

Government Interference with the Right to Privacy: Is the Right to Privacy an Endangered Animal?

Matisse Barbaro[†]

In Lake v Wal-Mart Stores, Inc., Justice Blatz held, “The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.” In the current era of public surveillance and rapid technological advancements, does that liberty no longer exist? This article aims to explain the concept of privacy – how it has developed and its different conceptions across different states. It then analyzes Article 17 of the International Covenant on Civil and Political Rights, the most important international document dealing with, and protecting, privacy. The article argues that Article 17, in its current form, is unable to respond to the threats that the digital age poses to individual privacy. This article, therefore, proposes a number of amendments to Article 17 to better protect against government interference and suggests how to strike a proper balance between public interest and private liberty.

Dans l’affaire Lake v Wal-Mart Stores, Inc., le juge Blatz écrivait que « le cœur de notre liberté réside dans le fait de pouvoir choisir les parties de notre vie personnelle que nous rendons publiques et celles que nous voulons tenir privée ». En cette époque de surveillance publique et de progrès technologiques rapides, cette liberté existe-t-elle encore? Cet article a pour but d’expliquer la notion de vie privée, son évolution et ses différentes conceptions selon les États. On passe ensuite à l’analyse de l’article 17 du Pacte international relatif aux droits civils et politiques, le plus important document international traitant des questions de vie privée et de protection de la vie privée. Dans sa forme actuelle, l’article 17 n’est pas en mesure de répondre aux menaces que représente l’ère numérique pour la vie privée de l’individu. Un certain nombre de modifications à l’article 17 sont donc proposées en vue d’assurer une meilleure protection contre l’interférence gouvernementale, d’une part, et d’établir un juste équilibre entre l’intérêt public et la liberté privée, d’autre part.

[†] LLM candidate, International Economic Law and Policy (IELPO), University of Barcelona.

I. Introduction

In June 2013, former CIA analyst Edward Snowden leaked information about the American and British surveillance programs to the British newspaper *The Guardian*. Snowden revealed that the United States National Security Agency was gathering telephone records of tens of millions of Americans. A top secret court order issued in April 2013 compelled the telephone company Verizon to give the NSA access “on an on-going daily basis”¹ to entire telephone data both within the United States and between the U.S. and other countries. This, however, is not a recent phenomenon. The Bush Administration, in response to the 9/11 attacks, commenced data-mining programs in 2001 when the President launched the so-called “War on Terror”.² Through its mass surveillance program called PRISM, the NSA tapped into the servers of companies like Google, Facebook, and Yahoo. In this way, the NSA collected and stored nearly 200 million text messages per day. The information collected is called “metadata” and although metadata does not include the actual content of a conversation, it nevertheless provides information (such as location, contacts and financial information) that is enough to build a comprehensive picture of any individual. The NSA had more than 61,000 hacking operations going on worldwide and was spying on the European Union offices in the U.S. and Europe. Millions of records of both American and foreign citizens were being collected indiscriminately and in bulk, regardless of whether they were suspected of any misconduct or represented a danger to society. The so-called “Snowden Revelations” have consequently resulted in allegations that the United States government, through the NSA, has violated these individuals’ nationally and internationally entrenched right to privacy and has thus, broken both national and international law.

Privacy is an elusive concept that is difficult to define as different societies define it differently and those definitions have changed over time. Some consider privacy impossible to classify because of its intangibility.³ Despite this contention, the notion of privacy is important enough that it is recognized as a fundamental human right in most countries and internationally.⁴ Privacy is not, however, an absolute right; it is a relative value that might be justifiably restricted in some circumstances to pursue other legitimate aims, provided

¹ Ewen MacAskill & Spencer Ackerman, “NSA Collecting Phone Records of Millions of Verizon Customers Daily”, *The Guardian* (6 June 2013), online: <www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

² Transcript of Speech by George W Bush (18 March 2003) published in *The Guardian*, London, online: <<https://www.theguardian.com/world/2003/mar/18/usa.iraq>>.

³ Fernand David Schoeman, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984) at 5.

⁴ Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UNHRC, 23rd Sess, Supp No 3, UN Doc A/HRC/23/40 (2013) at 6.

that the restriction is neither arbitrary nor unlawful.⁵ Accordingly, the right to privacy under international human rights law is structured around the idea of protecting privacy interests from illegitimate interference.⁶

The most important international provision is Article 17 of the *International Covenant on Civil and Political Rights* of 1966.⁷ Article 17 provides:

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

While protecting the right to privacy, this provision allows States to circumvent it in some cases, such as for reasons of national security.⁸ Recently, however, an alarming trend has emerged—the derogation of the right to privacy without fulfilling the requirements that allow such an action. The question is: can Government interference with the right to privacy be restricted to legitimate circumstances? In this context, “legitimate circumstances” means that such restrictions must be “lawful,” in the sense that they are envisaged by the law, and “non-arbitrary,” in that they are reasonable and proportional to the scope of the allowed interference.

Part II of this article examines the rise and the concept of privacy. Section A of Part II focuses on the origin of privacy while Section B attempts to define privacy by analyzing and comparing its American and French conceptions. Part III focuses on the right to privacy under international law. Section A of Part III introduces Article 17 and its *General Comment No 16*⁹ explains why there is a need to update the latter, and suggests a proposal for a new General Comment. Section B advances other possible frameworks that can be used to protect privacy interests by confining government interference to legitimate circumstances.

⁵ Andrew Clapham & Susan Marks, *International Human Rights Lexicon* (Toronto: Oxford University Press, 2005) at 263.

⁶ *Ibid.*

⁷ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UNHRC, 13th Sess, Supp No 3, UN Doc A/HRC/13/37 (2009) at 6; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 arts 17 (entered into force 23 March 1976) [ICCPR].

⁸ See *ibid.*, Art 4.

⁹ *General Comment No 16 – Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, UNHRCOR, 32nd Sess, HRI/GEN/1/Rev.9 (Vol. I) (1988) at para 3 [General Comment No 16].

II. Origin and Conceptualization of Individualism

A. The Origin of Privacy

The origin of the contemporary conception of privacy¹⁰ can be associated with the rise of individualism in the 18th and 19th centuries.¹¹ According to Hannah Arendt, an older conception of the private sphere could possibly have come from Ancient Rome, where privacy meant a haven, far away from the business of the *Res Publica*.¹² This early conception of privacy was conceived as a deprivation. As Arendt notes, “a man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian, had chosen not to establish such a realm, was not fully human.”¹³

Privacy is no longer perceived as a deprivation; it has assumed a positive connotation which can be linked to the rise of modern individualism. Individualism is a broad concept, giving absolute priority to the individual, who is identified as the ultimate measure of what is good.¹⁴ According to Steven Luke, privacy is, together with autonomy and self-development, one of the components of freedom, which in return, together with human dignity, constitute the fundamental values of individualism.¹⁵ Opposite to individualism is collectivism. The latter indicates entrenchment of individuals in a society. In such groups, conformity is encouraged because society is given priority over the individual. To this extent, there is a net contrast between individualist societies such as the United Kingdom, Switzerland and the United States, on the one hand, and collectivist societies, such as Nigeria, Peru and Pakistan on the other. The former emphasize the importance of the individual as opposed to the society as a whole, while the latter prioritize society to the detriment of the individual.¹⁶ The emergence of an individualistic society has been characterized by the development of individual rights with privacy chief among them. In the modern positive conception of privacy, the

¹⁰ This section serves to briefly outline an overview of the origin of the contemporary conception of privacy and thus, an extensive description of the history and development of privacy, both under the philosophical and the legal sense, falls outside the scope of this article.

¹¹ This thesis is supported by different authorities. See Hannah Arendt, *The Human Condition*, 2nd ed (Chicago: The University of Chicago Press, 1998) at ch 2; Pierre Demeulenaere, “Les difficultés de la caractérisation de la notion de vie privée d un point de vue Sociologique” in *La protection de la vie privée dans la société d’information*, t 3, Pierre Tabatoni (France: Presses Universitaires de France, 2002).

¹² Arendt, *supra* note 11 at ch 2.

¹³ *Ibid* at 35.

¹⁴ Markella Rutherford, “A Bibliographic Essay on Individualism” (2002) 4:1 *Hedgehog Rev* at 116.

¹⁵ Steven Luke, “The Meaning of ‘Individualism’” (1971) 32:1 *J History Ideas* at 45.

¹⁶ Gerald Roland & Yuriy Gorodnichenko, “Understanding the Individualism-Collectivism Cleavage and its Effects: Lessons from Cultural Psychology” (paper delivered at the XVIth Congress of the International Economic Association, 2011), online: <eml.berkeley.edu/~groland/pubs/IEA%20paper/vf.pdf>. For more information on individualism versus collectivism, please see Geert Hofstede, *Culture’s Consequences: Comparing Values, Behaviors and Organizations Across Nations*, 2nd ed (Thousand Oaks: Sage Publications, 2001).

relationship between the individual and the rest of society plays a central role. One needs the other in order to exist; nevertheless, these two actors are in constant tension: there is a continuous debate on the priority of one over the other. This debate turns on the issue of finding a balance between private interest and public good. As mentioned, individualism gives priority to the individual as the source of what is ultimately good. Accordingly, privacy must be conferred to the individual who cannot develop himself without it and who is not complete in its absence. Privacy forms a fundamental part of the individual's persona. On the other hand, privacy exists only as the individual is conceived in relation to another actor, in particular the State. If there is no State (or any other external actor), the concept of privacy vanishes. Privacy is a central part of the individual because the individual is conceived in relation to another actor. To this extent, even though the rise of modernism has caused privacy to assume a positive conception, becoming a fundamental part of the individual, it is intended to exist only in relation to an external actor against whom privacy must be preserved and protected.¹⁷

Several authors contributed to the development of the concept of privacy.¹⁸ An important contribution was certainly made by John Locke, who advocated for the protection of private property and individual freedom; fundamental values that comprehend privacy, and that they must be protected against the Government and other individuals.¹⁹ Locke depicts a conception of private property and individual freedom that confers a private sphere on the individual where the State and others are not allowed to interfere.²⁰ Since privacy can be conceived as the protection of a private sphere encompassing both physical property (an individual should be granted privacy in his home)²¹ but also sentiments and ideas (an individual should be granted privacy over his private conversations, even though eavesdropping does not suppose the act of infringing physical property itself),²² it is safe to affirm Locke's influence on the development of this concept.

¹⁷ Rutherford, *supra* note 14 at 118.

¹⁸ There are several authorities in support of the fact that the authors that I cite contributed to the origin of privacy (indeed, there are some other important authors that made a contribution to the development of privacy; nevertheless, this section only aims at briefly outlining the origin of privacy). See Isaiah Berlin, "Two Concepts of Liberties" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

¹⁹ John Locke, *Second Treatise of Government* (Aberdeen, WA: Watchmaker Publishing, 2011) (First published in 1690).

²⁰ In fact, Locke claims that property is formed when an unowned object is mixed with an individual's labour. Insofar as the individual's labour comprehends both physical objects and the fruit of the human mind, namely ideas and concepts, we can assume that the Lockean conception of property aims at protecting a private sphere, which is not only physical, but also intellectual.

²¹ When talking about the "individual" in this essay, I will refer to "him" or "himself", as most of the sources I have used for this article do so. I would like to clarify that whenever I mention the individual, I do refer to women too.

²² See Louis Brandeis & Samuel Warren, "The Right to Privacy" (1890) 4:5 Harv L Rev 193 at 205.

Despite seeming ambiguous, another important contribution was made by Jean-Jacques Rousseau and his division between a “General Will” (conceived as the public sphere) and the individual interest (rooted in the private sphere).²³ Accordingly, one may claim that this distinction supports the idea of a conceived legitimacy derived from the existence of private interests, included in the private sphere, where the public sphere should not interfere.²⁴ In support of this view, it should be underlined that, for a long time, privacy was often defined as whatever was not included in the public sphere.²⁵ Thus, early attempts to characterize privacy relied on its opposite, namely the definition of public life. The development of contemporary conception of privacy can further be attributed to Benjamin Constant,²⁶ who, according to Isaiah Berlin, is the most eloquent among all the defenders of freedom and privacy. Constant claimed that liberty and property must be guaranteed and protected against arbitrary invasion.²⁷ Finally, one cannot discuss individualism and privacy without mentioning John Stuart Mill.²⁸ Mill tried to draw a legitimate line between individual liberty and the necessity of social control. He defended individuality, rooted in the necessary private sphere of each individual, and denounced the tyranny of the majority. Mill affirmed that the individual enjoys total liberty insofar as his actions concern only himself and warned of the danger of public interference in the private sphere—a sphere that concerns only the individual.²⁹ The concept of privacy developed further until it progressively became anchored in the human mind and spirit. In particular, in 1890, Samuel D. Warren and Louis D. Brandeis wrote about the right to privacy.³⁰

B. Defining Privacy

Privacy has a multitude of distinct meanings and shades that shift in accordance with different periods, societies and contexts. It is a very abstract concept and extremely difficult to describe. The word privacy comes from the Latin *privare*: literally, to deprive. Its earliest sense was negative and had to be read in the light of its literal meaning. A private person was somebody deprived

²³ Jean-Jacques Rousseau, *Du contrat social* (Paris: Garnier Flammarion, 1966) at 309 (first published in 1762).

²⁴ Pierre Demeulenaere, “Les difficultés de la caractérisation de la notion de vie privée d’un point de vue sociologique”, in Pierre Tabatoni, ed, *La protection de la vie privée dans la société d’information*, t 3 (Paris: Presses Universitaires de France, 2002) at 195.

²⁵ Ambroise Soreau, *Droit d’auteur et vie privée* (PhD Thesis, Université de Nantes, 2000) [unpublished].

²⁶ Benjamin Constant, *Principles of Politics Applicable to All Governments* (Carmel, IN: Liberty Fund, 2003) (First published in 1815).

²⁷ Berlin, *supra* note 18 at 5.

²⁸ John Stuart Mill, *De la Liberté* translated by Laurence Lenglet (Paris: Gallimard, 1990) (First published in 1859).

²⁹ Nevertheless, Mill’s liberty is not infinite and some limits must be drawn, such as the fact that the individual is not free to sell himself into slavery or that an individual’s liberty ends where the liberty of another individual begins.

³⁰ Brandeis & Warren, *supra* note 22.

of an official position, absent from public life. From the 16th century onward, privacy began to acquire a more positive connotation; it was associated with privilege and no longer with deprivation. It meant privileged access, property or privileged relations, in that it represented autonomy, exclusivity and intimacy. Beginning in the 17th century, it signified a quiet life, the seclusion inside the walls of one's castle, one's home. Today, privacy is associated with a right, recognized and protected by both national and international law.

i. The American Conception of Privacy

The most substantial contribution to the American conception of privacy hails from an article written by Samuel D. Warren and Louis D. Brandeis in 1890, "The Right to Privacy".³¹ At first, the private zone of a person was conceived as a physical area free from interference with life and property, the so-called "right to life".³² Later, the scope of privacy broadened to the "right to enjoy life",³³ a right touching a person's spirit, feelings and intellect.³⁴ Warren and Brandeis then conceptualized the "right to be let alone",³⁵ identified as the protection provided to the individual's thoughts, sentiments, emotions and physical appropriation, insofar as it includes the quality of being owned and possessed.³⁶ Thus, the right to privacy bears on the right to property, which constitutes tangible and intangible property.³⁷ This private zone of the individual protects physical goods, but also the fruits of the human mind. Even though Warren and Brandeis' conception of privacy still lives in the law almost everywhere in the United States, it amounts in little practice today.³⁸ Warren and Brandeis' continental conception of privacy was based on the idea of "personal honor".³⁹ Accordingly, they tried to impart this conception to American law. Nevertheless, the transplant partly failed because the American conception of privacy is not built upon that idea.⁴⁰

A subsequent major contribution to the modern American conception of privacy was made by William Prosser. In addition to his privacy tort law,⁴¹

³¹ *Ibid* at 205.

³² *Ibid* at 193.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ The expression "right to be let alone" has been shaped by Cooley J. See Thomas Cooley, *A Treatise on the Law of Torts, or, The Wrongs which Arise Independent of Contract*, 2nd ed (Chicago: Callaghan & Co., 1888) at 29.

³⁶ Brandeis & Warren, *supra* note 22 at 205.

³⁷ The right to property is beyond the scope of this article. Nevertheless, in this topic, a significant contribution was made by John Locke. See Locke, *supra* note 19, ch 5.

³⁸ James Q Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 Yale LJ 1151 at 1204.

³⁹ *Ibid* at 1208.

⁴⁰ For more information on this point, see Rodney Smolla, "Privacy and the First Amendment Right To Gather News" (1999) 67 Geo Wash L Rev 1097 at 1101; Diane Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L Rev 291 at 340.

⁴¹ William Prosser, "Privacy" (1960) 48 Cal L Rev 383.

Prosser created a doctrine that serves to define the concept of privacy.⁴² In his doctrine, privacy, for tort law purposes, is defined through four kinds of invasions: disclosure of private facts, appropriation of likeness, false light and intrusion into seclusion.⁴³ The only commonality between these concepts is the interference with the right of the plaintiff to be let alone.⁴⁴ Since Prosser's death, no new privacy tort has been created.⁴⁵ Americans today, in general, hold "state interference in the individual's private life" above all other kinds of intrusion. This is not only Government intrusion in the individual's impenetrable fortress, namely his home, but this also includes the inference with personal feelings, most notably the feeling of security.⁴⁶ As Lord Camden affirmed in *Entick v Carrington*, "it is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property."⁴⁷ Accordingly, privacy has become a secure place where the individual has the power to fix the limits of the extent to which he wants to communicate his feelings and thoughts to others.⁴⁸ This creates a personal sphere of existence that properly belongs to the individual alone. It is a zone of personal freedom, where observation and intrusion are absent, and where the individual can make exclusive use of something that is exclusively his.⁴⁹ This personal autonomy, according to the United States Supreme Court, is incorporated in the constitutionally protected right to liberty.⁵⁰ More specifically, the US Supreme Court stated that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."⁵¹

The American concept of privacy is comprised of two aspects: first, the ability of individuals to choose what information about themselves and how

⁴² Daniel Solove & Neil Richards, "Prosser's Privacy Law: A Mixed Legacy" (2010) 98:6 Cal L Rev 1887 at 1913.

⁴³ Prosser, *supra* note 41 at 389.

⁴⁴ We can clearly see that Prosser took Warren and Brandeis's right to be let alone and developed it by turning it into his privacy tort law.

⁴⁵ Jonathan Graham, "Note, Privacy, Computers, and the Commercial Dissemination of Personal Information," (1987) 65 Tex L Rev 1395 at 1406.

⁴⁶ Here we implicitly find the concept of tranquillité d'esprit developed by Montesquieu: a free State guarantees the individual liberties, but also the feeling of security. See Montesquieu, *De l'Esprit des Lois*, t 2, (Paris: Gallimard Education, 1995) (First published in 1748).

⁴⁷ *Entick v Carrington* [1765] EWHC KB J98, 95 ER 807.

⁴⁸ Brandeis & Warren, *supra* note 22 at 198.

⁴⁹ *Prince Albert v Strange* (1849) 41 ER 1171 at 45, 1 Mac & G 25 (QB) Cottenham LC.

⁵⁰ According to the US Supreme Court, the guarantee of "liberty" of the Due Process Clause of 14th Amendment has to be read in a broad sense as incorporating a guarantee of privacy. See *Whalen v Roe*, 429 US 589 at 598-600 (1977) [*Whalen*].

⁵¹ *Planned Parenthood Of Southeastern Pennsylvania v Casey*, 505 US 833 at 851 (1992) (O'Connor, Kennedy, Souter JJ) [*Casey*].

much of it they want to reveal; and second, the idea of independence and intimacy, i.e., the individual freedom to perform or not to perform certain acts.⁵² By way of example, privacy means, *inter alia*, that the Government cannot interfere with the private decisions of parents when determining their children's education, it cannot interfere with a couple's intimate life and it cannot eavesdrop on people's conversations without a legitimate concern.⁵³ As a matter of fact, the concept of privacy has in it an inherent duty to protect people's affairs that do not pose a legitimate interest for the State from unwanted intrusion. It provides protection against unwanted disclosure. Privacy aims at keeping private what the individual exclusively sees as his own, and does not want to share with the public.⁵⁴ As Justice Brandeis stated, the Amendments of the American Constitution that deal with privacy,⁵⁵ seek to pursue happiness, and "to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as *against the Government* the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men."⁵⁶

To Americans, privacy, and the right that comes along with it, is so sacred that it constitutes "a part of the more general right to the immunity of the person, – the right to one's personality."⁵⁷ If the individual does not possess a space that is his and only his, he loses a part of his freedom, insofar as the latter is conceived as the expression of the individual persona. The American conception of privacy sees privacy as "an integral part of

⁵² *Whalen*, *supra* note 50.

⁵³ See *Meyer v Nebraska*, 262 US 390 (1923); *Griswold v Connecticut*, 381 US 479 (1965) [*Griswold*]; *Katz v United States* 389 US 347 (1967); *Stanley v Georgia*, 394 US 557 (1969).

⁵⁴ Brandeis & Warren, *supra* note 22 at 215.

⁵⁵ There is no direct mention of the right to privacy but it has been recognized several times by the US Supreme Court. See e.g. *Griswold*, *supra* note 53.

⁵⁶ *Olmstead v United States*, 277 US 438 at 478 (1928) [emphasis added].

⁵⁷ Brandeis & Warren, *supra* note 22 at 207. There are two main categories of rights: positive and negative rights. The distinction between these two depends on the role of the State in securing their fulfillment. On the one hand, a negative conception of rights supposes the guarantee of the Government's non-interference with individual interests. Thus the State ensures and protects such rights by refraining from interfering with them. On the other hand, a positive conception of the rights requires the Government to act, directly providing the necessary means for fulfilling such rights. The United States seems to prioritize political and civil rights, which are characterized as rights or freedoms from State intervention. Thus, the United States often gives preference to negative rights over positive ones. This assertion finds support, *inter alia*, in the fact that the unalienable rights in the United States Declaration of Independence of 1776 and several other rights of the Constitution of the United States (among which some enshrined, above all, in the first amendments) are considered negative rights. On the other hand, communist countries seem to prioritize social rights that characterize as positive rights. This position finds support in the fact that communist countries were reluctant to ratify the *ICCPR*, yet eager to ratify the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). For more information, see Roscoe Pound, *Social Control Through Law* (New Haven: Yale University Press, 1942); Martha Jackman, "Charter Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279; Alabama Policy Institute, "Understanding the Difference Between Positive and Negative Rights", online: <www.alabamapolicy.org/wp-content/uploads/GTI-Brief-Positive-Negative-Rights-1.pdf>.

our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."⁵⁸ Even though the right to privacy is a fundamental right, it is not absolute, but it rather must be balanced against the State's compelling interests.⁵⁹ These include the promotion of public morality, the protection of the people's psychological health, and the improvement of the quality of life.⁶⁰

To conclude, privacy is a highly problematic concept. When Prosser took Warren and Brandeis' doctrine of privacy and gave it new legitimacy, he also impeded its ability to develop and evolve. That is, Prosser, by excluding certain important interests such as seclusion and breach of confidence, fossilized the concept of privacy. Consequently, the notion of privacy has not evolved since then and as a result, it fails to take contemporary problems into consideration, such as extensive data collection and disclosure of personal information.⁶¹ In this regard, courts have affirmed that data collection is not an intrusion into an individual's "solitude" or "seclusion."⁶² Furthermore, many courts believe there is no privacy when the information has already been divulged to others since "there can be no privacy in that which is already public."⁶³ Thus, there is a necessity to adapt this dated conceptualization of privacy as new technologies can easily collect and disclose personal information in potentially problematic ways. The problem is that courts remain stuck in a conception adapted to fit the past century but not the current one.⁶⁴ Courts should abandon or adapt this dated conceptualization of privacy in favour of an approach that more appropriately responds to the concerns of the Digital Age.

ii. The French Conception of Privacy

The French conception of privacy, unlike the American one,⁶⁵ has never been properly defined by law,⁶⁶ nor by the authors that have shaped and developed an instructive notion of this complex conception.⁶⁷ Privacy is mostly clarified

⁵⁸ *Lake v Wal-Mart Stores, Inc.*, 582 NW (2d) 231 at 235 (1998) [*Lake*].

⁵⁹ *Roe v Wade*, 410 US 113 (1973).

⁶⁰ *Ibid.*

⁶¹ Solove & Richards, *supra* note 42 at 1904-18.

⁶² See *Muratore v M/S Scotia Prince*, 656 F Supp 471 at 482-83 (D Maine 1987).

⁶³ *Melvin v Reid*, 112 Cal App 285 at 290 (1931).

⁶⁴ Solove & Richards, *supra* note 42 at 1921.

⁶⁵ As outlined above, authors such as Warren, Brandeis and Prosser have served as guidance to the concept of privacy.

⁶⁶ The right to privacy, "le droit à la vie privée", under Civil law, is protected by article 9 of the *Civil Code*; art 9 CcF.

⁶⁷ France, Sénat, "La protection de la vie privée face aux medias", *Étude de législation comparée* No 33 (January 1998), online: <www.senat.fr/lc/lc33/lc33_mono.html#toc0> ["*Vie privée*"].

by French jurisprudence; nevertheless, the concept remains vague.⁶⁸ In the first stages of the conceptualization of the notion, privacy was conceived as a right to secret and, more broadly, as a right to control personal information.⁶⁹ Privacy was characterized as diametrically opposed to the concept of public life and was thus negatively defined, as privacy used to comprehend everything that did not belong to public life.⁷⁰ This solution was unsatisfactory as it simply diverted the task of defining privacy in and of itself, to the task of defining another complex concept, namely public life.

Today, the French conception of privacy is based on the existence of an individual's property, which, in turn, is based on liberty.⁷¹ This liberty fulfills the function of providing the individual with the guarantee of self-determination of the relationships that a person has with others.⁷² It is an individual's expression of autonomy in society,⁷³ a guarantee of a private sphere where each person has control over himself.⁷⁴ Privacy is the individual right of non-interference, protected against any other public or private person. An individual is thus free to set the limits and circumstances of their own personal disclosure. In this regard, the French Social Chamber stated that the individual is free in a world in which he can be by himself and defend the own physical and mental sanctuary against prying eyes.⁷⁵ These prying eyes are, above all, conceptualized as the eyes of the media.⁷⁶

More concretely, privacy under the French conception is composed of several facets, such as family life, love life, leisure activities, friendship, health, customs, religious and philosophical beliefs and political opinion. Conversely, one's professional life is generally not considered to be a part of one's privacy.⁷⁷ Some examples of acts ruled to be in violation of privacy include the enquiry by pension funds about personal information (as, for instance, identification of spouses, address and inheritance situation), information concerning sentimental life (such as a situation of cohabitation without being married) and information covered by physician-patient privilege. On the other hand, the French authorities do not consider the act of listening to private conversations between prisoners and family members to be an interference with an individual's privacy.⁷⁸

⁶⁸ Nathalie Mallet-Poujol, *Protection de la vie privée et des données personnelles*, Université Montpellier I UMR-5815, 2004, at 4, online: <www.generationcyb.net/IMG/pdf/guidevieprivée.pdf>.

⁶⁹ Soreau, *supra* note 25 at 19.

⁷⁰ Francois Rigaux, "La liberté de la vie privée" (1991) 43:3 RIDC 520 at 540.

⁷¹ This interpretation is also consistent with the notion of privacy protected by Article 9 of the *Civil Code*.

⁷² Soreau, *supra* note 25 at 19.

⁷³ Bernard Beignier, *L'honneur et le droit* (Paris: LGDJ, 1995) at 62.

⁷⁴ Jacques Robert & Jean Duffar, *Droits de l'homme et libertés fondamentales* (Montchrestien, 1993) at 14.

⁷⁵ J Lacroix, "Le public et le privé" (Paper delivered at the 47th semaine sociale de la France sur la socialisation et personne humaine) presented at Grenoble, 1960 at 241.

⁷⁶ See generally "Vie Privée" *supra* note 67; Whitman, *supra* note 38.

⁷⁷ Mallet-Poujol, *supra* note 68 at 4.

⁷⁸ *Wisse c France*, No 71611/01, [2005] II ECHR, online: <www.legislationline.org/topics/country/30/topic/3>.

As outlined above, the right to privacy is the individual's right to be free to conduct himself with the minimum possible degree of interference. In France, the right to privacy also comprises the protection against the violation of the right to a name, to an image, the right to intimacy, honour and reputation.⁷⁹ The individual's privacy is violated when something written about him or his image is divulged to the public, usually by the media.⁸⁰

Although liberty is an important element of the conception of privacy, it is not the most relevant aspect.⁸¹ To the French, privacy is primarily conceived as dignity.⁸² Privacy is a sacred zone where the individual can confine himself without worrying about intrusion. In this sanctuary, the individual can control what others see or what is disclosed about him to the public. For the French, one's dignity is intimately tied to public perception. Consequently, the French have a strong interest or desire in choosing what to disclose to the public as they have a certain image to maintain in the eyes of others (i.e. it is important not to disclose embarrassing or shameful facts about themselves).⁸³ As such, if this sanctuary is protected, one's dignity is preserved.

In order to understand the importance of dignity to the French, one must look back to the socio-economic divisions of the twentieth century. During this period, exclusively people of high status could expect their personal honour to be protected. Today, this kind of status privilege is rejected for it is considered unacceptable that only a certain class can have its dignity protected.⁸⁴ Dignity is for everyone and must be protected, in particular, against publications by the press.⁸⁵ This interpretation is supported by the French *Penal Code*,⁸⁶ which, in terms of the protection of dignity, is mostly concerned with the behaviour of the media, especially the press. The main aim is to penalize magazines and newspapers that publish paparazzi photos or disclose personal information.⁸⁷ Accordingly, "the conception of privacy as control of one's image rests, at base, on the idea that one ought to be able to keep one's name and picture out of the newspapers."⁸⁸

More generally, it is important to note that the conception of dignity lies at the heart of human rights. The significance of the concept is demonstrated, *inter alia*, by the fact that, at the time of the drafting of the *Charter of the United*

⁷⁹ "Vie privée", *supra* note 67.

⁸⁰ Mallet-Poujol, *supra* note 68.

⁸¹ Whitman, *supra* note 38.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid* at 1166.

⁸⁵ Special attention must be drawn on the word "chacun" in art 9 C pén. "Chacun" means that the right to privacy applies to anybody. See Alain Sériaux & Marc Bruschi, *Le commentaires de textes juridiques: lois et règlements*, 2nd ed (Paris: Ellipses Marketing, 2007) at 31.

⁸⁶ Art 226(1)-229(9) C pén.

⁸⁷ See e.g. art 226(1), 226(2) C pén.

⁸⁸ Whitman, *supra* note 38 at 1169.

*Nations*⁸⁹ in 1945 and the *Universal Declaration of Human Rights*⁹⁰ in 1948, human dignity served as a theoretical basis for the human rights movement (in the absence of other bases) for reaching consensus.⁹¹ The *Charter* and the *UDHR* represented the first global expression of rights to which all human beings are inherently entitled simply by virtue of being human. In the *UDHR*, “dignity” appears in the first sentence of the Preamble and then again in Article 1.⁹² Just like privacy, dignity is one of the most difficult human rights to express and to translate to a tangible form.⁹³ Both dignity and privacy (as well as all other human rights) are rights inherently held by individuals against the State. Yet, they are somehow abstract due to their intangible nature and the different conceptions they take on from country to country, culture to culture and time to time. This makes it difficult to properly define them and give them a concrete physical manifestation.

The right to privacy is not an absolute right since it must be balanced against other legitimate objectives, such as freedom of the press or State security. Furthermore, privacy also seems to be limited by temporal boundaries: when a person passes away, he no longer enjoys privacy protection.⁹⁴ In this regard, the conception of privacy appears to be a notion that takes on physical traits: as long as a person is physically alive, his privacy accompanies him. When the person dies, his privacy vanishes, replaced by other protected values – such as the liberty of expression and information.⁹⁵ Furthermore, the freedom of press justifies the publication of the image of a person who is directly involved in a news event without their consent as long as the disclosure does not violate the person’s dignity.⁹⁶

To conclude, the French conception of privacy is problematic as well. In both the American and French cases, the notion of privacy is shaped by the jurisprudence. Nevertheless, this complex notion is never defined by law nor by a clear privacy doctrine. If there is no exact definition of this concept,

⁸⁹ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [*Charter*].

⁹⁰ *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*].

⁹¹ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 Eur J Intl L 655 at 677.

⁹² *UDHR*, *supra* note 90, Preamble, Art 1.

⁹³ United Nations Human Rights Office of the High Commissioner, “Universal Declaration of Human Rights – in six cross-cutting themes”, online: <www.ohchr.org/EN/UDHR/Pages/CrossCuttingThemes.aspx>.

⁹⁴ Sériaux & Bruschi, *supra* note 85.

⁹⁵ For example, after a person’s death, his right to privacy is replaced by the liberty of a historian to write about the deceased. See France, Cour de Cassation, *Le droit de savoir, Rapport Annuel par le Cour de Cassation*, (Paris: La Documentation française, 2010) at 268, online: <www.courdecassation.fr/IMG/pdf/Rapport_annuel_CC_2010.pdf> [Droit de savoir].

⁹⁶ *Ibid* at 6. See also Emmanuel Derieux, (2001) 180:3 *Légipresse* at 53. To this extent, the “injury” suffered by the French is personal as opposed to the society where the individual lives. Such injury exists namely because the individual lives in such society, and wishes to maintain a certain imagine of etiquette within the community.

how can it be enforced or protected? To this extent, a reinterpretation seems imperative.

iii. A Comparison: Liberty Versus Dignity

The American and the French conception of privacy indeed share common ground. Both interpretations are built on the concept of property, an essential element of the private sphere. Also, they both include the concept of liberty as the capability of controlling disclosure of private facts. Nevertheless, it is the differences in their respective conceptions of privacy that are of the most interest.⁹⁷

There are remarkable differences between the French and American conceptions in regard to what must be kept private and, above all, from whom. Anecdotally, as a French article portrays,⁹⁸ in the United States strangers immediately share private information about their personal activities, such as their salary. It is unimaginable that a similar situation could take place in France.⁹⁹ Another illustrative example is the American practice of credit reporting. In the US, merchants' access to the credit history of customers is ordinary. On the other hand, Europeans are generally outraged by this practice.¹⁰⁰ Something that is perceived as completely normal by Americans is hardly understandable to the French.¹⁰¹ Accordingly, French people seem to think that in the US there is a lack of privacy.¹⁰² On the other hand, Americans do not understand the French approach to privacy. Something normal to the French, such as nudity or the fact that public authorities can choose what names parents will be permitted to give to their children, is barely understood by Americans, as it is viewed as a violation of personhood. Thus, Americans think that French privacy has failed. Such conflicts between these different interpretations of privacy arise, as each concept is sensible from a different perspective: Americans conceive privacy mainly as an aspect of liberty, whereas French think of privacy as an aspect of dignity. To Americans, the prime threat to privacy is the Government since privacy is anchored in the concept of liberty – liberty against the State. Privacy is freedom from Government intrusions. On the other hand, to the French, privacy means a right to personal dignity, a right to one's image

⁹⁷ This section is partly based on Whitman, *supra* note 38. Conceiving privacy, on the one hand, as liberty and, on the other hand, as dignity, is supported by several authorities and jurisprudence from both the United States and France. See Casey, *supra* note 51; Lake, *supra* note 58; Droit de savoir, *supra* note 95.

⁹⁸ Gilles Asselin, "Du mythe à la réalité des différences culturelles", France-Amérique (January 23–29, 1999); See reference in Whitman, *supra* note 38 at 1155.

⁹⁹ *Ibid.*

¹⁰⁰ Whitman, *supra* note 38 at 1156.

¹⁰¹ In my personal experience, I have also noticed Americans to be very open about their political standpoints, not refraining from saying who they would vote for in elections.

¹⁰² For example, it is claimed that Americans do not properly protect consumer privacy, which is fundamental to the French. See Steven Salbu, "The European Union Data Privacy Directive and International Relations" (2002) 35:2 Van J Transnat'l L at 655.

and reputation. To them, privacy is the control of a person's public image, a guarantee that people see you the way you want to be seen. The prime danger to this privacy is the media. A person's dignity must be conserved and not compromised by public eyes becoming privy to embarrassing and humiliating facts. Accordingly, to the French, "one can freely dispose of one's liberty, but one cannot freely dispose of one's dignity".¹⁰³

As a result of these distinct underlying justifications, to the French, it might seem that Americans violate privacy because they disclose personal facts or images that are a threat to personal dignity to the extent that they are conceived as socially inappropriate or non-conforming to "social etiquette". To Americans, it might seem that the French violate privacy because they do not object to government interference with the citizen's private sanctuary, namely their home. Accordingly, American privacy is a sort of protection afforded by the walls of a person's home. In this locus, Americans enjoy a reasonable expectation of privacy. Nevertheless, the protection of privacy becomes progressively weaker the further the person is from his home.¹⁰⁴

Clearly, the contrast between these interpretations is not absolute. The fact that Americans think of privacy as a liberty does not mean that they are not concerned about dignity. The opposite is also true: although, to the French, privacy is mostly a matter of dignity, liberty still plays a crucial role. Therefore, the differences are not to be seen in absolute terms, but rather, in relative ones.

We have seen why privacy is so sacred to Americans and to the French; generally speaking, the individual needs a personal sphere where he can freely develop his ideas and thoughts. Privacy is not only a fundamental value *per se*, but it is also a basis for other fundamental rights, such as freedom of expression,¹⁰⁵ association and movement that, without privacy, could not be fully enjoyed and perhaps never even realized. Montesquieu's view of liberty is illustrative on that matter. He identified two kinds of liberties: an objective one, which consists of the freedom to do anything the laws of the State allow, and a subjective one, which consists of the feeling of liberty, the feeling of being free. The impenetrable fortress of an individual is where he has his tranquillité d'esprit. This is where he is secure, where his mind tells him that he is safe. It is where he is free from unwanted interference. Accordingly, "an integral part of our free institutions is the security of the people from unwarranted intrusions by Government agents into their privacy."¹⁰⁶

¹⁰³ Beignier, *supra* note 73 at 61.

¹⁰⁴ This does not mean that privacy is only protected within the wall of one's home, but, rather, that "home" is the *locus par excellence* where privacy reigns.

¹⁰⁵ In order to deepen the relationship between the right to privacy and the freedom of expression and further understand why and how they are mutually interdependent, see La Rue, *supra* note 4 at 6.

¹⁰⁶ Jeffrey Brand, "Eavesdropping on Our Founding Fathers: How a Return to the Republic's Core Democratic Values Can Help Us Resolve the Surveillance Crisis," (2015) 6 Harv J National Security at 16.

III. The Right to Privacy Under International Law

C. Article 17 of the ICCPR

Frank La Rue, the former United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, affirmed that the right to privacy is undoubtedly a fundamental human right, recognized both at the regional and the international level.¹⁰⁷ Yet, there are different legally binding provisions that entrench this right at the international level: Article 12 of the *UDHR*, Article 17 of the *ICCPR*, Article 16 of the *Convention on the Rights of the Child*¹⁰⁸ and Article 14 of the *International Convention on the Protection of All Migrant Workers and Members of Their Families*.¹⁰⁹ The focus of this article will be on Article 17 of the *ICCPR* because it is the most important legally binding treaty provision in this matter.¹¹⁰ The *ICCPR* has been ratified by 169 States and signed by another 6.¹¹¹ Although the right to privacy is considered a fundamental human right, it is not an absolute right. Pursuant to Article 4 of the *ICCPR*, this includes, *inter alia*, states of emergency that are threatening the life of the Country (e.g., terrorism). Under some conditions States may derogate from some provisions of the treaty, including Article 17 in order to protect these “legitimate aims”.¹¹² The trend to derogate from the right to privacy in order to fight the War on Terror, as proclaimed by George W. Bush,¹¹³ strongly increased after 9/11, culminating in the aforementioned NSA spying scandal where the US Government collected data on millions of US nationals and foreign citizens. On this matter, Scheinin, the past Special Rapporteur, affirmed that “countering terrorism is not a trump card which automatically legitimates interferences with the right to privacy.”¹¹⁴ Further, he recalled that the international fight against terrorism is not a war in the true sense of the word and that, even during an armed conflict, international humanitarian rights law continues to apply.¹¹⁵

So far, only 18 States have declared a state of emergency and tried to derogate from Article 17. Nevertheless, none of them have specified the threat needed to justify derogating from Article 17 and what concrete measures would

¹⁰⁷ La Rue, *supra* note 4 at 6.

¹⁰⁸ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 16 (entered into force 2 September 1990).

¹⁰⁹ *International Convention on the Protection of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3 art 14 (entered into force 1 July 2003).

¹¹⁰ Scheinin, *supra* note 7 at 6.

¹¹¹ See UN Human Rights Office of the High Commissioner, “Status of Ratification”, online: <indicators.ohchr.org>.

¹¹² Scheinin, *supra* note 7 at 7.

¹¹³ Bush, *supra* note 2.

¹¹⁴ Scheinin, *supra* note 7 at 6.

¹¹⁵ *Ibid* at 5.

be taken in said derogation—mandatory conditions under Article 4.¹¹⁶ Indeed, it is fairly common in the jurisprudence and States' practice that Article 17 permits the temporary restriction of the right to privacy because of necessary, legitimate and proportionate restrictions.¹¹⁷ Thus, the issue is not the fact that States disregard Article 17 in order to safeguard their citizenry but, rather, the issue is how to enforce privacy protection where it has been disregarded under illegitimate circumstances. Surveillance and information technologies have expanded and developed rapidly and the law of privacy has not kept pace with such changes.¹¹⁸ Ultimately, derogation from the fundamental right to privacy to combat national threats, especially without significant evidence of said threat (e.g. the "perpetual threat of terrorism"), is not a compelling enough justification to be considered a contemplated "legitimate circumstance".

This article attempts to understand, from a legal perspective, whether it is possible to limit Government interference with the right to privacy to legitimate circumstances. However, it does not have the intention to solve all privacy-related issues. This article attempts to underline a basis for which a more solid legal international framework can be developed in order to safeguard the right to privacy, by confining interference with it to legitimate circumstances. The foundations of the international recognition of the right to privacy (and its exceptions) can be traced to *General Comment No 16*, in light of which Article 17 should be read. *General Comment No 16* was adopted in 1988, when the material provided under Article 17 was very limited, making it virtually impossible for *General Comment No 16* to address all the current privacy-related concerns. A new General Comment would be able to provide more concrete guidance on the circumstances that allow States to derogate from Article 17, taking into account the expanded ability of governments to interfere with the right to privacy through the use of modern information technologies.¹¹⁹ A new General Comment would also reflect the international human rights bodies' consideration of recent States' practices and new technologies.

As stated above, Article 17 should be read in accordance with *General Comment No 16*. General Comments are instructive insofar as they elaborate on, develop and clarify the content and the language used for the provisions. Further, they serve the function of collating jurisprudence to entrenched rights and illustrate the application of a right to a specific context. Therefore, General Comments prescribe a framework that enables State Parties to

¹¹⁶ *Ibid* at 7.

¹¹⁷ *Ibid*.

¹¹⁸ American Civil Liberties Union, *Privacy Rights in the Digital Age: A Proposal for a New General Comment on the Right to Privacy Under Article 17 of the International Covenant on Civil and Political Rights* (New York: American Civil Liberties Union, 2014) at 5, online: <<https://www.aclu.org/sites/default/files/assets/jus14-report-iccpr-web-rel1.pdf>> [ACLU].

¹¹⁹ *Ibid* at 4.

ensure their compliance with such rights.¹²⁰ Nevertheless, even though General Comments are highly persuasive authorities,¹²¹ they are not legally binding.¹²² This means that it is up to the States to decide whether to follow them or not.

General Comment No 16 requires that States who have signed it adopt measures (legislative or otherwise) in order to not only give effect to the prohibition of attacks and interferences laid down by Article 17, but also to take proactive measures to protect the right to privacy. Thus, Article 17 imposes both a positive and negative obligation on States.¹²³ Not only must States refrain from practices that are in breach of Article 17 but they must also create an effective legal framework to protect the right to privacy, irrespective of whether the interferences or attacks are perpetrated by the State itself, foreign States or private actors.¹²⁴

The interferences and attacks described in Article 17 must not be “unlawful” or “arbitrary”. “Unlawful” means that “no interference can take place except in cases envisaged by the law”¹²⁵ and that such law “must comply with the provisions, aims and objectives of the *Covenant*.”¹²⁶ With regard to “arbitrary interference,” *General Comment No 16* states that, “even interference provided by the law should be in accordance with the provisions, aims and objectives of the *Covenant* and should be, in any event, reasonable in the particular circumstances.”¹²⁷ Further, it is specified that the term “family” must be given a broad interpretation in order “to include all those comprising the family as understood in the society of the State party concerned,”¹²⁸ and “home” must be understood as “to indicate the place where a person resides or carries out his usual occupation.”¹²⁹

When States lawfully interfere with the right to privacy, they should produce reports that include information about the specific authorities and organs that can authorize such interference, about the extent to which this practice conforms with the law, about complaints lodged in respect of arbitrary or unlawful interference and about the remedies provided in such cases.¹³⁰ It is of primary importance that the relevant legislation specify in detail the precise circumstances in which interference is authorized. Furthermore, every

¹²⁰ *Ibid* at 3.

¹²¹ Simone Cusak & Lisa Pusey, “CEDAW and the Right to Non-discrimination and Equality” (2013) 14:1 *Melbourne J Intl L* at 58.

¹²² ACLU, *supra* note 118 at 7.

¹²³ Martin Scheinin, “LIBE Committee Inquiry on Electronic Mass Surveillance of EU Citizens” (Address delivered to the European Parliament, 14 October 2014) at 2.

¹²⁴ *Ibid*.

¹²⁵ *General Comment No 16, supra* note 9 at para 3.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* at para 4.

¹²⁸ *Ibid* at para 5.

¹²⁹ *Ibid*.

¹³⁰ *Ibid* at para 6.

individual should be aware of whether, and what, personal data is stored and collected. Surveillance, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations without a warrant should be prohibited unless the State conforms with the aforementioned criteria. Finally, compliance with Article 17 should be guaranteed *de jure* and *de facto*, meaning that this right must be protected in law as well as reality.

i. The Need for a New General Comment

As outlined above, *General Comment No 16* is highly problematic and is no longer able to respond to the concerns of the Digital Age. Of the same opinion is Frank La Rue, who recognized that, despite the recognition of the right to privacy in Article 17 of the ICCPR, at the time of its inclusion, the specific content of this right was not entirely developed by international human rights protection mechanisms.¹³¹ Further, La Rue affirmed that, in 1988, when *General Comment No 16* was adopted, the impact of improvement in information and communication technologies on the right to a private life was hardly understood.¹³²

General Comment No 16 should be replaced for several reasons.¹³³ Perhaps most importantly, there is a lacuna in it on the circumstances in which States are allowed to derogate from the right to privacy. The possible limitations to the right to privacy are not clearly specified; consequently, there is a vacuum that States can use as they please. The right to privacy is not an absolute right and, accordingly, States can disregard it essentially at their will. Thus, most importantly, a new General Comment must prescribe in more detail under which legitimate circumstances States can derogate from the obligation to preserve privacy. A further reason for a new General Comment is that the traditional understanding of privacy, described by *General Comment No 16*, is no longer adequate in the Digital Age. Terms like “home”, “family” and “correspondence” must be updated and interpreted more broadly as their conception in 1988 was remarkably different from how they are understood today. For example, in 1988, the term “home” indicated a specific physical space, namely the physical home of an individual. Today, the rise of online spaces that contain significant personal information, like social media for example, make it necessary to review, and expand, the term. Accordingly, “home” should not be given a purely physical connotation, but also one that includes online personal spaces, personal computers and other electronic devices.¹³⁴ The term “correspondence” should, clearly, also include

¹³¹ La Rue, *supra* note 4 at 6.

¹³² *Ibid* at 8.

¹³³ This paragraph is based on ACLU, *supra* note 118 at 5.

¹³⁴ See *Peiris v Sri Lanka*, UNHRCOR, 103rd Sess, UN Doc CCPR/C/103/D/1862/2009 (2012); *Bernh Larsen*

electronic communications. The General Assembly of the United Nations has confirmed that “the same rights people have offline must also be protected online, including the right to privacy.”¹³⁵ Accordingly, when concepts of “family”, “home” and “correspondence” have digital or virtual analogues, protection is equally afforded both to online and offline manifestations of these concepts.

Finally, there is no emphasis on the relationship between privacy, liberty and security (Article 9) or freedom of expression (Article 19). Surveillance programs justified on the basis of combating terrorism have not only adversely affected the right to privacy but these measures also had a chilling effect on other fundamental human rights.¹³⁶ Concerning this aspect, Scheinin affirmed that privacy is a basis for the realization of other rights without which they could not effectively be enjoyed. As Scheinin explains, “privacy is necessary to create zones to allow individuals and groups to be able to think and develop ideas and relationships. Other rights such as freedom of expression, association, and movement all require privacy to be able to develop effectively.”¹³⁷ Further, as alluded to above, *General Comment No 16* was constructed in a time when the Internet was at its early stages. Consequently, it does not specifically outline how privacy should be conceived of in the Digital Era; an era dominated by blogs, social networks and online shopping where a vast amount of personal information is potentially left vulnerable to both private and public actors.

ii. A Proposal for a New General Comment

Although non-exhaustive, I have included a list of eight recommendations that will ensure the General Comment is better equipped to address the protection of privacy challenges of the Digital Age.¹³⁸ First, a new General Comment should reaffirm the broad application of Article 17: the protection of privacy must cover bodily privacy, communication, home and information privacy. The right to privacy has been recognized as including different facets, such as: the right to freely express one’s identity,¹³⁹ the right to intimacy,¹⁴⁰ the right to personal development and the right to establish and develop relationships with other human beings.¹⁴¹

Holding AS and Ors v Norway, No 24117/08, [2013] ECHR at para 106.

¹³⁵ *The Right to Privacy in the Digital Age*, GA Res 68/167, UNGAOR, 68th Sess, UN Doc A/RES/68/167, (2013) 1.

¹³⁶ La Rue, *supra* note 4 at 9.

¹³⁷ Scheinin, *supra* note 7 at 13.

¹³⁸ This section is based on ACLU, *supra* note 118. For the whole proposal of the new General Comment, see ACLU, *supra* note 118.

¹³⁹ *Coeriel et al v The Netherlands*, UNHRCOR, 52nd Sess, UN Doc CPR/C/52/D/453/1991, (1991) at para 10.2.

¹⁴⁰ UNGAOR, 43rd Sess, Supp No 40, UN Doc. A/43/40 (1988) at 8.

¹⁴¹ *Shimovolos v Russia*, No 30194/09, [2011] ECHR 1 at para 64–66, (2014) 58 EHRR 26.

Second, it is necessary that privacy develop as to include rights to access and control individual personal data. This is essential as it is now extremely easy and cheap to collect, store, and use personal data. Recently, the protection of the right to digital identity has emerged and recognizes, that the zone where the individual can freely express his identity, “now includes online spaces, and identity now includes a person’s digital identity.”¹⁴²

Third, the concepts of “family”, “home” and “correspondence” must be updated. “Family” and “home” are now meant to include online private spaces, such as social networks and email inboxes, as well as personal computers. Further, “correspondence” should include all forms of communication and also metadata.¹⁴³ In fact, metadata can reveal information “that is even more sensitive than the contents of the communication.”¹⁴⁴ By collecting metadata, the Government can learn some of the most intimate details of an individual’s life (such as his movements, acquaintances, friends and tastes) and thus build a precise profile of his persona.

Fourth, greater specificity on situations where privacy can legitimately be restricted is imperative. Concerning “interference,” Article 17 only protects against measures that interfere with recognized privacy interests. Accordingly, a new General Comment should affirm that laws, especially if vague and unclear, might interfere with the right to privacy, and that the unjustifiable collection and storage of personal data unequivocally constitutes an interference with privacy interests.

Concerning the use of “lawfulness” in *General Comment No 16*, legitimate interference with the right to privacy may only occur on the basis of law, and as such, a test of lawfulness must be constructed. First, the law must be consistent with the provisions, aims and objectives of the whole *ICCPR*. Second, it must be in accordance with basic principles of international law. Third, it must be accessible to the public and foreseeable¹⁴⁵ and, fourth, it must be both specific and precise in order to avoid the abuse of power.

Finally, a new General Comment should specify that any interference with privacy must be both non-arbitrary and proportional. This will require a proportionality test to be established. The old *General Comment No 16* lays down that the interference must be “reasonable in the particular circumstances”. As

¹⁴² Claire Sullivan, “Digital Identity and Mistake” (2012) 20:3 Intl JL & IT 223 at 225.

¹⁴³ Metadata is the “footprint” left behind the data. For instance when a person uses a phone, metadata is the number called, the location from which the call is made, and the duration of the call. See Ben Grubb & James Massola, “What is ‘Metadata’ and Should you Worry if Yours is Stored by Law?”, *The Sydney Morning Herald* (6 August 2014), online: <www.smh.com.au>.

¹⁴⁴ *ACLU v Clapper*, 959 F Supp (2d) 724 (SD NY 2013) (Evidence, Declaration of Professor Edward W Felten) online: <<https://www.aclu.org/files/pdfs/natsec/clapper/2013.08.26%20ACLU%20PI%20Brief%20-%20Declaration%20-%20Felten.pdf>>.

¹⁴⁵ Laws and regulations that are accessible to the public help individuals to foresee the legal consequences of their actions, and they can thus regulate their conduct accordingly.

mentioned above, in *Van Hulst v Netherlands*,¹⁴⁶ the Committee underlined that reasonableness requires proportionality and a four-part test was developed. First, concerning proportionality, it is required that measures restricting the right to privacy are appropriate in order to achieve their protective function and such measures must be the least intrusive instrument amongst those that might achieve the desired result. They must be proportionate to the interest to be protected.¹⁴⁷ Second, concerning the test, the test prescribes four cumulative conditions: a legitimate aim to be pursued, a rational connection between the specific measure and that aim, a minimal impairment of the right to privacy, and a fair balance between the aim and the right.

Regarding the legitimate aim, Article 17 does not provide an exhaustive list of legitimate aims to possibly be pursued. In the absence of such a list, States are called upon to justify why a particular aim is legitimate as justification for restrictions upon Article 17. Such legitimate purposes must be understood in the context of the *ICCPR* and coherent with it.¹⁴⁸ Further, it is then upon the Human Rights Committee to monitor restrictive measures undertaken by State Parties.¹⁴⁹ An example of “legitimate aim” is law enforcement or national security (such as counterterrorism measures).¹⁵⁰ Concerning the rational connection between the measure and the aim: the interference must be suitable. Such interference must be capable of achieving its legitimate aim. Regarding the minimal impairment of the right to privacy, the interference must be strictly necessary and must be the least intrusive possible means of accomplishing its purpose. Finally, concerning the balance between the legitimate aim and the right, indiscriminate mass surveillance, mass collection and retention of data would be prohibited. The interference and corresponding surveillance must have a highly specific, targeted nature.¹⁵¹

Such a proportionality test prescribes the correct interpretation of the term “arbitrary” in relation to Article 17 because it includes a better legal framework, it has been developed across different various legal jurisdictions,¹⁵² and it is consistent with the aims, objectives and purpose of the *ICCPR*.¹⁵³ The four conditions of the test are also consistent with *General Comment No 16*'s provision that public authorities can only request “information relating to an individual's private life, the knowledge of which

¹⁴⁶ *Antonius Cornelis Van Hulst v Netherlands*, UNHRCOR, 82nd Sess, UN Doc CCPR/C/82/D/903/1999, (2004) [*Van Hulst*].

¹⁴⁷ Scheinin, *supra* note 7 at para 17.

¹⁴⁸ ACLU, *supra* note 118 at 38.

¹⁴⁹ Scheinin, *supra* note 7 at paras 17–18.

¹⁵⁰ ACLU, *supra* note 118 at 4.

¹⁵¹ *Ibid* at 22.

¹⁵² *R (Daly) v Home Secretary*, [2001] UKHL 26, [2001] 2 AC 532 at para 27; Bundesverfassungsgericht (BverfG - Federal Constitutional Court), 3 July 2006, 1 BvR 518/02 (Germany); Tribunal Constitucional, STC 7/2004 and STC 261/2005 (Spain).

¹⁵³ ACLU, *supra* note 118 at 38.

is essential in the interests of society”.¹⁵⁴

Both Martin Scheinin and Frank La Rue have stated that this test is the most valuable solution in order to evaluate whether a limitation on the right to privacy is arbitrary.¹⁵⁵ Indeed, these four conditions are cumulative: to be considered non-arbitrary the limitation must fulfill all the conditions. Further, a new General Comment should prescribe explicit guidance on the application of lawful and arbitrary standards to practices, policies and laws.

Fifth, surveillance and other measures that result in “blanket and indiscriminate” collection and storage of personal data should be prohibited insofar as they must be conceived as disproportionate.¹⁵⁶ Even targeted surveillance operations are only lawful if they are proportionate. This conclusion is supported, *inter alia*, by the views of the Committee, as well as case law of European Court of Human Rights. In *Van Hulst v Netherlands*, the Committee stated that “the decision to allow such interference can only be taken by the authority designated by law, on a case-by-case basis.”¹⁵⁷ The European Court of Human Rights has adopted a similar approach in several cases. In *Liberty v United Kingdom* the Court authorized surveillance of telephone communications. It commented that such legislation provided an “extremely broad discretion,” with “no limit to the type of external communications” caught by surveillance.¹⁵⁸ Consequently, the national law did not afford “adequate protection against abuse of power.”¹⁵⁹ As a result, in *Kennedy v United Kingdom*, the Court found that the surveillance regime then in place was compliant with Article 8 of the *European Convention on Human Rights* (the provision that enshrines the right to privacy), only to the extent that it specified in detail the categories of individuals targeted and the process concerning the surveillance.¹⁶⁰

Sixth, a new General Comment should reaffirm the necessary requirement of effective judicial and administrative oversight of surveillance and other related measures. For instance, in *Al-Gertani v Bosnia and Herzegovina*, the Committee held that the surveillance operations at stake were consistent with Article 17 partly because they “were considered and reviewed in a fair and thorough manner by the administrative and judicial authorities.”¹⁶¹ The Committee should state the prerequisites of the responsible tribunal

¹⁵⁴ General Comment No 16, *supra* note 9 at para 7.

¹⁵⁵ Scheinin, *supra* note 7 at 14–19; La Rue, *supra* note 4 at para 83.

¹⁵⁶ Article 17 allows targeted surveillance operations as lawful, only if they are proportionate. “[B]lanket and indiscriminate” surveillance operations are in breach of Article 17.

¹⁵⁷ *Van Hulst*, *supra* note 146 at para 7.7.

¹⁵⁸ *Liberty v United Kingdom*, No 58243/00, [2008] ECHR 568 at paras 64–65, (2009) 48 EHRR 1.

¹⁵⁹ *Ibid* at para 69.

¹⁶⁰ *Kennedy v United Kingdom*, No 26839/05, [2010] ECHR 682 at para 169, 52 EHRR 4; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5 art 8 (entered into force 3 September 1953).

¹⁶¹ *Al-Gertani v Bosnia and Herzegovina*, UNHRCOR, 109th Sess, UN Doc CCPR/C/109/D/1955/2010, (2013).

for oversight, as well as the requirements of “a fair and public hearing by a competent, independent and impartial tribunal established by law”¹⁶² provided in *General Comment No 32* (the right to equality before courts and tribunals and to a fair trial).¹⁶³ Further, the new General Comment should also emphasize the obligation of such a tribunal to ensure effective remedies to victims of arbitrary or unlawful interferences with the right to privacy.¹⁶⁴

Seventh, clarifications on the extraterritorial application¹⁶⁵ of the right to privacy are of utmost importance. A new General Comment should specify that Article 17 apply extra-territorially,¹⁶⁶ insofar as States must respect it whenever individuals are within their jurisdiction and their territory.¹⁶⁷ “Jurisdiction” must be applied broadly, comprising of the virtual power or control of the State. The application and acceptance of extra-territoriality is significant because if Article 17 did not apply extraterritorially, States would be powerless in regards to the protection of their own citizens’ rights from interferences by other States.

Finally, a new General Comment should mandate the principle of non-discrimination: equal protection to the right to privacy must be given to nationals, as well as to non-nationals. The State Parties, consistent with Article 2(1) of the *ICCPR*, are under the obligation to ensure that privacy protections are realized without discrimination of any kind. *General Comment 31* clarifies this non-discrimination principle: “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals,

¹⁶² *General Comment No 32 – Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, UNHRCOR, 90th Sess, UN Doc CCPR/C/GC/32 (2007) 1.

¹⁶³ ACLU, *supra* note 118 at 28.

¹⁶⁴ This principle was recognized by the Committee in *Bulgakov v Ukraine*, UNHRCOR, 106th Sess, UN Doc CCPR/C/106/D/1803/2008 (2012) 1 at para 9.

¹⁶⁵ Extraterritoriality is a situation where State powers govern relations of law, which are situated outside of the territory of the State. Therefore they have effective jurisdiction on the territory concerned. See Hervé Ascensio, “Contribution to the Work of the UN Secretary-General’s Special Representative on Human Rights and Transnational Corporations and Other Businesses, Extraterritoriality as an Instrument” (2010).

¹⁶⁶ The details of the extraterritorial application of the *ICCPR* do not directly fall within the scope of this article. Nevertheless, here follows a brief explanation. Article 2(1) of the *ICCPR* prescribes that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction” [emphasis added]. Article 31(1) (which is a universally accepted customary law on the treaty interpretation) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) prescribes that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The ordinary meaning of “and” states that there are two or more cumulative conditions. Thus, the “and” in Article 2(1) mandates that it apply both within the State’s territory and under its jurisdiction. Finally, all the provisions of the *ICCPR* must be read as a whole, ensuring consistency within such provisions. Therefore, the text of Article 17 must be read in the light of other language in the *ICCPR*, Article 2(1) included. For the outlined reasons, it is reasonable to assume that Article 17, and the *ICCPR* more generally, have an extra-territorial application. This view is supported by Peter Margulies, “The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism” (2014) 82:5 *Fordham L Rev* 2137.

¹⁶⁷ It is important to clarify the issues surrounding extra-territoriality issues as some Member States, specifically Israel and USA, claim that Article 17 does not have an extra-territorial application. See Ian Brown et al, “Towards Multilateral Standards for Surveillance Reform” (2015) Oxford Internet Institute.

regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”¹⁶⁸

D. Other Possible Paths

Developing and updating the General Comment is not the only solution available to protect privacy interests and limit Government interference to legitimate circumstances. Scheinin suggested that the Human Rights Council could initiate a soft law, namely a global declaration on privacy and data protection, as a complement to hard law.¹⁶⁹ This declaration would contain the principles developed through policymaking, jurisprudence, policy reviews and good practice from all over the world. In fact, as Ben Hayes et al. state, “the global political and economic pressure generated by the Snowden revelations provides us with an opportunity to modernize standards across the democratic world in a manner that respects privacy.”¹⁷⁰ New international legal standards should be based on the five principles identified by Scheinin, comprised of the following:¹⁷¹

- the principle of minimal intrusiveness, where the interference should be based on a proven need;
- the principle of purpose specification restricting secondary use, where the aim of the measure must be clearly specified in order to avoid abuse of power;
- the principle of oversight and regulated authorization of lawful access, where, in order to minimize harm and abuses, both an internal oversight and an external independent oversight must be established;
- the principle of transparency and integrity, that secret policy must be prohibited; and
- the principle of effective modernization, where there are assessments of the impact that interferences have on privacy interests, taking into account new surveillance techniques.

These principles would have the advantage of making people aware of what the specific surveillance practices are, to what extent their personal data is collected, stored and shared and under what circumstances the Government

¹⁶⁸ *General Comment No 31 - Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UNHRCOR, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add, (2004) 1 at para 10.

¹⁶⁹ Scheinin, *supra* note 7 at para 73.

¹⁷⁰ Brown, *supra* note 167 at 25.

¹⁷¹ For a full account of the principles, see Scheinin, *supra* note 7 at 17–20.

is allowed to do so.

Soft law is useful as it enables the raising of awareness of issues in the specific field and acts as a step towards developing legally binding obligations, namely hard law. Nevertheless, in my opinion, there is a pressing need for binding international agreements that protect privacy interests. Accordingly, the five principles, together with the provisions of a new General Comment, could be adopted as an additional protocol to Article 17, as also suggested by the 35th International Conference of Data Protection and Privacy Commissioners.¹⁷² This position is also supported by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament.¹⁷³ These two authorities have suggested entrenching some of the provisions of the General Comment in this proposed protocol. Without going further into detail, and although I do share a similar view, I believe that the protocol should encapsulate the provisions of the new General Comment as a replacement or a re-modernization, as exhaustively stressed above.

IV. Conclusion

Privacy is a complex notion, with several different possible understandings and meanings. In general, privacy is an area of personal liberty, interaction and independent development where it is exclusively up to the individual to choose to what extent he wishes to communicate with others. It is a free zone where the individual can be alone, secluded and protected from unwanted interference, from other individuals and from the State.¹⁷⁴ Privacy means liberty to Americans, and dignity to the French. Nevertheless, for legal purposes, the definition of privacy is both too vague and too outdated as States remain stuck in a conception that is unable to respond to the concerns of the Digital Age.

At the domestic level there is a need to work on a more specific definition in order for privacy interests to be preserved against unwanted illegitimate interference. At the international level, the right to privacy is recognized as a fundamental human right and entrenched, *inter alia*, in Article 17 of the ICCPR. Notwithstanding this fact, Article 17 and *General Comment No 16* seem to no longer be able to safeguard privacy concerns from illegitimate interference by Government. Recently, there have been several derogations from Article 17 due to national security issues, especially counter-terrorism. In doing

¹⁷² See 35th International Conference of Data Protection and Privacy Commissioners, *Privacy: A Compass in Turbulent World*, online: <<https://privacyconference2013.org/>>.

¹⁷³ EC, Committee on Civil Liberties, Justice and Home Affairs, *Draft Report on the US NSA surveillance Programme, Surveillance Bodies in Various Member States and their Impact on EU Citizens' Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs* (2013) at 32 (Rapporteur: Claude Moraes).

¹⁷⁴ Anthony Lester, David Pannick & Javan Herberg, *Human Rights Law and Practice*, 2nd ed (London: Butterworths Law, 2004).

so, States disregard the right to privacy by collecting and storing personal data on millions of people (rendered possible by technological advances in surveillance programs) without complying with the requirements for such restrictions.

Yet theoretically there are some possible frameworks that could limit Government interference with the right to privacy to legitimate circumstances. A new General Comment, which would replace the former *General Comment No 16* to Article 17, could be created. Additionally, a soft law encapsulating certain international legal standards could be developed; such principles and some of the provisions of a new General Comment could even be entrenched in hard law, namely an additional protocol to Article 17. Nevertheless, General Comments, though highly persuasive authority, are not legally binding, and soft law, although it would raise awareness, would have no enforcement mechanisms that would oblige State compliance.

For a new hard law to develop, States' consensus and cooperation are required—which indeed, is not an easy task. Consequently, the power is strictly held in the hands of the Governments. For the outlined reasons, it seems rather unlikely, at least at the moment, that Government interference can be limited to legitimate circumstances. Thus, privacy does seem to be an endangered animal. Just like Scheinin,¹⁷⁵ I am concerned that what was once exceptional—namely illegitimate interference with the right to privacy—is now customary. While this practice has been establishing itself, there is not an *opinio juris* on the subject yet. Nonetheless, society needs to be alert.

¹⁷⁵ Scheinin, *supra* note 7 at 20.