial Code, which includes a specific Chapter devoted to the protection of personality rights. Although a right to privacy as such is not mentioned in this Chapter, the latter includes some privacy safeguards drafted in human rights terms. For instance, Article 51 provides for the ‘inviolability of the human person and the respect of his dignity,” and Article 52 states that if a human person

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757 Ibid.
758 Ibid.
759 See Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, supra note 679 at 153, nn 70 and 71.
760 See supra note 719 and accompanying text.
761 This assertion is made based on the cases that have been brought before the courts. See Julio César Rivera, Gustavo Giatti & Juan Ignacio Alonso, supra note 714.
762 See Chapter 3, Title I, Frist Book of the Civil and Commercial Code of the Nation, supra note 719.
is damaged in his personal or familiar intimacy, honor, reputation, image or identity, or if his personal dignity is impaired by any other way, he may demand the prevention and reparation of the damage suffered. The wording of both articles resembles that of Article 11 of the ACHR, which provides for the respect of someone’s honor and the recognition of his dignity, as well as the prohibition against any arbitrary or abusive interference with his private life.\textsuperscript{763} Therefore, a similar link to the one that exists between the French Civil Code and the European Convention on Human Rights can be found between Argentina’s Civil Code and the ACHR.\textsuperscript{764}

France and Argentina demonstrate just how the protection of privacy can be strengthened with the use of human rights treaties, even in areas not covered by public law. These countries show how treaties can have an important impact on private law, particularly civil law. In the case of Mexico, the right to privacy included in human right treaties can be used as a model for amending the Civil Code and, thus, incorporate explicitly an autonomous right to privacy. Mexicans who deem their private lives to have been invaded by others could use such a right to bring their cases before the courts. While Mexican courts would have to define this right, an explicit right to privacy in the Civil Code would give Mexicans stronger legal grounds for arguing claims of privacy invasion. Additionally, as the French case illustrates, an explicit right to privacy would help simplify the civil liability rules currently established in the Mexican Civil Code. Human rights treaties could therefore expand the rights and freedoms of an individual not only in his relations with the state but also with other private individuals.

In light of the French and Argentinean examples, it can be argued that Mexico could follow suit and adopt a human rights approach to overcoming its civil law limitations in the protection of privacy. This approach might strengthen the current civil law protection of privacy that applies to

\textsuperscript{763} “Article 11. Right to Privacy
1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation

\textsuperscript{764} This link is actually mentioned in the Civil and Commercial Code’s edition published by the Argentine Ministry of Justice and Human Rights. The edition includes an “explanatory table” (page 478) and under the personality rights section, there is a specific reference to the AMCHR, the UDHR, and the ICCPR as the sources of personality rights.
relations between private individuals. The approach could provide individuals with a right to privacy worded as a clear normative entitlement, such as the one included in the human rights treaties that Mexico has ratified. Moreover, Mexico could use the international human rights jurisprudence on ‘provisional measures,’ especially, the one developed by the Inter-American Court of Human Rights, in order to design an injunction relief that could be applied to privacy invasion cases.

Mexico could thus derive a right to privacy and an injunctive relief from human rights treaties and international human rights jurisprudence and improve the protection of privacy that already exists in Mexican civil law. A right to privacy and an injunctive relief would lessen the rigidity of the rules of civil liability currently being applied in Mexico. This would help individuals to bring before the Mexican courts actions for moral damage caused by privacy invasion, even in cases where privacy invasion is caused by the collection, use or disclosure of personal information carried out by private individuals. It should be noted, however, that in cases where data processing is carried out by the state, a right to privacy and injunctive relief in the Civil Code might not be of great help. Although, as argued, the moral damage provisions of the 1928 Civil Code also apply to relations to which the state is a party, the civil law protection of privacy may not be the best route to follow in cases of invasion of privacy committed through the mandatory collection, use or disclosure of personal information carried out by the state. Such data processing may create power imbalances between individuals and the state, and civil law is not as well constituted as public law for addressing these issues. As has been explained in this chapter, civil law offers only an action for compensation for cases of moral damage caused by privacy invasion. This remedy does not address the question of whether or not a state should be collecting, using or disclosing certain types of personal information. This issue is best addressed by public law, specifically constitutional law, and international human rights law could also prove very useful. In the next chapter I will explain how the mechanisms that international human rights law has developed for the protection of privacy (analyzed in Chapter One) could be used in Mexico to stop or prevent the collection, use or disclosure of personal information where it poses undue invasion of the private lives of Mexicans.
Chapter 5
The Adoption of the International Human Rights Protection of Privacy in Mexico

1. Introduction

In the previous two chapters I analyzed the limitations of Constitutional Law and Civil Law in the protection of privacy in Mexico. Moreover, I considered the limitations these laws have in cases of privacy invasion committed through the collection, use or disclosure of personal information carried out by the state. In this chapter, I explain how the international human rights law on privacy examined in Chapter One can be used in Mexico to address cases of privacy invasion committed through the processing of data. The use of international human rights law (IHRL) in Mexico became possible with the 2011 amendment to the 1917 Mexican Constitution. This amendment incorporated into the constitution the human rights included in international treaties that Mexico had previously ratified, thereby expanding the constitutional catalogue that applies in the country.

The fact that IHRL now applies in Mexico does not mean that all international instruments have the same value within the Mexican legal system. As this chapter will explain, international treaties are accorded a status different from other international documents. This chapter will examine in detail how IHRL applies in Mexico today. It will explain how international instruments became effective tools for the interpretation of the constitution, and how the use of human rights treaties by the Supreme Court of Mexico facilitated the emergence of a constitutional doctrine based on two interpretative principles—the ‘in-conformity-with’ clause and the pro homine principle. This examination is needed for fully understanding how the international human rights on privacy analyzed in Chapter One may compensate for the legal limitations discussed in the third and fourth chapters.

The current chapter divides into two sections. The first analyzes the conditions that made possible the application of IHRL in Mexico. As will be discussed, the adoption of IHRL by the country in 2011 was not simply the result of political change, but, rather, part of a trend that began several decades earlier. Mexico experienced important economic transformations in the 1980s and 1990s that ultimately altered its legal landscape. This section explains how international treaties assumed a new role within the Mexican legal system to the extent that they
became an important source of Mexican law. We will see that human rights treaties were not excluded from this role and their influence slowly expanded over various political actors. The second section of the chapter focuses on how IHRL applies in Mexico today. It briefly outlines how jurisprudence on human rights is created at the international level (universally and regionally) and describes its true legal force and how it works today within the Mexican legal system. This section also describes the impact IHRL can have on the protection of privacy in Mexico. As discussed in Chapter One, IHRL frames the right to privacy as a clear, normative entitlement and has constructed a sound interpretation of this right through jurisprudence. For this reason, the use of this right and of the international human rights jurisprudence on the right to privacy is examined in this section. The chapter closes by arguing that Mexico could use both the human right to privacy and its jurisprudence to improve its own privacy jurisprudence.

2. The Openness of the Mexican Legal System to International Law

As discussed in previous chapters, the foundations of the current Mexican legal system are the 1917 Constitution and the federal and state codes promulgated some years after the enactment of this constitution. Additionally, federal and state congresses passed other legislation, regulating areas not covered by the codes. For this reason, the 1917 Constitution, along with federal and state legislation, formed the main source of law in Mexico during the first half of the twentieth century.

Despite the centrality of both federal and state legislation, international treaties have played an important role in the Mexican legal system. Article 133 of the 1917 Constitution provides that the constitution, the laws of the Congress of the Union and the treaties made by the President and ratified by the Senate shall be “the supreme law of the whole Union.” The wording of this provision denotes its source of inspiration—Article VI-2 of the U.S. Constitution. The principle behind this provision is that international treaties are supreme law of the land because ‘the people’ delegated sovereign authority to the President and the Senate. With minor

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765 Article VI-2 provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

variations,767 Mexico followed similar routes in the 1824 Constitution and the 1857 Constitution,768 thereby endorsing a monist approach to international law throughout the nineteenth century. According to this approach, no Act of Congress giving effect to international treaties is required.769 They just need to be published in the official gazette (Diario Oficial de la Federación) to have legal force in the country. Given these historical and constitutional reasons, Mexico has had a long-standing tradition of international treaty-making since its emergence as an independent state.770

Despite Mexico’s monism, international treaties did not play an important role in the legal system during the first half of the twentieth century. Their effects were limited and almost nobody paid attention to them.771 One explanation for this lack of interest in international treaties was that Mexico had a closed economic and political system that shielded the law from external influence and scrutiny.772 A legal nationalism prevailed in Mexico, reducing the number of people interested in international law.773

The above described trend changed in the 1970s when Mexico began to open its economy to foreign markets.774 The increase in international commerce demanded new and specific regulations, rendering international treaties suitable instruments for bringing Mexican law up to

767 For a brief reference to the American influence in the wording of the Mexican provision, see Manuel Becerra “Tratados internacionales. Se ubican jerárquicamente por encima de las leyes y en un segundo plano respecto de la constitución federal” (2000) 3 Cuestiones Constitucionales 169 at 174-175.
768 See Article 161 of the 1824 Constitution and Article 126 of the 1857 Constitution, in Felipe Tena Ramírez, Leyes Fundamentales de México 1808 – 2009, supra note 453.
769 For a brief explanation to the monist and dualist approaches to international law, see Peter Malanczuk, Modern Introduction to International Law, 7th ed (New York: Routledge, 1997) at 63-64.
770 Until June 2012, there were 1,349 international treaties (722 bilateral, 627 multilateral) international treaties in force in Mexico. See, online <http://www.ordenjuridico.gob.mx/Publicaciones/CDs2012/CDTratados/cd_tratados.php> <http://www.sre.gob.mx/tratados>
771 Sergio López-Ayllon, Las transformaciones del sistema jurídico y los significados sociales del derecho en México: la encrucijada entre tradición y modernidad (Mexico City: Universidad Nacional Autónoma de México, 1997) at 186.
773 Sergio López-Ayllon & Héctor Fix-Fierro, supra note 772 at 294, 332.
774 From 1972 to 1977, Mexico celebrated 116 international agreements in different areas. See Sergio López-Ayllon & Héctor Fix-Fierro, supra note 772 at 333.
The shift towards global market economics was thus a decisive factor in setting in motion a stronger interaction between Mexican law and legal systems elsewhere. A key point was reached in the 1990s when Mexico signed important international treaties such as the North America Free Trade Agreement (NAFTA) and agreements with the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD). These and other international agreements placed Mexico in an entirely new context. International agreements called for new legal frameworks. Required changes perforce had a modernizing effect on the Mexican legal system. The high level of specialization of several international agreements quickly showed that the Mexican legislation was outdated across various sectors, such as international trade, environmental protection, labor relations and human rights. Mexico was obligated to enact legislation consistent with these agreements. When that did not happen, national organizations began to demand the direct application of norms included in the international agreements Mexico had signed.

In addition to Mexico’s insertion into international trade, other worldwide factors contributed to opening up the then-closed Mexican legal system. Different factors such as the post-World War II political climate, the rise of the Third World, the proliferation of international, transnational and supra national institutions, the end of the Cold War and the emergence of a global economy took place during the second half of the twentieth century, creating a new phenomenon called ‘globalization’. Defined in the early 1990s as ‘the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa,’ globalization reshaped relationships between national economies. New legal frameworks aimed at regulating specific fields of human activity emerged as a result. These frameworks were evident in the cases of trade and environmental protection. For instance, many countries subscribed bilateral or multilateral agreements to facilitate the

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775 Sergio López-Ayllon, supra note 771 at 187.
776 Mexico signed 227 agreements in the period 1990-1995, almost twice the number signed during the period 1972-1975, see supra note 758. For a brief reference to all these agreements, classified by period and subject matter, see Sergio López-Ayllón & Héctor Fix-Fierro, supra note 756 at 333. The NAFTA, the WTO and OECD agreements went into force in Mexico on 20 December 1993, 5 June 1994, and 30 December 1994, respectively.
777 See Sergio López-Ayllón, supra note 771 at 187-189 and accompanying notes.
exchange of goods and services and reduce contamination of natural resources. Mexico joined the list of these countries in the late 1980s, but it was not until the mid 1990s that the country subscribed to an important number of environmental treaties and signed agreements of great economic significance, such as those with the WTO, the OECD, the U.S and Canada (e.g. NAFTA) as well as with other Latin American countries.

The international agreements that were reached as a result of globalization had a significant impact in the legal systems of many countries. In European countries, national legal orders had to be changed to transpose international legal obligations into domestic law. In Mexico, international agreements began to have an important influence on the legal system because they did not need ‘implementing’ legislation to be applied—they became domestic law once they were ratified in accordance with the Mexican constitution. This fact implied that international agreements could be invoked by private persons before domestic courts. To avoid potential conflicts of laws some legal changes were passed by Congress by the time international agreements were adopted. The big change that both globalization and the openness of Mexico to international trade brought to the Mexican legal system was that private individuals began to see international treaties as legal norms that could be legally enforced in judicial proceedings.

International agreements thus began to be applied to areas not covered or not specifically covered by Mexican laws. The application of these agreements, however, brought certain difficulties. Treaties and national legislation may regulate the same areas, creating potential conflicts of norms. To resolve these conflicts, a lex specialis approach was favored first—

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781 Sergio López-Ayllón & Héctor Fix-Fierro, supra note 772 at 334. For a detailed list of the international agreements on trade and environmental protection subscribed by Mexico see Sergio López-Ayllón, supra note 771 at 193-197.
782 Jost Delbrück, supra note 780 at 33.
783 The Supreme Court of Mexico has reinforced this approach to international law. For instance, in an early case related to the application of the Paris Convention for the Protection of Industrial Property, the Court ruled that since this Convention was ratified by the Senate and published in the Official Gazette [Diario Oficial de la Federación], according to Article 133 of the Constitution, “the Convention has a Supreme-Law-of-the-Union category and thus competent authorities have to comply with it.” See tesis de jurisprudencia which heading is CONVENIO DE PARIS PARA LA PROTECCION DE LA PROPIEDAD INDUSTRIAL TIENE CATEGORÍA DE LEY SUPREMA (Semanario Judicial de la Federación, Séptima Época, Volumen 72, Tercera Parte at 23.
784 Such was the case of NAFTA. See Sergio López-Ayllón & Héctor Fix-Fierro, supra note 772 at 333, note 76.
785 Sergio López-Ayllón, supra note 771 at 187.
international agreements would be *lex specialis* whereas national legislation would be *lex generalis*. But this approach was difficult to apply to cases where treaties and national legislation governed simultaneously the same specific matter. Article 133 of the Mexican Constitution gives no solution to this problem. It only provides that both treaties and laws of the Congress are the supreme law of the Union, but it does not indicate which of the two should prevail in cases where both are applicable. In 1992, the Supreme Court of Mexico interpreted Article 133 as establishing that treaties and national legislation are situated at the same level just below the Constitution. The Court made clear that the Constitution is superior to both treaties and national legislation, but the Court did not establish a hierarchy between them. This interpretation prevailed until 1999, when the Supreme Court radically changed this view as explained below.

Given the Supreme Court’s interpretation of Article 133 of the Constitution delivered in 1992, international treaties began to be seen in Mexico as instruments that could be domestically enforced. For some scholars they “complemented, substituted or even superimposed national legislation, creating an integrated [legal] system in which the traditional boundaries of differentiation between the national and international are blurred.” Little by little, private individuals began to invoke international treaties as law applicable to controversies to which they were party. Treaty invocation became noteworthy in the human rights area. Mexico signed relevant human rights treaties during the 1980s and early 1990s and, for this reason, human rights instruments—along with trade and environmental protection agreements—began to be considered as complementing national legislation, even the Mexican Constitution.

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787 See tesis de jurisprudencia P. C/92 which heading is LEYES FEDERALES Y TRATADOS INTERNACIONALES. TIENEN LA MISMA JERARQUIA NORMATIVA. (Gaceta del Semanario Judicial de la Federación, Octava Época, Número 60, diciembre de 1992 at 27.)

788 See tesis aislada I.7o.A.13 A which heading is PERSONALIDAD DE LAS SOCIEDADES EXTRANJERAS. ORDENAMIENTO LEGAL APLICABLE PARA ACREDITARLA EN EL JUICIO DE AMPARO, CUYO ACTO RECLAMADO SE REGULA POR LA LEY DE LA PROPIEDAD INDUSTRIAL. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.VIII, Octubre de 1998 at 1998.)


790 For a list of these treaties, see Sergio López Ayllon, *supra* note 771 at 193.
treaties, in other words, began to be seen as tools that could be used to fill constitutional or legal gaps.

Human rights treaty invocation reached a critical point during the mid and late 1990s. A couple of legal disputes regarding the application of Convention 87 on freedom of association and protection of the right to organize of the International Labour Organization (ILO) showed how international agreements could be used to complement the Mexican Constitution. The disputes were related to the creation of labor unions. The first case involved a statute of the State of Oaxaca that limited the creation of labor unions to one single union per public agency, thereby restricting public employees’ freedom of association. A group of workers had formed a second union, but official registration was denied by administrative authorities. Workers appealed the decision on grounds that the statute violated the constitutional provisions related to freedom of association (Art. 9 and Art. 123, A, fr. VI of the Mexican Constitution), but, most important, provisions of ILO Convention 87, which Mexico ratified in 1950. The case went all the way to the Supreme Court of Mexico, who declared unconstitutional the statute and protected workers’ freedom of association. Though the Court based its legal arguments on the constitutional provisions and dismissed ILO Convention, the case set an important precedent. For the first time a human rights treaty was invoked as a normative standard for the interpretation of domestic law.

The second dispute related to freedom of association and the application of ILO Convention 87 took place in 1999. This case had a tremendous impact on the Mexican legal system. The facts were similar to those described above: a (federal) statute restricting the creation of trade unions to a single union per public agency, federal employees wanting to form a distinct trade union, an

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792 For a brief summary of this case, see José Ramón Cossío, “Sindicación burocrática y activism judicial” Este País 67 (octubre 1996) at 22-24 online: Este Pais <http://estepais.com/site/>

793 The Court declared that laws restricting the right to establish trade unions infringe freedom of association protected in Article 123, B, fr. X of the Mexican Constitution. See tesis de jurisprudencia P./I. 43/99 which heading is SINDICACIÓN ÚNICA. LAS LEYES O ESTATUTOS QUE LA PREVEN, VIOLAN LA LIBERTAD SINDICAL CONSAGRADA EN EL ARTICULO 123, APARTADO B, FRACCIÓN X, CONSTITUCIONAL. (Semanario Judicial de la Federación y su Gaceta, Novena Época, t.IX, mayo de 1997 at 5.)
official denial of registration.\textsuperscript{794} What differentiates this case from the first is that the Supreme Court of Mexico assigned to international treaties a never before seen role in the Mexican legal system. The Court declared that “international treaties are hierarchically superior to federal laws, but located on a secondary plane with respect to the federal constitution.”\textsuperscript{795} This argument triggered intense debate among scholars and other legal actors. For the first time in Mexican legal history the Supreme Court recognized international treaties as norms having direct effect on domestic law, to the extent that the Court granted them superiority over national (both federal or state) legislation.\textsuperscript{796} The ruling provided procedural and substantive reasons for this international-treaty superiority, the most significant being that “[treaties] are international commitments assumed by the Mexican state as a whole and all public authorities are committed before the international community to comply with them.”\textsuperscript{797}

In the ruling, the Supreme Court first examines if the international treaty (ILO Convention 87) complies with the procedural requirements prescribed by the Constitution. Having verified them, the Court examines the substantive requirement—if the treaty is in accordance with the Constitution.\textsuperscript{798} To achieve this assessment, the ruling introduces a novel argument in terms of individual rights. The Court maintains that

\begin{quote}
  in the example, it is evident that if a treaty obliges [the Mexican State] to amplify an individual’s sphere of freedoms or if a treaty commits the State to perform specific actions for the benefit of traditionally weak human groups, such treaty is deemed constitutional.\textsuperscript{799}
\end{quote}

\textsuperscript{794} For a brief summary of this case, see José Ramón Cossío, “La nueva jerarquía de los tratados internacionales,” \textit{Este País} 107 (febrero 2000) at 34-38, online: Este País <http://estepais.com/inicio/historicos/107/7_ensayo3_cuestiones_cossio.pdf>

\textsuperscript{795} See tesis aislada P.LXXVII/99 which heading is TRATADOS INTERNACIONALES. SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL (\textit{Semanario Judicial de la Federación y su Gaceta}, Novena Época, t.X, noviembre de 1999 at 46.)

\textsuperscript{796} The Court also interpreted that there is no hierarchical relation between federal and state legislation because both have different scopes of application. \textit{Ibid}.

\textsuperscript{797} \textit{Ibid}. The international treaty needs to comply with all the procedural and substantive constitutional requirements before it is considered national law. For a criticism of this Supreme Court’s criterion, see José Ramón Cossio, \textit{supra} note 794.

\textsuperscript{798} For an explanation of the requirements, see Suprema Corte de Justicia de la Nación [Supreme Court], 11 de mayo de 1999, Amparo en Revisión 1475/98 (Mexico), online: <http://200.38.163.178/sjfsist/Paginas/DetalleGeneralScroll.aspx?id=6353&Clase=DetalleTesisEjecutorias>

\textsuperscript{799} \textit{Ibid}
Based on this premise, the Court examines ILO Convention 87 in light of the constitutional provisions related to workers’ freedom of association (Article 123, A-fr. XVI, B-fr.X.) The Court considers that this convention is in harmony with such provisions and also details their content. The Court then argues that because the federal statute limits the creation of trade unions to a single union per public agency, it contravenes ILO Convention 87 which fully guarantees freedom of association and the right to organize. Given that this treaty is an international commitment of Mexico (and thus superior to federal law) that expands upon the Mexican Constitution, the Court concludes that the federal statute should not be applied to the case at hand.

This case is important in Mexican law for several reasons. First, the Supreme Court of Mexico used an international instrument as law applicable to a particular legal controversy, thereby enabling the direct application of an international agreement in Mexican law. Second, the Supreme Court opened the source-of-law system that at the time was closed in Mexico by applying an international agreement to a particular legal controversy. Third and most important, the Court used the norms of an international treaty to expand the content of a constitutional provision. By using the norms included in ILO Convention 87, the Court provided a broader meaning to workers’ freedom of association already included in the Mexican Constitution. The Court’s use of an international instrument as a tool for interpreting a constitutional provision announced a relevant change in constitutional interpretation.

In Chapter Three I argued that for a long time (1917-2000) Mexican judges did not tend to interpret constitutional provisions as expanding their content. Judges tended to read the provisions narrowly, focusing more on the exact words of the constitutional text. In the case at hand, workers’ freedom to associate themselves and create unions was already included in Article 123, A-fr. XVI, B-fr.X of the Mexican Constitution. But such provisions state the freedom briefly, as the right to associate and form trade unions without further indication. The Court could have interpreted this right as encompassing a negative obligation on the part of the state—an obligation of not interfering with the exercise of this right by limiting the number of

800 Ibid
trade unions workers can create in a public agency. The Court avoided this route and instead used ILO Convention 87 to achieve this conclusion. All this deserves some elaboration.

ILO Convention 87, for instance, provides that workers have the right to establish organizations of their own choosing without previous authorization (Article 2.) It also prohibits states from establishing conditions aimed at limiting the acquisition of organizations’ legal personalities as a means of restricting rights (Article 7.) Given that these provisions cover exactly the case of the federal statute mentioned above, the Supreme Court applied these provisions, thereby protecting workers’ rights. The Court, in other words, used ILO Convention 87 to expand a narrow constitutional right.

The attitude of the Mexican Supreme Court might be difficult to understand at first glance. But if we consider that the Court worked for many years under the paradigm of the civil law tradition (i.e. judges apply the constitution, not expand it), the application of international treaties as a means to expanding individual rights seems rational. International treaties may contain normative frameworks not present in constitutional provisions. Such frameworks are readily available to judges adjudicating cases of fundamental rights violations. For this reason, international treaties can be used to complete constitutional texts, widening the scope of protection of constitutional rights. More so, the Court’s use of an international instrument as a tool for interpreting the constitution had a tremendous impact on the Mexican legal system. Perhaps inadvertently, the Court paved the way for the emergence of a new interpretative doctrine of the Mexican constitution. A doctrine which, as we will see later in this chapter, is based on two interpretative principles: the ‘in-conformity-with’ clause and the pro homine principle. Before we examine this doctrine and how it can improve the protection of privacy in Mexico, context must be clearly established.

3. An Appropriate Context for Constitutional Change

The abovementioned ILO-Convention-87 cases need to be put in context. The Supreme Court of Mexico issued the ruling in 1999 when globalization transformed the multi-nation market into the global market, creating a new commercial reality.801 This had an important impact on law.

As Martin Shapiro argued, “in this new world of external, disparate, one-of-a-kind deals, potentially the lawyer flourishes and the judge is sought far more than in the vertically integrated, single product corporation”. Law, in other words, began to intrude more into business dealings. Shapiro describes this process of legal intrusiveness as Americanization—“a style of more arms-length, more legalized business dealings.” Moreover, Shapiro asserts that globalization also impacted on the American public sector, subjecting modern bureaucracies to greater transparency and public participation. This transparency and public participation in bureaucratic decision-making was sought globally and law was an available instrument to achieve these goals. A ‘globalization of public law’ thus took place, renovating the administrative legal systems of many industrialized states.

In addition, judges started playing a primary role in industrialized states, not only scrutinizing bureaucratic actions but also enforcing national constitutions. Shapiro highlights that globalization of public law also included a global trend towards American constitutionalism. After World War II, many European countries enacted new constitutions, emulating the U.S. model. In fact, the European constitutions created a new constitutional model, known as the post-Second World War constitution. The new Western constitutions provided for the division of powers, a bill of rights and judicial review. The distinguishing feature of this constitutional model is, however, the role of courts. The courts not only police the separation of powers but guarantee individual rights. Courts, in other words, are entrusted with the task of enforcing the constitution and this implies upholding the fundamental rights and freedoms of individuals.

The post-World War II constitutional model went beyond Europe, exerting a major influence in other jurisdictions. Important events that took place during the second half of the twentieth century (the end of the Cold War, military dictatorships in Central and South America) triggered the enactment of new constitutions in Eastern Europe, Asia and Latin America. During the process of enacting new constitutions, the postwar constitution became the model to be followed given its modern, rights-protection character.

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803 Ibid at 44.
804 Ibid at 46.
805 Ibid at 48.
In the case of Mexico, a postwar constitution was not enacted during the second half of the twentieth century despite the significant influence of the American Constitution in Mexican constitutionalism. Unlike other Latin American countries, Mexico was not ruled by a military dictatorship in the 1960s, 1970s or 1980s. Nor did the country experienced periods of political unrest culminating in the adoption of a new constitution. Mexico transitioned from an authoritarian regime to a nascent democracy through an electoral process in 2000, and for this reason, the constitution adopted after the Mexican Revolution in 1917 remains in force.

The fact that Mexico did not change its constitution during the second half of the twentieth century does not mean that the country was immune to the globalization of constitutional rights during the second half of the twentieth century. Mexico in one way or another had to adapt its political and legal institutions to respond to this trend. As already argued, Mexico opened its economy to foreign markets throughout the 1980s. But, according to some experts, it would be difficult for any country to consolidate market economics and democracy without strengthening the rule of law. Indeed, Mexico undertook important legal reforms in the late 1980s and early 1990s. Perhaps the most important such reform, the 1994 judicial reform, introduced changes into the legal system that brought Mexico’s Supreme Court “closer to a European-style constitutional court, but without completely abandoning its roots in the American model of constitutional justice.” While some scholars consider that the 1994 judicial reform made the Mexican Supreme Court more an arbitrator “in the resolution of political conflicts among elected branches and subnational governments” than a court protecting fundamental rights, the fact is that before 1994 Mexico lacked a constitutional court like the one prescribed by the post-World War II constitutional model. Before that, the Mexican Supreme Court was not considered to

811 The bill introducing the 1994 amendment to the 1917 Constitution expresses that one of the objectives of the judicial reform was to consolidate the role of the Mexican Supreme Court as a constitutional court by conferring to
have had “institutional authority and social prestige.” It was a supreme court similar to those existing throughout Latin-America during most of the twentieth century; that is, non-independent with a conservative legal philosophy and without strong public trust and support.

The 1994 judicial reform thus transformed the Mexican Supreme Court into a constitutional court. The problem was, however, that from 1917 (when the Mexican Constitution entered into force) to 1994 “a strong and independent constitutional doctrine” was not developed by the Supreme Court. The President of Mexico, an especially dominant political figure at that time, eclipsed the role of the Supreme Court. Additionally, the Mexican Constitution was easy to amend, making it difficult for the Court to develop a consistent constitutional doctrine that could last over time. Moreover, although the Court did address violations of fundamental rights committed by public authorities through the *juicio de amparo*, this judicial procedure has only *inter partes* effects, as explained in Chapter Three. This prevented the Court from developing a consistent jurisprudence focused on the protection of human rights. The Supreme Court, in other words, played a minor role in interpreting and expanding human rights during the period 1917-1994.

Given this legal and political context, it can be argued that the incorporation of international human rights treaties into the Mexican legal order can be understood as an attempt by Mexico to bring its constitution in conformity with the postwar model of individual rights protection. The fundamental rights included in the Mexican Constitution needed some expansion and international human rights treaties made the promise of assisting Mexico in this task.

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812 Hector Fix Fierro, supra note 808 at 240.
813 For a brief reference of how Latin-American supreme courts were considered in the last decades of the twentieth century and how these courts have been changing their role over time, see Gretchen Helmke & Julio Ríos-Figueroa, “Introduction” in Gretchen Helmke & Julio Ríos-Figueroa, *supra* note 810 at 1-25.
815 Hector Fix Fierro, *supra* note 809 at 3-4.
816 For a brief explanation of the reasons explaining the lack of constitutional doctrine during the 1917-1994, see Héctor Fix-Fierro, *supra* note 809 at 4.
4. Human Rights Treaties as a Means of Expanding the Mexican Constitution

The incorporation of human rights treaties into the Mexican legal system could thus be understood as a way of expanding the text of the Mexican constitution, especially personal rights. As analyzed in the 1999 case examined above, the Mexican Supreme Court made this clear by stating that a human rights treaty would be deemed constitutional if it amplifies the realm of fundamental rights and freedoms. The Court, in other words, put the human rights included in international treaties alongside the fundamental rights and freedoms vested in the constitution. By doing this, the Mexican Supreme Court acknowledged certain ‘continuity’ between constitutional rights and human rights. Jeremy Waldron explains this continuity as meaning that both constitutional rights and human rights are fundamental rights associated with the dignity of the human person notwithstanding that they are found in different documents. Therefore, despite the fact that the Mexican constitution used to call constitutional rights ‘individual guarantees’ (garantías individuales) by the time the ILO Convention 87-ruling was issued, the Supreme Court found no difference between these rights and human rights.

The fact that the Supreme Court of Mexico used ILO Convention 87 to interpret and expand the right of workers to associate and form labor unions (already included in the Mexican constitution) did not bring about radical change in constitutional adjudication in the years following the ILO Convention 87-ruling. An illuminating ruling may not be reason enough for changing a whole court system not trained to construct and expand the text of constitutional provisions. The ruling itself had a very positive effect. It showed how constitutional rights and human rights should not be understood as disassociated rights but rather as part of the same class of rights that should be protected in a liberal and democratic society like the one Mexico was—and still is—trying to construct.

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817 See Amparo en Revision, supra notes 798 and 799 and accompanying texts.
The idea that constitutional rights and human rights are part of the same class of rights began to gain greater support among different groups within Mexican society. It was true that human rights did not exist, as such, when the Mexican Constitution was enacted in 1917, but similar rights and freedoms were embodied in its text. An update was needed and the human rights treaties signed and ratified by Mexico were readily available to assist in the updating process.

A 2003 diagnosis of the human rights situation in Mexico carried out by the Office of the UN Human Rights Commissioner became crucial in promoting continuity between constitutional rights and human rights. The final UN report recommended a constitutional amendment that 1) incorporates the concept of human rights as the fundamental axis of the Mexican constitution; 2) acknowledges human rights treaties as hierarchically superior to domestic legislation, with an express provision declaring that all public authorities are bound by such treaties when they confer greater human rights protection than that afforded by the Mexican Constitution or Mexican law. The recommendation of the Office of the UN Human Rights Commissioner, in other words, required all public authorities (including judges) to take into account international human rights agreements in their official tasks.

The UN Human Rights Commissioner’s recommendations gained strong approval among academics, civil society organizations and human rights defenders. In fact, one group of inter-organizational persons developed a proposal for a constitutional amendment that incorporated some of the Commissioner’s recommendations. A noteworthy feature of this proposal is that its authors insisted that the Mexican Constitution ought to be amended to adopt the term human rights in its bill of rights. For them, the dated term ‘individual guarantees’ (garantías individuales) created confusion and was not in harmony with the post-World War II constitutional practice nor with the international human rights treaties ratified by Mexico.

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820 See Naciones Unidas, Diagnóstico sobre la Situación de los Derechos Humanos en México (Mexico City: Oficina en México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, 2003)
821 Ibid at vii.
822 See Propuesta de Reforma Constitucional en Materia de Derechos Humanos Elaborada por las Organizaciones de la Sociedad Civil y por Académicas y Académicos Especialistas en Derechos Humanos (Mexico City: Talleres de Mar de Letras, 2008) at 14.
823 Ibid at 15-16.
824 The proposal made clear that “human rights are those rights bestowed to all people by the mere virtue of belonging to the human species.” Ibid at 16.
While it cannot be argued that the UN Human Rights Commissioner’s recommendations were directly responsible for incorporating international human rights treaties into the Mexican legal order, such recommendations triggered a social, political and academic debate that culminated in the constitutional amendment that will be described below.

5. The Amendment to Article 1 of the Mexican Constitution

Following more than a decade of legislative and academic discussions, political struggles, a case before the Inter-American Court of Human Rights condemning Mexico for violating the American Convention on Human Rights, the Mexican Constitution was finally amended in 2011.\textsuperscript{825} At the heart of the amendment lies the incorporation of the term ‘human rights’ into the constitutional text.\textsuperscript{826} The amendment was in line with the abovementioned UN High Commissioner’s recommendations, but also introduced novel principles for the interpretation of what is now called human rights.\textsuperscript{827}

The first paragraph of Article 1 of the Mexican Constitution provides that “all individuals shall enjoy the human rights recognized by the Constitution and by the international treaties to which the Mexican State is party.” The rights and freedoms included in international human rights treaties are therefore now considered part of the Mexican Constitution. Additionally, the second paragraph or Article 1 commands that “all human rights norms be interpreted in conformity with the Constitution and international treaties on the subject, favoring the broadest protection to

\textsuperscript{825} The constitutional amendment was published in the Oficial Gazette [Diario Oficial de la Federación] on 10 June 2011, online: <http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_194_10jun11.pdf> For a brief account of this process, see José Luis Caballero Ochoa, \textit{La Interpretación Conforme: el Modelo Constitucional ante los Tratados Internacionales sobre Derechos Humanos y el Control de Convencionalidad} 2d ed. (Mexico City: Porrua, 2014) at 1-13.

\textsuperscript{826} The name of Chapter One, Title First, of the Mexican Constitution was actually changed from “Of Individual Guarantees” (De las Garantías Individuales) to “Of Human Rights and its Guarantees” (De los Derechos Humanos y sus Garantías), linking the international human rights nomenclature with the traditional constitutional terminology.

\textsuperscript{827} It should be noted, however, that the term human rights was introduced to the Mexican Constitution in 1992 through a constitutional amendment by which human rights agencies (commissions) were created in Mexico at the federal and state level. According to the amendment, “the Congress of the Union and legislatures of the federal entities (states), within the ambit of their respective competences, shall establish organs to safeguard the human rights granted by the Mexican juridical order, which shall receive complaints against the acts or omissions of an administrative nature committed by any public authority or official, with the exception of those of the Judicial Power of the Federation, that violate these rights.” The human rights commissions exist until today and they issue non-binding public recommendations, denunciations and complaints before respective authorities. See, online: <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm> For the constitutional amendment, see, online: <http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_123_28ene92 ima.pdf>
persons at all times.” The new wording of Article 1 has thus introduced two important changes in constitutional adjudication, giving to international law a new and vigorous role within the Mexican legal system. Each of these changes is examined in the following two sections.

5.1 The Expansion of the Mexican Bill of Rights

The first change deals with the expansion of the bill of rights that existed in Mexico until 2011. The amendment created what some scholars have called the ‘constitutionality block’—a block integrated by the fundamental rights and freedoms vested in a domestic constitution and in international treaties. The Mexican bill of rights is now understood as comprising constitutional rights and the fundamental rights and freedoms included in the international treaties to which Mexico is party. The latter is not restricted to international human rights treaties, but, rather, includes any other international conventions, provided that the provisions of such conventions protect fundamental rights. Not only has the Mexican Supreme Court confirmed this understanding, but it has also declared that all rights are ‘human rights’ notwithstanding their constitutional or international origin. In other words, no hierarchical distinction exists between these two categories of rights.

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828 The term was coined in the early 1970s by a French author, Louis Favoreu, when commenting a ruling of the Conseil Constitutionnel. The bloc de constitutionnalité thus includes the 1958 French Constitution, the 1789 French Declaration of the Rights of Man and of the Citizen, the preamble of the 1946 French Constitution and fundamental principles. See Louis Favoreau and Francisco Rubio Llorente, El bloque de la constitucionalidad: simposium franco-español de derecho constitucional (Madrid: Civitas, 1991) at 19, 24-25. For the use of the term in Mexico see, César Astudillo, “El bloque y el parámetro de constitucionalidad en la interpretación de la Suprema Corte de Justicia de la Nación” in Miguel Carbonell et al, eds, Estado constitucional, derechos humanos, justicia y vida universitaria, t. IV, vol. 1 (Mexico City: Universidad Nacional Autónoma de México, 2015) at 117.

829 For instance, Article 36 of the Vienna Convention on Consular Relations guarantees the right to consular protection, which could be considered a ‘fundamental right’ notwithstanding the fact that it is not listed in an international human rights convention. Failing to comply with this right could give rise to international responsibility, as in the Avena case. In this case, the International Court of Justice found that the United States breached its obligations under Article 36 of the Vienna Convention on Consular Relations. The U.S. did not inform (without delay upon their detention) fifty five arrested Mexicans of their rights under such Article. See Avena and Other Nationals (Mexico v. United States of America), Judgment, I.C.J Reports 2004, p.12 available <http://www.icj-cij.org/docket/files/128/8188.pdf>

830 See Suprema Corte de Justicia de la Nación [Supreme Court], 3 September 2013, Contradicción de Tesis 293/2011 (Mexico), [hereinafter Contradicción de Tesis 293/2011], Considerando Quinto, at 28, online: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=129659>

831 Contradicción de Tesis 293/2011, supra note 830 at 30.
5.2 New Tools for Human Rights Interpretation

The second change brought about by the amendment of Article 1 of the Mexican Constitution is the introduction of two interpretative tools into the Mexican legal system. The first such tool is the so-called in-conformity-with interpretation clause (cláusula de interpretación conforme.) This clause mandates that “all human rights norms shall be interpreted in conformity with the Constitution and the international treaties on the subject.” The Supreme Court of Mexico has ruled that, by virtue of this clause, when legal actors are faced with the need of interpreting human rights norms (including constitutional norms) they are obliged to consider the new bill of rights (described above) in their interpretations.832 This means judges cannot disregard international human rights treaties when interpreting any norm related to fundamental rights or freedoms. This important and positive change means that a party to a case can invoke a human rights treaty before a court of law if such treaty covers a particular situation not regulated by the Mexican Constitution.

The second interpretative tool is the pro homine (or pro personae) principle which mandates that human rights norms shall be interpreted by favoring the broadest protection. Given that human rights now come from both the Mexican Constitution and international agreements, there may be cases where a right is listed in several documents. Freedom of expression, for example, is protected in Article 6 of the Mexican Constitution, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the American Convention on Human Rights (ACHR). In these cases, the pro homine principle helps in two ways. First, it helps to integrate the content of a right by considering the most protective element of each source. In our example, the content of the freedom of expression may be determined by taking elements from the Mexican Constitution, the ICCPR and/or the ACHR. Second, if antinomies exist among several sources, the pro homine principle indicates which norm prevails—the norm offering the broadest protection to the human being.833

832 The Court used the expression ‘human rights catalog’. See Contradicción de Tesis 293/2011, supra note 830 at 34.
833 See José Luis Caballero Ochoa, “La cláusula de interpretación conforme y el principio pro persona (Artículo 1º, segundo párrafo, de la Constitución)” in Miguel Carbonell Sánchez y Pedro Salazar Ugarte, eds, La Reforma Constitucional de Derechos Humanos: Un Nuevo Paradigma (Mexico City: Universidad Nacional Autónoma de
The Supreme Court of Mexico has ruled that the *pro homine* principle is a hermeneutical canon, typical in human rights interpretation, aimed at assisting legal actors (e.g. judges) in solving those cases where several human rights laws (and their interpretations) are found applicable.\(^{834}\) For the Court, when a difference in protection exists among several (national and international) human rights laws, the norm that prevails is the one giving the broadest protection or the one involving less restriction.\(^{835}\) The Court maintained that “the *pro homine* principle is a harmonizing and dynamic tool that allows the functioning of the human rights catalog.”\(^{836}\)

It should be noted that, according to Article 1 of the Mexican Constitution, human rights cannot be restricted or suspended except in cases and under conditions specified by the same Constitution. This provision becomes problematic in cases where the Mexican Constitution restricts the exercising of a right and the same right has no limitation under an international treaty. Following the *pro homine* principle, it may be concluded that because the treaty offers the ‘broadest protection,’ it takes precedence over the constitution. The Supreme Court of Mexico, however, arrived at an opposite conclusion. From textual argument, it ruled that the Mexican Constitution prevails when it includes an explicit restriction on the exercise of a human right.\(^{837}\)

5.3 New Principles for Human Rights Interpretation

Finally, it should be noted that the 2011 amendment introduced into the third paragraph of Article 1 of the Mexican Constitution another legal mandate. All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a
consequence, the state must prevent, investigate, penalize and redress violations of human rights in the terms prescribed by law. This legal mandate is for all authorities and not only judges. All federal and state authorities are therefore required to promote, respect, protect and guarantee human rights. This requirement entails negative obligations. Public authorities, for instance, must refrain from unjustifiably interfering with the exercise of rights. At the same time, positive duties are imposed, such as the adoption of measures aimed at preventing the violation of human rights by private actors or the promotion of affirmative action programs for members of disadvantaged minorities.

The third paragraph of Article 1 is important because it incorporates into the Mexican constitution the principles of universality, interdependence, indivisibility and progressiveness that exist in international human rights law. These principles can assist legal authorities when dealing with issues related to human rights. The principle of universality implies that human rights are rights that everyone has regardless of age, gender, religion or ethnic background. While interdependence means that the enjoyment of one right requires the enjoyment of others, indivisibility appeals to the unity of all human rights, not distinguishing between categories such as civil and political rights and economic, social and cultural rights. Progressiveness means simply that the enjoyment of human rights does not necessarily occur at a specific given moment, but, rather, requires gradual steps to achieve full realization. Although some Mexican scholars have started to study these principles, a thorough jurisprudence on each of

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838 Given that Mexico incorporated into its Constitution the human rights listed in international treaties, the distribution of powers within the country cannot be argued as an excuse for not complying with the international obligations posed by such treaties. See Article 28 of the American Convention on Human Rights and Article 50 of the International Covenant on Civil and Political Rights.

839 For how these obligations are being interpreted by Mexican scholars see Miguel Carbonell, “Las obligaciones del Estado en el Artículo 1° de la Constitución Mexicana” in Miguel Carbonell Sánchez y Pedro Salazar Ugarte, eds, supra note 833 at 135.


841 See, for instance, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, requiring States parties to the Covenant “to take steps, individually and through international assistance and co-operation, especially economical and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures.” Emphasis added.

them has yet to be developed by the Supreme Court of Mexico. Up to now, the Court has said that by virtue of the principle of interdependence, human rights establish reciprocal relations among them in such a way that the enjoyment of a right makes possible the enjoyment of others. Additionally, the Court has said that the principle of indivisibility appeals to the integrity of the person and to the need to satisfy her rights, excluding any possibility of establishing abstract hierarchies among them. Finally, the Court has mentioned that the principle of progressiveness implies the notion of ‘no regression’, meaning that human rights cannot be interpreted to the detriment of the progresses achieved so far.

Given that it has only been a very few short years since the amendment of Article 1 of the Mexican Constitution, it is still too early to draw conclusions on how the abovementioned principles play themselves out. No doubt the Supreme Court of Mexico will develop their meaning in the upcoming years. In the meantime, however, parties to a case can invoke such principles before courts and other public authorities (such as administrative tribunals), taking part in the construction of the jurisprudence on these principles.

6. A New Parameter for the Control of the Mexican Constitution

The amendment to Article 1 of the Mexican Constitution has been labeled as a paradigm shift in the protection of human rights by some scholars and, most importantly, by the Supreme Court of Mexico. For the Court, human rights included in the Mexican Constitution and the ones listed in the international agreements that Mexico is a party to conform a new ‘control parameter for constitutional regularity.’ This means that notwithstanding its national or international origin, human rights now compose a single catalog which is used as a parameter to examine the constitutional validity of the norms and acts of public authorities. The change is radical.

843 Contradicción de Tesis 293/2011, supra note 830 at 35-36.
844 Contradicción de Tesis 293/2011, supra note 830 at 50-51.
845 See Miguel Carbonell, El ABC de los derechos humanos y del control de convencionalidad, 2d ed. (Mexico City: Porrúa, 2015) at 122.
846 Contradicción de Tesis 293/2011, supra note 830 at 31-32, 47.
847 See tesis de jurisprudencia P/J.20/2014 which heading is DERECHOS HUMANOS CONTENIDOS EN LA CONSTITUCIÓN Y EN LOS TRATADOS INTERNACIONALES. CONSTITUYEN EL PARÁMETRO DE CONTROL DE REGULARIDAD CONSTITUCIONAL, PERO CUANDO EN LA CONSTITUCIÓN HAYA UNA RESTRICCIÓN EXPRESA AL EJERCICIO DE AQUELLOS, SE DEBERÁ ESTAR A LO QUE ESTABLECE EL TEXTO CONSTITUCIONAL (Semanario Judicial de la Federación y su Gaceta, Décima Epoca, Pleno, Libro 5, abril de 2014, t. I at 202.)
International norms, which are not passed by Mexican Congress, can be used now to invalidate legislation as well as acts of public authorities. The only requirement is that these international norms must confer human rights. In other words, international human rights norms are now considered part of the Mexican constitution and thus can be used as a canon for invalidating laws of the Mexican legal system or acts of Mexican public authorities when those laws or acts violate human rights.  

The Supreme Court of Mexico also ruled that the human rights catalog acting as a parameter for constitutional regularity gives coherence and unity to the Mexican legal system. This means that in cases where antinomies and lacunas exist, judges can use the human rights catalog to interpret such a system and fill the missing gaps. In this way, the human rights catalog also serves an interpretative function.

It could be the case that both the Mexican Constitution and the international treaties Mexico is a party to refer to the same right. The Supreme Court of Mexico has ruled that in this situation, given the pro homine principle, norms whose content most favorably protects a person shall be preferred. A different scenario takes place when an international treaty includes a human right not provided by the Mexican Constitution. The Court has maintained that in these circumstances, by virtue of Article 1 of the Mexican Constitution, the international human right becomes incorporated into the human rights catalog, which all public authorities must protect and guarantee. Accordingly, the Court argued that all legal acts of both public authorities and private individuals must be interpreted in conformity with the human rights catalog, in order to make them coherent and harmonic with all the rights included in such catalog. Therefore, international human rights norms thereby become part of the catalog and all laws and acts of public authorities must accord with it.

The interpretation that the Supreme Court of Mexico has given to the amendment of Article 1 of the Mexican Constitution is important for several reasons. First, the Court has clarified that human rights norms included in the international treaties Mexico is a party to have constitutional

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848 Contradicción de Tesis 293/2011, supra note 830 at 40.
849 Contradicción de Tesis 293/2011, supra note 830 at 40-41.
850 See José Luis Caballero Ochoa, supra note 825 at 250.
851 Contradicción de Tesis 293/2011, supra note 830 at 52.
status. Second, the Court has acknowledged the fact that international human rights norms can be not only used as an interpretative aid but also employed as foreign law.\textsuperscript{852} Third, there is no hierarchical distinction between domestic human rights provisions and international human rights norms. Four, with its ruling, the Court allows a comparative analysis of human rights norms, which flows in a twofold direction. A comparison may show that the domestic version of a human right norm is defective in light of an international human right norm or vice versa.\textsuperscript{853} Five, the Court has clarified the methodology to be followed when constitutional and international human rights norms are applicable to a specific controversy. As said, the norm offering the broadest protection will be applied, except in those situations where the Mexican Constitution provides explicit restrictions in exercising a human right. Although the Court did not elaborate on the rationale of this rule, the Court seemingly wants to make it clear that treaty makers cannot override constitutional provisions.\textsuperscript{854}

The Supreme Court of Mexico has thus confirmed the internationalist orientation of the Mexican legal system, a trend that gathered strength in the 1990s as explained above. Particularly, the Court validated the international human rights norms accommodation system designed by the drafters of the constitutional amendment.\textsuperscript{855} This system is a combination of two models followed in different countries around the world.\textsuperscript{856} On the one hand, Mexico has given constitutional status to international human rights norms (not human rights treaties), expanding the bill of rights that existed in the country prior to 2011.\textsuperscript{857} This model exists in Austria, Argentina, Chile, Colombia, Costa Rica, Guatemala, Peru, Paraguay, Kosovo and the Czech Republic.\textsuperscript{858} The Mexican Court has made clear, however, that national and international human rights norms integrate a single human rights catalog, which means that human rights norms are

\textsuperscript{852} See generally Gerald L. Neuman, “The Uses of International Law in Constitutional Interpretation,” (2004) 98 Am. J. Int’l L. 43 at 83 (arguing that those categories employing international law as an interpretative aid and as foreign law “can be difficult to separate.”)

\textsuperscript{855} Gerald L. Neuman argues that the central purpose of international human rights law is to call into question positive legal practices that fail to respect universal values. See Gerald L. Neuman, supra note 852 at 85.

\textsuperscript{857} See Contradicción de Tesis 293/2011, supra note 830 at 40-45.

\textsuperscript{856} For an explanation of these models and their strengths and weaknesses, see Gerald L. Neuman, “Human Rights and Constitutional Rights: Harmony and Dissonance,” supra note 29 at 1890-1899.

\textsuperscript{858} Eduardo Ferrer Mac-Gregor, “Interpretación conforme y control difuso de constitucionalidad. El nuevo paradigma para el juez mexicano” in Miguel Carbonell Sánchez y Pedro Salazar Ugarte, supra note 833 at 355-356.

\textsuperscript{853} See José Luis Caballero Ochoa, supra note 825 at 20-22; Gerald L. Neuman, supra note 36 at 1890-1895.
self-executing. As a result, international human rights norms are not applied in subsidiary fashion but directly, in harmony with other constitutional human rights norms.

On the other hand, Mexico has also incorporated a constitutional provision commanding that all human rights norms shall be interpreted ‘in conformity with’ the Constitution and international human rights treaties. A similar provision is found in the constitutions of Portugal, Spain, Peru and Romania. The ‘in-conformity-with’ clause forces countries to coordinate their interpretation of constitutional rights with corresponding international human rights treaties. Under this model, international human rights norms are not applied directly but, rather, are used to inform judges when construing the content of national human rights norms. One of the benefits of this coordinated interpretation is that external precedents might guide new democracies in interpreting constitutional rights, bolstering “the authority of the reviewing court against other political forces.” Mexico linked the “in-conformity-with’ clause with the pro homine principle, favoring the broadest protection to any person. A similar linkage can also be found in the recently enacted constitutions of Ecuador and the Dominican Republic. The effect of this linkage is twofold. First, it guarantees a ‘minimum content’ for a human right which can come either from the Constitution or an international human right treaty. The content would be the protection offered through a constitutional or international provision. Second, if a constitutional human right already has content, such content can be progressively expanded through the use of international human rights norms and the interpretations of these norms developed by their authoritative interpreters such as a regional court or a treaty body. Therefore, the jurisprudence developed by international human rights bodies or courts may also expand the content of a human right, thereby playing an important role in the protection of human rights as will be explained in the next section.

Finally, the sui generis nature of the “in-conformity-with” clause included in Article 1 of the Mexican Constitution should be highlighted. While most of these clauses pair constitutional rights with international human rights treaties, the Mexican clause does not restrict the equation

859 José Luis Caballero Ochoa, supra note 825 at 22; Gerald L. Neuman, supra note 36 at 1895.
860 José Luis Caballero Ochoa, supra note 825 at 28.
861 Gerald L. Neuman, supra note 36 at 1896.
862 José Luis Caballero Ochoa, supra note 825 at 114.
to ‘constitutional rights,’ but opens it to ‘all human rights norms.’ The effect of this broader wording is that non-constitutional human rights norms (substantive or procedural) can also be interpreted in conformity with international human rights treaties. The case would be those human rights included in federal or state legislation, but not in the Mexican Constitution and, hence, not considered ‘constitutional rights.’

A second feature is that the Mexican “in-conformity-with” clause mandates all public authorities to comply with it. Authorities include judges adjudicating human rights cases, congressmen passing legislation and bureaucrats performing administrative tasks. All of them must interpret human rights norms in conformity with the Mexican constitution and international human rights treaties. Another characteristic of the “in-conformity-with’ clause is that it implies a principle harmonizing the Mexican Constitution with international human rights treaties. The clause does not mandate a successive interpretation; that is, human rights norms are first interpreted in conformity with the Mexican Constitution and then in conformity with international human rights treaties. Rather, the clause commands an interpretation that must consider both sources (constitution and human rights treaties) as constituting a single unit. In the case of duplicate constitutional and international norms, the norm giving the broadest protection to a person prevails. The fourth feature of the “in-conformity-with” clause is related to the principles of universality, interdependence, indivisibility and progressiveness. All public authorities have to consider these principles when interpreting human rights norms in conformity with the Mexican Constitution and international human rights treaties.

7. The Effects of the Amendment to Article 1 of the Mexican Constitution in the Mexican Legal Order

The overall effect of amplifying the Mexican bill of rights by incorporating international human rights norms and including an ‘in-conformity-with’ clause linked to a pro homine principle is primarily the content expansion of the fundamental rights and freedoms that exist in Mexico. This expansion is achieved by integrating all human rights norms regardless of constitutional or international origin. As we have seen, both the Mexican Constitution and human rights treaties

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863 Edwardo Ferrer Mac-Gregor, supra note 857 at 363-364
864 For these and other particular features of the “in conformity with” clause see Edwardo Ferrer Mac-Gregor, supra note 857 at 363-368.
may include the same fundamental right or freedom. Take as an example freedom of religion. This fundamental right is included in both the Mexican constitution and international human rights treaties, but these instruments word things differently. A Mexican judge can today construct the content of freedom of religion by drawing on the normative elements included in both the constitutional and the international provisions. The ‘in-conformity-with’ clause does not entail a dismissal of the constitutional provisions. It gives judges and other public authorities the opportunity to compare these provisions with their international counterparts, and then take the normative elements of each definition that best protects a person.

It should be noted that international human rights norms may not be the best norms to be applied to a particular controversy. An international human rights norm may well offer less protection than its constitutional equivalent. \(^{865}\) In such a case, the pro homine principle prescribes that the Mexican Constitution be applied. In fact, international human rights law prescribes its own solution—international human rights instruments shall not be used to limit or derogate the exercise of fundamental rights and freedoms recognized by virtue of the laws of any State Party. \(^{866}\) If the Mexican constitution provides few normative elements of a fundamental right or does not provide such right at all, international human rights norms may contribute substantially. Judges may apply these norms to create a right that is clearly enshrined in international human rights law, but absent under Mexican law. The human right included in international treaties will thus become ‘the minimum level of constitutional protection.’ \(^{867}\)

In light of the reasons described above, it could be argued that the ultimate goal of the incorporation of human rights norm into the Mexican constitution, and of the adoption of an ‘in-conformity-with’ clause linked to the pro homine principle is to use both international and

\(^{865}\) Article 20(1) of the Spanish Constitution, for instance, prohibits ‘any form of prior censorship’ while Article 10 of the European Convention on Human Rights provides that freedom of expression may be subject to formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society, thereby opening the restrictions to some form of prior censorship. Given that the Spanish Constitution provides greater protection to freedom of expression, it would prevail over the European Convention on Human Rights. See José Luis Caballero Ochoa, La incorporación de los tratados internacionales sobre derechos humanos en España y México (Mexico City: Porrúa, 2009) at 197-198.


\(^{867}\) Gerald L. Neuman, *supra* note 36 at 1896.
domestic provisions to expand the content of human rights norms in Mexico, creating higher levels of protection.868

8. What the Amendment to Article 1 of the Mexican Constitution Means to Privacy in Mexico

The protection of privacy in Mexico can benefit substantially from the amendment to Article 1 of its constitution. As discussed in Chapter Three, the problem with the protection of privacy in Mexico does not spring from the fact that there is a lack of provisions aimed at protecting privacy. Several Articles of the Mexican Constitution protect the privacy of home, correspondence and communications. The issue is, rather, that these articles do not include an explicit general right to privacy and the Mexican Supreme Court has yet to articulate one. Given that international human rights treaties, such as the ICCPR and the ACHR, word the right to privacy as a discrete entitlement aimed at protecting the private lives of individuals from unlawful or arbitrary interferences, Mexican authorities (including judges) are now obliged to consider this right as articulated in such treaties. This means that judges, in theory, are obligated to examine laws or acts of public authorities allegedly posing privacy invasion in light of Article 17 of the ICCPR and/or Article 11 of the ACHR and determine whether such laws or acts are contrary to these articles. Judges are in this way required to use the normative elements included in either or both of these articles. Judges must use these elements when determining whether or not an intrusion upon the private lives of individuals is being carried out unlawfully or arbitrarily by the state. The wording of Articles 17 of the ICCPR and/or Article 11 of the ACHR can help judges protect a zone of individual existence and autonomy from the unwanted interference of the state. As discussed in Chapter One, this zone is what the human right to privacy safeguards and all Mexicans are entitled to enjoy it.

In cases of mandatory data processing carried out by the state, as we saw in Chapter Three, the 1917 Constitution has fallen short in the protection of the private lives of Mexicans. The incorporation of international human rights treaties into the Mexican legal order therefore has the potential to produce a very positive effect. To see this happen, Judges should be using normative parameters included in Article 17 of the ICCPR and/or Article 11 of the ACHR when determining whether the collection, retention, use or disclosure of personal information carried

868 José Luis Caballero Ochoa, supra note 825 at 139.
out by the state interferes with the private lives of individuals unlawfully or arbitrarily. This means that the normative parameters included in both articles can be used by Mexican judges to preserve the freedom-from-interference personal zone of Mexicans in cases of privacy invasion via the mandatory collection, retention, use or disclosure of personal information. As with the RENAUT and National Identity Card cases analyzed in Chapter Three, despite the threats to privacy invasion that both RENAUT and the National Identity Card posed, the Supreme Court of Mexico did not address the question of whether the data processing carried out by the state in those cases was unlawfully or arbitrarily performed. It could be the case that the Supreme Court did not address such a question because normative parameters such as ‘unlawful’ and ‘arbitrary’ (included in Article 17 of the ICCPR and/or Article 11 of the ACHR) appear nowhere in the Mexican Constitution. Given that Article 1 of the Mexican Constitution today requires judges to interpret norms ‘in conformity with’ international human rights treaties and ‘to favor the broadest possible protection for individuals,’ Article 17 of the ICCPR and/or Article 11 of the ACHR can assist judges when examining laws or acts of public authorities authorizing the state to conduct privacy invasion via mandatory data processing. The use of both Articles by Mexican judges will no doubt improve the protection of privacy in Mexico.

9. The Jurisprudence of Authoritative Human Rights Interpreters

One issue yet to be analyzed is whether human rights interpretations by international tribunals or treaty bodies should be considered by judges when applying international human rights norms. One argument in favor of following authoritative interpretations (especially those issued by international courts) is that they may modernize a constitutional court’s methodology of interpreting and applying human rights.869 Gerald Neuman explains the pros and cons of incorporating authoritative interpretations

If incorporation of the treaty does not incorporate authoritative interpretations, then constitutional review will not guarantee future compliance with international standards, and the constitutional court will be authorized to maintain an idiosyncratic version of what is ostensibly the treaty […]. If incorporation of the treaty does incorporate authoritative interpretations, then

869 Gerald L. Neuman, supra note 36 at 1893.
the meaning of a portion of the national constitution is effectively delegated to an international tribunal. The constitutional court will be bound by discretionary modifications of case law from time to time by the tribunal, possibly adopted without significant attention to the institutional setting and expectations of the particular country.\textsuperscript{870}

Neuman finally maintains that when an international human rights treaty does not have an authoritative interpreter or does not make the international oversight body’s view more binding in domestic law than they are in international law, far less tension should arise.\textsuperscript{871} Two issues need to be analyzed in order to determine if authoritative interpretations ought to be considered when applying an “in-conformity-with” clause. The first is the wording of the constitutional provision incorporating such a clause. It may explicitly refer to these interpretations or it may be ambiguous in this respect. The second issue is the role such interpretations have within a legal system. This is also related to the recognition of the jurisdiction of an international human rights court by a country.

Article 1 of the Mexican Constitution mandates the interpretation of human rights norms in conformity with the Constitution and the international human rights treaties to which Mexico is a party. This Article, however, makes no specific reference to authoritative interpretations such as the Inter-American Court jurisprudence or recommendations of human rights treaty bodies. The jurisprudence of both the Inter-American Court and the Mexican Supreme Court of Justice must therefore be considered when determining the role authoritative interpretations have within the Mexican legal system.

9.1 The Jurisprudence of the Inter-American Court of Human Rights

The American Convention on Human Rights (ACHR) is an international human rights treaty adopted by member states of the Organization of American States in San José, Costa Rica on November 22, 1969.\textsuperscript{872} It is the main instrument for human rights enforcement in the

\textsuperscript{870} Gerald L. Neuman, supra note 36 at 1894-1895.
\textsuperscript{871} Ibid at 1895.
\textsuperscript{872} The American Convention on Human Rights (ACHR), also known as Pact of San José, came into force after Grenada deposited the eleventh instrument of ratification on 18 July 1978. See Article 74.2 of ACHR.
Two bodies are responsible for ensuring compliance with the Convention—the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both organs decide individual complaints relating to alleged human rights violations. They may intervene in cases of extreme gravity or urgency by adopting measures aimed at preventing irreparable damage to persons. While the Commission promotes respect for and defense of human rights and makes recommendations to governments of member states, the Court rules cases concerning violations of the rights or freedoms protected by the ACHR. Only the Commission and states parties are empowered to submit to the Inter-American Court cases concerning the interpretation and application of the ACHR. Before submitting a case, States parties must recognize the jurisdiction of the Court. The Court has also advisory powers, thereby issuing opinions pertaining to the legal interpretation of the ACHR.

The Inter-American Court is thus a judicial institution whose purpose is the application and interpretation of the ACHR. The fact that the Court is the sole judicial interpreter of the ACHR does not necessarily answer the question of whether its jurisprudence should be legally binding on states that are not a party to a case submitted to its jurisdiction. The ACHR does not address this specific issue. Some scholars have argued that because the jurisprudence of the Inter-American Court is created through the interpretation that the Court makes of the ACHR, such jurisprudence has the same legal validity as the ACHR provisions. In other words, the normative force of the ACHR reaches the interpretations that the Inter-American Court has given to such instrument. As a consequence, the argument follows, the jurisprudence of the Inter-

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873 Twenty five countries have ratified or adhered to the ACHR, including Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago and Venezuela denounced the ACHR by communication addressed to the General Secretary of OAS on 26 May 1998 and 10 September 2012, respectively. The United States signed the ACHR on 1 June 1977, but has not yet ratified it. Although Canada joined OAS in 1990, it has not adhered to ACHR. For the list of countries that have ratified, acceded or denounced the ACHR, see, online: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm>

874 See Article 63.2 and Article 48.2 of ACHR.

875 For the functions of the Inter-American Commission on Human Rights, see Article 41 of the ACHR.

876 For the functions of the Inter-American Court of Human Rights see Articles 61-64 of the ACHR.

877 See Article 1 of the Statute of the IACHR, which was adopted by the General Assembly of the OAS at its Ninth Regular Session held in La Paz, Bolivia on October 1979, online: <http://www.corteidh.or.cr/index.php/en/about-us/estatuto>

878 Eduardo Ferrer Mac-Gregor, supra note 857 at 393-394.
American Court can be considered as norms that derive from the ACHR, having the same direct effect that this instrument has.  

There is another argument in favor of the binding effects of the Inter-American Court jurisprudence on states that are not a party to a case ruled by the Court. Article 69 of the ACHR mandates that a judgment of the Inter-American Court shall be notified to the parties to the case and “transmitted to the States Parties to the Convention.” Some scholars argue that when the Inter-American Court interprets the ACHR provisions, the Court expands the content of the original norms, creating an ‘interpreted norm.’ By mandating that all States Parties shall be notified of a judgment of the Inter-American Court, Article 69 suggests that these states must follow the ACHR norms as interpreted by the Inter-American Court. The interpretation, the argument follows, is ‘authentic’ and ‘trustworthy’ since it was delivered by the final interpreter of the ACHR (i.e. the Inter-American Court.) Furthermore, given that Article 69 mandates the dissemination of the ratio decidendi of all Inter-American Court rulings, it guarantees the effects of all ‘interpreted norms’ created by this Court. Therefore, when a judge of a State Party to the ACHR needs to apply this instrument, he must consider the Inter-American Court jurisprudence.

In 1999, the Inter-American Court held in an ‘advisory opinion’ that “human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.” While this document does not address the legal nature the Inter-American Court jurisprudence has within the legal system of a state party to the ACHR, the advisory opinion does suggest that the ACHR provisions cannot be analyzed in isolation, but rather in connection with the interpretations that the Inter-American Court has given to such provisions. Judges of all member states must therefore consider the Inter-American Court jurisprudence regardless of the fact that the state of which they are nationals has been a party to a case submitted to the Court.

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Doing the opposite would amount to “nullify the very essence of the ACHR.” The provisions of the ACHR and its interpretations by the Court thus create a ‘minimum standard’ which become a type of *ius commune* for the effective protection of human rights in the region.

9.1.1 The Doctrine of Conventionality Control

In the last decade, the Inter-American Court has been stressing the binding nature of its jurisprudence through several rulings, which, over time, have created what it is now called the doctrine of ‘conventionality control.’ Through this control, the Inter-American Court examines the acts of States parties to the ACHR and determines if such acts conform to the legal standards, principles and values of the ACHR. The conventionality control thus resembles the constitutional control carried out by constitutional courts in Europe or the judicial review performed by judges in the U.S or Canada. The conventionality control is not exclusive of the Inter-American Court. The European Court of Human Rights, for instance, performs a similar task by controlling that the acts of member states of the Council of Europe are in conformity with the European Convention on Human Rights. In general terms, it could be argued that through the conventionality control, international human rights tribunals verify that states comply with the provisions of the regional human rights treaties to which they are party.

The conventionality control took, however, another dimension in 2006. In *Almonacid Arellano et al v. Chile*, the Inter-American Court established that the Judiciary of all states parties to the ACHR “must exercise a sort of ‘conventionality control’” between the domestic legal provisions

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884 Eduardo Ferrer Mac-Gregor, *supra* note 857 at 393-394.
885 The comparison between the ‘constitutional control’ and the ‘conventionality control’ appeared for the first time in the Inter-American Court jurisprudence in the concurring opinion of Sergio García Ramírez, J., in the *Tibi Case (Ecuador)* Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 September 2004, Inter-Am. Ct. HR (Ser C) No 114, para. 3, online: <http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en>
887 *Almonacid-Arellano et al Case (Chile)* Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Inter-Am. Ct. HR (Ser C) No 154, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf>
which are applied to specific cases and the American Convention on Human Rights.” Furthermore, the Inter-American Court reinforced the legally binding nature of its jurisprudence by establishing

To perform this task [conventionality control], the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. (emphasis added)

Amonacid-Arellano v. Chile is a very important case for two reasons. First, through this case, the Inter-American Court has required judges of all states parties to the ACHR to exercise the conventionality control—to examine that the domestic legal provisions of their home countries comply with the provisions of the ACHR. This means that the conventionality control is no longer an exclusive control of the Inter-American Court. Second, when performing the conventionality control, judges not only have to take into account the ACHR but also the legal interpretations that the Inter-American Court has made of this instrument. Therefore, through the conventionality control, the Inter-American Court has confirmed the legally binding nature of its jurisprudence.

After Amonacid-Arellano v. Chile not only has the Inter-American Court confirmed the conventionality control doctrine but it has also elaborated on it. In Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru the Inter-American Court indicated that all judges (not just the Judiciary) are obliged to preserve the effet utile of the ACHR. The Court also held that the organs of the judiciary should exercise a control of conventionality ex officio (i.e. regardless of whether the parties to a case invoke it) between domestic norms and the ACHR “in the context

888 Amonacid-Arellano et al Case supra note 887, para. 124 The Amonacid-Arellano Case involved an amnesty law (Ley No. 2.191) passed by the Chilean Congress on 1978. By applying the amnesty law, Chile did not investigate crimes occurred during the period 1973-1978 nor punished the perpetrators of such crimes. The Inter-American Court found that, through the amnesty law, Chile did not comply with the obligations required by Article 1.1 and Article 2 of the ACHR (obligation to respect the rights and freedoms recognized in the ACHR) and violated the right to a fair trial and the right to judicial protection of Mr. Amonacid-Arellano’s heirs protected by Article 8.1 and Article 25 of the ACHR.

889 Amonacid-Arellano et al Case, supra note 887 at 114.
of their respective sphere of competence and the corresponding procedural regulations.” 890 Some years later, in Cabrera Garcia and Montiel Flores v. Mexico, the Inter-American Court made clear that “all [state] institutions including judges” are required to ensure that “all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end.” 891 Furthermore, the Inter-American Court extended the duty to perform the conventionality control to the Judiciary at “all levels.” This extension means that notwithstanding their hierarchical position (trial/appellate) or their level (national/sub-national), all judges of a state party to the ACHR must take into account (when deciding a case) both the ACHR and the legal interpretations that the Inter-American Court has made of this instrument. The Court reiterated this criterion in Gelman v. Uruguay in 2011. 892 What is relevant from the last two cases is the fact that the Inter-American Court declared that all state authorities (not just judges) have to ensure that their acts comply with the provisions of the ACHR and this mandate may include the jurisprudence of the Inter-American Court.

Finally, in 2013, the Inter-American Court distinguished the effects that its rulings have in countries that are party to a case brought to its jurisdiction from those that are not. While in the former a ruling is res judicata and therefore all state organs are obliged to comply with it, in the latter such ruling has a less binding effect. The Court held that in the latter situation the very fact that a state is a party to the ACHR has certain legal implications—all state authorities including democratic institutions and judges at all levels “are bound by the treaty [ACHR].” This means that state authorities need to perform a conventionality control over all general norms and such control has to consider the provisions of the ACHR and “the precedents and jurisprudential guidelines” issued by the Inter-American Court. Therefore, in spite of the distinction between

890 Dismissed Congressional Employees (Aguado-Alfaro et al.) Case (Peru) Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2006, Inter-Am Ct HR (Ser C) No 158, para. 128, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_158_ing.pdf>

891 Cabrera Garcia and Montiel Flores Case (Mexico) Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 November 2010, Inter-Am Ct HR (Ser C ) No 220, para. 225, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf>

892 Gelman Case (Uruguay) Merits and Reparations, Judgment of 24 February 2011 Inter-Am Ct HR (Ser C) No 220, para. 193, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf>
parties and non-parties to a case, the Inter-American Court has established that its jurisprudence has binding effects in all state parties to the ACHR.893

In the case of Mexico, the Supreme Court has recognized the full authority and binding nature of the Inter-American Court jurisprudence, regardless of whether or not Mexico has been a party to a case. This recognition was no straight forward matter. As the following section explains, after some initial resistance, the Mexican Supreme Court has finally declared that, together with its own jurisprudence, the Inter-American Court rulings are legally binding on all Mexican judges.  

9.1.2 The Jurisprudence of the Inter-American Court of Human Rights in Mexican Law

Mexico acceded to the ACHR on March 23, 1981, following the procedure prescribed in Article 74 of such treaty.894 The recognition of the jurisdiction of the Inter-American Court came almost twenty years later, when Mexico deposited the corresponding instrument with the General Secretariat of the Organization of American States on December 16, 1998.895 By submitting to the jurisdiction of the Inter-American Court, Mexico has undertaken to comply with the judgment of the Court in any case to which it is a party.896 Such a judgment is final and not subject to appeal.897 Furthermore, because Mexico has also ratified the Vienna Convention on

893  *Gelman Case (Uruguay)* Monitoring Compliance with Judgment, Order of the Court of 20 March 2013, Inter-Am Ct HR, para. 67-69, online: <http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13.pdf >
894  Article 74.2 of the ACHR prescribes “Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.” Mexico deposited its instrument of adherence on 24 March 1981. The ACHR was published in the Official Gazette [*Diario Oficial de la Federación*] on 5 May 1981, online: <http://www.dof.gob.mx/nota_detalle.php?codigo=4645612&fecha=07/05/1981>  
895  Article 62.1 of the ACHR prescribes “A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.” (Emphasis in original). The Declaration for Recognition of the Jurisdiction of the Inter-American Court of Human Rights was published in the Official Gazette [*Diario Oficial de la Federación*] on 24 February 1999; available at <http://www.dof.gob.mx/nota_detalle.php?codigo=4944372&fecha=24/02/1999>  Erratum <http://www.dof.gob.mx/nota_detalle.php?codigo=4944284&fecha=25/02/1999>  
896  Article 68.1 of the ACHR provides: “The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”
897  Article 67 of the ACHR provides: “The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.”
the law of treaties\textsuperscript{898} the country cannot invoke provisions of Mexican law as justification for its failure to comply with ACHR, including judgments of the Inter-American Court.

Mexico has been condemned for violating the ACHR in six out of eight cases that have been brought before the jurisdiction of the Inter-American Court.\textsuperscript{899} In \textit{Radilla Pacheco v. Mexico},\textsuperscript{900} \textit{Fernandez Ortega et al. v. Mexico},\textsuperscript{901} \textit{Rosendo Cantu et al. v. Mexico}\textsuperscript{902} and \textit{Cabrera Garcia and Montiel Flores v. Mexico},\textsuperscript{903} the Inter-American Court ordered Mexico to exercise the ‘control of conventionality’ \textit{ex officio} referred to above. The first of these cases had a significant impact in the Mexican legal system. For the first time, an international human rights tribunal condemned Mexico for violating a human rights treaty. As a result, the country had to adopt certain legal measures to comply with the judgment. One of such measures was the determination of the legal effects of the Inter-American Court rulings within the Mexican legal system.

After the first case against Mexico (\textit{Radilla Pacheco v. Mexico}) was ruled by the Inter-American Court, the Supreme Court of Mexico had to specify the legal implications that the ruling of such case would have within the Mexican legal system. The Supreme Court of Mexico issued in 2011


\textsuperscript{899} The cases are \textit{Castañeda Gutman v. Mexico} (2008); Gonzalez et al. (“Cotton Field”) v. Mexico (2009); Radilla Pacheco v. Mexico (2009); Fernandez Ortega et al v. Mexico (2010); Rosendo Cantu v. Mexico (2010); Cabrera Garcia and Montiel Flores v. Mexico (2010). In \textit{Alfonso Martin del Campo Dodd v. United Mexican States} (2004), the Inter-American Court admitted the \textit{ratione temporis} objection entered by Mexico and did not hear the alleged violations of the American Convention on Human Rights and of the Inter-American Convention to Prevent and Punish Torture. In the \textit{Garcia Cruz and Sanchez Silvestre v. Mexico} (2013), the Inter-American Court did not condemned Mexico because the country acknowledged its international responsibility and reached a “friendly settlement agreement” with the victims of human rights violations.

\textsuperscript{900} \textit{Radilla Pacheco Case (Mexico)} Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 November 2009, Inter-Am Ct HR (Ser C) No 209, para. 339, online: \url{http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf}

\textsuperscript{901} \textit{Fernandez Ortega et al Case (Mexico)} Preliminary Objection, Merits, Reparations and Costs, Judgment of 30 August 2010, Inter-Am Ct HR (Ser C) No 215, para. 236, online: \url{http://www.corteidh.or.cr/docs/casos/articulos/seriec_215_ing.pdf}

\textsuperscript{902} \textit{Rosendo Cantu Case (Mexico)} Preliminary Objection, Merits, Reparations and Costs, Judgment of 31 August 2010, Inter-Am Ct HR (Ser C) No 216, para. 219; available at \url{http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf}

\textsuperscript{903} \textit{Cabrera Garcia and Montiel FloresCase (Mexico)} Preliminary Objection, Merits, Reparations and Costs, Judgment of 26 November 2010 Inter-Am Ct HR (Ser C) No 220, para. 225, online: \url{http://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf}
a Resolution [hereinafter 2011 Resolution] in which it explained the concrete obligations that the Inter-American Court ruling created for the federal judicial power in Mexico. The Supreme Court agreed with the *res judicata* argument referred to above and made clear that the Supreme Court has no competence to analyze, review or qualify a ruling of the Inter-American Court. Therefore, the Supreme Court declared that Mexico is obliged to comply with the Inter-American Court ruling in its entirety.

With regard to the Inter-American jurisprudence, the Supreme Court of Mexico established in the 2011 Resolution an interesting distinction. The Court held that when Mexico is a party to a case brought before the Inter-American Court, the *ratio decidendi* of the rulings would be legally binding for all Mexican judges. But in the rest of the cases, the Inter-American Court rulings should only be regarded as ‘orientation criteria’ for all judges, without having any binding effect on them. Finally, the Supreme Court of Mexico specified in the 2011 Resolution the rules through which Mexico will exercise the conventionality control *ex officio* referred to above. These rules, however, will not be explained as they go beyond the analysis of this chapter.

It should be noted that in the 2011 Resolution the Supreme Court of Mexico did not elaborate on the reasons for the distinction referred to in the previous paragraph. Some scholars were dissatisfied with this criterion, arguing that it was against the very essence of the ACHR. It was not clear why the Supreme Court decided not to give binding effects to the *ratio decidendi* of those Inter-American Court rulings in which Mexico was not party. With its resolution, the Supreme Court limited in a significant manner the effects that the jurisprudence of the Inter-American Court could have had in the protection of human rights in Mexico.

The Supreme Court of Mexico, however, modified in 2013 its criterion on the binding effects of the Inter-American Court jurisprudence. The Supreme Court has finally recognized that such jurisprudence is legally binding on all judges regardless of whether Mexico is a party to a case or

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The Supreme Court argued that the Inter-American Court jurisprudence “constitutes an extension of the ACHR.” Notwithstanding this radical change, the Supreme Court established certain rules that judges must follow when applying the Inter-American Court jurisprudence. First, the Inter-American Court jurisprudence does not substitute the Supreme Court of Mexico jurisprudence. They must be applied in a ‘collaborative way.’ When both jurisprudences maintain different criteria, based on the pro homine principle, a judge must choose the criterion that gives the broadest protection to a person or the one that implies less restriction in the exercise of a fundamental right. Second, judges must determine if an Inter-American Court precedent would be applicable to the Mexican legal order. To achieve such determination, judges must make sure that the legal framework, the factual context and the particularities of a case in Mexico are analogous to the ones that motivated a ruling of the Inter-American Court. If judges find that the same reasons exist in both cases, then they may apply the precedent of the Inter-American Court to the case brought before them.

9.1.3 What the Inter-American Court Jurisprudence on Privacy Could Mean in Mexico

The jurisprudence of the Inter-American Court therefore has binding legal effects on Mexico. As discussed, the Inter-American Court requires that all public authorities (including judges) of countries which are a party to the ACHR must exercise a conventionality control—they must verify that the domestic legal provisions of a country comply with the principles, values and legal standards of the ACHR. When exercising the conventionality control, authorities must consider the jurisprudence of the Inter-American Court. As also explained, the Supreme Court of Mexico has acknowledged that this jurisprudence has binding effects on Mexican judges. This is of the greatest importance for the protection of privacy in Mexico. The jurisprudence on privacy developed by the Inter-American Court (analyzed in Chapter One) can be applied to cases of privacy invasion brought before Mexican courts. Mexican judges are now supposed to apply the privacy case law developed by the Inter-American Court when hearing cases of privacy invasion. In practice, this means that judges can borrow normative elements from the jurisprudence of the

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909 See Contradicción de Tesis 293/2011, supra note 830 at 63.
910 Contradicción de Tesis 293/2011, supra note 830 at 57.
911 Contradicción de Tesis 293/2011, supra note 830 at 58.
912 Contradicción de Tesis 293/2011, supra note 830 at 60.
Inter-American Court that they can use to articulate a right to privacy as a clear and sound entitlement. As explained in Chapter One, the Inter-American Court has interpreted Article 11 of the ACHR extensively, clearly defining a personal sphere of freedom and autonomy free from the interference of outsiders, especially the state. Given that a right to privacy is absent from the 1917 Constitution and the Supreme Court of Mexico has yet to articulate one, the interpretations that the Inter-American Court has made of Article 11 of the ACHR can assist the Mexican Supreme Court in creating a right to privacy that could work in the Mexican legal system as a discrete and normative entitlement.

Furthermore, given the legally binding nature of the Inter-American Court jurisprudence on Mexico, judges are also supposed to apply the proportionality test (examined in Chapter One) developed by the Inter-American Court in cases involving laws or acts of public authorities allegedly posing an interference with the right to privacy. This means, for instance, that all laws authorizing the Mexican state to conduct mandatory collection, retention, use or disclosure of personal information can be scrutinized by Mexican judges through the use of this proportionality test. This is not to say, of course, that judges will favor the right to privacy over broad societal benefits, such as national or public security, crime prevention or law enforcement. The use of the proportionality test by Mexican judges would simply assure individuals that laws authorizing the state to conduct mandatory data processing have been enacted by an elected Congress, have a legitimate purpose and are appropriate, necessary and proportionate in a democratic society. In this way, the proportionality test developed by the Inter-American Court for cases of privacy invasion could be used by Mexican judges as a tool for the analysis of laws or acts of public authorities allegedly posing privacy invasion. The jurisprudence of the Inter-American Court could therefore become a relevant source of privacy law in Mexico in the years to come.

The fact that Inter-American Court jurisprudence is legally binding in Mexico does not necessarily mean that human rights interpretations made by other permanent international bodies, such as of the UN human rights committees, lack legal force in Mexican law. The following section examines the jurisprudence developed by these committees and the binding effects it may have on UN Member States and in the Mexican legal system.
9.2. The Jurisprudence of the UN Human Rights Committees

9.2.1 The UN Human Rights Committees

Mexico signed the United Nations (UN) Universal Declaration of Human Rights in 1948 and has ratified or acceded to the core international human rights instruments—International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); Convention on the Rights of Persons with Disabilities (CRPD); Convention for the Protection of All Persons from Enforced Disappearance (CPED).  

Each of these international human rights treaties has established an international committee of independent experts that monitors, by various means, the implementation of the treaty by its states parties. Such means are 1) the consideration of periodic reports detailing the application of a treaty provisions nationally, 2) the reception of communications from individuals subject to a state party jurisdiction who claim to be victims of violations by such state party authorities of the rights set forth in a human rights treaty, 3) the conduction of ‘country inquires’ when a committee receives reliable information containing well-found indications of serious, grave or systematic violation of a convention in a State party 4) the interpretation of the provisions of the respective human rights treaty through the publication of ‘general comments’ or ‘general recommendations’, and 5) the organization of thematic discussions related to the respective treaty. Although all committees perform similar functions, their means may vary depending on the mandates given to each committee by the relevant treaty.  

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913 Mexico has also ratified or acceded to several optional protocols related to these treaties. For a detailed list of the international human rights treaties and optional protocols that Mexico has ratified or acceded to, see, online: <http://tbinternet.ohchr.org/Layers/TreatyBodyExternal/Countries.aspx?CountryCode=MEX&Lang=>

have also been called human rights treaty bodies. In the following paragraphs both terms will be used interchangeably.

Human rights treaty bodies do not necessarily have decision-making powers similar to those of a court or tribunal. For instance, they do not issue judgments but rather suggestions, comments or recommendations; they hold closed meetings when examining individual communications; and they do not award compensation. The Human Rights Committee, which monitors implementation of the ICCPR, is not considered a court of law but rather a body with a more ‘amorphous nature.’ For Dominic McGoldrick this nature “includes elements of judicial, quasi-judicial, administrative, investigative, inquisitorial, supervisory and conciliatory functions.”

The lack of judicial or quasi-judicial powers does not mean that human rights treaty bodies do not create jurisprudence. UN Committees deliver interpretations of international human rights conventions through 1) the adoption of ‘concluding observations’ on the reports of individual states parties, 2) the publication of ‘general comments’ and 3) the formulation of final ‘views’ in complaints procedures.

9.2.1.1 Concluding Observations

When a country ratifies any of the UN human rights treaties not only does such country assume the legal obligation to implement the rights recognized in a treaty but it also commits to submit periodic reports to the respective treaty monitoring body. In the reporting process, Committees receive information from state party representatives and non-governmental

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916 See, for instance, Article 9 (2) of CERD; Article 40 (4) of ICCPR; Article 21 (1) of CEDAW; Article 20 (4) of CAT; Article 45 (d) of CRC Article 7(3) Optional Protocol to the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW OP) or Article 5 and Article 6(3) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD OP) The Human Rights Committee ‘forwards its views’ to both the State Party concerned and the individual who submitted the communication (Article 5(4) of the ICCPR Optional Protocol).

917 See, for instance, Article 7(2) of CEDAW OP, Article 5 of CRPD.


919 McGoldrick also explains the drafting process that preceded the creation of the Human Rights Committee. Ibid.

920 See, for instance, Article 40 of ICCPR. A similar provision exists in the other core UN human rights treaties.
organizations, assessing the level of respect for human rights in a particular country. The reporting process thus creates a ‘dialogue’ between state parties and committees about the implementation of a human rights treaty. In response to a state party report, the respective treaty body issues their ‘concluding observations,’ a non-binding document “containing its collective assessment of a State’s record and recommendations for enhanced implementation of the rights in question.” Concluding observations’ can be “specific and pointed, providing “an opportunity for the delivery of an authoritative overview of the state of human rights in a country and for the delivery of forms of advice which can stimulate systematic improvements.” The country-specific nature of ‘concluding observations’ raises the question of whether these observations have broader jurisprudential value. While some UN Committee members have argued that concluding observations “have wider significance as they represent a consensus view of the [respective] Committee of how particular provisions of the [human rights] instrument should be interpreted and applied,” others remain skeptical, restricting the interpretative value of such observations just to the state party involved in the reporting process. Some scholars argue that the jurisprudential value of ‘concluding observations’ is ‘marginal’ and ‘exceptional’ because “they very often remain at a level or generality which defies efforts to extract from them statements which have a clear normative significance beyond the specific, narrow context in which they are made.”

In any case, ‘concluding observations’ offer important interpretations of human rights provisions and, given that such interpretations are made by a treaty body, they have authoritative value. There are at least three reasons for this. First, despite its non-binding nature, ‘concluding observations’ are made by independent experts who have the power to interpret human rights

924 Elizabeth Evatt, supra note 921 at vi.
925 Michael O’Flaherty, supra note 923 at 27.
926 Michael O’Flaherty, supra note 923.
treaties. Such power is not arbitrary, but, rather, essential to carrying out their functions. \(^928\) Second, ‘concluding observations’ are adopted by consensus, so they cannot be easily dismissed by states on grounds of political or cultural prejudices, misunderstandings or eccentricities of treaty-body members. \(^929\) Third, because ‘concluding observations’ are drafted carefully and with formal character, some scholars see them as “authoritative pronouncements on whether a particular state has or has not complied with its [treaty] obligations…” Therefore, concluding observations can indeed provide insights about the manner in which a treaty body interprets a human rights convention. \(^930\) Finally, the authoritative significance of ‘concluding observations’ is reflected in the fact that international tribunals such as the International Court of Justice have invoked them in their rulings. \(^931\)

9.2.1.2 General Comments

Treaty bodies issue General Comments or General Recommendations, \(^932\) interpreting the scope and meaning of specific provisions of human rights conventions. \(^933\) General Comments have been defined as “means by which a UN human rights expert committee distils its considered


\(^931\) See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), Advisory Opinion, ICJ Reports 136 at para. 110, online: <http://www.icj-cij.org/docket/files/131/1671.pdf> The ICJ considered the concluding observations formulated by the Human Rights Committee in 1998 and 2003 in regard to the obligations of Israel under the ICCPR. The ICJ agreed with the Committee that Israel had to comply with its duties under ICCPR “in respect of acts done…in the exercise of its jurisdiction outside its own territory”. Ibid at para. 111.


views on an issue which arises out of the provisions of a treaty, whose implementation it supervises, and presents those views in the context of a formal statement of its understanding to which it attaches major importance. General Comments are thus instruments through which a committee “spells out and make more accessible the ‘jurisprudence’ emerging from its work.”

Human rights instruments do not refer to General Comments as such and for this reason, their role, nature and normative significance “remain remarkably unclear.” Early General Comments were more technical and procedural rather than substantive. They were aimed at defining the internal procedures of Committees and clarifying the form and content of periodic reports. The content and purpose of General Comments have evolved over time to the extent that they may now include general interpretations of substantive provisions of the UN human rights instruments. Although General comments are not legally binding per se, some scholars maintain that “they have considerable legal weight.” Theodor Meron considers that while a human rights convention may not give a Committee general competence to interpret it, such Committee may interpret the convention provisions to perform its functions. This interpretation, Meron suggests, “affects the reporting obligations of states parties as well as their internal and external behavior.” Moreover, “it shapes the practice of States in applying the Convention and may establish and reflect the agreement of the parties regarding its interpretation.” In any case, given that human rights norms are usually drafted in vague or open-ended terms, UN Committees can use General Comments to clarify or give content to such

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934 Philip Alston, *supra* note 927 at 764.
935 Philip Alston, *supra* note 927 at 764.
936 Philip Alston, *supra* note 927 at 763-764.
941 Meron also clarifies “Whether a particular interpretation or decision by the Committee serves such a function can, of course, be determined only *in concreto*. *Ibid.* Emphasis in original.
norms, preventing non-compliance with treaty obligations by states parties. \(^{942}\) Therefore, General Comments have normative force notwithstanding their non-binding nature.

Because General Comments articulate authoritative, interpretative statements reflecting a Committee’s understanding of human rights norms, some authors consider that such Comments are similar to the advisory opinions of the International Court of Justice or the Inter-American Court of Human Rights. \(^{943}\) Other authors, however, remain critical, highlighting the ‘broad and unsystematic nature’ of General Comments issued by certain Committees. \(^{944}\) Whatever the reason may be, the truth is that General Comments have evolved in the past decades. In the case of the Human Rights Committee, for instance, General Comments have changed from being merely descriptive documents to being instruments offering a more comprehensive and detailed interpretation of the provisions of the ICCPR. \(^{945}\) General Comments issued by other UN Human Rights Committees have followed a similar path. \(^{946}\) For this reason, some authors today consider them as “theoretical exercises based on lengthy and technical discussion.” \(^{947}\) This consideration is a consequence of the drafting process of a General Comment. When a Committee issues a General Comment, it relies on its own jurisprudence and practice and also considers documents and interpretations made by other human rights treaty bodies. Given that Committees do not have time constraints, they discuss drafts in several sessions and publish a General Comment until they reach a sophisticated document. \(^{948}\) General Comments can indeed be true, prescriptive normative instruments defining the content of human rights vested in human rights treaties such as those issued by the Committee on Economic, Social and Cultural Rights. \(^{949}\)

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\(^{942}\) Philip Alston, *supra* note 927 at 767-768.

\(^{943}\) Conway Blake, *supra* note 932 at 9.

\(^{944}\) Philip Alston, *supra* note 927 at 764, note 8 and accompanying text.


\(^{946}\) Mara R. Bustelo, “The Committee on the Elimination of Discrimination against Woman at the Crossroads,” in in Philip Alston and James Crawford, *supra* note 919, 79 at 96. Bustelo explains that early CEDAW Committee general recommendations “were short and narrowly focused, [but] as the Committee developed, they became more sophisticated and lengthy”. *Ibid.*

\(^{947}\) EricTistounet, *supra* note 945 at 395.

\(^{948}\) EricTistounet, *supra* note 945 at 395.

\(^{949}\) See, for instance “General Comment No 3: The Nature of States Parties’ obligations (art. 2, para. 1, of the Covenant)” (establishing a minimum core obligation on States to ensure the satisfaction of minimum essential levels of the rights protected through ICESCR) or “General Comment No.4: The right to adequate housing (art. 11(1) of the Covenant) and “General Comment No.4: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions” (both defining the normative content of the ‘right to adequate housing’ derived from Article 11(1)
Interpretations of human rights treaties authored by UN human rights committees have not been overlooked by international tribunals nor states parties to such treaties. The International Criminal Tribunal for the Former Yugoslavia, for instance, has invoked General Comments issued by the Human Rights Committee in the cases Prosecutor v. Milosevic\(^950\), Prosecutor v. Anto Furundzija\(^951\) and Prosecutor v. Zejnil Delalic.\(^952\) At the regional level, the jurisprudence of the Human Rights Committee and the Committee on the Rights of the Child have influenced the Inter-American Court of Human Rights in the cases Apiz Barbera v. Venezuela,\(^953\) Barreto Feiva v. Venezuela,\(^954\) Chitay Nech v. Guatemala\(^955\), Bámaca Velásquez v. Guatemala.\(^956\) At the

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\(^{950}\text{Prosecutor v. Slobodan Milosevic, IT-99-PT, Decision on Preliminary Motions (8 November 2001) at para 9 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).}

\(^{951}\text{Prosecutor v. Anto Furundzija (Lašva Valley Case), IT-95-17/1, Judgment, (10 December 1998) at para 155, note 172 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).}

\(^{952}\text{Prosecutor v. Zenjil Delalic, Zdravko Mucic, Hazim Delic and Esad Lanzo (Čelebići Camp Case) IT-96-21, Decision on Motion for Provisional Release, (25 September 1996) at para 19, (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).}

\(^{953}\text{Apitz Barbera et al (First Court of Administrative Disputes) Case (Venezuela), Preliminary Objection, Merits, Reparations and Costs, Judgment of 5 August 2008, Inter-Am Ct Hr (Ser C) No 182, at para 43, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_182_ing.pdf> (considering para 20 of General Comment No. 32 of the Human Rights Committee on Article 14 of the ICCPR (right to equality before courts and tribunals and to a fair trial.).}

\(^{954}\text{Barreto Leiva Case (Venezuela), Merits, Reparations and Costs, Judgment of 17 November 2009, Inter-Am Ct Hr (Ser C) No 206, at para 86, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_206_ing.pdf> (considering para 47 of General Comment No. 32 of the Human Rights Committee on Article 14 of the ICCPR (right to equality before courts and tribunals and to a fair trial.).}

\(^{955}\text{Chitay Nech et al Case (Guatemala) Preliminary Objection, Merits, Reparations and Costs, Judgment of 25 May 2010, Inter-Am Ct Hr (Ser C) No 212 at para108, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_212_ing.pdf> (considering para 42 of General Observation No. 11 of the Committee on the Rights of the Child on Article 11 of the CRC (indigenous children and their rights under the convention.)}
domestic level, national courts and tribunals from signatories of UN human rights treaties have considered General Comments in their judicial decisions. The use that such courts or tribunals have made of General Comments has been detailed in reports drafted by professional organizations. While some courts have welcomed enthusiastically these instruments, others have not showed the same enthusiasm. Given the non-binding nature of General Comments, national courts can reject them when they do not conform with the particular understandings that such courts have over certain human rights. But even in this situation, as Philip Alston highlights, a General Comment can have a positive normative impact. For Alston, “…it draws attention to the relevant interpretation and helps to establish it as a benchmark against which alternative interpretations will be forced to compete at something of a disadvantaged.” In other words, General Comments set minimum normative standards which need to be considered by national courts when establishing their own human rights jurisprudence.

It can thus be concluded that General Comments have moved from being instruments describing procedures for the submission of state reports to UN Human Rights Committees to documents establishing human rights standards and norms through the interpretation in abstracto of concrete cases. General Comments do not endorse general or abstract exegesis of human rights treaties but rather interpretations based on the practice of treaty bodies. The fact that General Comments are non-binding instruments and that states can contest them does not mean that they are ‘not law’ and thus ignored. General Comments are indeed pronouncements based on legal

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956 Bámaca Velásquez Case (Guatemala) Merits, Judgment of 25 November 2000, Inter-Am Ct Hr (Ser C) No70 at para 172, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf> (considering para 3 of General Comment No. 6 of the Human Rights Committee on Article 6 of the ICCPR (right to life)).
957 See International Law Association, supra note 928 at 22-25.
958 International Law Association, supra note 928 at 20-25 (presenting the use of General Comments by national courts of different countries across the world); Conway Blake, supra note 932 at 20-23 (giving examples of the use of General Comments by courts in England and South Africa; Yuji Iwasawa, “The Domestic Impact of International Human Rights Standards: The Japanese Experience,” in Philip Alston and James Crawford, supra note 915, 245, at 259-260 (explaining the use of General Comments by national courts in Japan.)
959 Philip Alston, supra note 927 at 765.
norms imposing binding obligations to state parties. \footnote{Conway Blake, supra note 932 at 34.} The practical authority of General Comments does not come from their legal nature, but rather from the fact that they contain normative interpretations of human rights treaties adopted by a committee of experts as a whole, by consensus, and addressed to all state parties. \footnote{Ineke Boerefijn, supra note 961 at 300.}

9.2.1.3 ‘Views’ in individual complaints procedures

Another form by which treaty bodies develop jurisprudence on human rights is through ‘Views’ expressed in individual communications procedures. Commonly referred to as ‘complaint procedures’, \footnote{See Christian Tomuschat, Human Rights: Between Idealism and Realism 3rd ed (New York: Oxford University Press, 2014) at 238 (arguing that, at the UN level, the practice is to speak of ‘communications’ rather than ‘complaints,’ given that the latter term has an “unpleasant connotation.” For Tomouschat, the use of the term ‘communications’ has served “to make acceptance of the relevant control mechanism easier for states.”) Ibid. In this section both terms will be used interchangeably.} they are established in either the text of human rights conventions or in the optional protocols to some of these conventions. \footnote{For a description of the workings of the individual complain procedure, see UN, Individual Complaint Procedures under the United Nations Human Rights Treaties, Fact Sheet No. 7/Rev.2 (Geneva: Office of the High Commissioner for Human Rights, 2013), online: <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> \footnote{UN, The United Nations Human Rights Treaty System, supra note 914 at 30-31.}} Under these procedures, treaty bodies receive and consider communications from individuals or groups of individuals who believe their rights have been violated by a state party. Before a treaty body considers an individual complaint relating to a state party, such state party has to recognize expressly the competence of that treaty body. \footnote{See ICERD, Article 14; OP-ICCPR; CAT, Article 22; CMW, Article 77; OP-CEDAW; CED, Article 31; OP-CRPD; OP-ICESCR; OPIC-CRC. \footnote{As an exception to this rule, individuals can initiate individual communications in cases where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the (alleged) violation of human rights. See Article 5(2) OP-ICCPR; Article 14(7)(a) CERD; Article 22(5)(b) CAT; Article 4(1) OP-CEDAW; Article 2(d) OP-CRPD; Article 7(e) OP-CRC; Article 31(2)(d) CED and Article 3(1) OP-CECSR.}} The recognition of competence can be made either by declaration under the relevant article of a human rights convention or by accepting the relevant optional protocol. \footnote{See ICERD, Article 14; OP-ICCPR; CAT, Article 22; CMW, Article 77; OP-CEDAW; CED, Article 31; OP-CRPD; OP-ICESCR; OPIC-CRC.} An individual must exhaust all domestic remedies before filing a communication. \footnote{As an exception to this rule, individuals can initiate individual communications in cases where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the (alleged) violation of human rights. See Article 5(2) OP-ICCPR; Article 14(7)(a) CERD; Article 22(5)(b) CAT; Article 4(1) OP-CEDAW; Article 2(d) OP-CRPD; Article 7(e) OP-CRC; Article 31(2)(d) CED and Article 3(1) OP-CECSR.} The complaint procedure has been described as quasi-judicial for several reasons. First, while treaty bodies adjudicate individual cases and give concrete meaning to the rights and freedoms included in the
UN human rights conventions, they do not function as courts of law. For instance, they conduct their proceedings in closed meetings, litigant parties (i.e. a state party and an individual) do not appear before treaty bodies but rather make submissions in writing, there are no oral hearings and no evidence is taken from witnesses or experts. Second, while the final decision (Views) of a treaty body may find that a state has incurred in violations of the human rights protected by a convention and recommend particular action, such Views are not legally binding on that state party. Treaty bodies transmit simultaneously their Views to the complainant and the state party and invite the latter to provide information, within 180 days, on the steps it has taken to implement recommendations. The problem, however, is that human rights conventions do not provide what happens in those cases in which particular actions recommended by a treaty body are ignored by a state party. To remedy this problem, several treaty bodies have established follow-up procedures, appointing a Special Rapporteur to monitor the implementation of treaty body recommendations until satisfactory measures are taken. Furthermore, some publicity is given to this process. Contrary to the confidential nature of the complaint procedure, information relating to follow up procedures and the meetings during which this information is discussed are public.

The fact that Views are not legally binding does not imply that they are irrelevant. States cannot dismiss them. One scholar maintains that “when a state has submitted to an international procedure, it must participate in that procedure bona fide until its very end.” Additionally, it could be argued that if a state party recognizes the competence of a treaty body to consider individual complaints, such state party accepts to respect the findings of that treaty body.

Views have a very important normative value. As mentioned, it is through Views how treaty bodies give concrete content and meaning to the rights and freedoms protected through the UN

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969 UN, Individual Complaint Procedures under the United Nations Human Rights Treaties, supra note 965 at 1.
971 UN, Individual Complaint Procedures under the United Nations Human Rights Treaties, supra note 965 at 11.
972 Henry J. Steiner, Philip Alston & Ryan Goodman, supra note 970 at 892.
973 Christian Tomuschat, supra note 964 at 268.
975 Christian Tomuschat, supra note 948 at 268.
976 UN, Individual Complaint Procedures under the United Nations Human Rights Treaties, supra note 965 at 11.
human rights conventions. Views represent “an authoritative interpretation of the respective treaties.” As Christian Tomuschat points out “No better expertise as to the scope and meaning of any of the human rights treaties can be found than in the expert bodies set up to monitor their observance by states.” Treaty bodies have indeed developed over the years a considerable amount of substantive jurisprudence on human rights, making impossible to any court or tribunal to overlook such jurisprudence. The Human Rights Committee (HRC), for instance, one of the first treaty bodies to be established, has issued over a period of almost forty years 1008 Views, including 850 in which violations of the ICCPR were found. In each of these Views, the HRC has asserted human rights “as true entitlements at the legal level.” This is reflected in the fact that when the HRC finds a violation to the ICCPR, it requests to the relevant state party to remedy that violation. Remedies vary from payment of compensation to the repeal or amendment of legislation or the release of a detained person. The HRC usually leaves little or no doubt as to the necessary remedial action that a state party must take when complying with its Views. If a state party chooses to reject them, it “must present detailed observations specifying its counter-arguments.”

It is through its Views how the HRC has interpreted provisions of the ICCPR in specific, concrete situations and has also revealed the absence of procedural safeguards necessary to prevent human rights violations. This special character of Views places the HRC in a role similar to that of other regional human rights tribunals such as the European and Inter-American

977 Ibid.
978 Christian Tomuschat, supra note 964 at 267.
979 The Human Rights Committee started its work under the OP-ICCPR at its second session in 1977. It has received 2,371 individual communications concerning 89 state parties since then. As of 2015, of the 167 States that have ratified, acceded to or succeeded to the ICCPR, 114 have recognized the Human Rights Committee competence to consider individual complaints. See Report of the Human Rights Committee, UNGAOR, 69th Sess, Supp No 40, UN Doc A/69/40 (Vol. I) (2014) at 140, para 139-140, online: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/054/90/PDF/G1405490.pdf?OpenElement>
980 Christian Tomuschat, supra note 964 at 239.
982 Dominic McGoldrick, supra note 918 at 199.
983 Christian Tomuschat, supra note 964 at 267.
984 Dominic McGoldrick, supra note 918 at 199.
Courts of Human Rights. The HRC thus expounds the ICCPR when issuing its Views—it elucidates, interprets and explains the provisions of such instrument. As Henry Steiner points out:

Given the significance and complexity as well as the range of the issues that come before it under the Protocol, the [Human Rights] Committee is inevitably engaged in the development of the Covenant: confronting its ambiguities and indeterminacy, resolving conflicts among its principles and rights, working out meanings of its grand terms through consideration of the object and purposes of the Covenant, or through recourse to methods of interpretation other than the teleological, such as travaux préparatoires, the contextual analysis of a provision within the broader structure of the treaty, or attention to trends in legal and moral thought.

For these reasons, the jurisprudence created by the HRC through the issuance of its Views poses an important normative value. It defines and gives substantive content to the rights and freedoms included in the ICCPR. Therefore, when considering such rights and freedoms, one should reflect on the Views issued by the HRC. Given that there is no human rights tribunal at the universal level, the case law developed by the HRC (and other human rights bodies that have followed suit) could serve “as the most authoritative source for universally applicable human rights standards.” Views are thus a valuable point of reference for courts and decision makers in all state parties when dealing with issues similar to those addressed in Views. Finally, it should be noted that Views are also considered by the HRC when formulating its General Comments, giving consistency to its own jurisprudence.

9.2.1.4 The Status of the UN Human Rights Committees Jurisprudence

It is through Concluding Observations, General Comments and Views that human rights treaty bodies develop jurisprudence on the rights and freedoms protected through the UN human rights

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985 Henry J. Steiner, supra note 938 at 41.
986 Henry J. Steiner, supra note 938 at 31
987 Henry J. Steiner, supra note 938 at 39.
988 Christian Tomuschat, supra note 964 at 269.
990 Ineke Boerefijn, supra note 961 at 300-301.
conventions, and this jurisprudence may be entitled to serious consideration by domestic courts, especially constitutional courts. This can be explained in the following way. States that are party to a human rights treaty are expected to apply international human rights norms as they stand. If the interpretation of treaty bodies (and its reception by states) leads to new understandings of human rights provisions, this is how domestic courts should understand the relevant provision as well. In this regard, it is illustrative what the HRC stated in General Comment No. 24 with respect to reservations

The Committee’s role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee’s competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

Things get complicated, however, when states reject the Views of a treaty body or are divided on such Views. Likewise, states that are party to a human rights treaty can express their disagreement with a general comment adopted by a treaty body, as was the case with the HRC and its General Comment No 24. It will be more difficult to consider treaty body pronouncements as ‘the law’ in these cases than in cases where no objection has been raised by states.

The International Law Association has highlighted the importance of state practice in determining the status of treaty body jurisprudence. When states that are a party to a human rights treaty do not object to a General Comment, their acquiescence can be interpreted as establishing an agreement on the interpretation delivered by a treaty body through such a General Comment. In the case of Concluding Observations and Views, the response of the state directly concerned is of the utmost importance. For the International Law Association, it remains

991 Gerald L. Neuman, supra note 36 at 1895.
992 Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UNCCPROR, 52th Sess, UN Doc CCPR/C/21/Rev.1/Add. 6 (1994) [hereinafter General Comment No. 24] at para. 11, online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en>
994 International Law Association, supra note 928 at para. 23.
unclear whether the dissent of the directly-concerned state would suffice to delegitimize a treaty body decision as the correct interpretation of a human rights treaty. 995 Conversely, states can legitimize a treaty body interpretation by referring to the relevant treaty body decision “in their own pleadings before a committee, in their reports to the committee, in the judicial decisions of their courts, or in the form of demarches calling on another State to implement or respect a committee’s views.”996 Therefore, to determine the status of a particular Concluding Observations, General Comment or Views, detailed attention must be paid to how states that are party to a human rights treaty have reacted to all these documents.

9.2.2 The Jurisprudence of the UN Human Rights Committees in Mexican Law

Mexico deposited with the UN Secretary-General the instrument of accession to the Optional Protocol to the International Covenant on Civil and Political Rights in 2002.997 As explained, through this instrument, Mexico recognized the competence of the Human Rights Committee to receive and consider communications from individuals subject to Mexican jurisdiction who claim to be victims of violations by Mexican authorities of the rights set forth in the Covenant. Mexico has also recognized the competence of other UN human rights treaty bodies such as the Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee on Migrant Workers, Committee against Torture and Committee on the Rights of Persons with Disabilities.998 Like the Human Rights Committee, 999 UNTS 171. The Optional Protocol was published in the Official Gazette [Diario Oficial de la Federación] on 3 May 2002, see, online: <http://www.dof.gob.mx/nota_detalle.php?codigo=732479&fecha=03/05/2002>

997 Ibid.

998 The competence of the Committee on Migrants Workers (not currently considering individual complaints) was accepted by Mexico on 8 March 1999 and of the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination and the Committee against Torture on 15 March 2002 and the Committee on the Rights of Persons with Disabilities on 17 December 2007. For details, see, online: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MEX&Lang=EE> The administrative decrees through which Mexico recognized the competence of the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination and the Committee against Torture were published in the Official Gazette [Diario Oficial de la Federación] on 3 May 2002, online: <http://www.dof.gob.mx/nota_detalle.php?codigo=732479&fecha=03/05/2002> The Optional Protocol to the Convention on the Rights of Persons with Disabilities through which Mexico recognized the competence of the Committee on the Rights of Persons with Disabilities was published in the Official Gazette [Diario Oficial de la Federación] on 2 May 2008, online: <http://dof.gob.mx/nota_detalle.php?codigo=5033826&fecha=02/05/2008>
most of these committees receive communications from individuals who claim that they are victims of human rights violations by the Mexican State. 999

Only one individual communication procedure where an individual has alleged that Mexico has violated his rights protected by the ICCPR has been considered by the Human Rights Committee (HRC). Such Committee, however, found that Mexico made no breach of any provision of the ICCPR. 1000 There have been other individual communication procedures before the HRC and the Committee against Torture (CAT) related to Mexico, but in such cases Mexico has not been the state party to which it is attributed the human rights violation. 1001

As for the submission of party reports to UN human rights treaty bodies, Mexico has complied with this obligation. For instance, Mexico submitted its last report to the HRC on July 17, 2008, the Committee issuing its Concluding Observations on April 7, 2010. It should be noted that the right to privacy protected under Article 17 of ICCPR was not considered in any of these Observations. The next report to be submitted to the HRC by Mexico was scheduled for August 31, 2015. 1002

It remains to be established what is the legal status of the jurisprudence of the human rights treaty bodies within Mexican law. Contrary to what happened with the jurisprudence of the Inter-American Court of Human Rights, the Supreme Court of Mexico has not specifically addressed the legal status of the Concluding Observations, General Comments or Views issued by UN treaty bodies. As explained, none of these instruments are legally binding on state parties to human rights conventions, and in the case of Concluding Observations specifically addressed to

999 For a general overview of the functioning of the UN human rights bodies, see Philip Alston and James Crawford, eds, supra note 915.
1001 While Canada has been the state accused to violate the rights protected by the ICCPR or CAT, these cases have involved either nationals from Mexico located in Canada or Canadians who have alleged risk of torture if extradited to Mexico. See the Reporting Status of Mexico, online: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MEX&Lang=EN>
1002 For more information about these reports and other reports submitted by Mexico to other UN Human Rights treaty bodies, see Reporting Status of Mexico, supra note 1001.
Mexico, it is only ‘expected’ that the country adopts the recommendations suggested by the relevant UN treaty body.

The non-binding nature of General Comments or Views, however, does not mean that their normative value cannot be considered by Mexican courts. Judges may use the normative frameworks included in General Comments or Views that UN treaty bodies have developed to protect the rights and freedoms listed in human rights conventions. This is precisely because, as discussed before, treaty body jurisprudence helps to elucidate the meaning of the provisions included in human rights treaties. Given that Mexico has ratified the most relevant treaties on human rights at the universal level, it is expected that Mexico understands the provisions of these treaties as interpreted by the UN treaty bodies.

In fact, the use of General Comments or Views is compatible with the amendment to Article 1 of the Mexican Constitution. As argued, the amendment requires judges (as well as other public authorities) to observe the pro homine principle, interpreting human rights norms as favoring the broadest protection to individual persons at all times. Mexican judges may thus use the jurisprudence of treaty bodies when adjudicating individual cases of alleged human rights violations. It should be noted, however, that according to the Supreme Court of Mexico, such jurisprudence may only orient—as opposed to obligate—Mexican judges when resolving those cases. Despite this limitation, the normative value of the UN Jurisprudence can have a very positive impact within the Mexican legal system, including the UN Jurisprudence on Privacy analyzed in Chapter One.

9.2.3 What the UN Jurisprudence on Privacy Could Mean to Mexico

As discussed in Chapter One, the right to privacy has been the subject of various UN human rights instruments. The Human Rights Committee, for instance, issued “General Comment No.

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1003 See Expediente Varios 912/2010, supra note 904 at para 20. It should be noted that the Supreme Court of Mexico did not address in Expediente Varios 912/2010 the role of the jurisprudence of the UN treaty bodies within the Mexican legal system. But in such a document the Court considered that the Inter-American rulings issued in cases in which Mexico was not a party shall only be considered ‘orientation criteria’ by all Mexican judges. Although the Supreme Court of Mexico changed this criterion in 2013 and, thus, declared all Inter-American Court jurisprudence binding on Mexico (supra notes 907 and 909 and accompanying text), the ‘orientation criteria’ argument developed by the Court can be applied mutatis mutandis to the jurisprudence of the UN treaty bodies. This means that this jurisprudence might only be considered as ‘orientation criteria’ by Mexican judges.
16: Article 17 (Right to privacy)” interpreting several normative elements included in Article 17 of the ICCPR. General Comment No. 16 thus reflects how states that are party to the ICCPR understand the right to privacy in international human rights law. Given that Mexico is a party to the ICCPR and did not object to General Comment No. 16, it is expected that Mexico reads Article 17 of the ICCPR as interpreted by the Human Rights Committee.

Furthermore, the 2011 amendment to the Mexican Constitution has created a favorable environment for improving the protection of privacy in Mexico by making use of the UN privacy jurisprudence. While it is true that General Comment No. 16 is not legally binding on states party to the ICCPR, its normative value could be of great help to Mexico. Given that Article 1 of the Mexican Constitution today prescribes that human rights norms (domestic or international) must be interpreted “as favoring the broadest protection to persons at all times,” General Comment No. 16 can guide Mexican judges when performing this task. This means that Mexican judges can use General Comment No. 16 as a normative source when examining laws or acts of public authorities allegedly posing privacy infringements. General Comment No. 16 could thus guide Mexican judges in determining, say, whether an interference with the right to privacy is being carried out unlawfully or arbitrarily by the state. By doing so, General Comment No. 16 could help Mexican judges in their pursuit of ‘favoring the broadest protection of privacy.’ Even in those cases where a Mexican judge might choose not to follow the interpretations included in General Comment No. 16, this document would still be of great help. A party to a trial who believes his right to privacy is being arbitrarily or unlawfully infringed upon by the state may well invoke General Comment No. 16 in his trial. The judge hearing the case would be obligated to express his reasons for not following the interpretations included in this document. General Comment No. 16 would be the benchmark for his alternative interpretation of the law. General Comment No. 16 could thus set minimum normative standards on privacy protection that judges cannot overlook, thereby improving the normative value of Mexico’s privacy jurisprudence.

Although the Report of the UN High Commissioner for Human Rights (“The Right to Privacy in the Digital Age”) is not UN jurisprudence per se (it was not issued by a UN human rights

1004 See supra note 959 and accompanying text.
committee), it can and must be used by Mexican judges when examining cases of privacy invasion, especially when the invasion is committed through the mandatory data processing carried out by the state. As has been argued in this chapter, Mexican judges must interpret human rights norms ‘favoring the broadest protection to individuals.’ The two normative frameworks (the ‘proportionality’ and ‘meaning of law’ tests) included in this Report are specifically aimed at protecting the privacy of individuals from the unlawful or arbitrary collection, retention, use or disclosure of personal information carried out by states. No similar frameworks exist today under Mexican law. If Mexican judges are required to favor the broadest protection of the right to privacy, the Report is therefore an invaluable source of guidance for assessing alleged cases of privacy invasion committed by the Mexican state via data processing. Judges could use the normative frameworks when examining laws and/or acts of public authorities empowering the Mexican state to conduct mandatory data processing, as in the case of surveillance practices. Furthermore, the use of these frameworks by the Human Rights Committee in its 2014 Concluding Observations on a periodic report on the United States shows us that such frameworks are already en route to becoming official UN jurisprudence, potentially increasing their influence on Mexican judges.

Although Resolutions 68/167 and 69/166 of the UN General Assembly (also covered in Chapter One) are not legally binding on UN Member States, these documents too can have a normative influence on Mexican judges. Resolution 69/166, in particular, points to the principles of legality, necessity and proportionality, highlighting the fact that UN Member States should take into account these principles when conducting interferences with the right to privacy via data processing, as in the case of digital surveillance practices. Given that Mexico co-sponsored both Resolutions, Mexican judges could consider using such principles when examining alleged cases of privacy invasion committed by the Mexican state through the mandatory collection, retention, use or disclosure of personal information. The aforementioned principles would no doubt help Mexican judges in finding the interpretation of the law that favors the broadest protection of Mexicans privacy.

The use of the UN privacy jurisprudence by Mexican judges thus seems inevitable. Given that Mexico has not articulated a right to privacy nor has it developed privacy jurisprudence similar to that developed by UN organs, Mexican judges cannot dismiss this jurisprudence. To do otherwise would be counter to the duty imposed by the 2011 constitutional amendment—to
contrast domestic norms with international human rights norms and choose those offering the
broadest protection to the human being. If Mexican judges truly want to comply with this duty,
they must use General Comment No 16 and the normative frameworks included in the Report of
the UN High Commissioner for Human Rights. The use of the UN privacy jurisprudence by
Mexican judges can thus make a big difference in protecting the private lives of Mexicans from
state interference committed through data processing.

Given its normative value, the UN jurisprudence on privacy can clearly help improve the
protection of privacy in Mexico.

10. The Impact of International Human Rights Law on the Mexican Legal System and the
Protection of Privacy

Against this background, several conclusions can be drawn about the role international human
rights law is playing in Mexican Law, especially in the protection of privacy. First, Mexico has
acknowledged the similarities of constitutional rights and human rights, understanding both as a
single class of rights associated with the protection of the dignity of the human being. Second,
the 1917 Mexican Constitution today embraces a bill of rights composed of constitutional rights
and the fundamental rights and freedoms included in the international treaties to which Mexico is
party. No hierarchical distinction exists between these two categories of rights. This means that
international human rights norms are considered domestic law within the Mexican legal system.
Third, all human rights norms must be interpreted in conformity with both the Mexican
Constitution and the international human rights treaties Mexico has ratified. Where both a
constitutional provision and an international norm are found to be applicable to a case, the
general rule is that that which offers the broadest protection or involves the fewest restrictions on
the exercise of a right shall prevail. Fourth, the Mexican Constitution trumps an international
human rights norm only in those cases where the Constitution explicitly provides a restriction to
the exercise of a fundamental right.

The amendment to Article 1 of the 1917 Constitution and its interpretation by the Mexican
Supreme Court offers great potential for improving the protection of fundamental rights and
freedoms. This potential becomes crucial in cases where rights and freedoms are included in
international human rights conventions, but absent or near absent from the Mexican Constitution.
This is the case with the right to privacy. As explained in the Chapter Three, the original
catalogue of rights and freedoms included in the current Mexican Constitution dates back to the second half of the nineteenth century. If one considers that most international human rights conventions were drafted in the second half of the twentieth century, it comes as no surprise to find a right to privacy worded as a clear and sound discrete entitlement in these conventions. As discussed in Chapter Three, no such wording exists in either the Mexican Constitution or Mexican jurisprudence.

Mexico has ratified the most relevant international human rights instruments, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and, at the regional level, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The 2011 amendment to Article 1 of the Mexican Constitution implies that the previous ratifications of these instruments made by Mexico have brought to the Mexican Constitution the rights and freedoms included in these documents. As a result, the right to privacy, as worded in Article 17 of the ICCPR and Article 11 of the ACHR, is, in theory, currently in force in the country.

The jurisprudence of the UN treaty bodies helps to elucidate the meaning of the provisions of human rights treaties. In the case of Article 17 of the ICCPR, the Human Rights Committee has issued General Comment No. 16, further interpreting this provision. Given that Mexico is a state party to the ICCPR, it must apply the ICCPR as it stands. This means that Mexico must read Article 17 of the ICCPR as interpreted by the Human Rights Committee through General Comment No. 16. Mexican judges can thus use General Comment No. 16 to examine cases of privacy invasion, including those where the invasion is allegedly committed by the state via data processing.

It should be noted, however, that the regional human rights instruments ratified by Mexico may exert greater influence on Mexican law than their United Nations (UN) counterparts. This results from the fact that Mexico has accepted the jurisdiction of the Inter-American Court. Unlike UN treaty bodies, which only issue General Comments or Recommendations, the Inter-American Court can hear cases of alleged human rights violations committed by the Mexican State. If the Inter-American Court finds that Mexico has violated a right or freedom included in the ACHR, the Court may order Mexico to comply with its international obligations. The Inter-American
Court could require Mexico to ensure that an injured individual enjoys the right or freedom that was violated and/or compel Mexico to pay him fair compensation.

The great influence of regional human rights instruments on Mexican law, particularly the ACHR, also derives from the Inter-American Court jurisprudence. As explained, the Inter-American Court today requires all Mexican judges to exercise a ‘conventionality control’ _ex officio_ between all legal norms (including Acts passed by legislatures) and the ACHR. When exercising this control, judges must consider not only the provisions of the ACHR but also the legal interpretations the Inter-American Court has made of this instrument. Given that the Supreme Court of Mexico has recently validated the legally binding nature of the Inter-American Court jurisprudence, Mexican judges must now consider such jurisprudence when adjudicating human rights cases.

This binding nature of the Inter-American Court jurisprudence can thus have an important impact on the protection of privacy in Mexico. Given the conventionality control, nothing prevents Mexican judges today (especially those sitting on the Supreme Court) from applying Article 11 of the ACHR to cases involving privacy invasion, nor from citing in such cases interpretations the Inter-American Court has made of this article. Furthermore, the incorporation into the Mexican legal order of Article 11 of the ACHR and its interpretations by the Inter-American Court can add an extra layer of legal protection to privacy in Mexico. If, in a case involving privacy invasion, neither Article 11 of the ACHR nor the Inter-American Court jurisprudence is applied, the injured party might bring the case before the Inter-American Commission on Human Rights. The injured party must of course show that the Mexican state violated the right to privacy included in Article 11 of the ACHR. Because Mexico has recognized the jurisdiction of the Inter-American Court, the Commission might refer the case to the Court, provided that certain conditions are met. If the Court finds that the Mexican state has violated Article 11 of the ACHR, the Court may require Mexico to ensure that the injured party enjoys the right to privacy and/or compel Mexico pay monetary compensation. The Court may also require Mexico to adopt the necessary measures aimed at guaranteeing that the right to privacy will be respected across the whole country.

The legal change brought by the amendment to Article 1 of the Mexican Constitution is thus significant for individuals. Though previously weakly positioned to claim a right to privacy
(because such a right was almost absent from the Mexican Constitution), individuals can now invoke before Mexican judges either Article 17 of the ICCPR or Article 11 of the ACHR and the interpretations that the Human Rights Committee and the Inter-American Court have respectively made of these articles. The right to privacy included in such articles and the normative frameworks developed by these authoritative interpreters might prove very useful in alleged cases of privacy invasion committed through the mandatory collection, retention, use or disclosure of personal information carried out by the state. Both the right to privacy and its jurisprudence will serve as the law on which individuals could base a complaint for privacy invasion in cases where the data processing carried out by the state is mandatory and unduly interferes with their private lives. While we have yet to see how Mexican judges are making use of such articles and jurisprudence, the international human rights law on privacy truly opens new opportunities for improving the protection of privacy in Mexico.

The international human rights law on privacy is part of Mexican law today. The discrete entitlement articulated in both Article 17 of the ICCPR and Article 11 of the ACHR and the normative frameworks developed by the authoritative interpreters of these articles can compensate for the current limitations other areas of Mexican law have in the protection of privacy. It remains unclear for how long international human rights law will be a source of law within the Mexican legal system. Although this system has adopted an internationalist approach in the past three decades, Mexico has also shown a tendency to frequently amend its constitution. And so, the use of international human rights law may be permanent, but it may change over time. The protection of privacy can only be improved through the use of international human rights law in the meantime.
Conclusions

Use the “biblio” The International human rights law on privacy has the potential to have a very positive effect on the protection of privacy in Mexico. As this thesis shows, international human rights law can compensate for the limitations of data protection law and constitutional law in the protection of privacy, especially in those cases where privacy invasion results from the mandatory collection, retention, use or disclosure of personal information carried out by the state. A right to privacy as such was not included in the constitutions that have been in force in Mexico since its independence from Spain. Given that Mexico followed the civil-law tradition, for a very long time the Mexican Supreme Court narrowly read the constitutional provisions. The Court did not significantly expand the text of the Mexican Constitution, let alone use the text to articulate new rights. This failure to create jurisprudentially-based rights had an important impact on the protection of privacy. Unlike other national supreme courts, and despite the existence of several constitutional provisions aimed at protecting the private lives of individuals, the Mexican Supreme Court did not articulate a right to privacy nor develop thorough privacy jurisprudence during the latter half of the twentieth century. This lack of privacy jurisprudence has made the protection of privacy challenging in relevant cases involving the mandatory data processing of personal information carried out by the state. Given that a right to privacy as such appears nowhere in the Mexican Constitution, individuals have difficulties in founding their complaints of privacy invasion committed by the state through mandatory data processing. At the same time, judges entangle themselves in textual and historical interpretations of the constitution, often losing sight of the real problem—the invasion of the private lives of individuals via mandatory data processing.

While Mexican civil law offers an action for compensation for moral damage caused by privacy invasion, this action is unsuitable for challenging the mandatory data processing carried out by the state that unduly interferes with the private lives of individuals. To be awarded monetary indemnification for privacy invasion committed through data processing, Mexicans must submit to a test that can be difficult to pass. They must show that an illicit act committed by the state caused an interference with their private lives (moral damage) and that a causal link between the two exists. A plaintiff also needs to present before the courts the opinion of an expert confirming the damage he experienced in his private life. Given that the mandatory collection, retention, use
or disclosure of personal information tends to be authorized by law, it can be difficult to
determine if the Mexican state has, in fact, committed an illicit act if, say, an Act of Congress
required the government to conduct data processing. The rigidity of these rules might be lessened
if Mexico incorporates into its civil law either an explicit right to privacy or provisions
describing what constitutes an invasion to someone’s private life. No doubt international human
rights law would help Mexico in lessening the rigidity of the civil law on privacy.

Unlike other jurisdictions, Mexico has adopted a monist approach to international law since its
emergence as an independent state. Moreover, in the past three decades, it has opened its legal
system to international law. The use of international human rights law in the country was made
possible by the 2011 amendment to the 1917 Mexican Constitution. This amendment
incorporated into the Constitution the human rights included in international treaties ratified by
Mexico and two interpretative tools aimed at enhancing the protection of human rights in the
country—the ‘in-conformity-with’ clause and the pro homine principle. Both offer the possibility
of expanding those constitutional provisions related to the preservation of fundamental rights and
freedoms, thereby creating a great opportunity for improving the protection of privacy in
Mexico.

Because of the 2011 amendment, judges must today consider the right to privacy as framed in
the International Covenant on Civil and Political Rights (ICCPR) and/or the American
Convention of Human Rights (ACHR) when examining laws or acts of public authorities
involving privacy invasion, including those cases where the invasion is committed by the state
via data processing. The jurisprudence of authoritative human rights interpreters must also be
considered. Given that Mexico submitted to the jurisdiction of the Inter-American Court of
Human Rights and, by virtue of the doctrine of conventionality control, Mexico must exercise
this control between its domestic legal provisions and the ACHR, including the jurisprudence of
the Inter-American Court. The privacy jurisprudence developed by this court must thus be
considered by Mexican judges, including those sitting on the Supreme Court. Although United
Nations jurisprudence is not legally binding on Mexico, such jurisprudence is of great value for
the fulfillment of Mexico’s obligations under international human rights treaties. Mexico is a
party to the ICCPR and, for this reason, it is expected that Mexico will apply this treaty as it
stands. Mexico must thus read Article 17 of the ICCPR as interpreted by the Human Rights
Committee. The privacy frameworks developed by both the Human Rights Committee and other
UN human rights organs have an important normative value and can thus help judges improve the privacy jurisprudence that Mexico should begin to develop. For all these reasons, it could be concluded that the international human rights law on privacy might have a positive effect in the protection of privacy in Mexico, but the successful application of this law will be contingent on a range of other political, social and cultural factors.

We live in the Big Data era where developments in information and communication technologies have allowed governments to substantially increase the amount of personal information they collect, retain, use and disclose. The data processing carried out by states today poses never before seen challenges to the protection of the private lives of individuals. Given the extended use of high-speed Internet networks, smartphones and other WiFi-enabled devices, individuals are leaving behind permanent records related to their private lives. Governments around the world are eagerly seeking access to these records, to facilitate their surveillance practices and increase their power over individuals, especially in the context of national security, crime prevention or law enforcement. While data protection law imposes relevant obligations on governments aimed at preventing the erosion of individual privacy, in the digital age this law has fallen short of addressing some of the current privacy invasions committed by states through data processing. The issue becomes critical when the collection, retention, use or disclosure of personal information is carried out by the state on grounds of national or public security, crime prevention or law enforcement. In most of these cases, data protection laws and data protection principles do not apply or do not fully apply. Additionally, individuals do not have a ‘right to withhold personal information’ on which they could base a complaint to challenge the collection, retention, use or disclosure of personal information and thus prevent privacy invasion. This data protection law limitation gives states an opportunity for invading the private lives of individuals through data processing without having to in any way be accountable. While national or public security, crime prevention or law enforcement are considered legitimate social interests which can be used to limit the exercising of the right to privacy in any democratic society, the state should not have in these fields unchecked power to collect, retain, use or disclose personal information.

Constitutional law can be used to protect individuals from privacy invasions carried out by the state through data processing. This protection will depend, of course, on how well a given legal system articulates the right to privacy. It is more likely that the protection of privacy would be
greater in countries where this right appears in their constitutional bill of rights or has been articulated through constitutional jurisprudence than in those countries where the right to privacy is absent from such a bill and the judiciary has yet to articulate it. The more that jurisprudence and normative frameworks on privacy are developed by the judiciary of a country, the better equipped is that country to address issues of privacy invasion, even in those cases where privacy invasion is committed through the mandatory collection, retention, use or disclosure of personal information carried out by the state.

International human rights law offers normative elements that are ready to assist countries in improving their current legal frameworks aimed at protecting the privacy of individuals. International human rights treaties, for instance, articulate the right to privacy as a clear, normative, discrete entitlement that clearly demarcates a zone of personal liberty and autonomy and shields that zone from unwarranted interference by the state or private parties. Furthermore, the normative frameworks developed by authoritative human rights interpreters are precisely designed to protect the private lives of individuals from unwarranted interference of the state, without comprising the delivery of broad societal benefits. The normative frameworks recently developed by the United Nations are tailored to protect privacy in the digital age; that is, to protect the private lives of individuals from the mandatory collection, retention, use and disclosure of communications data carried out by the state, especially for surveillance purposes. Countries whose privacy legal frameworks have not kept pace with technological developments in information and communication technologies can thus draw relevant normative elements from the UN privacy frameworks.

While it is true that the international human rights law on privacy may prove more helpful in countries whose legal systems have yet to develop constitutional mechanisms for protecting privacy than in those where such mechanisms have been developed, it is also true that the international human rights law on privacy can still work as a point of reference. This law can be used by any country to compare its own privacy frameworks with those existing at the international level and determine whether their domestic frameworks should be enhanced or not. Furthermore, countries with strong constitutional mechanisms for protecting privacy, which also respect international rights, can benefit tremendously from international human rights law. The privacy frameworks developed in international law can either influence (positively) their constitutional mechanisms or serve as yet another normative touchstone.
In the case of privacy invasion through the collection, retention, use or disclosure of personal information, international human rights law on privacy seems very promising. Given that this law is drafted in ways that protect individuals from abuses of state power, it can compensate for the limitations that data protection law and constitutional law currently have in the protection of privacy. This would be the case with mandatory data processing carried out by the state on grounds of national or public security, crime prevention or law enforcement. The international human rights law on privacy can supply normative standards to all jurisdictions, to be used when examining laws and/or acts of public authorities involving mandatory data processing carried out by the state on those grounds.