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Habeas Data, Development and Origin in Latin America and Albania

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Abstract

In this article, is examined the evolution and origin of Habeas Data, as a new guarantee in Latin America and Albania. As is well known, the right of Habeas Corpus is central to European legal culture, namely English legal culture, when it comes to fundamental rights. This jurisdictional guarantee of personal freedom dates back at least to the Magna Carta of 1215. Without it, neither the presumption of innocence nor the principle of due process of law, the only ones that comply with the liberal-democratic state of law, can be realized.

Parallel to Habeas Corpus, the constitutional protection of Habeas Data is being established throughout Latin America along this line of thought in favor of freedom and the right of the individual. For several years, the Republic of Albania's data bank system has been transferred to the government platform E - Albania.

From the standpoint of convenience, it is a significant benefit for citizens, who may access 90% of services simply login onto this platform without having to visit the counters of the institutions.

However, the convenience of accessing the service comes with some increased risks for citizens' personal data. The e-Albania system was hacked in March 2023, and as a result, the service was disabled for citizens.

Meanwhile, a new project was launched to bring second-level banks onto this platform. According to banking sources, the interaction would be done with a special customer authentication for entering the e-banking platform from e-Albania, the same technique used for access through the bank's website or application.

This security filter seeks to keep bank account data safe from security concerns caused by cyber attacks. Citizens are concerned about what will happen to their bank accounts in the case of a cybernetic attack. I believe we are late, but better late than never, for our legislators to propose a review of the chapter on the protection and guarantee of the right to privacy in the Albanian Assembly.

The Latin American experience with habeas data confirms the significant legal integration accomplished, particularly in public law, in a journey that began in the 1970s and 1980s. Regarding Albania, I believe that Albanian parliamentarians should make an immediate contribution to the amendment of the Constitution regarding the protection and guarantee of personal data.

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Introduction

The scientific methods used in the given study are: historical, qualitative, analytical, comparative methods, as well as the data collection method, which are intertwined in the issues addressed in the given paper.

Historical method: This method was used to reflect the evolutionary development of respect and constitutional guarantees for the protection of personal data in different legal systems, especially in Latin American countries and Albania.

Qualitative method: The use of this method is based on data that will be obtained from various texts and the constitutions of the countries studied, that is, from primary and secondary sources.

Comparative method: Through the use of this method, it is intended to make an interpretation of the data that will be obtained in order to compare between the constitutions taken into consideration, highlighting the similarities and differences between them.

Data collection method: To achieve the objectives of the paper, the collection of secondary information was done by dividing the literature into theoretical and empirical, literature that was obtained from the Library of the University of Urbino, the texts of the Constitutions of Latin America. An important role has also been played by academic works, such as scientific research, international conferences held abroad, which have completed the framework of secondary sources.

THE ORIGIN OF HABEAS DATA

As is well known, the right of Habeas Corpus is central to European legal culture, namely English legal culture, when it comes to fundamental rights. This jurisdictional guarantee of personal freedom dates back at least to the Magna Carta of 1215. Without it, neither the presumption of innocence nor the principle of due process of law, the only ones that comply with the liberal-democratic state of law, can be realized.

Parallel to Habeas Corpus, the constitutional protection of Habeas Data is being established throughout Latin America along this line of thought in favor of freedom and the right of the individual. (A. Borea Odria, Las Garantias Constitucionales: habeas corpus y amparo, Lima, Libros Peruanos, 1992).

The development of communications and information in the second half of the XX century until today, without referring to any episode in the previous times, has led to completely new interpersonal and inter-institutional relations that the law could not foresee. The changes of the new generation have been so accelerated that the constitutional legislators of the developed countries have not foreseen the measures at the constitutional level in time to deal with the dangers posed to persons and institutions by attacks on the level of personal data. The individual, in the face of computer developments, information tools, interconnected global networks for data transmission, mobile satellite telephones, multimedia technologies and countless data containers, has remained for a long time without adequate protection. of his rights.

The legal concept of habeas data, like that of habeas corpus, is comprehensive, in the sense that it contains all guarantees, actions, recourses and judgments that ensure: 1. The right to personal data, such as the protection of the data of the person who may be violated by those who manage personal data; 2. The right to data protection, as the power of individuals to obtain from public authorities the protection of those rights violated or threatened by access, registration or transmission to third parties of their personal data.; 3. Freedom of information, as the right of individuals, groups, institutions to decide when,

as well as how much information is the object of communications to third parties; 4. Computer freedom as a personal guarantee to know and to access the personal information that is present in the data bank, to check their content and to modify it in case of inaccuracies and unfair archiving, as well as to decide on the circulation or transmission of theirs.

The above four specifications limit the idea of habeas data, while in order to overcome them, it must be understood that habeas data, like habeas corpus and amparo, in Latin America has the category of a fundamental right of conversion and jurisdictional guarantee, which is exercised as action, recourse or judgment, with different ways, procedures and effects. (AA.VV. habeas corpus, amparo, habeas data y accion de cumplimento: normativi dad vigente, Lima, Comision Andina de Justicia, 1994).

Habeas data as a right, certainly belongs to the group of the third or last generation, even though in the Weimar constitution there is a cryptomodel, very compact both in relation to the field and to the individual. In fact, the new right is formed and developed in parallel with informatics, with the electronic archiving of data, thanks to the widespread use of the computer, which allows the collection of information unlimited and immediate, total and planetary circulation of information, on all personal information.

Circulation, use and treatment that bring the risks of violation of personal data, rights of privacy, privacy and in the same way of violation of legal goods. (C. Correa et altri, Derecho informatico, Buenos Aires, De palma, 1994, 249ff.).

From this reality arises the need to create a jurisdictional mechanism, recourse action, judgment to protect the right to freedom of privacy, implied as a duty-opportunity of all individuals to keep aspects of their private life private, in such a way so that no one intervenes or conditions you. The higher it corresponds to the family space, individual lives, preferences, character, in other words, the strictly personal form with which the right of personality is made concrete and which is expressed with the freedom of conscience. (P. A. Diaz Arenas, La constitution politica de Colombia, Bogotà, Temis, 1993, 249).

The jurisdictional mechanism must be able to guarantee in the same way other autonomous elements, but related to privacy, such as the right of image, meaning the right of honuor. In the same way, you must ensure the right to good name, reputation, opinion and fame, that people and communities must act towards all those who have shown their virtues, merits and qualities (A. E. Perez Luno, Informatica Y Libertad. Comentarios al articulo 18 de la consitucion espanola, in Revista Politicos, Madrid, 1981 - 24, 46 ss).

The instrument should allow the achievement of four objectives: 1. Access to information of data registered in public and private entities related to personal life; 2. The possibility of correction, in order to recognize the individual capacity to stop the manipulation of personal information or the dissemination of data that only interests their owners; 3. The possibility to know what information about the interested person has been communicated to third parties and for what purpose; 4. To avoid that personal data is used or treated in a way that damages rights or freedom. (E. Roppo, Informatica, tutela della privacy e diritti della libertà, Milan, Giuffrè, 1985, 285 ss)

This mechanism becomes a procedural instrument in favour of the right to security, helps to create a reliable personal, family and social environment.

The concept of Habeas Data is very complex because in Latin America from the constitutional point of view it is a right - freedom and a jurisdictional guarantee. Right - freedom and guarantee that imply an action, recourse, judgment with the aim of protecting the right to information and information, the protection of personal data, including therefore the right to reputation, safety and honour.

NORMATIVE EVOLUTION OF GUARANTEE LAW

From the definition we gave to habeas data, it can be deduced that the origin and evolution of the guarantee right of habeas data are not separated from the rights and freedoms that it protects and guarantees. First, the mentioned rights and freedoms are acquired and developed, and in the end, the constitutional guarantee mechanism and the right of habeas data are perfected.

The evolution that leads to habeas data begins with the affirmation of the right to privacy. Jurisprudentially, in 1891, in the United States of America, the right "to be left alone", intimacy and solitude in everyone's life, or as it is called otherwise, "right to be alone", is recognized. The development of the idea and practice of privacy, in the century when it was created, did not exactly imagine the magnitude of the great social and technological transformations that the world is experiencing.

Revolutions have changed and are constantly changing life and relationships with people, private and public relations. Today, all legal systems of civilized countries provide for the right to privacy, as freedom of action or inaction. In the evolution achieved, the right to privacy becomes more real today thanks to the concept of habeas data, which makes it a material freedom, with the content of informational freedom.

From privacy or the right to be alone, the right to the protection of personal data has developed, until today it shows the right of people to decide freely how and to what extent they communicate with others about their personal information. In this aspect, the law must protect those aspects of life that are considered reserved and that should not be circulated or distributed. The private and public considerations of this right start from this point. The first, with a negative character, in the sense of stopping the violation of the private sphere of the individual; the second, with affirmative content, as a guarantee and protection of the freedom and follow-up of persons. The first important effects of this development refer to the freedom of the press, procedural guarantees for the formation of evidence and limitations in the archiving, circulation and treatment of personal data. Vanguard in this aspect are the United States of America, Sweden and the United Kingdom with legislation from the Freedom Information Act of 1966 in the USA to the British Data Protection Act in 1984.

Normative and jurisprudential evolution of the guarantee of habeas data in Latin America

In European countries, only the constitution of Portugal, in its article 35, has clearly and fully established information freedom as a constitutional norm. The Spanish Constitution provides only the basics for the development of discipline. Charter of fundamental rights of the European Union provides the right, but not the constitutional guarantee. Moreover, the member countries are not obliged to implement the law. Other states and the United States of America have laws on privacy but without creating constitutional guarantees. In this international context, we can affirm that Latin American constitutionalism offers a valuable contribution, creating in the constitutional aspect the guarantee, recourse, action and judgment of the special amparo of habeas data.

THE DATA PROTECTION IN THE CONSTITUTION OF THE REPUBLIC OF ALBANIA

In terms of personal data, Albania should also review its new Constitution of 1998. From November 1998, Albania has a new Constitution which places it among democratic countries with full rights and expects the most modern aspirations of the people. Albanian.

It constitutes the achievement of an aspiration that started from the moment of the declaration of independence by the Albanian State. In fact, after the recognition of the separation from the Ottoman Empire, in 1912, a new constitutional asset was thought for the Albanian State. An international control commission, formed by the major European

powers, established an organic Statute of Albania. In light of the constitutional movements advancing throughout Europe, this Statute described Albania as a Constitutional State, with a parliamentary basis; but, due to the strong resistance exercised in that period, the Parliament did not have that central position in the constitutional asset, thus having a less important role.

The liberation coincided with the affirmation of the communist regime. This regime approved (March 1946) a new, totalitarian and monistic Constitution.

All in all, power was concentrated in the hands of the President, not changing much from what the Zogist statute provided, even as it was explained above, concentrated, in relation to the power of the Head of State.

This Constitution expressly declared the need for the dictatorship of the proletariat, which in fact, even though it provided for a formal recognition of rights and freedoms, was far from respecting them.

This Constitution was modelled on the Yugoslav and Soviet constitutions.

From this situation began the process of reforming efforts for a democratic Constitution.

In the early 90s, the Albanian state and the institutions that made it up underwent a transformation which was reflected in the Main Constitutional Provisions of 1991. In the said provisions, among other things, the creation of the Constitutional Court was sanctioned, an institution that was considered by the legislator as the highest authority that guarantees respect for the Constitution and interprets it.

The constitutional legislation and the Constitutional Court were built according to the European model, mainly Italian and German, according to which the constitutional control is focused on a single body, the Constitutional Court.

The activity of the Constitutional Court can be divided into two stages:

In the first stage, 1992-1998, its activity was based on the Main Constitutional Provisions. At this stage, although without the appropriate experience, this Court managed to lay the first foundation stones of a constitutional practice, which was then consolidated in the second stage after 1998, with the adoption of the Constitution.

Our Constitution sanctions democratic values widely accepted by Western European countries and progressive democracies, generally as is the case with young Constitutions, but in practice the situation is more complicated. This depends on the political, legal culture, economic and social status and other factors of a certain country. These factors also explain the differences between countries with consolidated democracies and countries with developing democracies, even though at the legal-formal level they may be party to the same conventions and international acts. In this context, the challenge of the Constitutional Court can be understood as a promoter of the implementation of constitutional justice.

Over the years, the Constitutional Court has tried to interpret the constitutional norms, with the aim of giving the best possible and efficient meaning, according to the approach that: "...the Constitution must be interpreted as a "living instrument", in the light of the current life conditions and , so that it makes the most reasonable and efficient sense possible".

The Constitutional Court guarantees respect for the Constitution as the highest act in the hierarchy of legal norms.

The mission of the Constitutional Court is the breakdown of the principles of the rule of law, the contouring of the behavior of public authorities within these principles as a necessity for the prevention of abuse of power, the control of the principle of the separation of powers, the control of respect for human rights and how a common

denominator of this mission, the strengthening of constitutional democracy in the country, where the primacy of the Constitution should prevail.

The rule of law is a fundamental constitutional principle, conceived as the pillar of the constitutional system. The Constitution can be violated by laws that contradict its provisions, but it can also be violated in the spirit, and the basic values that it expresses and protects.

According to the Constitutional Court, the principle of the rule of law, which supports a democratic state, means the rule of law and the avoidance of arbitrariness, in order to achieve respect and guarantee of human dignity, justice and legal certainty. The rule of law presupposes that any intervention of the executive authorities in the rights of individuals or legal entities, must be the subject of an effective control by a body that offers the guarantee of independence and impartiality during the examination of the process.

The principle of the rule of law obliges all bodies of public power to exercise their powers only within and on the basis of constitutional norms. The legal acts issued by these bodies must be in accordance with the higher legal acts, both in the formal and material sense.

The rule of law, which is guaranteed in the Preamble of the Constitution, is one of the most basic and important principles in the state and democratic society. As such, it constitutes an independent constitutional norm, therefore its violation constitutes in itself a sufficient basis for declaring a law as unconstitutional.

The Albanian Constitution borrowed the basic human rights and freedoms almost identically from the Universal Declaration of Human Rights and the European Convention on Human Rights, and even put the latter on the same level as the Constitution, as far as it concerns the restrictions that can be made to rights and freedoms. In a large number of decisions, the Constitutional Court has interpreted the constitutional standards related to the limitation of rights; as the limitation only by law approved by the Assembly; restriction for public interest or to protect the rights of others; respecting the principle of proportionality; non-violation of the essence of the right and in any case not exceeding the restrictions sanctioned in the ECHR. According to the Constitutional Court, the sanctioning of human rights and freedoms accepted in the Constitution and the accompanying measures for their implementation should aim at improving and increasing the standards of rights.

A significant part of the activity of the Constitutional Court is related to the control of the regular legal process, as a constitutional procedural right. Over the years, this court has expanded the concept of the rights of the individual and his right to complain in accordance with the standards of the ECHR.

According to the already consolidated jurisprudence of the Constitutional Court, the individual's right to a regular legal process provided for in Article 42 of the Constitution is not limited only to the judicial process, but also to the administrative, parliamentary disciplinary one.

Also, the Constitutional Court has expanded the spaces of the individual, interpreting legitimation maximally in favor of access to the court. The individual can turn to this court not only when he has exhausted all levels of judgment, but also when following the appeal procedures would result in the extension of the violation or a further aggravation of the situation.

The Constitutional Court has assessed that the requests of individuals, for the violation of the right to a trial within a reasonable time, can be considered by this court, despite the fact that the trial for the protection of their constitutional and legal rights, freedoms and

interests may not have been completed in all stages of trial by courts of ordinary jurisdiction.

Likewise, this court has accepted that when the applicant has exhausted the means of appeal, and when the nature of the interim decision requires it, as an exception, it can be considered final for the purposes of Article 131/f of the Constitution, paving the way for constitutional review of this category of decisions.

In relation to the effect of ECtHR decisions on the internal Albanian legal system, this Court, in a novelty case, annulled the decision of the Supreme Court on the grounds that even though the Albanian criminal system does not allow (from a formal point of view) a review of the decisions final criminal proceedings through the reopening of the process, after the finding by the ECtHR of serious violations of the fair process, the Supreme Court must directly apply the Constitution and the ECHR, reopening the criminal processes concluded with a final decision, after giving a decision by the ECHR.

However, human rights are a global agenda and any discussion of human rights challenges in the 21st century would only be meaningful as part of historical processes, where a society's demands for freedom and prosperity have remained unfulfilled desires and tasks half completed, although, all societies continue to be in continuous efforts to define and redefine the concept of rights and freedoms as well as to find or improve their protective mechanisms.

The Constitutional Court has the responsibility to examine and take on risks to respond to the problems posed to new democracies, to respond to major interests, on a much broader level than the national one, and to avoid or reduce different social or political tensions.

After the new Parliament was formed, in 1997, a new constitutional project was launched, for which at that time the help of the European Community was requested and within the country, all political forces were invited to participate.

The state in the 1998 Constitution is clearly defined as a state of law, in which the law defines and limits the duties and power of all state bodies.

The new Constitution has paid special attention to the institution of the People's Advocate as a means of protecting individuals against the public administration.

Regarding personal data and the right to privacy, Albania has adopted law no. 9887 dated 10.03.2008 "For the protection of personal data". Article 35 of the Constitution quotes the following:

1. No one can be forced, except when required by law, to make public data related to his person.

2. The collection, use and making public of data about the person is done with his consent, except for the cases provided by law.

3. Everyone shall be entitled to know the data collected about him, except for the cases provided by law.

4. Anyone shall be entitled to request the correction or deletion of false or incomplete data or data collected in violation of the law.

This legal framework naturally foresees the cases when personal data can be published and processed, but it has not foreseen the forms of action, the recourse that the individual can undertake in case of violation of the right to privacy. In the century we are living in, as in all other democratic countries, Albania is also experiencing an unthinkable development of technology. As a result of this development, there are also risks that threaten personal data, Habeas Data, from external and previously unthinkable factors. The Constitution of the Republic of Albania, although new, has not provided constitutional guarantees for the protection of this right and freedom, but the Albanian

legislature has been limited by the issuance of law no. 9887 for the protection of personal data.

For several years, the data bank system has been transferred to the government platform E - Albania. From the point of view of the ease of receiving the service, it is a great advantage for the citizens, who by logging into this platform manage to receive 90% of the services without appearing at the counters of the institutions. But this ease in receiving the service carries some increased risks for citizens' personal data. In March 2023, the e-Albania system was hacked and, as a result, the service was blocked for citizens. Meanwhile, an added project was that of introducing second-level banks to this platform. Sources from the banking sector inform that the interaction will be done with a special client authentication for entering the e-banking platform from e-Albania, the same as the procedure followed for access through the bank's website or application. This security filter attempts to prevent bank account data from being exposed to security risks that may come from cyber attacks. Citizens are afraid of what will happen to their bank accounts in the event of an attack cybernetic. I think we are late, but better late than never, for our legislators to propose in the Assembly of Albania a review of the chapter on the protection and guarantee of the right to privacy.

Conclusions

The Latin American experience in the field of habeas data confirms the important legal integration achieved, above all in public law, in a journey started in the 70s - 80s. This integration is clear and visible above all in the catalogued field of constitutional rights and freedoms and guarantees, constitutional justice, institutions and control bodies, democratic institutions, regional political and economic integration, hierarchical relationships and the supremacy of international law over in domestic law and in the field of constitutional review.

The institution of habeas data, together with other recourses and constitutional guarantees of habeas corpus, amparo and public action of constitutionality, becomes a common denominator, representative of Latin American legal evolution.

Lawyers and researchers of comparative public law have many criticisms towards Latin America, above all regarding the connection between the formal and material constitution. Many of the criticisms are based if we consider the fact that in the face of the commitment of the political class for the modernization of the legal and political structures of the countries, there is often a lack of compromise for the actualization of the reforms. Absence that often erases efforts made in the construction of the modern constitutional state. criticism in any case cannot hide or reduce the effort that Latin American countries make with the objective of modernizing or updating their constitutional systems. An important test is the rights, recourses and guarantees, as in the specific case with habeas data.

As analysed, the legal nature of habeas data in Latin America corresponds to a constitutional right, created to protect other rights. It is exercised through a constitutional action or a judicial recourse to stop the violation or to restore the violated right. In this case, the constitutional right to the protection of personal data, which includes the right to privacy, freedom of computer self-determination, guaranteed by the direct action or recourse of the person entitled to the right to the competent judge, which in some cases is the judge himself of the constitutional court.

The Latin American experience in this field allows the distinction of two typologies of habeas data: proper habeas data proprio and improper habeas data. The first for the protection of personal data, the second to recognize public information of general, collective interest. The right of access to the data bank, archives and public or private registers of the collection of personal information, for the purpose of verifying the truth,

the purpose of collection and the possibility of proceeding for updating, cancellation or deletion, prohibition of circulation or distribution, is based on different subtypes of habeas data proprio.

In this sense, from the constitutional point of view, the following subtypes are foreseen:

1. Informative, for computer access to know the purpose of collecting the computer catalogue and to know the person responsible for collecting the information

2. Updating or including information in order to complete the catalogue

3. Correction to make the information true.

4. Exception to cancel/prohibit that in the data banks, archives/registries, information collected incorrectly or not legitimate in its purpose can be found.

5. Stored to prevent the data collected in a legitimate way, but with limited access, from being disseminated to a third party without the authorization of the owner.

These subtypes are the most widespread habeas data provided for in the constitution in Latin American countries.

Concerning the procedural aspects of action or recourse, it can be affirmed that any individual, without distinction or discrimination, can act immediately with or without the assistance of a lawyer. In the case of minors, the request can be made by the People's Advocate (Ombudsman) or by rights-protection organizations.

This type of recourse can be presented only during extraordinary situations. Since we are dealing with a distributed system of constitutional law, every judge of the country in which the violation of the right has been verified shall be competent to decide and accept the appeal.

Regarding Albania, I believe that Albanian legislators should make an immediate contribution to the amendment of the Constitution regarding the protection and guarantee of personal data.

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