

**PRIVACY RIGHTS UNDER MEXICAN LAW:
EMERGENCE AND LEGAL
CONFIGURATION OF A PANOPLY
OF NEW RIGHTS**

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I. INTRODUCTION

Since the origin of humankind, scientific and technological developments have clearly constituted a powerful tool for humans to achieve higher levels of progress and enlightenment. The classical Greek legend of Prometheus, who—with the aid of Athena, the goddess of wisdom—went up to heaven and lit his torch at the chariot of the sun, bringing fire to man and thus allowing man to become superior to all other animals,¹

1. BULLFINCH’S MYTHOLOGY: THE AGE OF FABLE OR STORIES OF GODS AND HEROES 12-20 (1948).

represents the eternal quest of man to control and shape his surroundings using tools that range from plowshares and shovels to swords and guns in the past, and from pencils to computers and video cameras in the present.

Man's scientific and technological advancements have ultimately reached such a degree of sophistication that they now pose profound and pervasive threats to certain legal rights that have traditionally been considered inherently personal to each individual. These are known as the relatively novel but universal notions of "privacy rights."²

The scientific and technological knowledge applied by NASA engineers to construct the Spirit rover that landed on Mars in January 2004,³ is virtually the same scientific and technical expertise utilized by high-tech companies to build faster, better, and smaller computers for universities, banking institutions, and private companies; to develop digital cellular phones with video, television, and e-mail capabilities for the military, police agencies, investigators, and the general public; and to invent miniaturized recording devices consisting of microphones and video cameras commonly for TV and radio stations, reporters, detectives, and security guards as well as for factories, theaters, private and public buildings, manufacturing centers, commercial malls, and stores in general.

All of these technologies—as well as those that are being designed and developed today to be in operation tomorrow—pose no small risks and threats to the integrity of the legal sphere formed by constitutional, civil, and human rights that belong exclusively to a single "individual." The time has come when scientific and technological developments have reached such a level of advancement and perfection that they may be able to probe into the most personal and intimate space of any

2. For further reading, see RICHARD F. HIXON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* (1987); DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW* (2003); PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION* (1996); JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* (1997).

3. See Thomas H. Maugh II & Charles Piller, *NASA's Rover Touches Down Safely on Mars*, *L.A. TIMES*, Jan. 4, 2004, at A1; Anahad O'Connor, *Relieved Mars Enthusiasts Celebrate Successful Landing*, *N.Y. TIMES*, Jan. 5, 2004, at A13.

individual. Today, these developments may not only capture, unveil, and record the information that shape and configure uniquely personal landscapes, they are also capable of capturing, gathering, transferring, disseminating, and exposing those landscapes with potentially devastating consequences of an economic, moral, psychological, and legal nature.

Whereas in the past ultra advanced technologies appeared to be restricted to elites in government or scientific institutions, thus making it relatively easier to control their undesired effects upon the population at large, today these ultra modern technologies are easily available—virtually with no apparent restrictions—to the general populace. Therefore, the open accessibility of these technologies, jointly with their unprecedented capability of piercing the personal veil that surrounds the intimate realm of each individual with the power of inflicting serious injury or damage, raise serious and profound concerns from a legal and philosophical viewpoint.

When one considers that the world has become a global village,⁴ precisely because of these extraordinary scientific and technological developments, and that our planet in the dawn of the twenty-first century has been transformed into a closely interconnected space, it is evident that computers and cellular phones—as the symbols of these new technologies—are equally found in highly developed countries as well as in relatively poor, developing nations. The phenomenon of “globalization” has not only eliminated trade barriers but has, indiscriminately, showered ultra-modern devices upon urbanites and country dwellers alike.

Interestingly, most of the legal systems in these foreign lands are not yet equipped with principles, legal rules, and institutions especially designed to provide individuals and legal

4. See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999).

[G]lobalization involves the inexorable integration of markets, nation-states, and technologies to a degree never witnessed before—in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before . . . Globalization means the spread of free-market capitalism to virtually every country in the world.

Id. at 7–8.

entities with adequate protection against the intrusive and abusive use of these modern technologies.⁵ In sum, the world, as it exists today, is being reshaped and transformed by the uncontrolled and virtually infinite power of this global scientific and technological revolution. This unprecedented revolution is affecting not only the conduct of business and commercial activities on a world-wide scale but, more importantly, it is influencing and legally redefining certain traditional concepts, such as privacy and privacy rights, the scope of human rights, and civil and constitutional rights.⁶ In the early twenty-first century, the most fundamental question continues to be: How are these inherently personal rights to be protected from unwanted intrusions posed by these rapidly advancing technologies?

For many decades, Mexico has been the recipient of a constant flow of investments and modern technologies from the United States.⁷ Because of the North American Free Trade Agreement (NAFTA), for example, the bilateral trade between our two countries has tripled, elevating the Mexican exports to

5. See PRIVACY AND HUMAN RIGHTS 2000: THREATS TO PRIVACY, at <http://pi.gn.apc.org/survey/phr2000/threats.html> (last visited October 24, 2004). Most countries, save for a few highly developed countries, did not have any legal regime to cope with intrusions upon privacy rights.

6. For further reading, see CHRISTOPHER KUNER, EUROPEAN DATA PRIVACY LAW AND ONLINE BUSINESS (2003); Professor Lorenz, *Privacy and the Press – A German Experience*, in BUTTERWORTH LECTURES: 1989–90 at 79 (1990); Mogens Skipper Pedersen, *Comparative Studies in the Right to Privacy in U.S.A. and Denmark*, in HEIN'S LEGAL THESES AND DISSERTATIONS (1968); IAN LAWSON, PUBLIC INTEREST ADVOCACY CENTRE, PRIVACY AND FREE ENTERPRISE: THE LEGAL PROTECTION OF PERSONAL INFORMATION IN THE PRIVATE SECTOR (1993).

7. U.S. Department of State, *FY 2001 Country Commercial Guide: Mexico 2* (July 2000) [hereinafter U.S. Department of State, *FY 2001*] at http://www.state.gov/www/about_state/business/com_guides/2001/wha/mexico_ccg2001.pdf.

In 1999 the United States accounted for 88 percent of Mexico's exports and provided 74 percent of Mexico's imports. Both countries' exports to each other set records in 1997, in 1998, and again in 1999. Growth has continued through the first quarter of 2000, with U.S. export increasing 37.11% compared to the same period in 1999. The United States exports more goods and services to Mexico than it does to all other counties in Latin America combined.

Eighty-five percent of U.S. goods now enter Mexico duty free.

Id.

an unprecedented total of \$293 billion dollars in 2003.⁸ Today, the United States is Mexico's largest foreign investor.⁹ Moreover, Mexico's geographical contiguity with the United States has dramatically increased the flow of people across the border, with

8. *Id.* at 8.

The North American Free Trade Agreement (NAFTA) continues to be a key factor in boosting all three member-countries' exports and raising Mexico's overall level of economic activity. During the first six years of NAFTA, 1994-1999, Mexico's exports increased by 163 percent, setting a new record for total exports each year. Mexico's exports grew 17 percent in 1994, 31 percent in 1995, 21 percent in 1996, 15 percent in 1997, 6 percent in 1998, and 16 percent in 1999. During the same period, Mexico's imports grew by 117 percent. Mexican imports grew by 21 in 1994, declined 9 percent in 1995, grew by 23 percent in 1996 and 1997, grew by 14 percent in 1998 and grew by 13 percent in 1999 . . . In 1999, the United States accounted for 88 percent of Mexico's exports and provided 74 percent of Mexico's imports. Mexico has surpassed Japan as the second most important trading partner of the United States, and it now trails only Canada.

Mexico is vigorously pursuing free trade agreement with many other countries as a way of expanding the benefits from trade liberalization and attempting to lessen its dependence on the U.S. market. Prior to 2000, in addition to NAFTA, Mexico had free trade agreements in effect with Chile, Costa Rica, Bolivia, Colombia, Venezuela, and Nicaragua.

Id.

9. U.S. Department of State, Bureau of Western Hemisphere Affairs, *Background Note: Mexico* (Sept. 2004), at <http://www.state.gov/r/pa/ei/bgn/35749.htm>; U.S. Department of State, *FY 2001*, *supra* note 7. "The market for automotive parts in Mexico totaled \$115 billion in 1999, with imports accounting for about 31 percent. The United States contributed two-thirds of all imports with 20 percent of the total market." *Id.* at 47. "The United States continues to be the largest single supplier of telecommunications equipment to Mexico, with U.S. exports to Mexico growing 48 percent in 1998 compared to 27 percent the previous year. The U.S. share of Mexican imports was 68 percent in 1997 and reached 73 percent in 1998." *Id.* at 51.

Mexico is the U.S.'s second largest trading partner after Canada, and Mexico-U.S. trade reached \$232 billion in 2002. Mexico-US trade has increased by over 225 percent since the North American Free Trade Agreement of 1994. U.S. exports to Mexico total \$62.5 billion ([sic] year to date, while imports were \$90.2 billion. (Sources: U.S. Census Bureau, International Trade Administration).

Rebecca Jannol, et al., *U.S.-Canada-Mexico Fact Sheet on Trade and Migration* 1 (Nov. 2003), available at http://www.migrationpolicy.org/pubs/three_us_mexico_canada_trade.pdf. "In 2002, Texas was the top state exporter to Mexico at close to \$20 billion, followed by Michigan at \$15 billion and California at almost \$14 billion. (Source: U.S.-Mexico Chamber of Commerce)" *Id.* at 2.

fifteen million American tourists visiting Mexico every year and forty-eight-and-a-half million Mexicans crossing the border as tourists, workers, or shoppers during 2003.¹⁰

This substantial increase of U.S. trade and investments in Mexico has resulted in the proliferation of U.S. companies operating in that country, many of which supply the Mexican market with U.S. goods and services, including goods that are being manufactured with the latest technologies.¹¹ Moreover,

10. See Department of Transportation, Bureau of Transportation Statistics, Table 12 – Incoming Pedestrian Crossing, U.S.-Mexican Border, at http://www.bts.gov/programs/international/border_crossing_entry_data/us_mexico/html/table_12.html (last visited Oct. 24, 2004).

There are 79 ports along the U.S.-Canadian border and 25 ports along the U.S.-Mexican border. . . .

In 2002, a total of 50 million pedestrians crossed from Mexico to the U.S. at all 25 ports of entry. . . .

. . . At the Mexican-U.S. border, 4 million trucks entered the United States. (Source: U.S. Department of Transportation).

In 2002, 89 million personal vehicles from Mexico. . . entered the United States. (Source: US Department of Transportation).

Jannol, et al., *supra* note 9, at 2.

In 2002, Mexico was the country of origin of the largest number of legal immigrant admissions to the U.S. with 219,380 admissions, representing about 20.6 percent of the total number of admissions. Canadian immigrant admissions numbered 19,519 in 2002, only 1.8 percent of total legal admissions. In 2002, about 9,659,000 Mexicans were living in the U.S., compared with 714,000 Canadians. (Sources: CIS Statistical Yearbook 2002, Migration Information Source)

Mexicans represented about 29.8 percent of the total foreign-born population in 2002. Relative to the 281.4 million people in the United States, foreign-born Mexicans accounted for 3.3 percent of the total population. The five states with the largest foreign-born populations from Mexico are California, Texas, Illinois, Arizona, and Georgia. (Source: The Migration Information Source)

Id. at 3.

Over nine million people live along the 2,000 mile U.S.-Mexico border, mostly in the fifteen “sister city” pairs. Around 300,000 people on the U.S. Southern border lack safe drinking water, wastewater collection and treatment systems, or adequate solid waste disposal facilities. Over 1,200 of these unincorporated areas called “colonias” are located in Texas and New Mexico. (Source: Environmental Protection Agency).

Id. at 4.

11. U.S. Department of State, *FY 2001*, *supra* note 7, at 18.

There are over 450 franchises operating in Mexico of which 40 percent are

since the advent of the *maquiladoras* in the late 1960s,¹² many manufacturing centers and assembly plants in Mexico have been designed and built boasting the most advanced technologies commonly used in the United States, such as video and teleconferencing facilities, computer systems and networks, satellite communications, video cameras in the workplace, and access to computer and telephone use by managers and employees for business purposes.

It is not surprising, therefore, that U.S. investors and entrepreneurs have recently become keenly interested in finding out more about privacy rights under Mexican law. Does Mexico have a statute or code defining and enumerating these rights? Are privacy rights in Mexico equivalent to constitutional rights? What are the specific privacy rights enjoyed by workers in the workplace, and what are the specific obligations of their employers regarding these rights? Does Mexico also recognize privacy rights in the civil, criminal, fiscal, and administrative legal arenas? What are the privacy rights of Mexican nationals *vis à vis* commercial companies and other Mexican nationals? What are the privacy rights of Mexican nationals *vis à vis* the Mexican Federal government? And what legal remedies are provided by Mexican law when these privacy rights have been infringed upon?

This article has been divided into six parts. Part One introduced the complex issues relating to Mexican Privacy

foreign and 60 percent Mexican. In 1999, franchisors had 17,390 sales outlets grossing US\$4 billion in sales.

In almost every Mexican city one can find outlets for McDonalds, Pizza Hut, Dunkin Donuts, Dominos Pizza and Kentucky Fried Chicken, among many others. In addition to scores of strong U.S. franchises, the competition includes foreign firms from Canada, Spain, and other countries.

Services franchises have shown fast growth in the last few years and currently account for 24 percent of the market. Particularly popular are business service firms, advertising agencies, financial consulting, printing and publishing, temporary job services, training centers, and automotive services.

There are no barriers to franchisers of any legal products or services.

Id.

12. See Tony M. Ramírez, *The Maquiladora Industry: A Brief History*, at www.madeinmexicoinc.com/maquiladora_overview.htm (last visited Oct. 24, 2004).

Rights. Part Two examines the emergence, content and scope of privacy rights under Mexican law. Part Three describes and analyzes the current legislative enactments that govern privacy rights in Mexico today. Part Four discusses the legal symmetry between privacy rights in Mexico and international law as reflected in certain international conventions to which Mexico is a party. Part Five makes a cursory review of some recent and interesting judicial decisions rendered by Mexico's highest federal courts, including its supreme court, and Part Six offers some conclusions and recommendations.

II. PRIVACY RIGHTS IN MEXICO: USE OF THE TERM "PRIVACY RIGHTS"

Privacy rights, informally known in Mexico as *derechos de privacidad* or *derecho a la privacidad*, have yet to acquire a formal and explicit recognition as part of Mexico's legal system. Notwithstanding that it is common in Mexico today to hear in conversations or read in journals and newspapers the words *privacia* and *privacidad* in a multiple contexts, including cultural, economic, educational, legal, medical, political, religious, and social contexts. As of this writing there is no Mexican legislative enactment, whether a code, statute, or regulation, that explicitly enumerates, cites, or even simply alludes to the term privacy rights.¹³

However, even though the legal denomination of privacy rights has not yet formally acquired a letter of naturalization in the Mexican legal landscape, it deserves to be mentioned that Mexico's legal system is already endowed with fundamental legal notions that may be equivalent to, or legally embrace, the substance of what is known in the United States as privacy rights, albeit under a different nomenclature. Such would be the case, first, of certain constitutional rights known in Mexico as "individual guarantees."¹⁴ Second, the notion of "human rights"

13. Interestingly, the *Nuevo Diccionario Jurídico Mexicano* (New Mexican Legal Dictionary), consisting of four volumes and four thousand pages and written by the researchers of the *Instituto de Investigaciones Jurídicas* of Mexico's National Autonomous University (UNAM), does not include entries for "*Privacia*" or "*Privacidad*." NUESTRO DICCIONARIO JURÍDICO MEXICANO 3038–39 (2001).

14. See 1 JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS

was popularly incorporated into Mexico's legal terminology in the early 1990s,¹⁵ explicitly comprises several privacy rights enunciated through seminal international human rights conventions that explicitly contain several privacy rights, notably the Universal Declaration of Human Rights¹⁶ and the International Covenant on Civil and Political Rights.¹⁷ The third notion involves civil rights.¹⁸

In a modern context, privacy rights appear to be a universal reaction against the unwanted intrusions and serious threats posed by scientific and technological devices that are inimical to certain inherently personal rights. There is clear evidence that personal computers, cellular phones, video and digital cameras, parabolic infrared microphones, portable recording devices, polygraph and DNA tests, "bugging" devices, physical location sensors placed in cars and rented vehicles, have the technical capability of gathering, transferring, and electronically reporting inherently personal information pertaining to a given individual or to a group of individuals under a specific category such as subscribers, consumers, clients or voters.

AND INTERNATIONAL INVESTORS 37-67 (1998) [hereinafter VARGAS, MEXICAN LAW] (explaining that Mexico's individual guarantees (*derechos* or *garantías individuales*) are composed by the constitutional rights enumerated in Articles 1-28 of Mexico's Federal Constitution of 1917, all of them clearly inspired by the U.S. Constitution through the first Mexican Federal Constitutions of 1824 and 1857).

15. Although Mexican doctrinarians claim that human rights are not new in Mexico when one considers that the use of the term "*derechos del hombre*" may be traced back to the Federal Constitution of 1857, the fact remains that the notion of human rights became quite popular as a result of the establishment of Mexico's National Commission of Human Rights (*Comisión Nacional de Derechos Humanos* or CNDH) by President Carlos Salinas de Gortari. The commission was established first by means of a presidential decree and then at the local and national level through a constitutional amendment to Article 102 of the Federal Constitution. "Decreto por el que se crea la Comisión Nacional de Derechos Humanos como un órgano desconcentrado de la Secretaría de Gobernación," D.O., 6 de junio de 1990; "Decreto por el que se reforma el Artículo 102 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 28 de enero de 1992.

16. *International Bill of Human Rights: Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. GAOR 3d Sess., 183d plen. mtg. at 71-77, U.N. Doc. A/810 (1948).

17. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 171-86.

18. See *infra* Part II.C.

Some of these *sui generis* rights include protection of personal name; personal image, physical configuration and likeness; bio-data; medical information; intimate, sexual, and reproductive information; personal identity; economic, financial, banking, and credit information; sexual, religious, and political inclinations; police, criminal, and penal records; and military service and academic records. Other rights are more ambiguous and difficult to define since they relate to rather subjective notions such as honor, reputation, beliefs, dignity, affections, sentiments, and decorum.¹⁹

The invention of the personal computer, with its virtually unlimited capability of gathering, storing, and classifying personal data to create electronic data banks and transfer and exchange data files with other computers or with individuals, for explicit and non-explicit purposes, has profoundly revolutionized the handling of personal data. The definition of these personal rights and the rules and regulations enacted to control these actual or perceived technological intrusions and threats are likely to first appear as legal rules or principles formulated by technologically advanced countries and then gradually flow out to be transferred, copied, or adapted by developing nations.

A. *Personality Rights in Mexico*

“Personality rights” is a relatively novel legal notion in the Civil Law of Mexico. It appeared in 1982 when Article 1916 of the Civil Code for the Federal District was amended to introduce the concept of “moral damages”²⁰ in extra-contractual liability cases by means of a legislative bill formulated by then President Miguel de la Madrid Hurtado.²¹

According to Ernesto Gutiérrez y González, Mexico’s leading specialist on the subject of personality rights, personality rights

19. See Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico*, 35 U. MIAMI INTER-AM. L. REV. 183, 187-88 (2004) [hereinafter Vargas, *Moral Damages*] (analyzing Mexico’s recently introduced change in the Civil Code protecting the subjective notion of “moral damages” in civil liability cases).

20. *Id.* at 187.

21. “Decreto por el que se reforman los artículos 1916 y 2116 y adiciona un artículo 1916 bis al Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal,” D.O., 31 de diciembre de 1982.

may be defined as “assets formed by certain physical and psychological extensions of the human being relative to his mental integrity, that are applied to himself, or to other legal entities created by the law, and which are individualized by a given legal regime.”²² Personality rights may be grouped into three large categories: (1) a public social part, which includes rights to honor and reputation, a professional title, personal secrets, a name, an aesthetic presence, and the so-called rights of convenience such as free transit, daily sleep, access to a home, and clean environment; (2) an affective part; and (3) a psychosomatic part that includes the right to life, freedom, physical integrity, ecological rights, body rights, and post-mortem rights.²³ Thus, personality rights are subjective rights that protect an individual’s interests or values over patrimonial assets, such as a house, or non-patrimonial assets, such as a sentiment or belief, including those assets associated with legal entities, as explicitly enunciated by the law.²⁴

Ignacio Galindo Garfias, a Mexican civil law expert, argues that the goal of these personality rights is the enjoyment of those assets fundamental or essential to the benefit of an individual’s spiritual and physical life.²⁵ He clarifies that these rights can be asserted not only against all other individuals but also against the State, qualities inherent in mankind as recognized by the law.²⁶ These qualities constitute indispensable components for the enjoyment of all other rights, whether pecuniary or non-pecuniary that, under Mexican law, form a person’s individual patrimony, both in an economic and moral sense.²⁷

Another specialist in this area, Jorge Olivera Toro, defines personality rights as those assets or rights that form the legal sphere that is strictly personal to each individual and that

22. ERNESTO GUTIERREZ Y GONZALEZ, *EL PATRIMONIO: EL PECUNIARIO Y EL MORAL O DERECHOS DE LA PERSONALIDAD* 767–73 (5th ed. 2002).

23. *Id.* at 749.

24. *Id.* at 767–68.

25. IGNACIO GALINDO GARFIAS, *DERECHO CIVIL: PARTE GENERAL, PERSONAS, FAMILIA* [Civil Law: General Part, Persons, Family] 330 (16th ed. 1997).

26. *Id.*

27. *Id.* at 330.

define the special and peculiar attributes that only a given individual possesses.²⁸ According to Olivera Toro, violations of personality rights include, *inter alia*, illegal deprivation of freedom, culpable transmission of diseases, domicile violation or intrusion, revealing a personal and private secret, intimacy rights violations, and publication of photographs showing serious physical defects.²⁹

Based on the preceding discussion, the Mexican notion of personality rights embraces legal rights derived from a number of legal disciplines. For example, it may include the right to a name, which is an eminently civil law right;³⁰ protection from an illegal deprivation of freedom or unlawful intrusion into a personal home and the right to a clean environment, which are constitutional rights;³¹ and protection from culpable transmission of diseases, which qualifies as a criminal offense.³²

However, the use of the novel term “patrimonial rights” becomes the proper and preferred term when any of these rights is infringed upon as a result of a tortious act, thus resulting in the corresponding civil liability. Under Mexican civil law, the eventual economic indemnification from these illicit acts covers not only any consequential damages and losses but also moral damages.³³ Moreover, under Article 1916 of the applicable Civil Code of the place where the tortious act occurred, there is cause of action to file a lawsuit solely for the infliction of moral damages, independently of the existence of any material damages or strict liability.³⁴ In this regard, Article 1916 of

28. JORGE OLIVERA TORO, *EL DAÑO MORAL* [Moral Damage] 5 (Editorial Themis, 3d ed. 1998).

29. *Id.* at 7–8.

30. Article 22 of the Act for the Protection of the Rights of Girls, Boys and Teenagers recognizes that in Mexico children and teenagers have the right to an identity composed of the right: (1) to have a given name and a last name from the time of birth that is to be registered at the Civil Registry; (2) to have a nationality; (3) to know parentage and origin; and (4) to belong to a cultural group. “Ley para la Protección de los Derechos de Niñas, Niños, y Adolescentes,” D.O., 29 de mayo de 2000. *See also* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.] art. 4 (Mex.).

31. *See* CONST. arts. 4, 14, 16.

32. *See* CÓDIGO PENAL PARA EL DISTRITO FEDERAL [C.P.D.F.] art. 199 bis (Mex.).

33. Vargas, *Moral Damages*, *supra* note 19, at 245.

34. *See id.*

Mexico's Federal Civil Code prescribes:

Moral damage is understood as the injury a person suffers in his sentiments, affections, beliefs, decorum, honor, reputation, private life, configuration and physical aspects, or in the opinion that others have about that person. It will be presumed that moral damage was inflicted when the liberty or the physical and psychological integrity of any person is violated or deteriorated.³⁵

A recent review of the decisions rendered by Mexico's highest federal appellate courts including the Supreme Court of the Nation³⁶ indicates that from 1982, when the notion of moral damages was introduced, through December 31, 2003, no decisions were rendered involving infringements to privacy rights derived from personality rights. However, this situation may change in the future depending upon the importance and notoriety that privacy rights may acquire in Mexico, as well as the eventual enactment of specific legislation in Mexico, providing remedies against unwanted or abusive intrusions of privacy rights inflicted by private individuals, companies, or governmental agencies.

B. Constitutional Rights: The Constitutional Doctrine of Embedded Privacy Rights

In Mexico, the term individual guarantees refers to constitutional rights that protect the fundamental rights and freedoms inherent in any individual, whether a Mexican national or a foreigner, as enunciated in Chapter I of the Federal Constitution of 1917.³⁷ As recognized by Mexican constitutional specialists, the essential and inalienable rights explicitly formulated in the first twenty-nine articles of Mexico's Federal Constitution were inspired by the Declaration of Independence of the United States and by the Bill of Rights of the U.S. Constitution, which also influenced Mexico's Federal

35. CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] art. 1916 (Mex.).

36. See Vargas, *Moral Damages*, *supra* note 19, at 243–65.

37. See IGNACIO BURGOA, *LAS GARANTÍAS INDIVIDUALES* (34th ed. 2002); JORGE CARPIZO, *NUEVOS ESTUDIOS CONSTITUCIONALES* (2000).

Constitutions of 1824 and 1857.³⁸

Mexico's current constitution was enacted in 1917 by a Constitutional Congress that met in the City of Querétaro in 1916–1917. Based on a draft prepared by President Venustiano Carranza, the Constitution was strongly influenced by the political and socio-economic principles and ideals advanced by the populous and nationalistic revolution initiated in Mexico in 1910.³⁹ In order to synchronize it with the passage of time and to reflect the political philosophy of the president in turn, Mexico's Federal Constitution has been amended numerous times. Today, there have been 427 amendments to the Mexican Constitution.⁴⁰

These individual guarantees include, inter alia, equality of rights without sexual distinction, prohibition of special legal protective status, due process, liberty to engage in family planning, liberty to possess firearms for safety and self defense, liberty of movement within and outside of the country, freedom of thought, freedom to write and publish works, freedom of religion, right to petition authorities, freedom of assembly for political reasons, prohibition of extradition of political offenders, non-retroactivity of any law, prohibition of unusual and inhuman penalties, abolition of imprisonment for civil debts, and no double jeopardy.⁴¹

A simple reading of these individual guarantees clearly shows that they are constitutional rights rather than specific

38. Carlos del Río Rodríguez, *La Tradición Española y la Influencia Norteamericana en México*, in OBRA JURÍDICA MEXICANA 4147–73 (1988); Felipe Tena Ramírez reports that the members of Mexico's Constitutional Congress of 1824 were, in the words of its President, Lorenzo de Zavala, “enthusia[stic] about the federal system and their manual was the Constitution of the United States, a copy of which in a bad translation printed in the City of Puebla de los Angeles, served as the text and model to new legislators.” FELIPE TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO, 1808–1991 [Fundamental Laws of Mexico] 153 (16th ed. 1991). Articles 1–29 of Mexico's Federal Constitution of 1857, under the title “The Rights of Man,” contained a long enumeration of constitutional rights in close symmetry with those in the Bill of Rights of the U.S. Constitution. Compare U.S. CONST. amends. I–X, with CONSTITUTION POLÍTICA DE LA REPUBLICA MEXICANA arts. 1–29 (1957), reprinted in RAMÍREZ, *supra*, at 607–11.

39. See VARGAS, MEXICAN LAW, *supra* note 14, at 38–45.

40. For the current list of amendments with dates of publication, see “*Historial de Reformas a la Constitución Política de los Estados Unidos Mexicanos, por Artículo*,” D.O., 27 de septiembre de 2004.

41. See CONST. arts. 1–29 (Mex.).

privacy rights. However, the protection of some of these fundamental rights—for example, family planning, protected by Article 4 of the Constitution⁴²—may involve the protection of certain non-explicitly enunciated privacy rights in the constitutional document. For instance, this would be the case of an unauthorized and public disclosure of information regarding the birth control method used by a given couple for family planning purposes.

Accordingly, the individual guarantees that are explicitly enunciated by the Mexican Constitution provide an excellent legal sphere of protection for important fundamental rights. This sphere may be validly used by individuals or legal entities as the basis for certain privacy rights, which, although not expressly formulated in the Constitution, *de jure* form an integral component of the individual guarantees in question. In other words, the constitutional right serves as the legal anchor to provide support to a privacy right that is absent from the language of the Constitution but whose substance is embedded in that constitutional right.

This doctrine of embedded privacy rights in constitutional law precepts may provide a valid strategy to protect novel privacy rights that until now, had not been explicitly included in Mexico's legal system. An amendment to Article 16 of the Constitution in 1996 may have signaled the beginning of a policy that appears to favor an explicit recognition and protection of privacy rights in Mexico.

Since their promulgation in 1917, Articles 14 and 16 of the Mexican Constitution have been the most powerful legal bases used by individuals and legal entities in Mexico to fight back unlawful intrusions by public authorities violating the rights guaranteed by the Constitution by means of the federal lawsuit of *Amparo*.⁴³ Articles 14 and 16 prescribe in part:

ARTICLE 14. No person shall be deprived of life,

42. The second paragraph of Article 4 reads: "Any person has the right to decide in a free, responsible and informed manner, on the number and spacing of their children." CONST. art. 4.

43. See VARGAS, MEXICAN LAW, *supra* note 14, at 60–62 (explaining the *Amparo* lawsuit); see also "Amparo," in JORGE A. VARGAS, MEXICAN LEGAL DICTIONARY AND DESK REFERENCE 20–27 (2003) [hereinafter VARGAS, DICTIONARY].

liberty, property, possessions or rights without judicial proceedings in a court of law in compliance with due process and in accordance with duly enacted laws.⁴⁴

ARTICLE 16. No one shall be disturbed in his or her person, family, *domicile*, documents or possessions except by virtue of a written order by the competent authority stating the legal grounds and the justification for the action taken. . . .⁴⁵

In 1996, the following two paragraphs were added to Article 16 of the Constitution:

Private communications are inviolable. The law shall criminally sanction any act which infringes upon the liberty and privacy of said communications. Only the federal judicial authority, at the request of the federal authority empowered by the law or the Public Prosecutor [Ministerio Público] of the corresponding federal entity, may authorize the interception of any private communication. For this purpose, the competent authority, in a written order, must provide the legal grounds and the justification of the request, indicating, in addition, the type of interception, the subjects involved, and its duration. The federal judicial authority cannot grant these authorizations in matters of an electoral, fiscal, mercantile, civil, labor or administrative nature, nor in the case of communications between a detainee and his or her legal counsel.

The interceptions authorized shall comply with the requirements and limitations prescribed by the laws. The results of the interceptions that do not comply with these requirements, shall have no evidentiary value.⁴⁶

44. CONST. art. 14, ¶ 2.

45. CONST. art. 16 (emphasis added). A written order is also known as a search warrant (*orden de cateo*). This paragraph is identical to the corresponding Article of the Federal Constitution of 1857. Compare *id. with*, CONSTITUCIÓN POLÍTICA DE LA REPUBLICA MEXICANA art. 16 (1857), reprinted in RAMÍREZ, *supra* note 38, at 608.

46. CONST. art. 16 ¶¶ 9–10 (emphasis added). These amendments were published in the *Diario Oficial de la Federación*. “Decreto mediante el cual se declaran reformados los artículos 16. 20 fracción I y penúltimo párrafo, 21, 23, 73 fracción XXI de la Constitución Política de los Estados Unidos Mexicanos,” D.O., 3 de julio de 1996.

In general, Mexican constitutional law specialists are of the opinion that Article 16 of Mexico's Federal Constitution is directed at guaranteeing: (a) the legality of authority acts; (b) the freedom of individuals; and (c) the inviolability of the domicile and of private communications.⁴⁷

The protection and inviolability of "private communications" was added as a result of the 1996 constitutional amendment and is an extension of the inviolability and protection conferred upon the domicile by both Constitutional Assemblies in 1856–1857 and 1916–1917. In this regard, the influence that the Fourth Amendment of the Bill of Rights of the U.S. Constitution⁴⁸ exercised on the drafting and content of this Article of the Mexican Constitution should be evident.

The inviolable protection of an individual's home was among the earliest and most fundamental constitutional rights recognized in the legislative history of Mexico. The earliest explicit recognition of this right is found in Article 32 of the Constitution of Apatzingán of 1814, which reads: "The home of every citizen is an inviolable asylum: only one may enter into a home when there is a fire, or a flood, or when a proprietary claim makes this act necessary. In criminal proceedings, the requisites prescribed by the law must precede any acts."⁴⁹

Since an individual's home is his own "asylum," the right to be protected from any unwanted intrusion into this private and personal domestic realm has always been recognized as a fundamental and inviolable right. Whatever takes place inside this home is presumed to be personal and intimate, eminently private and kept and maintained within the "four walls" that not only protect, but also form the legal notion of what is to be a home. Therefore, it is only logical that any private communications resulting from the 1996 amendment are now

47. Jose Ovalle Favela, *Artículo 16, in CONSTITUCIÓN POLÍTICA COMENTADA Y CONCORDADA 209–52* (Miguel Carbonell ed., 17th ed. 2003).

48. U.S. CONST. amend. IV (1791) ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.").

49. "Decreto Constitucional para la Libertad de la América Mexicana" [Constitutional Decree for the Freedom of Mexican America] art. 32, 22 de octubre de 1814.

deemed to be an extension of one's home and, as such, constitutionally protected as private and inviolable.⁵⁰

The 1996 amendment to Article 16 of the Constitution was one in a series of changes directed at detailing and expanding the scope of due process rights in a criminal procedural context.⁵¹ These changes included: the right to be freed on bail;⁵² exceptions to the confiscation of assets in criminal cases, especially when involving illicit enrichment or in criminal offenses committed by members of the organized crime;⁵³ and the power of the Federal Congress to legislate on criminal offenses against the Federation and the imposition of penalties.⁵⁴ This explains the criminal law orientation as the objective found in all of these amendments, including that of Article 16. It would be fair to assert that the spirit of these changes was to give larger and stronger protection to individuals in the criminal law context. Accordingly, the explicit recognition of the inviolability of private communications was an incidental or supplementary addition to the constitutional right of the inviolability of the domicile. As a matter of fact, the inviolability of private communications was meant to suggest an exception to the power of the State, to be exercised only through the federal judicial authority, as carved out from the inviolability of the domicile and personal correspondence.⁵⁵

It has been suggested that this amendment simply recognizes the existence of the right to intimacy or privacy that was already incorporated in the original text of Article 16 of the Constitution.⁵⁶ This may be true; however, it would have been much better if the Federal Congress had passed a more comprehensive and explicit modification not only acknowledging

50. Ovalle Favela, *supra* note 47, at 248.

51. CONST. art. 16 (amended 1996). The 1996 amendment modified Articles 16, 20(I), 21, 22 and 73(XXI) of the Mexican Federal Constitution. Ovalle Favela, *supra* note 47, at 248. These articles protect substantive and procedural constitutional rights in criminal proceedings. See CONST. arts. 16, 20(I), 21, 22, 73(XXI).

52. CONST. art. 21.

53. *Id.* art. 22.

54. *Id.* art. 73(XXI).

55. See Ovalle Favela, *supra* note 47, at 248–49; CONST. art. 16, ¶ 9.

56. See Ovalle Favela, *supra* note 47, at 248.

the constitutional right of the inviolability and privacy of private communications, as the amendment reads, but also incorporating in an explicit manner the notion of the right to privacy. Certainly the explicit insertion of this right into the text of Mexico's Federal Constitution would have allowed the Federal Congress to enact more specific and detailed secondary legislation on this novel but important subject at a later date.

Dr. Ovalle Favela has validly criticized the imprecision or vagueness in the language of the two additional paragraphs to Article 16. First, the amendment should have been formulated as a clear exception to the constitutional rule prescribing the inviolability of private communications.⁵⁷ Second, it should also have circumscribed the power to intercept these communications solely by Federal Prosecutors (*Agentes del Ministerio Público Federal*) rather than using the expression "the federal authority empowered by the law," as written in the amendment.⁵⁸ Evidently, this expression leaves the door open to include not only Federal Prosecutors but actually "any federal authority, with the only condition to be empowered by the law to that effect."⁵⁹ However, it should be kept in mind that the amendment prescribes that this authorization to intercept private communication is given only to "the federal judicial authority: namely to the organs of the Federal Judicial Power."⁶⁰

The fundamental problem of this reform is, according to Favela, that the language of said reform does not expressly indicate "in what matters and under what conditions the federal judicial authority may authorize or deny the interception of private communications."⁶¹ The language of this amendment simply states, albeit redundantly, that "the competent authority" requesting the authorization to intercept a private communication "must provide the legal grounds and the justification of the request," a requisite that is already mandated by the opening paragraph of Article 16.⁶²

57. *Id.*

58. *Id.* at 249.

59. *Id.* at 248–49.

60. *Id.* at 249.

61. *Id.*

62. *Id.*

Another serious criticism is leveled against the language of the 1996 amendment to Article 16 of Mexico's Federal Constitution: instead of delineating the cases and objectives when the federal judicial authority is to authorize the interception of private communications, the amendment opted for enumerating a number of subject areas where the authorization to conduct an interception "cannot be granted," namely, "in matters of an electoral, fiscal, mercantile, civil, labor or administrative nature, nor in the case of communications between a detainee and his legal counsel."⁶³ The question is: Is this an exhaustive list or not? Can interceptions be authorized in other areas, such as agrarian, social security, familial and constitutional cases?⁶⁴

Given the imprecision of the language utilized by the Federal Congress, it is not likely that this language would serve to limit interceptions. On the contrary, it may not be surprising if it would lead to undue intrusions and abusive interceptions in private communications. To correct these language deficiencies, Dr. Ovalle Favela suggests these proposals:

[1] The amendment should have enumerated in a precise fashion the minimum requisites or conditions for the federal judicial authority to authorize the Federal Prosecutor (and this organ only) to conduct the interceptions. . . [2] Interceptions may only take place with respect to: [a] criminal investigations [*averiguaciones previas*] in *serious* criminal offenses; [b] when there is evidence or *indicia* which clearly suggest the probable participation in the commission of those serious offenses of the individual against whom the interception is requested; [c] where there are no other means to adequately ascertain the facts; and, [d] to properly record and document the execution of the interception, considering its eventual use as an evidentiary proof in the eventual trial.⁶⁵

Considering the extraordinary importance that privacy rights and the inviolability of private communications are

63. CONST. art. 16, ¶ 9.

64. Ovalle Favela, *supra* note 47, at 249.

65. *Id.* at 249–50.

acquiring in Mexico today, hopefully, that in the near future Mexico's Federal Congress will revisit this subject in order to explicitly include the right to privacy as an individual guarantee enshrined in its Federal Constitution. The eventual recognition of this inalienable constitutional right would also permit Congress to subsequently enact secondary legislation devoted entirely to the important novel subject of privacy rights, thus enumerating these rights, describing the manner in which they are to be protected under the law, and identifying the remedies and institutions to be utilized when these rights are infringed upon or violated by individuals, corporations, or government officials.

Until Mexico expressly incorporates in its Federal Constitution the right to privacy with the resulting federal legislation on this subject, the doctrine of embedded privacy rights is expected to continue to operate. Accordingly, Mexican courts and Mexican governmental agencies and authorities will continue to seek, and find, the implicit presence of privacy rights not only in relation with specific provisions in the constitutional text, particularly in the provisions enumerating the individual guarantees, but also in the language of a number of other legislative enactments, especially those at the federal level. However, the adoption of an open and explicit policy on this matter is by far superior to the current reliance on the ambiguous existence of embedded privacy rights.

C. Civil Rights

Mexico's legal system belongs to the civil law tradition.⁶⁶ It should not be surprising, therefore, that the term "civil rights" has a different legal meaning than that attributed to it in the United States.

Basically, under Mexican law, civil rights are those fundamental rights and freedoms inherent to any person that are recognized and legally protected without any distinction or

66. See JOHN H. MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA* 1184-86 (1994); RENÉ DAVID & J. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 82-83 (1978).

discrimination whatsoever.⁶⁷ In a more technical sense, civil rights in Mexico are commonly associated with those rights that govern the relations between individuals in a strictly personal setting, such as birth, marriage, divorce, adoptions, inheritance, and personal contracts, as regulated by the Civil Law.⁶⁸ This is the most common and popular use of this term. Most of these civil rights are already incorporated as constitutional rights in the first chapter of Mexico's Federal Constitution.⁶⁹

Civil rights then are those legal norms and principles that regulate the ordinary relations of all individuals in a social setting, who are subjects of specific rights and obligations. The civil rights protect the individuals as human beings as well as their personal interests from moral viewpoints, such as familial and corporate interests, and from patrimonial viewpoints such as property rights, contracts, and *mortis causa* succession and inheritance.

It would seem that the term personality rights, recently incorporated into the Mexican legal terminology due to a strong European influence from France and Spain, refers to certain civil rights that carry a very personal, private or even intimate legal connotation. In any event, as of this writing in February 2004, no Civil Code in Mexico includes any reference or section devoted to privacy rights.

D. Human Rights

In Mexico, the usage of the term human rights is of relatively recent origin. Some specialists are of the opinion that the history of human rights may be traced back to the War of Independence initiated in 1810 and in particular to the Federal Constitution of 1857,⁷⁰ which made a passing reference to the

67. See "Derechos Civiles" in NUEVO DICCIONARIO JURÍDICO MEXICANO 1244–45 (2000) [hereinafter DICCIONARIO JURÍDICO 2000].

68. Civil Law occupies the central and most salient place within Mexico's legal system. The Federal Civil Code (and the corresponding individual codes of Mexico's thirty-one States) is divided into four "books": Persons, Property, Successions, and Contracts.

69. CONST. arts. 1–24.

70. See RODOLFO LARA PONTE, LOS DERECHOS EN EL CONSTITUCIONALISMO MEXICANO 92–99 (3d ed. 2002).

expression “*derechos del hombre*,” or “the rights of man.” However, it is generally recognized that the modern popularization of the term human rights is largely due to the important work of the United Nations in its efforts to enunciate, promote, and codify international human rights at the universal level.⁷¹

The term human rights quickly became a component of Mexico’s legal language in 1990, when President Carlos Salinas de Gortari created the National Commission of Human Rights (*Comisión Nacional de Derechos Humanos* or CNDH) by presidential decree.⁷² Two years later, given the tremendous success accomplished by the CNDH, a special section, *Apartado B*, was added to Article 102 of the Federal Constitution by means of a constitutional amendment⁷³ that resulted in the establishment of similar commissions both at the national and local levels.⁷⁴

It has been reported that during NAFTA negotiations, a thorny issue that slowed down the negotiations for this agreement between the United States and Mexico was Mexico’s

71. Whereas the expression *droits de l’homme* (human rights) is attributed to the French Declaration of the Rights of Man and of the Citizen of 1789 that exercised a profound influence in a multitude of constitutional documents at a global scale, including Mexico’s Constitution of 1857, the modern term “human rights” was coined by the United Nations (UN) in the UN Charter of 1945, and especially in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. U.N. CHARTER pmb.; *International Bill of Human Rights: Universal Declaration of Human Rights*, *supra* note 16, at 71; International Covenant on Civil and Political Rights, *supra* note 17, at 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4, 4–5.

72. “Decreto por el que se crea la Comisión Nacional de Derechos Humanos como un órgano desconcentrado de la Secretaría de Gobernación,” D.O., 6 de junio de 1990.

73. “Decreto por el que se reforma el Artículo 102 de la Constitución Política de los Estados Unidos Mexicanos,” D.O., 28 de enero de 1992. The National Commission’s Act (*Ley de la Comisión Nacional de Derechos Humanos*) was later published in Mexico’s Official Gazette defining it as a separate entity (*organismo público descentralizado*). “Ley de la Comisión Nacional de Derechos Humanos,” D.O., 29 de junio de 1992.

74. See José Luis Soberanes Fernández, *Estudio Preliminar*, in MARCO JURÍDICO DE LOS ORGANISMOS PÚBLICOS DE PROTECCIÓN Y DEFENSA DE LOS DERECHOS HUMANOS EN LAS ENTIDADES FEDERATIVAS 9–11 (José Gómez Huerta Suárez & Eugenio Hurtado Márquez eds., 2003).

poor record in the area of human rights.⁷⁵ To overcome this impression and promote respect for human rights at the domestic level, President Salinas astutely decided to establish a national commission to protect human rights violations in Mexico.⁷⁶

The establishment of the CNDH, according to Mexico's leading experts in this discipline, marks "*the initiation of a culture of human rights*, an essential factor in order to attain their true protection, all this accomplished through an intense promotional campaign consisting of lectures, round tables, courses, training programs and the publication of numerous books and pamphlets on this subject."⁷⁷

Although there is no statutory legal definition of human rights in any of Mexico's legislative enactments, the CNDH provides this explanation:

Human Rights are a group of privileges inherent to the nature of a human being, whose effective realization becomes indispensable for the integral development of an individual who lives in a given society that is juridically organized. *These rights, established in the Constitution and in the laws, should be recognized and guaranteed by the State.*

Everyone is obligated to respect any other individual's human rights. However, pursuant to the constitutional mandate, those who have the most responsibility in this area are the government authorities; namely, the men and women who work as public servants.

The State's task of protecting anyone's human rights represents the demand to provide and maintain the necessary conditions to insure that, within a situation

75. See Fernando González-Martín, *HIV/AIDS and Human Rights in Mexico*, 3 HUM. RTS. BR. 2, ¶ 3 (Spring 1996), at <http://wcl.american.edu/hrbrief/v3i3/hivmex33.htm>.

76. See JORGE MADRAZO, DERECHOS HUMANOS: EL NUEVO ENFOQUE MEXICANO 69, 71 (1993) (explaining that CNDH objectives include eliminating torture and abuses by public authorities, giving more humane treatment to inmates in penitentiaries, and to respond to the increased number of claims advanced by indigenous peoples).

77. Héctor Zamudio & Héctor Fierro, *Artículo 102*, in 4 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS COMENTADA Y CONCORDADA 85, 95-96 (2003) (emphasis added).

of justice, peace, and liberty, any person may really enjoy the totality of all of his or her rights. The common good presupposes that the public power must do whatever is necessary to overcome, in a gradual manner, inequality, poverty and discrimination.⁷⁸

The CNDH acknowledges that its duty to defend and protect human rights in Mexico comprises several activities, including, inter alia, the following: (1) contributing to the integral development the individual; (2) delimiting, for all individuals, an "autonomy sphere" within which they may be able to act freely, protected against abuses by authorities, public servants, and other individuals; (3) establishing boundaries to the acts of any public servants, regardless of their hierarchical level or governmental agency, whether federal, state, or municipal; (4) endeavoring to protect against the abuse of power, negligence, or mere ignorance of what the public function entails; and, (5) creating avenues and mechanisms of participation that allow all individuals to take an active part in the handling of public affairs and in the adoption of community decisions.⁷⁹

The CNDH has jurisdiction to take recognition of complaints regarding acts or omissions of an administrative nature that violate human rights committed by any authority or public official at the federal level, except those of the Federal Judicial Power.⁸⁰ In addition, any individual may report to the CNDH any human rights violation, even those who do not have any legal standing.⁸¹ The Commission first examines whether it has jurisdiction over the matter. In cases under its jurisdiction,⁸² it

78. Comisión Nacional de los Derechos Humanos, *Concepto de los Derechos Humanos*, at http://www.cndh.org.mx/Principal/document/derechos/fr_concep.htm (last visited Oct. 24, 2004).

79. *Id.*

80. Ley de la Comisión Nacional de los Derechos Humanos [CNDH Act] arts. 3, 6 ¶ 1, *available* at http://www.cndh.org.mx/Principal/document/juridica/leg_cndh/fr_legis.htm (last visited Oct. 24, 2004).

81. *Id.* art. 25.

82. *Id.* art. 36; *see also* Reglamento Interno de la Comisión Nacional de los Derechos Humanos [International Regulations of the National Commission on Human Rights] art. 9, *available* at http://www.cndh.org.mx/Principal/document/juridica/leg_cndh/fr_legis.htm (last visited Oct. 24, 2004) (outlining the jurisdictional reach of the National Commission on Human

requests a detailed report from the authority responsible for the alleged violation.⁸³ Legally, all authorities are obliged to produce this report within fifteen days of the date of the request and to make full disclosure and provide any documents requested by the Commission.⁸⁴ Once in possession of all the necessary information and documentation, the CNDH directs a formal “recommendation” to the authority in question “suggesting” a certain course of action.⁸⁵ Most recommendations are voluntarily complied with by the corresponding authorities.⁸⁶ The CNDH also issues opinions freeing authorities of any responsibility (*documentos de no responsabilidad*).⁸⁷ Patterned after the CNDH, all of Mexico’s thirty-one states, as well as the Federal District, have local commissions.

Despite the unprecedented progress made in recent years by Mexico in promoting and advancing the recognition of human rights and the respect for human dignity, Mexico continues to receive severe criticisms both at the domestic and international levels for the notorious cases of arbitrary administration of justice and continued violations of human rights.⁸⁸ As of this writing, Mexico has not enacted specific legislation on human rights. Accordingly, human rights under Mexican law may correspond to a number of legal rights, whether included in specific secondary legislative enactments or as the constitutional rights enunciated in the first chapter of Mexico’s Federal Constitution. As expressly indicated in the corresponding CNDH Act, emphasis is placed on administrative violations by actions or omissions of federal authorities that impinge upon certain

Rights).

83. *Id.* art. 34.

84. *Id.* arts. 34, 67–69.

85. *Id.* arts. 44, 46.

86. *Id.* art. 46; Reglamento Interno de la CNDH arts. 128–40.

87. Ley de la CNDH art. 45; Reglamento Interno de la CNDH arts. 141–47.

88. See, e.g., Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en México, *Diagnóstico sobre la Situación de los Derechos Humanos en México* 26–34 (2003) [hereinafter *Diagnóstico*], available at www.cinu.org.mx/prensa/especiales/2003/dh_2003/index.htm; U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Mexico: Country Reports on Human Rights Practices - 2003*, (Feb. 25, 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27905pf.htm>.

statutorily undefined human rights and fit the criterion of the national or the local commission.⁸⁹

The first two “Recommendations” made in his recently released *Diagnosis* published by the High Commissioner of the United Nations for Human Rights in Mexico were:

1.To amend the Constitution to incorporate the concept of human rights as the fundamental axis of said Constitution, and to recognize that human rights treaties have a superior hierarchy to the federal and local normative regimes. . .

2.To enact secondary legislation regarding each of the human rights that are constitutionally recognized and to guarantee their protection at the same level for all the inhabitants in the country *vis à vis* the federal and local governments.⁹⁰

Since its inception in 1992, the National Commission of Human Rights has not specifically addressed any case involving the alleged violation of any privacy Rights.

III. INTRUSIONS INTO “PRIVACY RIGHTS” UNDER MEXICAN LAW

For over a century, the Amparo Suit (*Juicio de Amparo*) has been the preferred legal tool utilized in Mexico by individuals and legal entities alike to seek the prompt and effective protection of the federal judiciary against acts of authorities that infringe or violate the constitutional rights enunciated in Chapter 1 of Mexico’s Federal Constitution.⁹¹ Indeed, *Juicio de Amparo* is one of the most valuable legal institutions Mexico has produced as a means of constitutional control and as an impenetrable legal shield “to shelter and protect” individuals against arbitrary and unconstitutional acts of Mexican authorities, whether federal, state, or municipal.⁹²

89. Ley de la CNDH arts. 2, 8.

90. *Diagnóstico*, *supra* note 88, at vii.

91. IGNACIO BURGOA, *EL JUICIO DE AMPARO* 184 (1984); OCTAVIO HERNÁNDEZ, *CURSO DE AMPARO: INSTITUCIONES FUNDAMENTALES* 6 (1983); GENERAL PIMENTEL, *EL DERECHO QUE TENEMOS: LA JUSTÍCIA QUE ESPERAMOS* (2000).

92. The *Juicio de Amparo*—popularly referred to simply as “*Amparo*,” which means to shelter or protect—is a type of federal lawsuit that shares some similarities with the

Accordingly, any time an individual, whether a Mexican national or a foreigner,⁹³ claims an authority has violated a right guaranteed by the Constitution (*garantía individual*), then the individual in question has cause of action pursuant to the *Amparo Act* to sue the authority responsible for the constitutional right violation. These guaranteed rights include: the Article 3 right of private individuals or private companies to impart private education; the Article 4 protection against any discriminatory treatment of a woman or a denial to provide her with medical treatment in a public clinic or hospital; the Article 5 right against an authority's prohibition for an individual to exercise a given profession; the Articles 6 and 7 protection against censorship by the State regarding the publication of a written article or book; the Article 8 right to an official response from an authority to an individual's written inquiry; the Article 10 right to have a firearm at home for personal protection; The Article 14 prevention of a law from being applied retroactively to injure a given individual or deprived of his liberty, property, or possessions without due process; the Article 15 prevention of a political inmate from being extradited according to a treaty; and the Article 16 protection against invasion of a person's home, family, domicile, papers or possessions without a judicial order.⁹⁴

In the overwhelming majority of *Amparo* cases, Articles 14 and 16 of the Federal Constitution provide the indispensable

habeas corpus and other mechanisms of judicial review and constitutional control. In Mexico, this federal lawsuit is governed in substance and procedurally by the *Amparo Act*, derived from Articles 103 and 107 of the Mexican Constitution. "Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 10 de enero de 1936. For further reading *Amparo*, see VARGAS, MEXICAN LAW, *supra* note 14, at 60–62 and VARGAS, DICTIONARY, *supra* note 43, at 20–27.

93. Article 1 of the Mexican Constitution prescribes that the legal concept "individual guarantees" applies in Mexico to "any individual," thus embracing foreigners, as defined by Article 33 of the Constitution and the applicable provisions of Mexico's Immigration Act, which is contained within *Ley General de Población* (General Population Act). CONST. arts. 1, 33; LEY GENERAL DE POBLACIÓN arts. 32–75. However, in Mexico, like in the United States, constitutional rights favoring foreigners may be denied, limited or restricted when expressly mandated by the Constitution itself, or by the applicable statutes or regulations. See Héctor Fix Fierro, *Commentary to Article 1 of the Constitution*, in 1 CONSTITUCIÓN POLÍTICA MEXICANA COMENTADA 12–14 (2000).

94. CONST. arts. 3–8, 10, 14–16.

legal bases upon which the entire lawsuit is structured. Article 14 provides, *inter alia*, that “no one may be *deprived* of life, freedom, properties, possessions or rights” without due process in a court of law.⁹⁵ Article 16 adds that “no one may be *molested* in his or her person, family, domicile, papers or possessions” without a judicial order that must state “the legal grounds and the rationale for the action taken.”⁹⁶ Consequently, the *Amparo* lawsuit is the major and most powerful legal instrument that has been traditionally utilized in Mexico to stop, curb, and control any perceived unconstitutional, arbitrary, abusive, and unlawful act of any authorities adversely affecting the legal rights of Mexican nationals, companies, and foreigners in that country.

Now, since Mexico has not yet enacted specific legislation on privacy rights, and taking into consideration that many of these rights may be implied or embedded in a number of Mexican legal areas, such as constitutional law, civil law, labor law, criminal law, administrative law, banking and financial law, and fiscal law, it is to be expected that the *Amparo* lawsuit will continue to be the ordinary and most common avenue to seek a remedy in the new and emerging area of privacy rights violations. Regardless of the fact that Mexico has not enacted legislation on privacy rights, the *Amparo* lawsuit remains today as the major legal avenue that provides a remedy for the infringement of certain constitutional, as well as other rights. Therefore, it may actually serve as some kind of legal platform from which to file a lawsuit to seek protection for privacy rights violations. In these types of cases, the plaintiff uses the existing platform of legal rights to anchor or attach to them those incipient notions that are beginning to be referred to Mexico as privacy rights.

Thus, privacy rights are those created to protect very personal, private, and intimate areas that are inherent to any person and to form an essential component of his legal sphere. Intimacy and private life are key elements of the novel notion of

95. CONST. art. 14 (emphasis added). For the text of Article 14 of the Mexican Federal Constitution, *see supra* note 44 and accompanying text.

96. CONST. art. 16 (emphasis added). For the text of Article 16 of the Mexican Federal Constitution, *see supra* notes 45–46 and accompanying text.

privacy rights. One author identifies several private or intimate areas where most individuals would not tolerate any intrusion by others as:

- [1] Domicile
- [2] Image
- [3] Personal correspondence
- [4] Personal papers, archives and registries
- [5] Telephone or conversations in private
- [6] Financial information
- [7] Medical information
- [8] Affective or sentimental relations
- [9] Sexual relations
- [10] Political or religious ideologies or positions
- [11] Personal circumstances pertaining to honor
- [12] Personal background (criminal, labor, academic, etc.)⁹⁷

From a survey conducted to explore whether a person would object to making available information regarding intimate aspects of the person's life, the following represents the percentage of affirmative answers to the question: "Would you object to disclosing information about your . . . ?":

[1] Sexual life	87%
[2] Personal income	78%
[3] Medical history	51%
[4] Political opinions	42%
[5] Personal telephone number	34%
[6] Domicile	33%
[7] Religious opinions	28%
[8] Maiden name	18%
[9] Education, level of	17%
[10] Occupation	12%
[11] Racial origin	13%
[12] Nationality	8% ⁹⁸

97. See LUIS MANUEL C. MÉJAN, *EL DERECHO A LA INTIMIDAD Y LA INFORMÁTICA* 80–81 (1994).

98. ADORACIÓN DE MIGUEL CASTAÑO, *DERECHO A LA INFORMACIÓN FRENTE AL DERECHO A LA INTIMIDAD* 32 (1983). See also MÉJAN, *supra* note 97 at 81.

A. *Inviolability of the Domicile*

Article 16 of Mexico's Federal Constitution of 1917 enshrines one of the most basic and fundamental rights: the inviolability of the personal domicile.⁹⁹ Before mankind had the ability to invent technological devices to be utilized as artificial extensions of his own senses, allowing him to be able to see or to listen to conversations, personal interactions, or other events involving targeting people or places located in private or reserved spaces, an individual's physical abode was unanimously and universally recognized—as it continues to be today both at the domestic and international levels—as the ultimate and most private space to be protected from any intrusions from State officials or other individuals. Article 16 of Mexico's Constitution explicitly incorporates this universal principle.

Mexico's Civil Law recognizes different types of domiciles, such as personal, legal, conjugal, fiscal, commercial, and contractual domiciles.¹⁰⁰ In general, the domicile of an individual person is the place where he habitually resides, or if none, then where he has his principal place of business, or if none, then where he actually lives, and if none, then where he is located. A person is presumed to habitually reside at a place if he remains there for more than six months.¹⁰¹

1. *Search and Seizure Cases*

Article 16 of Mexico's Federal Constitution, as discussed earlier,¹⁰² expressly establishes the parameters with which a public authority must comply when the authority is conducting a search and seizure in that country. This Article enshrines the so-called "guarantee of the legality of the acts of an authority."¹⁰³ It originally appeared in the Draft of the Federal Constitution

99. CONST. art. 16.

100. See C.C.D.F. arts. 29–34 (defining such domiciles).

101. *Id.* art. 29.

102. See *supra* notes 45–50 and accompanying text.

103. Under Mexican Constitutional Law, the term "individual guarantee" is referred to as la *garantía de legalidad de los actos de autoridad*. Ovalle Favela, *supra* note 47, at 210.

prepared by President Venustiano Carranza in 1916.¹⁰⁴ The pertinent and current language of the first and eighth paragraph this Article reads:

ARTICLE 16. No one shall be disturbed in his person, family, *domicile*, documents or possessions except by virtue of a written order [such as a search warrant or *orden de cateo*] by the competent authority stating the legal grounds and the justification for the action taken.

. . . .

Every search warrant (*orden de cateo*), which only the judicial authority may issue and that must be in writing, must specify the place to be searched, the person or persons to be apprehended, and the objects sought. Such search or seizure must only be limited by said warrant and, at the conclusion of said proceeding, a detailed statement (*acta circunstanciada*) must be prepared in the presence of two witnesses designated by the occupant of the place searched or, on his or her absence or refusal, by the authority conducting the proceedings.¹⁰⁵

Search warrants issued by the competent judicial authority have been an inescapable legal requirement for almost ninety years in Mexico. Therefore, an intrusion into a private home by any authority, or an arrest or a prolonged detention by the judicial police, can only take place with a valid written search or arrest warrant (*orden de cateo* or *orden de arresto*).

As a consequence, it may be concluded that in Mexico the privacy of the home, the privacy of the individual or people in it and the privacy of their acts is today legally protected by Article 16 of the Federal Constitution.

2. *Invasion of Home Privacy*

As a result of the 1996 amendment to Article 16,¹⁰⁶ private communications received or generated in the privacy of a home are also constitutionally protected by the same provision. In more specific terms, this constitutional protection would embrace private communications, such as telephone

104. *Id.* at 211–12.

105. *Id.* at 209–10.

106. *See supra* notes 46–48 and accompanying text.

conversations, electronic mail (e-mail) transmissions, radio communications, and facsimile (fax) transmissions. In addition, the protection would reach postal communications, telegrams, and other types of communications such as, DHL, Federal Express, and *Servicio Estafeta*.

In a 1993 decision rendered by a Federal Collegiate Circuit Court regarding the unauthorized recording of certain telephone interceptions by the Judicial Police, the Court wrote:

[T]he individual guarantees protect (or guarantee) certain individual rights that are considered to be of the highest importance so it can be said that one lives in freedom, with dignity, and not in a police state. It would be a wrong interpretation of the Constitution to ignore the advancements of technology to allow the violation of those rights. In essence, the spirit of the constitutional guarantee protects individuals, their properties and *privacy rights* [*Privacidad*], and not only tangible places and objects, in a material and strict sense. The guarantee of search warrants [*garantía de los cateos*] not only regulates the taking of material and tangible objects but it also embraces having access to, through recordings and listening, of oral statements made by an individual thinking that he is acting under his right to privacy. The recognition and respect of this guarantee demands that the police must not interfere with said Right to Privacy, without an order from a judicial authority to have access and take possession of the content of telephone conversations.¹⁰⁷

In this *Ejecutoria*,¹⁰⁸ the First Collegiate Circuit on Administrative Matters underlines that the constitutional right of the privacy of a home enshrined in Article 16 of the Federal Constitution, should not be interpreted in a narrow sense. The

107. "Karam Valle, Fernando," 217–28 S.J.F. 75 (7a época 1987) (emphasis added).

108. *Ejecutoria*, or *Tesis*, is the individual decision rendered by the Supreme Court of Mexico or by a Circuit Collegiate Court. Although Mexico does not adhere to the doctrine of *stare decisis*, under certain circumstances federal judicial precedents rendered by Mexico's Supreme Court and by Circuit Collegiate Courts exercise a "persuasive influence" upon judges when these decide cases involving identical or similar legal issues. These persuasive decisions are known in Mexico as *Ejecutorias*. For additional information on *Ejecutorias* and their role in producing *Jurisprudencias*, see VARGAS, MEXICAN LAW, *supra* note 14, at 38–45.

Circuit Court is explicit in pointing out that this guarantee not only protects individuals, tangible places and objects “in a material and strict sense,”¹⁰⁹ but it also incorporates the much broader concept of privacy rights.¹¹⁰ Under this approach, the privacy of a home includes virtually any acts that take place under this legally protected shelter that is the family dwelling, including telephone conversations, for example. However, it should be pointed out that the two 1996 amendments¹¹¹ to Article 16 of the Federal Constitution allow federal judges to authorize “the interception of any private communications” at the explicit request of (1) “the federal authority empowered by the law or [2] the *Ministerio Público*” of a given State.¹¹²

From another angle, any unlawful or unauthorized interception of any private communications is now sanctioned by the applicable provisions of the Federal Criminal Code.¹¹³ The Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*) regulates in detail the conduct of searches and seizures (*cateos*).¹¹⁴ In addition, as the amendment prescribes, “the results of the interceptions that do not comply” with the requirements mandated by Article 16 of the Federal Constitution “shall have no evidentiary value” before any court of law or before any authority.¹¹⁵

B. *Interception of Correspondence*

The protection of the privacy of letters received through the regular mail service against any interception or intrusion from a public authority, a company, or an individual—formally recognized in Mexico as a constitutional right—has been

109. “Karam Valle, Fernando,” 217–28 S.J.F. 75 (7a época 1987).

110. *Id.*

111. *See supra* notes 48–49 and accompanying text.

112. CONST. art. 16, ¶ 8. For a discussion on the lawful interception of telephone conversations and other private communications, see *infra* Part III.C.

113. For some of the criminal offenses, see *infra* Part III.E.

114. CÓDIGO FEDERAL DE PROCEDIMIENTOS PENALES [C.F.P.P.] arts. 61–70 (Mex.); *see also* “Rodarte Ibarra, José Octavio,” 14 S.J.F. 4 (9a época 2001) (involving the unauthorized conduct of a search warrant in Mazatlán, Sinaloa, which led to the nullification of the evidence found consisting of a considerable amount of marijuana and a cache of high power weapons).

115. CONST. art. 16, ¶ 8; *see supra* note 46 and accompanying text.

guaranteed since the Federal Constitution of 1857.¹¹⁶ Patterned after Article 25 of the Federal Constitution of 1857, the current eleventh paragraph of Article 16 of Mexico's Federal Constitution reads today: "Correspondence which is sent through the Mexican Postal System shall be free from any search and its violation shall be punished by the law."¹¹⁷

The privacy of letters and other pieces in the regular mail continues to be protected as a constitutional right. Given the 1996 amendments to Article 16, the privacy of letters and correspondence has now been strengthened since regular mail falls under the new legal category of private communications.¹¹⁸ Today, this individual guarantee is recognized as the "inviolability of private communications."¹¹⁹

The Third Federal Collegiate Court in a 1991 violation of correspondence case, referred to "correspondence as a written communication. . . such as a letter or [other] communication in a sealed envelope, . . . a telegraph or telephone message . . . and any other similar written communication."¹²⁰ In his commentary to Article 16 of the Federal Constitution, José Ovalle Favela asserts: "The inviolability of private communications forms a part of the *right to intimacy or to privacy*, which was already implied in the first paragraph of Article 16 of the Constitution, insofar as it prescribes the inviolability of the domicile and of correspondence."¹²¹ However, Favela does not provide a definition of the right to intimacy or to privacy. The Federal Penal Code prescribes the sanctions to be applied to those who "unduly open a written communication not addressed to him,"¹²² or to the individual who "unduly intercepts" a communication "even though it keeps it sealed and does not read it."¹²³

116. CONST. art 25 (1857) (Mex.).

117. CONST. art. 16, ¶ 11; Ovalle Favela, *supra* note 47, at 210.

118. Ovalle Favela, *supra* note 47, at 248.

119. *Id.*

120. "Domínguez, Hernández Justino," 7 S.J.F. 459 (8a época 1991).

121. Ovalle Favela, *supra* note 47, at 248.

122. CÓDIGO PENAL FEDERAL [C.P.F.] art. 173, ¶ I (Mex.).

123. *Id.* art. 173, ¶ II. In both cases, the sanction consists of a maximum of 180 journeys of community service (*jornadas de trabajo en favor de la comunidad*). The Código Penal Federal also includes other federal crimes involving correspondence and

C. Interception of Telecommunications

The privacy rights of individuals in the Republic of Mexico with regard to their personal home or domicile, whether Mexican nationals or foreigners, are duly protected by the provisions of the first paragraph of Article 16 of the Federal Constitution.¹²⁴ Principally due to the additions made to this Article in 1996, the original inviolability of the home was constitutionally extended to also embrace the inviolability of private communications.¹²⁵ These include telephone conversations, e-mail communications, radio telecommunications, faxes, and, in general, letters, telegrams, and other type of communications.¹²⁶

As previously discussed,¹²⁷ when Mexican authorities at the federal, state, or municipal level bug or tap these private communications without the proper written judicial search warrant, as mandated by Article 16 of the Federal Constitution, the person whose privacy was infringed by these unlawful acts of authority has cause of action to file the corresponding *Amparo* lawsuit. The petitioner will eventually be protected and his rights restored in the exercise of his constitutional rights—rights which, albeit in an implied or embedded manner, contain Privacy Rights.

The opinion of the Federal Collegiate Circuit Court on this matter, reaffirmed as a precedent in 1993, encapsulates the legal philosophy of Mexico's Federal Judiciary on this issue today:

The guarantee of search warrants [*garantía de los cateos*] not only regulates the taking of material and tangible objects but it also embraces having access to, through recordings and listening, of oral statements made by an individual thinking that he or she is acting under his or her right to privacy, and the recognition and respect of this guarantee demands that the police

telecommunications. *Id.* arts. 174–77.

124. *See supra* text accompanying note 45.

125. *See supra* text accompanying notes 46–47.

126. *See supra* text accompanying note 106.

127. *See supra* text accompanying note 91–96.

must not interfere with said right to privacy, without an order from a judicial authority to have access and take possession of the content of telephone conversations.¹²⁸

In 1996, Mexico enacted a special federal statute formulated and designed to fight organized crime.¹²⁹ A special chapter of this Act prescribes an expeditious mechanism, unprecedented in the legal history of Mexico, to obtain search warrants and intercept private communications¹³⁰ and was clearly inspired by similar U.S. enactments.

D. Unauthorized Photographs, Films and "Peeping"

The relatively recent adoption by Mexico of the European legal notion of "personality Rights," as reflected in the 1982 amendment to Article 1916 of the Civil Code of the Federal District,¹³¹ followed by a subsequent amendment in 1994, provides the legal basis to protect individuals from unauthorized photographs, films, and peeping by allowing filing for the infliction of moral damages.¹³²

Moral damages may be filed now throughout the Republic of Mexico independently from the existence of material damages in both contractual and non-contractual liability cases. Under this new civil remedy, moral damages are inflicted when a person suffers an injury to his sentiments, affections, private life, honor, or decorum.¹³³ Moreover, moral damage is presumed to have been inflicted "when the liberty or the psychological integrity of any person is violated or deteriorated."¹³⁴ The resulting economic indemnification is to be determined by the

128. "Karam Valle, Fernando," 217-28 S.J.F. 75 (7a época 1987); *see also supra* note 99.

129. "Ley Federal contra la Delincuencia Organizada," D.O., 7 de noviembre de 1996.

130. *Id.* arts. 15-28 (addressing search warrants and interception of private communications).

131. *See supra* text accompanying note 20.

132. For further reading on moral damages, *see* Vargas, *Moral Damages*, *supra* note 19.

133. C.C.D.F. art. 1916.

134. *Id.*

judge taking into account “the injured rights, the degree of liability, the economic situation of the responsible and that of the victim, as well as the other circumstances of the case.”¹³⁵

Thus, for example, when the paparazzi snap unauthorized photos of a given person, or when a person’s image and other personal incidents and that individual are depicted in a negative fashion, and the photos are printed in a newspaper or magazine and the film is shown to the public, if the person in question believes that the photos or the film have inflicted an injury in his sentiments, affections, or intimate life, that person may file a lawsuit for the infliction of a moral damage. Under the personality rights theory, the personal image as well as certain intimate details of a given individual are considered to be an inherent component of that person’s legal sphere. These personality rights are duly protected by the applicable positive law of Mexico.

According to a leading Mexican law specialist on moral damages, Dr. Jorge Olivera Toro, examples of moral or non-patrimonial damages include: (1) bodily injury threats; (2) threats to a person’s honor; (3) illegal deprivation of freedom; (4) culpable transmission of diseases; (5) insulting or offending graffiti in a person’s home; (6) domicile violation or intrusion; (7) revealing a private or dishonorable secret; (8) intimacy rights violations; (9) publication of photographs showing serious physical defects; (10) disfigurement of a woman’s face; and (11) death of a dear person.¹³⁶ Although the notion of moral damage is a recent legal development, since its introduction to Mexico’s legal system in 1982, some one hundred decisions, consisting of *Ejecutorias* and a few *Jurisprudencias*, have been rendered by Mexico’s federal appellate courts, including Mexico’s Supreme Court, in a variety of legal areas.¹³⁷

E. Criminal Offenses

Sometimes, the intrusions into the privacy rights of a given

135. *Id.*

136. TORO, *supra* note 28, at 7–8.

137. For an analysis of the major federal decisions, see Vargas, *Moral Damages*, *supra* note 19, at 241–68.

person are so serious in nature that they are catalogued as criminal offenses under Mexican law, whether at the federal or a state level. Unlike the U.S. criminal law system, where crimes are classified as felonies and misdemeanors depending upon their seriousness, in Mexico all criminal acts fall under the general category of "crimes" (*delitos*), as these are explicitly defined by the Federal Penal Code (*Código Penal Federal*¹³⁸) or by the corresponding State Penal Code (*Código Penal del Estado*).

Virtually all crimes under Mexican law have been formulated without consideration of the intrusion or violation of the victim's privacy rights, since privacy rights, personality rights and human rights are relatively novel notions. However, Mexican criminal offenses tend to be firmly based upon two tiers of protection. The first tier consists of those constitutional rights, the *garantías individuales*, enunciated by Mexico's Federal Constitution as well as those rights contained in the language of the thirty-one local constitutions of each of Mexico's thirty-one states. The second tier of protection consists of rights, principles, and institutions included in Mexico's positive law (*droit positif*). This is the law found in all of the legislative enactments in force, such as statutes, codes, regulations, decrees, and international agreements approved by Mexico's Senate.

The existence of certain criminal offenses may be used, in a more current interpretation, as a means of protecting against privacy rights violations. In other words, although most crimes included in Mexico's Penal Codes were formulated by the respective legislatures without intending to give any protection to privacy rights, the definition and scope of these crimes allow penal judges today to utilize them as valid legal means of protecting an undefined, but legally existing, number of personal rights embedded in the notion of personality rights. This would be the case with the following federal crimes: (1) sexual harassment; (2) home invasion; (3) crimes against honor; (4)

138. In general, federal crimes (*delitos del orden federal* or *delitos federales*) are those provided by federal laws and applicable international treaties. See VARGAS, DICTIONARY, *supra* note 43, at 179-80.

unlawful deprivation of a person's liberty; (5) secret disclosure; and (6) illicit access to electronic information.

1. *Sexual Harassment*

Sexual harassment (*hostigamiento sexual*) is a new criminal offense in Mexico. Article 259 bis defines sexual harassment in the following terms:

Anyone who insistently harasses persons of either sex with a lascivious goal, taking advantage of his hierarchical position derived from his labor, academic, domestic or any other which implies subordination, shall be imposed a sanction of up to a forty-day fine. If the harassing person is a public servant [*servidor público*] and utilizes his means or circumstances associated with his position, shall be fired from that position.

Sexual harassment shall be punished only when it causes an injury or damage [*perjuicio o daño*].¹³⁹

2. *Home Invasion*

Article 285 of the Federal Penal Code reads:

Imprisonment from a month or up to two years and a fine from ten to one hundred pesos shall be imposed to the individual who, without a valid reason [*sin motivo justificado*], with no search warrant of a competent authority and outside those cases permitted by the law, introduces himself furtively or by deceit or violence [*con engaño o violencia*], or without permission from the person authorized to give such permission, to an apartment, house or annex [*dependencia*] of an inhabited house.¹⁴⁰

139. C.P.F. art. 259 bis.

140. *Id.* art. 285. In Spanish, the name of this crime is *allanamiento de morada*. The fine from one up to one hundred pesos would be equivalent from one to ten dollars, under the current exchange rate of eleven pesos to one dollar. U.S. Federal Reserve, *Federal Reserve Statistical Release: Mexico Historical Rates*, at http://www.federalreserve.gov/releases/H10/Hist/dat00_mx.htm (last visited Oct. 24, 2004). See *also* supra Part III.A.2.

3. *Crimes Against the Honor*

Article 350 of the Federal Penal Code prescribes:

The crime of defamation [*difamación*] shall be punished with imprisonment up to two years or a fine ranging from fifty up to three hundred pesos, or both sanctions, at the judge's discretion.

Defamation consists of: maliciously communicating to one or more people an imputation made about an individual [*persona física*], or a legal entity [*persona moral*] in the cases prescribed by the law, of a true or false fact, specific or undetermined, that may cause [that person or entity] dishonor, discredit, injury, or to be exposed to someone's scorn.¹⁴¹

4. *Unlawful Deprivation of a Person's Liberty*

Over the last decade, Mexican people who have lived in Mexico City and other large cities have suffered a violent wave of kidnappings (*secuestros*) for a ransom. These kidnappings may last for a few days only (*secuestros express*) or for months at a time, or even for years. This wave of kidnappings led to the formulation of their criminalization.

Article 364 of the Federal Penal Code provides:

Imprisonment from six months up to three years and a fine from twenty five to one hundred days shall be imposed . . . I. To the individual who deprives another person of his liberty up to five days. . . . II. To anyone who in some manner violates, to the prejudice of another, the rights and guarantees established by the General Constitution of the Republic [of Mexico]. . . .¹⁴²

5. *Disclosure of Secrets*

Article 210 of the Federal Penal Code reads:

141. *Id.* art. 350. In addition, Article 356 defines the crime against the honor of calumny (*calumnia*) as imputing that another person committed a certain act characterized as a criminal, when the act in question is false, or when the imputed person is free and innocent of the commission of the crime. *Id.* art. 356.

142. *Id.* art. 364. *See also id.* arts. 365–66 (enumerating other crimes involving imprisonment of a person).

From thirty to two hundred days of community work shall be imposed to the person who, without reasonable cause [*sin justa causa*], injuring someone and lacking the potential victim's consent, reveals a secret or reserved communication that he knows or has received due to his employment, position or work.¹⁴³

6. *Illicit Access to Electronic Information.*

Article 211 bis 1 of the Federal Penal Code prescribes:

Anyone who, without authorization, modifies, destroys or causes the loss of information contained in information (*informática*) systems or equipment protected by some security mechanism, shall be sanctioned from six months up to two years of imprisonment and a fine from one hundred to three hundred days.¹⁴⁴

F. *Privacy Rights in the Workplace*

Article 123 of Mexico's Federal Constitution of 1917—still in force after having been amended nearly five-hundred times—establishes the fundamental legal principles and rules, including special labor courts, that nourish and sustain Mexico's legal regime and philosophy in the field of labor law. The provisions contained in Article 123 emanated from the 1910 national revolutionary movement that profoundly transformed Mexico in a social, economic, and political sense, launching it into the twentieth century to become a more modern, politically stable, and democratic nation.

Given the substantial degree of legal and social protection given to Mexico's working class *vis à vis* the employers, Article 123 and the resulting legislation, consisting of the Federal Labor

143. *Id.* art. 210. The sanction is more drastic when it involves professional or technical secrets, or public officials or when it involves the use of information or images obtained by violating a private communication. *Id.* arts. 211–211 bis.

144. *Id.* art. 211 bis 1. Other articles in this section of this Code apply to those individuals “who without authorization reads [*conozca*] or copies electronic information protected by a security mechanism,” or when public officials or servants unduly access information or data that belongs to the State or to financial institutions. *Id.* arts. 211 bis 2–bis 6.

Act, are recognized as the epitome of a new category of law, commonly referred to as “social law.”¹⁴⁵

The Federal Labor Act (*Ley Federal del Trabajo*)¹⁴⁶ may be informally considered as Mexico’s Labor Code, both substantively and procedurally.¹⁴⁷ It should be said at the outset that the Federal Labor Act was not intended to protect the privacy rights of workers in the Republic of Mexico. Instead, this federal statute was formulated to provide the legal regime that governs the relations between workers and employers and the institutional mechanisms to solve labor disputes in a peaceful and expeditious manner through labor arbitration and conciliation boards. It should not be surprising, therefore, that this Act does not contain a single provision that explicitly addresses privacy rights at the workplace.

Every year one million Mexican nationals enter the job market in Mexico.¹⁴⁸ This sustained labor demand exercises tremendous pressure upon the Mexican government to create one million jobs per year that is not only a challenging but a monumental task. Accordingly, finding permanent jobs for the millions of new Mexican workers has been the highest priority for the Mexican government over the last decades.

Rather than centering their attention on alleged violations of privacy rights in the workplace, Mexican authorities have directed their efforts at guaranteeing that Mexicans have jobs that are remunerated, licit, and permanent. Consequently, it may seem evident to conclude that in Mexico—jointly with other

145. See Linda Escandón Ojeda & Marina L.C. Bottone, *Mexican Labor Law*, in VARGAS, MEXICAN LAW, *supra* note 14, at 151, 153; see also VARGAS, MEXICAN LAW, *supra* note 14, at 40–42.

146. “Ley Federal del Trabajo,” D.O., 1 de abril de 1970 (amended). For the English, but outdated, text of this Act, see WILLIAM D. SIGNET, 1 MEXICAN LAW LIBRARY COMMERCIAL CODES 311–711 (1997). For the current and official text of this Act in Spanish, see LEY FEDERAL DEL TRABAJO, *available at* <http://www.cddhcu.gob.mx/leyinfo>.

147. Formed by 684 articles (equivalent to sections), and amended numerous times, this Act regulates employment conditions, rights and obligations of workers and employers, employment of minors, special employment, collective labor relations, and work related risks (equivalent to the U.S. Workers Compensation Act), as well as labor lawsuits before the Federal and Local Conciliation and Arbitration Boards.

148. Sam Dillon, *Smaller Families to Bring Big Change in Mexico*, N.Y. TIMES, June 8, 1999, at A12.

developing countries in Latin America, Asia and Africa—the highest political and economic priority is directed at creating and securing permanent jobs for its incessantly growing population, instead of protecting the privacy rights of workers in the workplace. Therefore, a primary objective that permeates all of Mexico’s legal system, from its highest constitutional provisions to the lowest administrative regulations, is the creation of jobs and then securing the permanency of those jobs throughout the nation and throughout each and every branch of the legal system.

In a more technical way, it should be mentioned that the Federal Labor Act imposes a number of rights and obligations on employers and workers. For example, it is unlawful for an employer “[T]o engage in any activity which *may impair the rights given to workers under the laws.*”¹⁴⁹ Conversely, it shall be unlawful for a worker “to use tools or implements furnished by the employer *for a purpose other than that intended.*”¹⁵⁰

Based on these provisions, one may say that employees in Mexico may not use telephones, fax machines, or computers provided by the employer at the workplace for personal use. However, this raises the issue of what the employer should do when, for example, the workers’ productivity significantly diminishes. Are the workers engaging in heavy e-mail traffic with friends or participating in “chat rooms” and not working for the company’s business purposes? Are they using the computers to download inappropriate materials? Are they making unauthorized, personal local and long distance telephone calls? And how is the employer going to monitor or supervise what the employers are doing during working hours without infringing upon the workers’ rights, including privacy rights”?

From the other side, workers may be concerned that employers may be bugging or tapping into their reasonable and necessary personal communications. Are these technological or electronic intrusions in violation of their labor rights, human rights, or privacy rights, especially where there is no explicit statutory enunciation of this panoply of new rights? What are

149. LEY FEDERAL DEL TRABAJO [L.F.T.], art. 133, ¶ 7 (emphasis added).

150. *Id.* art. 135 ¶ 9 (emphasis added).

the workers to do in these cases?

Both Mexican nationals and foreign investors, and their business companies, are governed by Mexico's statutes, codes, and regulations, including the Federal Labor Act, the Foreign Investment Act, the General Companies Act, the Civil Code the Code of Commerce, and, above all, the individual guarantees expressly enunciated in Chapter I of Mexico's Federal Constitution of 1917.

Since Mexico does not have specific legislation explicitly recognizing the right to privacy enjoyed by workers in the workplace, a foreign or domestic company that operates in Mexico has the right to formulate and implement reasonable policies to guarantee the company's efficiency, financial soundness, and ordained commercial development and expansion. These internal corporate policies, which may regulate access to the Internet, monitoring of e-mail, voice mail, use of computers, and other digital and telecommunications equipment, must not infringe or violate any legislation in force in that country.

Under the Mexican Federal Labor Act, the individual labor contract spells out the employment conditions, working schedule, services to be provided, manner of payment, amount of wages, and "such other employment conditions such as days of rest, vacations, *and others as may be agreed to by the worker and the employer.*"¹⁵¹ Based on this federal act, current provisions offer the employer an opportunity to insert in the individual labor contract a provision (*cláusula*) that may indicate, for example, that the employer has the right to conduct monitoring or surveillance activities regarding any of the worker's activities at the work place, including access and use of the internet, e-mail, and fax machines, voice communications, and telephone and radio traffic, to ascertain that the employee's activities are aligned with the company's policies and in order to deter, avoid, or eliminate the employee's misuses and abuses.

It has become customary for employers to include in each individual labor contract an agreement between the parties authorizing the employer to exercise certain monitoring or

151. *Id.* art. 25, ¶ IX (emphasis added).

surveillance on the employees' activities at the workplace during working hours to guarantee that the employees' time is devoted to the company's activities, as well as the employees' proper use of tools, machines, equipment, computers, and telephones. These agreements have become known as monitoring and surveillance clauses.

Securing the employee's agreement on these issues, and the corresponding employee's signature in a labor contract that includes a monitoring and surveillance clause, probably constitutes the easiest and best authorization an employer can obtain in writing to lawfully engage in these monitoring and surveillance activities. Given Mexico's plentiful labor force in virtually any labor field, if any potential employee is reluctant to sign his labor contract with the monitoring and surveillance clause it would not be difficult for the employer to find another worker who would be willing to sign the contract containing such a clause.

In addition, companies are allowed under the Federal Labor Act to formulate internal working rules (*reglamento interior de trabajo*) with which the employees at a given workplace must comply.¹⁵² These regulations may contain similar monitoring and surveillance mechanisms.

In Mexico, corporate entities, depending on the size and location of the company, are a source of permanent and remunerated jobs for Mexican nationals. When a company provides Mexican workers with a permanent job, a remunerative salary, and adequate working conditions, Mexican authorities inspect the company in order to determine that they are complying with the applicable domestic legislation—whether in the areas including labor, tax, health and sanitation, environmental conditions, and administrative regulations. Since Mexico has not promulgated legislation protecting privacy rights, or regulating the internet, e-mail, and voice mail communications, Mexican authorities have no legal basis for looking into or inspecting these matters.

152. "Internal employment regulations are the aggregate of rules which are obligatory upon workers and employers in the performance of work within the company or establishment." *Id.* art. 422. *See also id.* arts. 423–25 (regarding the content and preparation of these rules).

In sum, whether a company currently conducts monitoring or surveillance activities to intercept the employees' voice and electronic communications through the use of computer, fax, and telephone equipment is not a matter regulated under Mexican law and, as a consequence, these corporate activities are clearly outside the legal scope of Mexico's public authorities. However, it must be pointed out that these corporate policies should consist of reasonable business measures adopted as a "business necessity" to improve the company's administrative and labor efficiency. The policies cannot infringe upon or violate any Mexican legislation currently in force, especially any constitutional provisions.

While not explicitly expressed in Mexican legislation, there has been an international effort to recognize these privacy rights. In 1972, the United Nations Educational, Scientific and Cultural Organization,¹⁵³ and more recently the International Labor Organization, have created special working groups to discuss measures to protect the privacy rights of workers in the workplace.¹⁵⁴

G. Appropriation of a Person's Name or Likeness

Recently, identity theft has become a criminal offense of national proportions in the United States. Mexico does not have a crime that fits the legal contours of identify theft. However, under Mexico's legal system, certain civil actions and criminal offenses, or a combination thereof, may be creatively utilized to punish an individual who unlawfully appropriates the name, likeness, or identity of another person in order to access that victim's bank account, credit card, airplane mileage, or other sensitive personal information.¹⁵⁵

153. See United Nations Educational, Scientific and Cultural Organization, *The Protection of Privacy*, 24 INT'L SOCIAL SCIENCE J. 413, 417 (1972).

154. See, e.g., INTERNATIONAL LABOUR OFFICE, 10 CONDITIONS OF WORK DIGEST: WORKERS' PRIVACY PART I: PROTECTION OF DATA (1991); INTERNATIONAL LABOUR OFFICE, 12 CONDITIONS OF WORK DIGEST PART II: MONITORING AND SURVEILLANCE IN THE WORKPLACE (1993); and INTERNATIONAL LABOUR OFFICE, 12 CONDITIONS OF WORK DIGEST PART III: TESTING IN THE WORKPLACE (1993).

155. The criminal offender may be accused in this case, for example, of fraud, unlawful enrichment, etc., under the applicable Penal Code or be sued for the infliction

H. Medical Examinations and Medical Files

Most Mexicans receive medical services through governmental agencies, the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social* or IMSS)¹⁵⁶ or the Institute for Security and Social Services for State Employed Laborers (*Instituto de Seguridad y Servicios Sociales de los Trabajadores al Servicio del Estado* or ISSSTE).¹⁵⁷ IMSS provides medical services and hospitalization, medications, rehabilitation programs, workers' compensation and retirement benefits for all employed Mexican workers. These services are covered through quotas paid by the employees, their employers, and the Federal government, at an equal 33% share each.¹⁵⁸ ISSSTE renders similar services for government employees.

The handling of personal data and medical information by these two federal agencies takes place every day at an administrative level. However, there are no published regulations regarding the transfer of medical and personal data between federal and state agencies; between public welfare and other medical agencies; or between these public agencies and private legal entities or private individuals, including research institutions, pharmaceutical companies, and medical doctors in private practice. Nor has the transfer of personal and medical data at the transnational level been expressly regulated.

Since both the IMSS and the ISSSTE are public entities, individuals in any administrative capacity who work for them are considered public servants and, as such, subject to the norms and regulations applicable to these special category of workers.

of a moral damage pursuant to the Civil Code.

156. The IMSS is regulated by the Mexican Institute of Social Security Act and its Regulations. "Ley del Seguro Social," D.O., 21 de diciembre de 1995. For the current and official text of this Act in Spanish, see LEY DEL SEGURO SOCIAL, available at <http://www.cddhcu.gob.mx/leyinfo/pdf/92.pdf> (last visited Oct. 24, 2004).

157. The ISSSTE is governed by the ISSSTE Act and its regulations. "Ley del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado," D.O., 27 de diciembre de 1983. For the current and official text of this Act in Spanish, see LEY DEL INSTITUTO DE SEGURIDAD Y SERVICIOS SOCIALES DE LOS TRABAJADORES DEL ESTADO, available at <http://www.cddhcu.gob.mx/leyinfo/pdf/92.pdf> (last visited Oct. 24, 2004).

158. LEY DEL SEGURO SOCIAL arts. 2-5.

As seen earlier,¹⁵⁹ the Federal Penal Code sanctions certain criminal offenses committed by public servants who have illicit access to any electronic or manual data banks or equipment protected by a security mechanism, such as a password or code.¹⁶⁰ Similar criminal offenses apply to private individuals who, without authorization, “modify, destroy or provoke the loss of information” stored in mechanical or electronic information systems, “protected by a security mechanism.”¹⁶¹

IV. THE INTERNATIONAL DIMENSIONS OF PRIVACY RIGHTS

By its nature, privacy rights refer to those essential rights and fundamental freedoms that are inherent to a person, regardless of nationality, race, sex, language or religion. Therefore, there is a logical and indispensable relationship between privacy rights and human rights. As a part of the larger concept of human rights, privacy rights are at the core of that set of physical and cultural attributes that legally define and identify each person at a given time and space.

The panoply of these special rights legally envelop and give shape to the juridical notion of “person” or “individual” as articulated by both the domestic legal systems and by the rules and principles of international law. Accordingly, privacy rights may be considered special rights because the sum of these rights create the uniqueness of each individual; they form the exclusive set of special and peculiar attributes that identify and even “make” the exterior presence and the interior cultural image that each individual develops and carries along his life. Since the inseparable combination of these internal and external elements composes the perceived notion of “person” in any social milieu, it becomes an indispensable task of any legal system—whether domestic or international—to endeavor to accomplish the most complete and unrestrained protection of these privacy

159. *See supra* Part III.E.6.

160. *See* C.P.F. art. 211 bis 3. The sanction consists of imprisonment from two to eight years, and a fine from 300 to 900 days. *Id.*

161. *See id.* art. 211 bis 1. In addition, other criminal offenses may be used to fit these cases, such as those prescribed in Title IX of the Código Penal Federal. *Id.* arts. 210–211 bis.

rights.

The formulation and recognition of human rights may be principally characterized as a modern legal development. Furthermore, the definition, impetus, and popularization—in the literal meaning of this word—of the legal notion of human rights at a global scale is largely due today to the seminal and incessant work of the United Nations. In modern times, the notion of human rights emerges in the international legal arena with the proclamation of the United Nations Charter in 1945,¹⁶² and later expanded and solidified through conventional international law by means of the International Bill of Rights consisting of the Universal Declaration of Human Rights of 1948,¹⁶³ the International Covenant on Economic, Social and Cultural Rights of 1966,¹⁶⁴ and the International Covenant on Civil and Political Rights of 1966.¹⁶⁵

Notwithstanding the fact that Mexico adheres to all of these international instruments, between the late 1960s and the early 1990s, its legal system appeared to give little or no formal recognition to the legal notion of human rights. As previously stated,¹⁶⁶ prior to the introduction of the term human rights in the Mexican legal, political, and diplomatic arenas by the Salinas Administration in 1990, questions pertaining to alleged violations of fundamental freedoms and individual guarantees were addressed and resolved by means of the protection provided by the *Juicio de Amparo*, not as human rights violations but, instead, as constitutional law violations. In other words, the expression human rights acquired instant adoption and national prominence in Mexico as a direct consequence of President Salinas' establishment of the CNDH in 1990 first, and then, two years later, by the establishment of similar

162. U.N. CHARTER pmbl. In its Preamble, the U.N. Charter asserted: "We, the peoples of the United Nations determined. . .To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." *Id.*

163. *International Bill of Rights: Universal Declaration of Human Rights*, *supra* note 16, at 71.

164. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 71, at 4–5.

165. *International Covenant on Civil and Political Rights*, *supra* note 17, at 173.

166. *See supra* notes 91–96 and accompanying text

commissions at the state level throughout Mexico.¹⁶⁷

Being a party to several human rights conventions at the international and regional levels, it was only expected that Mexico, especially after the establishment of the CNDH, was ready to tap into the rich and varied fountain of human rights especially found in the increasingly important legislative work of the United Nations through the Economic and Social Council, the Human Rights Committee, and the U.N. Commission on Human Rights. Interestingly, the oldest and principal international instruments produced by the United Nations enunciate fundamental rights and freedoms that may be characterized today as privacy rights.

For example, the Universal Declaration of Human Rights includes the following:

Article 3. Everyone has the right to life, liberty and the security of one's person;

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms;

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

Article 6. Everyone has the right to recognition everywhere as a person before the law;

....

Article 9. No one shall be subjected to arbitrary arrest, detention or exile;

....

Article 11. Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to the law in a public trial in which he has had all the guarantees necessary for his defense;

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of

167. See VARGAS, MEXICAN LAW, *supra* note 14, at 37-84.

the law against such interference or attacks;

....

Article 15. Everyone has the right to a nationality;

Article 16. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family.¹⁶⁸

Similar human rights and privacy rights provisions are found in the text of other international instruments, including the American Convention of Human Rights,¹⁶⁹ the American Declaration of the Rights and Duties of Man,¹⁷⁰ the African [Banjul] Charter on Human and Peoples' Rights,¹⁷¹ and, especially, the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁷² Undoubtedly, all of these international human rights instruments have exercised a profound influence upon Mexico's legal system as suggested by Mexican specialists in this field,¹⁷³ and by the intense work of the CNDH and the respective state commissions.

Recently, pursuant to an amendment in 1992, a new Section B of Article 102 of Mexico's Federal Constitution was added¹⁷⁴ establishing what is known as the *Ombudsman*. In symmetry

168. *International Bill of Rights: Declaration of Human Rights*, *supra* note 16, arts 3–6, 9, 11–12, 15–16, at 72–74.

169. American Convention on Human Rights: "Pact of San Jose, Costa Rica," Nov. 22, 1969, 44 U.N.T.S. 123 (entered into force July 18, 1978).

170. American Declaration of the Rights and Duties of Man, OAS Res. XXX, Int'l Conference of American States, 9th Conf., O.A.S. Doc. OEA/Ser. L/V/74 Rev. XXX (1948), *reprinted in* NOVENA CONFERENCIA INTERNACIONAL AMERICANA, ACTAS Y DOCUMENTOS 297–302 (1953).

171. African Charter on Human and People's Rights, June 26, 1981, 21 I.L.M. 59 (entered into force Oct. 21, 1986).

172. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (amended 1970, 1971 1990).

173. *See, e.g.*, GERMAN J. VIDART CAMPOS, *TEORÍA GENERAL DE LOS DERECHOS HUMANOS*. (1989); Jesús Rodríguez y Rodríguez, "Derechos Humanos," *in* DICCIONARIO JURÍDICO 2000, *supra* note 67, at 68–70.

174. *See* "Decreto por el que se reforma el Artículo 102 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 28 de enero de 1992. For the amendment to Section B, *see* "Decreto por el que se reforma y adicono el Artículo 102 Apartado B de la Constitución Política de los Estados Unidos Mexicanos," D.O., 13 de septiembre de 1999.

with similar legal developments that took place throughout Latin America in the late 1980s and early 1990s,¹⁷⁵ the *Ombudsman* is the official entity formed by one or several public officials, designated by the Executive, the Federal Congress, or both, and authorized to receive and investigate claims involving constitutional rights or human rights violations committed by administrative authorities. Section B of Article 102 of the Federal Constitution reads:

The Congress of the Union and the legislatures of the states, within the scope of their respective jurisdiction, shall establish agencies [*organismos*] to protect the human rights conferred upon by the Mexican legal order, that shall take cognizance of complaints [*quejas*] against acts or omissions of an administrative nature committed by any authority or public servant who violate said rights, except those of the Judicial Power of the Federation.¹⁷⁶

Notwithstanding that Mexico is a party to several international human rights conventions, and that Article 102, Section B, explicitly refers to the protection of “human rights conferred upon by the Mexican legal order,” Mexico does not have what may be described as a “human rights catalogue” or a specific legislation that enunciates these rights. This may be explained by the fact that in Latin America, the general trend has been to identify human rights as those “fundamental rights prescribed by the Constitution, both individual and collective, in addition to the traditional protection of legitimate rights and interests regulated by the ordinary legislation.”¹⁷⁷

175. In Latin America, several countries established similar agencies protecting human rights, including Guatemala in 1985, Colombia in 1991, El Salvador in 1991, Paraguay in 1992, Honduras in 1995, Nicaragua in 1995, Perú in 1993, and Bolivia and Argentina in 1994. See Zamudio & Fierro, *supra* note 77, at 85–101.

176. *Id.* at 85 (emphasis added).

177. *Id.* at 93–94.

V. MEXICO'S RECENT LEGISLATION ON PERSONAL DATA

A. *Personal Data of Mexican Nationals Sold to U.S. Agencies*

In May of 2003, Mexicans were shocked and incensed when Mexico City newspapers¹⁷⁸ and the international print media reported that the personal data of millions of voters listed in Mexico's official Federal Voters National Registry (*Padrón Federal Electoral*) were sold by ChoicePoint, Inc., an American company, to U.S. federal agencies of the George W. Bush administration (Bush Administration), including the Department of Justice, Immigration and Customs, and the Federal Bureau of Investigation.¹⁷⁹ This data consisted of the complete names, addresses, telephone numbers, dates of birth and passport numbers of the citizens.¹⁸⁰ In addition, ChoicePoint sold drivers' license data of six million residents of Mexico City.¹⁸¹ Moreover, ChoicePoint said that it bought "official registry files" from subcontractors in Mexico, Nicaragua, Colombia, Venezuela, Costa Rica, Guatemala, Honduras, and El Salvador,¹⁸² thus demonstrating the international scope of the privacy data invasion.

Under Mexican law, the personal data collected and

178. Mariana Sánchez, *La Fepade Cita a Funcionarios del IFE en Relación con el Caso ChoicePoint*, LA JORNADA, April 24, 2003; *Solicitan Periodista al IFE Datos sobre ChoicePoint*, EL UNIVERSAL, April 16, 2003.

179. See Laura Bonilla, *Latin American Governments Investigate Sale of Personal Information to the U.S.*, AGENCE FRANCE PRESSE, May 13, 2003, available at 2003 WL 2801210; Oliver Burkeman & Jo Tuckman, *How U.S. Paid for Secret Files of Foreign Citizens: Latin Americans Furious in Row Over Selling Personal Data*, THE GUARDIAN, May 5, 2003, at 4.

180. Bonilla, *supra* note 179; Burkeman & Tuckman, *supra* note 179, at 4.

181. Associated Press, Filadelfo Aleman, *Nicaraguan Companies Accused of Spying*, (April 25, 2003), available at 2003 WL 19162786. ChoicePoint, Inc., an "Atlanta-based company[,] sells internet access information to the U.S. immigration service, [the] Justice Department and other agencies." *Id.* A Mexican company paid 400,000 Mexican pesos for a "hard disk full of data drawn largely from the electoral roll" which was then "sold to ChoicePoint for just \$250,000, indicating the huge profitability of ChoicePoint's contracts—last year's \$11 m[illion] dollar payment was part of a five-year contract worth \$67 m[illion]." Burkeman & Tuckman, *supra* note 179, at 4.

182. Aleman, *supra* note 181.

included in Mexico's Federal Voters National Registry is confidential, under the exclusive control and possession of the Federal Electoral Institute (IFE), and may not be used for any other purposes.¹⁸³ The Bush Administration bought the personal data from Mexico and the other Latin American countries to be used in a number of ways including: for immigration purposes, drug enforcement, security, customs, police and criminal law.¹⁸⁴

As a result of this national scandal, Senator Leticia Burgos Ochoa, of the Revolutionary Democratic Party (PRD), on July 16, 2003, submitted a Resolution (*Proposición con Punto de Acuerdo*)¹⁸⁵ to the Secretariat of Foreign Affairs (*Secretaría de Relaciones Exteriores*), the Secretariat of Public Function (*Secretaría de Función Pública*) and the Attorney General's Office (*Procuraduría General de la República*), which are Mexico's cabinet level federal agencies under President Vicente Fox's administration. The resolution sought to send a diplomatic note to the U.S. government seeking information about this case; to investigate the public officials involved in the case and, if appropriate, press charges, and to request a detailed report on the undergoing criminal investigations respectively.

This national scandal deeply affected sixty-five million Mexican voters throughout the country. Most of them were concerned that the disclosure and sale of personal data to the United States would undermine and even endanger Mexico's slow and delicate process toward a true democratic nation. Others were upset to find out that this personal information

183. See "Código Federal de Instituciones y Procedimientos Electorales," [Federal Code of Electoral Institutions and Proceedings] D.O., 15 de agosto de 1990; see also "Acuerdo de la Comisión Nacional de Vigilancia del Registro Federal de Electores, por el que se aprueban variantes mínimas al modelo de la nueva credencial," [Agreement of the National Commission to Supervise the Federal Registry of Electors approving minimal changes to the model of a new Electoral I.D.] D.O., 30 de septiembre de 1992. Santiago Creel, Secretary of the Interior (*Secretario de Gobernación*) said that the sales of these personal data to ChoicePoint would be investigated "as a criminal act." Aleman, *supra* note 181.

184. See Burkeman & Tuckman, *supra* note 179 (referencing statement by Greg Palmore, a spokesman for the U.S. Bureau of Immigration and Customs).

185. "Proposiciones de Ciudadanos Legisladores," GACETA PARLAMENTARIA, 16 de julio de 2003, available at <http://www.senado.gob.mx/gaceta> (last visited on Oct. 24, 2004). This matter was sent to the Second Commission (*Segunda Comisión*). *Id.*

ended up in the hands of U.S. federal officials, interpreting it as an invasion of Mexico's federal institutions and a deliberate and clear intrusion into Mexico's sovereign affairs, thus leaving Mexico's security exposed to the United States. As a corollary of this delicate and tense situation, this incident contributed to the heightened interest of Mexican nationals, public authorities, the private sector, legislators, and academicians in turning their attention to the protection of personal data. This protection was perceived as a national priority to be translated in the corresponding protective legislation both at the federal and state levels.

B. The Personal Data Protection Act of 2003 of the State of Colima

On May 28, 2002, the Governor of the State of Colima sent to the local Congress a legislative bill regarding an "Act for the Protection of Personal Data in the State [of Colima]."¹⁸⁶ In the corresponding bill, the Governor of the State asserted:

The new information technologies offer new and more flexible manners of utilizing information in an improper manner, unethical and possibly prejudicial for the individual providing the data. For example, traditional archives made it difficult to cross reference the information taken from different documents. However, once this information is put in a digital manner, then cross referencing it becomes quick and easy to do. These advantages are not negative but they offer malicious people new possibilities, some of which may be convenient to characterize as criminal activities for the protection of those individuals who may be adversely affected. [Mexico's] *current legislation does not consider many of these actions as criminal, because they were not a threat in the past.*

....

In Mexico, the legal framework [to protect personal data] has not been developed in an adequate manner.

186. Ley de Protección de Datos Personales del Estado de Colima, Decreto del Estado No. 356 (Colima 2002), available at <http://www.congresocol.gob.mx/leyes/ley-proteccion-datos-pers.htm>.

Recently, some changes were made to the Penal Code at the federal level, directed at protecting the information in computer systems, and in other provisions to facilitate the electronic commerce. However, *the protection of the citizen is still incomplete.*¹⁸⁷

The State of Colima's Personal Data Protection Act constitutes the first legislative enactment that regulates personal data for the protection of the providers of this information, whether individuals or legal entities, with no precedent in Mexico's legal history.

Some of the salient aspects of this Act include:

1. It is composed of twenty-three Articles divided into six chapters: general provisions; personal data; protection of personal data; files; the Personal Data Commission; and violations and sanctions.¹⁸⁸
2. It includes, inter alia, the following principles for the handling of personal data: (a) personal data should be adequate, pertinent, and not excessive; (b) it cannot be used for activities incompatible with the purposes for which it was originally obtained; (c) it must be correct and up to date; (d) it cannot be kept in any manner that identifies the interested party; (e) the right to access personal data must be guaranteed to all interested parties; (f) prior to obtaining any personal data, the interested party must be informed in a complete and precise manner on the existence of the file, its purposes, the obligatory or optional nature of the information given.¹⁸⁹
3. The explicit and unequivocal consent of the interested party is required for any handling of the personal data, save for the following exceptions: (a) when mandated by the law; (b) when it is a part of a civil, labor, commercial, or administrative contracts; (c) when it is needed for the conduct of the public administration; (d) when it is available from public access sources; and (e) when they are

187. *Id.* (emphasis added).

188. *Id.*

189. *Id.* art. 4.

- necessary for medical treatment.¹⁹⁰
4. The interested party may revoke the consent needed to obtain the personal data when there is valid cause,¹⁹¹ but shall not be applied retroactively.
 5. Public servants, professional, workers and other people who, because of their activities have access to files or personal data, shall be obligated to maintain the confidentiality of the data and not to disclose it to third parties.¹⁹²
 6. Personal data regarding health may only be handled by professionals and institutions in accordance with health regulations while maintaining the confidentiality of said data in accordance with this Act.¹⁹³
 7. The protection of personal data belonging to individuals and legal entities may take place by filing an action for the protection of personal data, also known as *Habeas Data*.¹⁹⁴
 8. Individuals and legal entities have the following rights regarding personal data: (a) to obtain a free copy of all their personal data; (b) to challenge administrative acts or private decisions based on their personal data and to obtain information on the criteria used to assess their personal data; (c) to freely request corrections and cancellations regarding their personal data; (d) to obtain a free copy of their personal data stored at the Registry of Data Protection (*Registro de Protección de Datos*); and (e) to receive an indemnification proportional to the damage or injury (*daño o lesión*) caused upon their property or rights.¹⁹⁵
 9. The Act established a Commission responsible for

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* art. 7.

195. *Id.*

the protection of the personal data rights enunciated by the statute.¹⁹⁶

10. The Act closed with a section devoted to violations and sanctions imposed by the Commission. Infringements to the Act are divided into three levels of fines depending upon their seriousness. Sanctions consist of fines and are imposed taking into account: “[a] the nature of the personal data affected; [b] the inappropriateness of the handling of personal data; [c] the benefits received by the offender; [d] the intention to cause harm or damage; [e] recidivism; and [f] the damages and losses caused.”¹⁹⁷

C. Proposed Legislation at the Federal Level

On February 14, 2001, Senator Antonio García Torres, of the Institutional Revolutionary Party (PRI),¹⁹⁸ submitted to the Permanent Commission (*Comisión Permanente*) of the Federal Congress a legislative bill to enact a Federal Act for the Protection of Personal Data.¹⁹⁹ In June 2003, Senator Torres headed a Mexican delegation at an Iberian-American conference on the Protection of Personal Data, held in Antigua, Guatemala. At the conference, the following points were made in regard to the initiative to enact the Federal Act for the Protection of Personal Data in Mexico:

1. This legislative bill’s basic objective is “to protect the peoples’ rights of dignity, honor and intimacy through the regulation of the automatic handling of personal data, and the regulation of the right of access to

196. *Id.* arts. 15–16.

197. *Id.* arts. 17–23.

198. This political party exercised a virtual monopoly over all political activities in Mexico, controlling and manipulating elections at the municipal, state and presidential levels for over seventy-three years. For the first time in Mexico’s electoral history, the PRI’s presidential candidate was defeated in the 2001 elections by Vicente Fox Quesada, of the opposition conservative National Action Party (PAN).

199. See “De Ley Federal de Protección de Datos Personales, Presentada por el Senador Antonio Garcia Torres, del Grupo Parlamentario del Partido Revolucionario Institucional, en la Sesión de la Comisión Permanente del Miércoles 14 de febrero de 2001,” *GACETA PARLAMENTARIA*, 15 de febrero de 2001.

information that pertains to a given person, save for the cases of State interest and public interest.”²⁰⁰

2. Private individuals [and companies] have developed data banks for the automatic handling of information regarding personal data in areas such as health, trade, and banking and stock operations;²⁰¹
3. In the automatic processing of data lurks the risk that the gathered data are incomplete, erroneous, outdated, unduly recorded, or omitted when they should be included, all of this to the prejudice of the data provider;²⁰²
4. “Another problem is that the data provider does not have available a [legal] remedy whereby he can have access to the corresponding data, of his personal interest;”²⁰³
5. “Facing this legal vacuum, the proposed legislative bill establishes the bases for the regulation of archives, data bases, personal data banks, public and private, establishes the obligations of the personal data handlers, the rights of the interested people in having access to the corresponding data. The right to demand the inclusion, modification, denied access, suspension or cancellation of personal data.” In addition, the proposed legislative bill establishes an Institute whose fundamental task is the control of archives, data bases, or personal data banks in favor of the data providers and users.²⁰⁴
6. The proposed bill is in symmetry with Mexico’s legal system because:
 - (a) it recognizes the principles, values and assets protected and guaranteed by the Constitution, finding its legal bases in Articles 14 and 16;
 - (b) it incorporates a vision in accordance with the federal

200. Seminario Iberoamericano sobre Protección de Datos Personales, DGEI-Reporte, *Legislación sobre Protección de Datos Personales en México* (June 17, 2003) available at <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/reporte-ifai.doc>.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

- order reserving in favor of the States the regulation of these matters at the State level; and
- (c) it does not infringe the legal regulation of personal data regarding those relative statistics, or those applicable to public security, and the like.²⁰⁵
7. It is expressly acknowledged that the proposed bill is also in symmetry with the international legal order—in particular, the Universal Declaration of Human Rights and others—as well as the legislative enactments in this field by France, Spain, the United States, Brazil, Colombia, Paraguay, Ecuador and Argentina.²⁰⁶
8. The Congressional Commissions underlined the importance of the regulation as a fundamental right of any human being, such as the right to personal intimacy and human dignity. “A citizen’s intimacy and dignity, enshrined in the Federal Constitution, is a right that has to have its own development, to protect and guarantee that the citizen shall not be subject of abuses by any individual who attempts to injure human dignity to obtain a personal benefit.”²⁰⁷
9. Finally, “the *Right to Intimacy* incorporates a series of subjective and physical elements such as sentiments, thought and physical aspects, including personal information obtained through any means, that cannot be left without protection.”²⁰⁸
10. The Right to Intimacy includes an active component where each person determines the control over certain information that by its own nature belongs to that particular person, and this is translated as the right to have access to his or her own personal data stored in data bases. [It also includes] the exercise of certain rights manifested in the *Right to Habeas Data*, in order to correct mistakes that occurred during the automatic

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

handling and storing of such personal data.”²⁰⁹

This proposed Federal Act on Personal Data Protection is a more comprehensive statute than the Colima’s Act on the same subject. The federal draft is formed by five chapters: (1) providing general provisions, legal scope of application, terminology, and principles; (2) enumerating the rights of data providers and the corresponding obligations for data handlers, including those in credit and public institutions; (3) establishing and regulating the Federal Institute for the Protection of Personal Data (*Instituto Federal de Protección de Datos Personales*) as a regulatory agency from the Executive Power; (4) addressing violations and sanctions to be applied by the Institute; and (5) establishing special proceedings of a cause of action to protect personal data to be filed by the aggrieved party.²¹⁰

VI. CONCLUSIONS

Privacy rights, as a novel semantic notion, have been informally incorporated into Mexico’s legal system in recent years. Contrary to the legislative policies of countries throughout Latin America and the European Union, as well as Canada and the United States, which have adopted the modern trend of enacting specific legislation on privacy rights and the protection of personal data, Mexico has yet to follow a similar path. The absence of national legislation on privacy rights in Mexico may be explained by the fact that Mexico’s Federal Constitution, since its enactment in 1917, contains a formidable and expanding catalogue of constitutional rights. Thus, the individual guarantees found in Chapter I of the Constitution have provided the necessary legal foundation to protect certain traditional constitutional rights that today may also be semantically characterized as privacy rights via means of the *Juicio de Amparo*.

Therefore, constitutional rights play a dual role in Mexico. On the one hand, their essential role is the protection of

209. *Id.*

210. For the language of this proposed federal Act, formed by fifty-three Articles, see GACETA PARLAMENTARIA, 15 de febrero de 2001, *supra* note 199.

fundamental freedoms. On the other, they may also be used to provide a more modern protection in that emerging area known as privacy rights. To a large extent, privacy rights today constitute a global trend triggered by the need to protect personal fundamental rights inherent to any individual from the threats posed by unwanted intrusions or disclosures due to the latest technological and scientific developments. Clearly, this is a trend that, rather than defusing and fading away, will grow in substance and scope, to ultimately be at the core of individual fundamental rights.

Furthermore, this dual role played by constitutional rights may be equally applied to human rights. One must keep in mind the close symmetry that exists between human rights and privacy rights and their unique power to metamorphose into a single legal concept. This may also serve to provide an explanation why, notwithstanding the familiarity of Mexican nationals with human rights—another novel acquisition by that nation—and the fruitful work by Mexico's commissions on human rights at the national and state levels, there is no legislation containing a catalogue of human rights.

The answer may be quite simple. For Mexico and Mexicans, the rich catalogue of constitutional rights present in the Federal Constitution provides ample protection to any individual guarantees, whether these fundamental rights are semantically identified as constitutional rights, civil rights, human rights or, lately, as privacy rights.