

ANA DHAMO

European University of Tirana, Albania

IRIS DHAMO

European University of Tirana, Albania

HABEAS DATA: NEW JUDICIAL GUARANTEE IN PUBLIC LAW OF LATIN AMERICA

Abstract:

In this conference we want to make our contribution in the theme " Habeas data: new judicial guarantee in public law of Latin America ", concept of habeas data, origin and evolution, regulatory developments of the right-guarantee habeas data in the Latin America, experience of Colombia, Brasil, Venezuela and Costa Rica, legal interests protected, active and passive subjects.

The first theme that we want to discuss is related to the basic concept of habeas data, its origin and regulatory development, the regulatory and judicial development in the Latin America Continent. In second place we have analized some tipical realities of Latin America, so that we can observe, through the constitutional paper, the respect and the rules for the application of this right-guarantee of third generation. The third theme in which was focused our study is related to the analysis of active and passive subjects, legitimate in the application of the right-guarantee of habeas data, the legal interest protected, legal and procedural aspects of this right-guarantee. Analitic study related to the guarantee of habeas data in the founding charts of the countries included in this study;

Fields of application, legitimate of application and procedural aspects related; Comparative analysis of reality.

Raise awareness of the Albanian legislator to build and include, at constitutional level, through the forms of constitutional review provided, the right-law of habeas data. Lead the albanian citizens to learn, update and rectify the informations concerning the protection of fundamental rights related whith the privacy and honour. Make the necessary constitutional revisions provided, with the purposes of including in the constitution the right-guarantee of habeas data.

Keywords:

Habeas data, concept, origin, Colombia, Brasil, Venezuela, Costa Rica, Albania, active and passive subjects, public law.

JEL Classification: K39

1. Introduction: The Concept of Habeas Data.

As it is known, the right of Habeas corpus belongs to the essence of European legal culture and more exactly on English into the fundamental rights. At least from Magna Charta of 1215 it does exist this jurisdictional guarantee of personal freedom. Without it, is not possible the realization of the principle of presumption of innocence nor actualization due to legal process or due to regular legal process, the only one consistent in a liberal democratic state of the right. In this line, the opinion in favor of freedom and individual right, consistent with Latin America, in parallel with Habeas Corpus, Habeas Data constitutional guarantee.

World development of communication and information from the second half of the Century XX until today, without precedents in time has led to interpersonal and inter-institutional relationships entirely new regarding to predictions of the right. Developments in informatics of the means of mass information, the world means interconnecting data transmission, fixed telephony and satellite television units, multimedia technology and public and private archives, of the data closely related to individuals and rulers of the individual before these developments has remained for a long time for the necessary legal protection in respect of its rights. Legal concept of Habeas Data as that of the Corpus, is inclusiveness, in the sense that includes all guarantees, bonds, recourses and judgments that challenge:

- the right of data protection as a protection of various rights of the individual which may be affected by the "leaders" of personal data.
- the right of data protection as the individual power to reach the side of public authorities, the protection of the rights infringed or violated by access, recording or transmission to third parties to their personal data.
- Freedom of information accurately implied a right of informative self-determination , so, as a the right of individuals, groups and institutions to set the time, in manner and quantum (Amount) of personal information subject to communication with third parties.
- freedom of information as a personal guarantees for recognition and access to personal information in existing data banks to control their content and to modify in case of incorrect or archiving or treatment, as well as to decide on the circulation or transmission.

On this basis, the definition of Habeas Data, a right which allows the individual to recognize, actualize and ratify information related to it and that are in the database, public or private archives, the protection of fundamental rights to privacy, honor and happiness is narrow, so transverse. The same applies to the idea of Habeas Data, considered so limited as a control mechanism of the quality of personal information archived in data banks with the opportunity to request the correction or deletion of inaccurate data and deciding on circulation or their transforming potential. the concept of Habeas Data as an autonomous and fundamental right which allows each person to recognize, examine and update his information collected in databases and archives of public or private institutions, in defense of the fundamental rights intimacy, privacy, honor and reputation, let aside the essential elements. To pass the above restrictions must realize that Habeas Data, Habeas Corpus and Amparo in Latin technique has simultaneously fundamental constitutional right and jurisdictional guarantee which is used as action, recourse or trial, with various proceedings and effects. Habeas Data, as a right belongs the group of third or last generation even though in Weimer constitution there is one type of model, narrowly related to material as well as subjects.

Indeed, the new law is formed and developed personally by Informatics, electronic archiving of data, thanks to the use of generalized computer which enables an infinite collection of information flow and an immediate, total and Planetarium and mainly personal. Circulation, use and treatment that make any kind of danger which may violate the intimacy rights, privacy and at the same time the infringement of various legal entities. This reality arises from the creation of a jurisdictional mechanism, a draftee, action or judgment which protects the right to freedom and privacy. Privacy as a means of power-duty of all individuals to keep reserved aspects of their life private so that no pretend not to intervene or impose conditions on behaviors that do not affect in any way the rights or freedoms of others. Corresponds, in this way, family relations space of individual life, preferences, character, the personal life which made concrete right personality and expresses the freedom of conscience.

Specified jurisdictional mechanism should be more specified to guarantee in the same way other elements autonomous but connected to the privacy as a right of personal image, is the right of honor in the sense that each one has for himself and his qualities awaiting a forced respect from others. In the same way should provide the right of the name, reputation and force that individuals and communities should be given to all those who have shown their merits virtues and qualities.

The tool should allow the achievement of four conclusions:

- a) Access to the information of recorded data in public and private institutions related to them.
- b) Possibility of correction, in order to allow individual opportunities to stop the manipulation of personal information or data distribution that interest only the office-holder.
- c) Opportunity to know what information over the interested individual are communicated to third parties and to what purpose.

Be avoided that the data collected be used or treated with a view to affect the rights or freedoms of the interested. Consequently mechanism also becomes a procedural instrument in favor of security right in terms of contribution to create a stream of confidence and personal peace, social and familiar in order to develop the personality. On the other hand it provides the effectiveness of the right of forgetfulness, as one of the main natural rights so that the past experience not be the cause of personal freedom and the right to create a new personality.

In conclusion, the concept Habeas Data is very complex because in Latin America there is in a constitutional order a right-freedom jurisdictional guarantee. Guaranty- freedom constituting a recourse action trial with the aim of protecting the rights of information and to be informed, data protection and protection of personal information.

2. Origin and normative development of guarantee right

From the previous definition deduced that the origin and development of the law guarantees Habeas Data cannot be separated from rights and freedoms and finally the conclusion of a long struggle for the right to reach the elaboration and perfection of the mechanism and the constitutional guarantee of Habeas Data right, the development of this war for the right to bring or to Habeas Data begins with the affirmation of the privacy or intimacy right. Accessible Jurisprudential in 1891 in U.S.A. it is possible the recognition of the right to be alone, intimacy and secrets of life as they have expressed that we want to be alone.

The development of the idea and practice of privacy has been unimaginable in terms of extraordinary dimension of major social and technological transformations that the words has lived with .Revolutions that have changed and continue to change relational life, public and private relationships of individuals. Today all legal systems of civil countries provide the right of

privacy, including Albania, as freedom to act or refrain from acting without being forced to do without hindrance to make it.

In the evolution achieved as can be ascertained the right of privacy becomes more real and concrete today due to Habeas Data, which makes a material freedom with the content of informatics freedom and the right of informational self-determination.

By privacy or right to be alone it is developed the right for protection of personal data of individuals, something which today means the right of individuals to decide freely the manner and amount of communication with others of personal information. In this perspective, the law must protect the privacy aspects of life, which are considered reserved and therefore cannot be circulated or spread.

Viewing in a negative point, in the sense that prohibits interference in the private sphere of individual, containing affirmative rights as security and defense of freedom and security. The first important effects of this development, only to remember some of them has been from restrictions of freedom of the press, procedural guarantees for the formation of evidence and filing restrictions, circulation and the treatment of personal data. By privacy of individuals following legal discussion of them, the enterprises, societies and nonprofit societies, public institutional, local and national up to the state.

Doctrine and legislation are not fully agreed in giving the title of personal juridical right. Juridical individuals are not human beings and therefore cannot claim the title of an individual right privacy intimacy or physic persons. In this prism, nationally , protection of data belonging without allowing the legal right of privacy anyway. In the international area, UK, USA and EU member state enabling the freedom to dispose of matter that allow the application of the existing agreement on data charges and data banks and legal entities. Parallel to the development privacy right and freedom of information as a result of the right to information. In liberal Democracies for a long time exists the right-freedom of thought and its manifestation in any means and formed various professions which have to do with the information, use, circulation and treatment of it. Technological developments of means of communication create informative field. Individuals, social groups should be taught especially to protect the privacy and rights of others related to it. Arise this way this new legislation on information to set limits and boundaries for freedom of

information, the right of information and freedom to obtain information thereby forming the right of informative self-determination.

If informative right information is exercised with the right to collect, direct, treat and transmit information by any means, specifically mass medias, which were extended so revolutionary, Internet protection of narrow personal rights of privacy in this field is realized through its informational self-determination a right to stop any information, the access way to which the recognition or source must be legally prohibited due to valid reasons, with the purpose of measuring individual rights or collective interest. Arises this way freedom of information as a right to dispose of the stored information for identity information, in other words, to allow control of data pertaining to the individual.

Among the first legislations that have explicitly recognized the right to freedom of information and informational self-determination, ranked a particular law of the Federal State of Hesse in Germany 1970. This law provided the protection of data and the creation of a judge for protection of their application, to control, but without arriving at Habeas Data, the features and functional and normative content that Latin America has.

3. Normative and jurisprudential development of the guarantee-right of habeas data in latin america

Latin American constitution provides an important contribution to creating a constitutional level, guarantee, recruiting, action and judgment of Habeas Data collected in archives, databases or any other form of state registers. Without entering currently in concrete analysis of institute of the following constitutions, it is easily distinguished the contribution Latin American on topic represents an important step in the legal representation on Human Rights.

Different experiences on Habeas Data, Constitution in Latin America may be divided into three categories: states that the constitution sets out directly, total and precision of Habeas Data, the guarantee states that exclude other warranties via constitutional amparo. Other experiences.

States that have established constitutional Habeas Data directly and totally in developmental rate. In Latin America there are places that has not used the constitutional Habeas Data as direct and total form of the order of evolution. We can analyze these states.

a) Guatemala

Guatemalan Constitution, in force since 1985 and updated in 1993, is the first Latin American constitutional text that has used the Institute of Habeas Data. Constitution begins with forecasting of protection of the right to private life before any other communication means. Those affected are entitled to be protected and calm. Free access on information sources is guaranteed without being limited this right by any authority. We can affirm that Guatemalan constitution clearly creates Habeas Data, guaranteeing in this way each individual the right to be recognized with information and data belonging, collected in archives, databases or any other type of state registers. In the same way Constitution prohibits the records and archives of political groups with the exception of electoral authorities and political parties.

b) Brasil

Constitutional developments of Habeas Data in Latin America continue in Brazil's constitution in 1988. Constitution begins with the prediction of the universal right to equality without distinction and guaranteeing Brazilians and foreigners resident in this country, the inviolability of life, liberty, equality, gender and property. These rights that are guaranteed under the constitution must be respected by principle and not infringement of privacy, private life, honor and personal image and the right to compensate for material or moral damage as a result of the principle breach. Following above constitution guarantees all of Habeas Data action to stop recognizing any information regarding the applicant, which results from registries or databases of government institutions or public character.

The Constitution provides access to Habeas Data must be free and be immediately exercisable as to all norms that guarantee the rights and basic guarantees. It is also guaranteed access to information and protection of the resources sector as a fundamental part of the right of information.

c) Columbia

The Constitution of Colombia is 1991 and its design has had an opportunity to ensure its constitutional terms, especially regarding the rights and main guarantees. Among significant changes, the Colombian constitution which marks Habeas Data as constitutional guarantees include the right the intimacy and other related to information and informatics. On its own terms, Colombian Constitution provides for the right of all individuals to their privacy and of family

members. On the aggregation, treatment and circulation of data should be respected freedom and guarantees containers as constitution.

Article 15 of the Constitution guarantees the respect of the right of privacy or fundamental privacy and protects individuals from various technological developments, phone tapping, violation of law as a correspondent, spying in all its aspects and typology.

The essence of Habeas Data Colombian constitution is individual dignity protection , as a development of personality.

4. Conclusions

Habeas Data in Latin America.

Type and Object.

Legal Defense

Latin American experience in the field of Habeas Data confirms a significant level of legal interpretation achieved, which differentiates itself from the continent to other European countries, including Albania. Evidence of integration of the southern American continent in particular is distinguished from the subject form of state or government, the catalog of rights and constitutional guarantees, constitutional and administrative adjudication, the creation of the control apparatus, creation and participation democratic organs and constitutional reforms. Institute of Habeas Data becomes a common divisor, the legal representative of the new evolution in Latin America. With the guarantee of Habeas Data, Latin American public law not only gets rich but offers a valuable contribution to public law in general .The state of law, also wins even an efficient institution for the protection of the right essential jurisdictional and therefore gets more perfect. Albania should look with interest those changes in order to fully guarantee the right of personal data for all Albanian citizens .Just because we are dealing with a relatively new constitution drafted and approved in 1998, the country should follow the example of southern American continent to fully guaranteed constitutional right level of privacy through the establishment of the constitutional guarantee of Habeas data.

References

BERGEL S.D. , *El habeas data: instrumento protector de la privacidad*, in *Revista de Derecho privado y comunitario*, Santa Fe, Rubinzal Culzoni, 1994, 127 ss.

- COREA C.M., *Derecho informatico*, Depalma, Buenos Aires, 1994.
- CHIRINO SANCHEZ A., *Autodeterminacion informatica y Estado de derecho en la sociedad tecnologica*, Conamaj, San Hosè, 1997.
- DIAS ARENAS P.A., *La constitucion politica de Colombia*, Temis, Bogota, 1993.
- EKMEKDJAN M. e PIZZILA C. , *Habeas data. El derecho a la intimidad frente a la revolucion informatica*, Depalma, Buenos Aires, 1996.
- ESTADELLA YUSTE O., *La proteccion de la intimidad frente a la transmisiòn internacional e datos personales*, Madrid, Tecnos, 1995.
- FALCON E. H., *Habeas data. Concepto y procedimiento*, Buenos Aires, Abedelo-Perrot, 1996.
- HERRERO-TEJEDOR F., *Honor, intimidad y propia imagen*, Colex, Madrid, 1990.
- PUCCINELLI O.R., *El habeas data en Indoiberoamerica*, Bogota, Temis, 1999.
- RODOTA' S., *Tecnopolitica. La democrazia e le nuove tecnologie dell'informazione*, Roma-Bari, 1997.
- ROPPO E., *Informatica, tutela della privacy e diritti della libertà*, Milano, Giuffrè, 1985.