

UPDATING ON PRINCIPLES ON PRIVACY AND PERSONAL DATA PROTECTION

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As I mentioned in a previous study on the theme, among the new ideas, referring to was said before in historical terms that keep us apart from immediate issues, about the structure of current societies, we may find different demands from individuals, not necessarily new ones, but certainly more immediate – essentially but not exclusively, about the legal protection needed for different values that are considered primary and inalienable ones that are part of the essence of the Rule of Law in States worthy of the name.

In this regard, and related to the issue under study, we must refer to the *Right of Privacy and Protection of Personal Data*, to the free circulation of information, as well as [the right of] *Access to Public Information*, as structuring elements of a democratic society. It should be highlighted that we are not referring to opposite approaches of that pursue dissimilar purposes. They are, in fact, of complementary nature and in some of their aspects they need a precise demarcation implying a balance, an estimate of the values they seek to protect and that, in each case, it will be essential to determine them. In light of the above, we should point out that although we are witnessing complementary institutes that are intrinsically related, they are different and they admit a diversified approach, although not an independent and autonomous one.

The relevance of the issue has been reflected in the acceptance that the domestic legislation of States have already shown. We should point out here that in some countries, the *Right of Protection of Personal Data* has been included in the norm with the highest formal efficiency, that is, the Constitution, either in an express format or derived from the evolutionary interpretation of same and, in other cases, this right has been established by means of legislative norms. In turn, we should highlight that most of the Latin American countries the enacting of legislation on the *Right of Protection of Personal Data* has taken place during the last decade.

In the area of the American International Law it should be said that the General Assembly of the Organization of American States (OAS), through Resolution AG/RES. 2811 (XLIII-O/13), commissioned the Inter-American Juridical Committee (IAJC) to draft proposals to the Commission of Juridical and Political Affairs on the different approaches for the regulation of the protection of personal data, including a Model Draft-Law on the Protection of Personal Data, taking into consideration the international standard on the issue.

The Inter-American Juridical Committee (IAJC) through Resolution (CJI/RES. 212 (LXXXVI-0/15) dated March 27, 2015, established to “*Approve the report of the IAJC on “Privacy and the protection of personal data”, document CJI/doc. 474/15 rev.2, attached to this Resolution. 3. To communicate this resolution to the Permanent council of the*

Organization of American States. 4. To conclude the work of the Inter-American Juridical Committee on this topic”.

The first aspect to be considered refers that the Inter-American Juridical Committee was inclined – taking into consideration the nature of the topic under study and the impact caused on it by the new information technologies - by a *Declaration of Principles on Privacy and Protection of Personal Data in the Americas*. As mentioned in the report above “*The purpose of these principles is to urge the Member States of the organization to adopt measures to protect the privacy, reputation and the dignity of people. Its aim is to be the basis so that Member States may consider the possibility of formulating and adopting legislation to protect the personal information and privacy interests of individuals throughout our hemisphere*”. In turn, the “*aim of the OAS Principles on privacy and protection of personal data is to establish a framework for safeguarding the rights of people to the protection of their personal data and to the self-determination regarding information. Principles are based in well-known international norms. They intend to protect people from the unlawful or unnecessary compilation, use, retention and dissemination of personal data... The norms on privacy must allow consumers and companies to benefit from the use of personal data in a safe and protected manner. They must be balanced and technologically neutral and allow the free flow of data within each country and through the national borders in such a manner to promote technological innovation and economic development and the growth of trade. In addition to 1) protection effectively the personal privacy; 2) guaranteeing the free flow of data in order to promote economic advances; and in order to achieve these states must 3) enforce a clear policy of transparency with due respect to their protections and procedures*”.

The concept of privacy, as said before, is “*clearly established in Article V of the American Declaration on the Rights and Duties of Man (1948) and in articles 11 and 13 of the American Convention on Human Rights (“San José Pact”) (1969) (Appendix A). The Inter-American court of Human rights has confirmed the right to privacy. In addition, the Constitution and the fundamental legislation of many OAS Member States guarantee the respect and the protection of privacy, of personal dignity and of family honor, the inviolability of the home and of private communications, personal data and related concepts... furthermore, the fundamental principles of freedom of expression and association and the free flow of information are acknowledged by the main human rights systems worldwide, among them the OAS system*”.

In addition, the area of enforcement comprises both public and private organizations in relation to the data that are generated, compiled or managed by them.

In relation to the *Principles on the Protection of Personal Data*, they are achieved as follows:

Legitimate and Fair Purposes: personal data must be compiled just for legitimate purposes and through fair and legal means;

Clarity and Consent: The purposes for which personal data are compiled must be specific when compiling them. As a general rule, personal data should only be compiled with the consent of the person they refer to;

Pertinence and Necessity: Data must be veridical, pertinent and necessary for the purposes expressed in their compilation;

Restricted Use and Retention: personal data must be kept and used only by means of legitimate uses that are compatible with the purpose or purposes for which they were compiled. They should never be retained beyond the time they are needed and for the purpose or purposes of compilation, pursuant to the corresponding domestic legislation;

Duty of Confidentiality: Personal data must not be disclosed or made available to third party, or use them for other purposes that are not those for which they were compiled, except with the awareness or consent of the person in question or according to the allowance provided by law;

Protection and Safety: Personal data must be protected through reasonable and adequate safeguards against unauthorized access, loss, destruction, use, modification or disclosure;

Data Veracity: personal data must be kept truthful and updated to the maximum extent as necessary for the purposes of their use;

Access and Correction: Reasonable methodologies must be established to allow those people whose personal data have been compiled to request data controls to modify, correct or erase them. In case of restriction to data access or correction, the reasons for that must be given in conformity with the domestic legislation;

Sensitive Personal Data: Some types of personal data, taking into consideration its sensitive nature in specific contexts, are especially susceptible to cause considerable damage to people, when and if they are misused. Data controllers should adopt privacy and safety measures concomitant to the sensitivity of data and their capacity to cause damage to the individuals they refer to;

Liability: Data controllers shall use and implement the measures leading to the compliance of these principles.

Cross bordering Flow of Data and Liability: Member states shall mutually cooperate for the implementation of mechanisms and procedures guaranteeing that data controllers working in more than one jurisdiction may be effectively made liable for any incompliance of these principles.

Publicity of Exceptions: when the national authorities establish exceptions to these principles for reasons related to national sovereignty, domestic or external security, the fight against crime, the compliance of norms or other public order prerogatives, they must inform the public about those exceptions.

The Resolution of the General Assembly of June 5, 2018–AG/RES. 2926 (XLVIII-18)- International Law, item “*i. Observations and recommendations to the IAJC annual report*” establishes a mandate for the IAJC to “*start the updating work on the Principles on the Protection of Personal Data, taking into consideration their evolution*”.

It should be highlighted that, in turn, the Inter-American Juridical Committee (CJI/RES.212 (LXXXVI-O/15) in the Resolution approving the report containing the *OAS Principles on Privacy and of Personal Data Protection*. Item 4 of the Report reads as follows: “*To consider the work of the Inter-American Juridical Committee on this topic completed*”. Notwithstanding this, the evolution of the question claimed for the inclusion of the theme in the Committee’s agenda during the 92nd regular session which took place from February 26 to March 2, 2018 in Mexico, DF. This decision was supported, among other aspects, by the Standards on the protection of Personal Data for Ibero-American States, drafted by the Ibero-American network of Data Protection (RIPD), which is the new regulatory document of the European Union on the issue, as well as some other notorious facts directly related to this question.

As in this case it is the first movement towards the updating of those principles, I take the liberty of saying that the work drafted by the IAJC on the *OAS Principles on Privacy and of Personal Data Protection* are still in full force. However, certain aspects should be studied in greater detail, such as, among others:

- a) the so-called **Anonymization**, which is understood, in a first approximation, as “*the enforcement of measures of any kind seeking the prevention of the identification or re-identification of a natural person without displaying disproportionate efforts*”;
- b) the relationship and effects of the Principles with the Domestic Rights;
- c) the study of personal data of children (girls and boys) and adolescents;
- d) the right of *portability* of personal data; and
- e) the broadening of the legitimation of natural person related to dead person or those appointed by them, according to the terms to exercise the right of access, modification, cancellation, opposition and portability.

This document is a guide drafted in order to start analyzing the mandate established by the General Assembly on this topic.